No. 15-

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**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In *Samantar v. Yousuf*, 560 U.S. 305 (2010), this Court held that the common law, rather than the Foreign Sovereign Immunities Act (FSIA), governs the immunity of individual foreign officials who are sued for their official acts. On remand in that case, the Fourth Circuit created a categorical exception to common-law immunity whenever plaintiffs sue foreign officials over alleged *jus cogens* norms of international law. In this case, the Fourth Circuit applied its per se rule of non-immunity to deny common law immunity to a foreign official accused of violations of alleged *jus cogens* norms. As the United States recognized in a brief filed in connection with an unsuccessful succesive petition for a writ of certiorari in the *Samantar* case, following the remand in that case, the Fourth Circuit's per se rule of non-immunity creates a circuit split and jeopardizes important interests of the United States. The question presented, which now arises on certiorari from the Fourth Circuit's final judgment in this case, is:

Whether a foreign official's common-law immunity for acts performed on behalf of a foreign state is abrogated by plaintiff's allegations that those official acts violated *jus cogens* norms of international law.

## PARTIES TO THE PROCEEDING

Petitioner is Yusuf Abdi Ali. Respondent is Farhan Mohamoud Tani Warfaa.

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## PETITION FOR WRIT OF CERTIORARI

Yusuf Abdi Ali respectfully petitions for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Fourth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals on immunity (Pet. App.) is reported at 811 F.3d 653 (4th Cir. Feb. 1, 2016).

The district court's opinion denying in part and granting in part Petitioner's motion to dismiss the amended complaint is reported at 33 F. Supp. 3d 653 (E.D. Va. 2014) (Pet. App.26a).

## JURISDICTION

Petitioner seeks review of a final decision of the Fourth Circuit entered on February 1, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involves the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602-1606, 1608 (Pet. App. at 91a), the Alien Tort Statute (ATS), 28 U.S.C. § 1350 (Pet. App. at 92a), and the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note (Pet. App. at 92a).

## STATEMENT OF THE CASE

Petitioner Yusuf Abdi Ali was a colonel in the Somali National Army in the late 1980s, serving in the Fifth Battalion, in northern Somalia. App. at 26a-27a. The history of the instant appeal is best understood in the context of this Court's earlier consideration of similar issues of common-law immunity raised by another former government official from Somalia during that period, *viz.,* Mohamed Ali Samantar, who served as the First Vice President, Minister of Defense and Prime Minister of the Democratic Republic of Somalia during the 1980s.

In *Samantar v. Yousuf*, 560 U.S. 305 (2010), this Court held that the FSIA does not govern the immunity of individual officials who are sued for acts taken on behalf of a foreign state. Plaintiffs would still be prevented from circumventing the FSIA, the Court explained, because the immunity of foreign officials who are sued for their official acts is "properly governed by the common law . . . ." *Id.* at 325.

On remand, however, the Fourth Circuit created an exception to common-law immunity that swallows the rule. The court held that a foreign official is not entitled to common-law immunity for acts performed in an official capacity whenever plaintiffs in a civil suit allege that those acts violate *jus cogens* norms of international law, such as norms prohibiting torture.

In response to a petition for a writ of certiorari in the *Samantar* case following remand ("*Samantar II*"), this Court called for the views of the Solicitor General. The

Government advised that the Fourth Circuit's "per se," "categorical judicial exception" to immunity for *jus cogens* violations "conflicts with the Second Circuit's decision" on the same issue; "is predicated on . . . critical legal errors"; and should not be "left standing" because it threatens "negative consequences for the United States' foreign-relations interests." *See* Brief for the United States as Amicus Curiae at 11-12, 22, *Samantar v. Yousuf*, 134 S. Ct. 897 (2014) (Mem.) (No. 12-1078), *available at* http://www.state.gov/documents/organization/226368.pdf "U.S. Br."). This Court denied the petition for certiorari in *Samantar II*. 134 S. Ct. 897 (2014) (Mem.).

This Court's plenary review of the Fourth Circuit's erroneous rule of law in the instant appeal by Ali is warranted.

**District Court Proceedings**

As adverted to above, Petitioner Yusuf Abdi Ali was a colonel in the Somali National Army in the late 1980s, serving in the Fifth Battalion, in northern Somalia. Pet. App. at 27a. Two plaintiffs, then proceeding anonymously as Jane and John Doe, the latter of whom is the Respondent to the instant Petition, sued Ali under the TVPA and the ATS for alleged actions taken in his official capacity on behalf of Somalia. *Id.* at 28a.

Respondent, whom we now know as Farhan Mohamoud Tani Warfaa, and the other plaintiff filed their complaint in November of 2004, in the United States District Court for the Eastern District of Virginia. Pursuant to an order of that court, issued on April 29, 2005, their complaint was dismissed voluntarily, and, in June of 2005, Warfaa

and the same plaintiff recommenced their suit in the same court, again proceeding anonymously. *Id*. For most of its duration, the subject proceedings were stayed in order to allow the United States Department of State an opportunity to submit its views as to: (1) whether it objects to the action going forward on the ground that Ali should have immunity, and (2) whether fact discovery in Ethiopia would interfere with U.S. foreign policy. Appendix at [the page # for the 6/21/13 letter from the district court to State]. In April of 2012, after the subject case briefly resumed, the district court granted a consent motion further to stay proceedings pending the decision of this Court in *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013). After this Court issued its decision in *Kiobel, supra,* in April of 2013, the district court judge, in consideration of the then recent recognition of The Federal Republic of Somalia Government by the United States, dispatched a letter to the State Department, advising the State Department that the district court had decided to continue the stay of the case in order to afford the State Department an opportunity to advise the court if allowing the subject litigation to proceed would have any negative effect on the foreign relations of the United States and requesting that any opinion to be given be received by the district court on or before September 19, 2013. Pet. App. at 1a. Responding to the district court's invitation to file a statement of interest, the United States responded, on September 19, 2013, by declining to take an affirmative position, and explaining, through a representative of the Legal Adviser to the Secretary of State, that it was "not in a position to present views to the [c]ourt concerning [the] matter at this time." Pet. App. at 4a-7a.

Subsequently, *i.e.*, on or about November 30, 2013, the then Prime Minister of The Federal Republic of Somalia, Abdi Farah Shirdon, issued a diplomatic letter to Secretary of State John Kerry, requesting, *inter alia*, a designation of immunity for Ali, pursuant to 28 U.S.C., § 517, and that the State Department take action to obtain the dismissal of this case, a copy of which diplomatic letter was filed by undersigned counsel with the district court on December 4, 2013. Pet. App. at 8a-16a.

Thereafter, in April of 2014, the district court lifted the stay, and, on May 9, 2014, Respondent, using his true name, filed an amended complaint against Ali, while the other original plaintiff dismissed her claims against Ali. Ali then moved to dismiss the amended complaint, arguing that he was entitled to common law "official acts" immunity. Pet. App. at 26a-50a, *passim*. Although the issue had not been raised in said motion to dismiss, the district court directed the parties in advance of the hearing of the motion to dismiss to be prepared to address the implications of the *Kiobel* decision as regards the Respondent's claims under the ATS. *Id.*

The district court then held a hearing on the motion to dismiss the amended complaint on July 25, 2013. Pet. App. at 17a-25a, *passim.* In its ruling dismissing Respondent's ATS claims, the district court pointed out that "'[a]ll of the alleged conduct", which was said to have been carried out by Ali, "who at the time was not a citizen or resident of the United States," occurred in Somalia, and that Warfaa "has alleged no facts showing that [Petitioner's] violations of international law otherwise 'touch [ed] and concern[ed] the territory of the United States." Pet. App. at 31a.

The district court also rejected Ali's claims of common law immunity, on the "official acts" principle, because his alleged acts violated *jus cogens* norms, citing the Fourth Circuit's holding in *Yousef v. Samantar,* 699 F. 3d 763 (4th Cir. 2012), as controlling. Pet. App. at 40a-43a.

Both parties timely appealed. Pet. App. at 57a.

**Fourth Circuit Proceedings**

The Fourth Circuit affirmed the district court's rulings, dismissing Respondent's claims under the ATS and allowing his claims under the TVPA to proceed, rejecting Ali's claim of "official acts" common law immunity and his invitation to to have the Fourth Circuit overrule its 2012 holding in *Samantar, supra*, where a panel of the Fourth Circuit had concluded that foreign officials are never entitled to common law immunity for acts committed in an official capacity if a plaintiff in a civil suit alleges violations of *jus cogens* norms of international law. Pet. App. at 53a-79a, *passim.* The Fourth Circuit explained its decision thus by stating, *ipse dixit,* that it was bound by the holding in *Samantar*, *inter alia,* and, perforce, that it had decided collectively not to exercise its power to overrule another panel of the Fourth Circuit, outside the *en banc* context, as a "matter of prudence." Pet. App. at 78a-79a. There was also an opinion written by one of the judges on the panel, concurring in part and dissenting in part. Pet. App. at 79a-88a. The dissent addressed that aspect of the majority opinion pertaining to the dismissal of the ATS claims, opining that because Ali had extensive contacts with the United States, he should have been subject to the jurisdiction of the United *States. Id.*

**Petition for Certiorari**

Petitioner seeks this Court's review of the Fourth Circuit's immunity decision. The Fourth Circuit's decision reinforces a circuit split, contravenes settled principles of domestic and international law, and risks reciprocal treatment of U.S. officials abroad.

## REASONS FOR GRANTING THE PETITION

### I. THE FOURTH CIRCUIT'S DECISION REINFORCES A CIRCUIT SPLIT OVER THE IMPORTANT QUESTION OF WHETHER ALLEGED *JUS COGENS* VIOLATIONS DEFEAT FOREIGN OFFICIAL IMMUNITY

#### A. The Fourth Circuit's Decision Conflicts With The Decisions Of Other Circuits

As the Solicitor General previously recognized in the Government's brief in *Samantar II* (described *infra*, p. 16), the Fourth Circuit fashioned a "per se" rule—a "categorical judicial exception to conduct-based immunity for cases involving alleged violations of *jus cogens* norms." U.S. Br. at 11, 19-22. Lower courts in the Third and Ninth Circuits have applied the Fourth Circuit rule, while concluding that the conduct before them did not require the forfeiture of the defendants' common law immunities. *See Mireskandari v. Mayne*, No. CV12-3861 JGB (MRWx) X, 2016 WL 1165896, at *17 (C.D. Cal. Mar. 23, 2016), judgment entered, No. CV123861JGBMRWX, 2016 WL 1170871 (C.D. Cal. Mar. 23, 2016) ("The Court finds the reasoning of the Fourth Circuit in Yousuf detailed and persuasive, and as such, will apply it to the facts of this

case."); *Richardson v. Attorney Gen. of the British Virgin Islands*, No. CV 2008-144, 2013 WL 4494975, at *15-17 (D.V.I. Aug. 20, 2013).

By contrast, the Second, Seventh, and D.C. Circuits have reached the opposite conclusion. *See Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009) (relying on an Executive Branch determination in order to find immunity but reciting generally that "[a] claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity"); *Belhas v. Ya'alon*, 515 F.3d 1279, 1287 (D.C. Cir. 2008), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010); *Ye v. Zemin*, 383 F.3d 620, 625-27 (7th Cir. 2004), *cert. denied*, 544 U.S. 975 (2005).

1. As the Solicitor General noted to this Court in *Samantar II*, the Fourth Circuit's decision "conflicts with the Second Circuit's decision in *Matar* v. *Dichter*." U.S. Br. at 22. Whereas the Fourth Circuit created "a categorical exception to official immunity whenever allegations of *jus cogens* violations are made," *Matar* granted official immunity to a defendant "in a case involving alleged violations of *jus cogens* norms." *Id*. at 21-22.

In *Matar*, plaintiffs sued the former head of the Israeli Security Agency under the ATS and TVPA, alleging that he authorized various war crimes in an Israeli military operation in Gaza City. 563 F.3d at 10-11. Plaintiffs claimed that he was not entitled to foreign official immunity because these acts allegedly violated *jus cogens* norms of international law.

The Government filed a statement of interest in *Matar* explaining that the common law does not recognize any

exception to foreign sovereign immunity for alleged *jus cogens* violations. *See* Statement of Interest of the United States of America at 27-33, *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05-10270), http://www.state.gov/documents/organization/98806.pdf (U.S. SOI in *Matar*); Brief for the United States of America as Amicus Curiae in Support of Affirmance at 21-25, *Matar*, 563 F.3d 9 (2d Cir. 2007) (No. 07-2579), 2007 WL 6931924 (U.S. Amicus in *Matar*).

The Second Circuit agreed with the Government's well-founded views and expressly rejected the plaintiffs' argument that "there can be no immunity . . . for violations of *jus cogens* . . . norms." 563 F.3d at 14. "A claim premised on the violation of *jus cogens*," the court held, "does not withstand foreign sovereign immunity." *Id.* at 15. Thus, the defendant was entitled to common-law "immunity for 'acts performed in his official capacity.'" *Id.* at 14 (quoting Restatement (Second) of Foreign Relations Law § 66(f) and citing *Heaney v. Gov't of Spain*, 445 F.2d 501, 504 (2d Cir. 1971)).

To be sure, the Government in this case has taken no position as to whether Petitioner should be granted immunity, *see* Pet. App. 4a-7awhile, in *Matar*, the Government suggested that the defendant be immunized from suit. U.S. Amicus in *Matar* at 3-4. But in *Matar*, the Government argued against a *jus cogens* exception to immunity. U.S. SOI in *Matar* at 27-33; U.S. Amicus in *Matar* at 21-25. Indeed, the Government has consistently taken the position that the common law of foreign official immunity does not recognize a *jus cogens* exception. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Affirmance at 27-30, *Ye v. Zemin*, 383 F.3d

620 (7th Cir. 2004) (No. 03-3989), http://www.state.gov/documents/organization/78379.pdf (U.S. Amicus in *Ye*); Further Statement of Interest of the United States in Support of the United States' Suggestion of Immunity at 14-15, Weixum v. Xilai, 568 F. Supp. 2d 35 (D.D.C. 2008) (No. 04-0649), *available at* http://www.state.gov/documents/organization/98772. pdf.

The Second Circuit's position in *Matar* has since been upheld by that court in 1*Rosenberg v. Pasha*, 577 F. App'x 22 (2d Cir. 2014). In finding common law immunity for two directors of a Pakistani intelligence agency alleged to have coordinated the 2008 Mumbai terror attacks, the court specifically rejected the suggestion of the plaintiffs that 2"we should . . . adopt a 'cogent litmus test similar to the Fourth Circuit'" ( quoting the Appellants' brief). *Id.* at 24.

2. The Fourth Circuit's decision also conflicts with the D.C. Circuit's decision in *Belhas*, 515 F.3d at 1286-88. There, plaintiffs sued a former general of the Israeli Defense Forces under the ATS and TVPA, alleging that he authorized war crimes and extrajudicial killings that occurred during Israeli military operations in Lebanon. *Id.* at 1281-82. In concluding that the defendant was entitled to foreign sovereign immunity, the D.C. Circuit rejected the plaintiffs' argument "that *jus cogens* violations can never be authorized by a foreign state and so can never cloak foreign officials in immunity." *Id*. at 1287.

*Belhas*, which was decided before this Court's decision in *Samantar*, considered whether a *jus cogens* exception applied to an individual official's immunity under the FSIA. *See id*. at 1286-88. But, because the rules developed for foreign official immunity under the FSIA also "may be

correct as a matter of common-law principles," *Samantar*, 560 U.S. at 322 n.17, the rationale and result of *Belhas* continue to apply after this Court's holding in *Samantar* that individual immunity is governed by the common law directly, rather than by the common law as codified by the FSIA. *See Giraldo v. Drummond Co.*, 808 F. Supp. 2d 247, 250-51 (D.D.C. 2011) (applying *Belhas* and concluding that "plaintiffs' allegations of *jus cogens* violations do not defeat" a foreign official's entitlement to common-law immunity), *aff'd*, 493 F. App'x 106 (D.C. Cir. 2012) (per curiam).

3. Finally, the decision below also is at odds with the Seventh Circuit's decision in *Ye*, 383 F.3d at 625-27. There, the plaintiffs sued the former President of China under the ATS, alleging that he authorized torture, genocide, and the arbitrary arrest and imprisonment of Falun Gong practitioners. *Id.* at 622. The plaintiffs argued that because these alleged acts violated *jus cogens* norms, the defendant was not entitled to immunity. *Id.* at 624. The Government urged the Seventh Circuit not to recognize a *jus cogens* exception. *See* U.S. Amicus in *Ye* at 27-34. The Seventh Circuit agreed, rejecting the plaintiffs' argument that "the Executive Branch has no power to immunize a head of state (*or any person for that matter*) for acts that violate *jus cogens* norms of international law." *Ye*, 383 F.3d at 625 (emphasis added); *see also* Brief for the United States as Amicus Curiae Supporting Appellee at 8, *Giraldo v. Drummond Co.*, 493 F. App'x 106 (D.C. Cir. 2012) (No. 11-7118), 2012 WL 3152126 (explaining that the Seventh Circuit in *Ye* "expressly h[eld] that allegations of *jus cogens* violations cannot overcome the Executive Branch's determination of foreign official immunity").

### B. This Important Question Warrants This Court's Immediate Review

The circuit split that the Fourth Circuit has created involves an exceptionally important question that warrants this Court's immediate intervention. As the Solicitor General put it in his brief in *Samantar II*, the Fourth Circuit's ruling should not be "left standing" because it "could have negative consequences for the United States' foreign-relations interests." U.S. Br. at 12.

The Fourth Circuit rule applied in this case undermines the comity between the United States and other sovereigns that the doctrine of foreign sovereign immunity was meant to protect. *See, e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004) (citing *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch)116, 136 (1812)). It also opens the floodgates to "countless" cases in U.S. courts challenging extraterritorial conduct in foreign nations, including close allies of the United States. *See, e.g.*, *Belhas*, 515 F.3d at 1287 (suit alleging *jus cogens* violations by former Israeli general in connection with military operations in Lebanon).

Indeed, if the decision below is allowed to stand, the Fourth Circuit may well become a magnet for suits against foreign officials, who may be served whenever they pass through Maryland or Northern Virginia to reach Washington, D.C. *Cf. Ye*, 383 F.3d at 623 (process served while President Jiang was staying at a hotel in Chicago); Mem. of P. & A. in Supp. of Avraham Dichter's Mot. to Dismiss the Compl. at 1, *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05-10270), 2005 WL 3881690 (process served while former Director of Israel's Security

Agency was appearing in New York for a speech); *see also Mwani v. bin Laden*, 417 F.3d 1, 10-15 (D.C. Cir. 2005) (concluding that Federal Rule of Civil Procedure 4(k)(2) effectively served as a nationwide long-arm statute that "eliminate[d] the need to employ the forum state's long arm statute" in an action brought under the Alien Tort Statute).

The Fourth Circuit's per se rule nullifies foreign sovereign immunity in the vast majority of ATS and TVPA cases. The *jus cogens* exception "merges the merits of the underlying claim with the issue of immunity." *Belhas*, 515 F.3d at 1292-93 (Williams, J., concurring). Thus, every time a plaintiff even alleges a *jus cogens* violation by a foreign official, "there will effectively be no immunity." *Giraldo*, 808 F. Supp. 2d at 250; *see also Heaney*, 445 F.2d at 504.

Many ATS and TVPA suits against foreign states and their officials, including some close allies of the United States, already involve allegations of *jus cogens* violations.[1] Indeed, a Westlaw search of cases published

1. *See, e.g.*, *Matar*, 563 F.3d at 10 (alleging former director of Israeli Security Agency authorized extrajudicial killing and other war crimes in military operations in Gaza City); *Belhas*, 515 F.3d at 1281-82 (alleging former Israeli Head of Army Intelligence authorized extrajudicial killing and other war crimes in military operations in Lebanon); *Enahoro v. Abubakar*, 408 F.3d 877, 878-79 (7th Cir. 2005) (alleging Nigerian general authorized torture and extrajudicial killing); *Ye*, 383 F.3d at 622 (alleging President of China authorized torture and genocide); *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 96-97 (D.D.C. 2005) (alleging Israeli officials authorized torture and genocide); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1266-70 (N.D. Cal. 2004) (alleging Chinese officials tortured and

between March 1, 2010 and May 1, 2014 involving ATS and TVPA claims against foreign states and/or foreign officials disclosed that 92% (33 out of 36 cases) involved alleged conduct that would violate *jus cogens* norms, as the Fourth Circuit defines that term. The Fourth Circuit's opinion in this case invites ever more such suits.

The *jus cogens* exception recognized by the court below also effectively "make[s] the [FSIA] optional,'" *Samantar*, 560 U.S. at 324 (quoting *Chuidian v. Phillipine Nat'l Bank*, 912 F.2d 1095, 1102 (9th Cir. 1990)), contrary to this Court's decision in *Samantar*, 560 U.S. at 324. Every court to consider the question has held that there is no *jus cogens* exception to a foreign state's immunity under the FSIA. *See Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1156 (7th Cir. 2001) (noting that a *jus cogens* exception "would allow for a major, open-ended expansion of our jurisdiction into an area with substantial impact on the United States' foreign relations"); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242-45 (2d Cir. 1996) (rejecting argument that "a foreign state should be deemed to have forfeited its sovereign immunity [under the FSIA] whenever it engages in conduct that violates fundamental humanitarian standards" (emphasis omitted)); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1994) (holding that "[t]he fact that there has been a violation of *jus cogens* does not confer jurisdiction" over a foreign state under the FSIA); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 & n.1 (D.C. Cir. 1994) (finding no *jus cogens* exception to FSIA

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arbitrarily detained plaintiffs); *Paul v. Avril*, 812 F. Supp. 207, 209 (S.D. Fla. 1993) (alleging former head of Haitian military authorized torture and arbitrary detention).

immunity). Under the Fourth Circuit's rule, however, "litigants through 'artful pleading,'" *Samantar*, 560 U.S. at 324, will easily circumvent FSIA immunity by suing the responsible officer instead of the foreign state itself.

Finally, the decision below risks reciprocal treatment for U.S. officials sued in foreign courts—whether those officials are former Bush Administration officials sued for allegedly authorizing "torture," or Obama Administration officials sued for allegedly authorizing "illegal" drone attacks. As the Government has made clear, "[g]iven the global leadership role of the United States," U.S. officials "are at special risk of being subjected to politically driven lawsuits abroad in connection with controversial U.S. military operations." U.S. Amicus in *Matar* at 25.

The Fourth Circuit's erroneous decision thus reinforces the circuit split on a significant and recurring issue, and warrants this Court's immediate review.

### C. This Case Presents An Ideal Vehicle To Consider The Question Presented

This case presents an excellent vehicle to consider the Question Presented. The Fourth Circuit's position, while wrong, is thoroughly reasoned. The Government's previous filing in *Samantar II* makes clear that the Fourth Circuit's rule reflects a circuit split and threatens important national interests. Also, unlike the situation in Samantar II, where this Court denied certiorari, the decision in this case is also unfreighted by any Executive Branch determination of immunity, any question as to desire of the Government of Somalia to have Petitioner recognized as immune, or any judgment in the District Court adverse to Petitioner.

## II. THE FOURTH CIRCUIT'S DECISION IS WRONG

The Fourth Circuit's per se rule of non-immunity whenever *jus cogens* violations are alleged is wrong as a matter of law.

### A. The Fourth Circuit's Decision Is Contrary To International Law

The Solicitor General explained in *Samantar II* that the Fourth Circuit "fundamentally erred" by "fashioning a new categorical judicial exception to immunity for claims alleging violation of *jus cogens* norms." U.S. Br. 19, 21. This "per se," "categorical exception" contradicts bedrock principles of international law and should not be "left standing." *Id.* at 12, 19, 21.

The U.S. State Department recently recognized that the scope of the *jus cogens* doctrine has not gained a sufficient international consensus to admit of its being a subject for consideration by the U.N. International Law Commission. In arguing against adding the subject of *jus cogens* to the Commission's work agenda, the Acting Legal Advisor noted that "it is not clear that practice on this topic has developed sufficiently since 1993 to justify a conclusion different than the one reached at that time [not to have the Commission address the topic then]." Remarks by Mary McLeod at the 69th United Nations General Assembly Sixth Committee (Legal) Session on Agenda Item 78: Report of the International Law Commission on the Work of its 66th Session (Oct. 28, 2014) *available at* http://usun.state.gov/ remarks/6229.

As the Fourth Circuit has recognized, "international law has shaped the development of the common law of foreign sovereign immunity." *Samantar II*, 699 F.3d at 773. Thus, it is critical that courts interpreting the common law not "disturb th[e] international consensus" concerning foreign official immunity since "[s]uch a deviation from the international norm would create an acute risk of reciprocation by foreign jurisdictions." U.S. Amicus in *Matar* at 24-25. As this Court explained in a related context, "in light of the concept of reciprocity that governs much of international law in this area, we have a more parochial reason to protect foreign diplomats in this country. Doing so ensures that similar protections will be accorded those that we send abroad to represent the United States, and thus serves our national interest in protecting our own citizens." *Boos v. Barry*, 485 U.S. 312, 323-24 (1988) (citation omitted).

Courts in other countries have consistently refused to recognize a *jus cogens* exception to immunity in civil cases—whether a foreign state or its officials are sued. *See, e.g.*, *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*, 1 A.C. at 291-306 (Lord Hoffman) (U.K.); *Bouzari v. Islamic Republic of Iran*, [2004] 71 O.R.3d 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).

Indeed, the International Court of Justice has rejected a *jus cogens* exception to immunity in civil suits. *See* Jurisdictional Immunities of the State (Ger. v. Italy), Judgment, ¶¶ 85-97 (Feb. 3, 2012), *available at* http://www.icj-cij.org/docket/files/143/16883.pdf. As to cases brought

in an Italian court against Germany and German officials for war crimes that occurred in Italy during World War II, the ICJ found that "there is almost no State practice which might be considered to support the proposition that a State is deprived of its entitlement to immunity in such a case." *Id.* at ¶ 83. The ICJ emphasized that the national courts of the United Kingdom, Canada, Poland, New Zealand, and Greece, as well as the European Court of Human Rights, have rejected such an exception "in each case after careful consideration." *Id.* at ¶ 96 (citing cases). Moreover, the ICJ warned that if "the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skillful construction of the claim." *Id.* at ¶ 82. Therefore, "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict." *Id.* at ¶ 91.

The UN Convention on Jurisdictional Immunities of States and Their Properties similarly confirms that a *jus cogens* exception to immunity in civil cases contravenes customary international law. This proposed multilateral treaty, which the UN General Assembly endorsed in 2004, does not recognize such an exception. *See Fang*, NZAR at 434; *Jones*, 1 A.C. at 289 (Lord Bingham). "In fact, the Convention's drafters twice rejected proposals to adopt such an exception, both because there was no settled state practice to support it and because any attempt to include such a provision would almost certainly have jeopardized the conclusion of the Convention." Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S.*

*Common Law of Foreign Official Immunity*, 2010 Sup. Ct. Rev. 213, 246 (citation and internal quotation marks omitted).

The Fourth Circuit in *Samantar II* cited authorities recognizing a *jus cogens* exception to immunity in *criminal* cases where the Convention Against Torture (CAT) applies. *See, e.g., Regina v. Bartle, ex parte Pinochet*, 38 I.L.M. 581, 593-95 (H.L. 1999). However, while parties to the CAT have agreed to *criminal* jurisdiction over extraterritorial torture in certain circumstances, the CAT does not abrogate immunity in civil cases. *See* Jurisdictional Immunities of the State (Ger. v. Italy) at ¶ 87 ("The Court does not consider that the United Kingdom judgment in *Pinochet* . . . is relevant" because *inter alia* "the rationale for the judgment in *Pinochet* was based upon the specific language of the 1984 United Nations Convention against Torture."); *see also Fang*, NZAR at 433-34; *Jones*, 1 A.C. at 286-87, 289-91, 293, 296-306; *Bouzari*, 71 O.R.3d at 691-96; *Status of the CAT*, at 21, UN Doc. CAT/C/2/Rev.5 (Jan. 22, 1998); 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (the CAT "requires a State party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State," not for alleged torture abroad).

For at least two reasons, "international law clearly distinguishes between the civil and criminal immunity of officials." U.S. SOI in *Matar* at 30; *see also, e.g.*, Jurisdictional Immunities of the State (Ger. v. Italy) at ¶ 87 (explaining that "the distinction between criminal and civil proceedings [w]as 'fundamental to the decision'" in *Pinochet* (quoting *Jones*, 1 A.C. at 290 (Lord Bingham)).

First, "officials are accorded immunity [from civil suits] in part because states themselves are responsible for their officials' acts [while] [o]n the criminal side, . . . international law holds individuals personally responsible for their international crimes, and does not recognize the concept of state criminal responsibility." U.S. SOI in *Matar* at 30. Thus, because states cannot be held criminally liable for their acts, "the [criminal] sanction can be imposed on the individual without subjecting one state to the jurisdiction of another." *Bouzari*, 71 O.R.3d at 695; *Jones*, 1 A.C. at 290 ("A state is not criminally responsible in international or English law, and therefore cannot be directly impleaded in criminal proceedings.") (Lord Bingham).

Second, private civil litigation over *jus cogens* claims, to which states have not consented, lacks the prosecutorial safeguards and state-to-state direct accountability of a criminal proceeding initiated by the government. *See* U.S. SOI in *Matar* at 30 ("critically, there is the check of prosecutorial discretion in the criminal context"); *Fang*, NZAR at 433 ("Criminal proceedings may only be brought . . . by the state [while] civil proceedings . . . may be brought by private persons."); *Zhang*, NSWCA 255, at ¶ 159 ("Litigation of a criminal character can ultimately be controlled by the powers and capacities of the Attorney-General and the prosecuting authorities."); Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 Mich. L. Rev. 2129, 2181 (1999).

As these authorities demonstrate, there is no *jus cogens* exception to foreign official immunity in civil cases. Indeed, the Fourth Circuit's rule dramatically

departs from customary international law and creates a significant risk of reciprocal treatment of U.S. officials by foreign nations.

### B. The Fourth Circuit's Decision Is Contrary To Domestic Law, Including Decisions Of This Court

The Fourth Circuit also erroneously decided that domestic law recognizes a *jus cogens* exception to foreign official immunity on the basis that "violation[s] of *jus cogens* norms cannot constitute official sovereign acts." *Samantar II*, 699 F.3d at 776 (quoting *Sarei v. Rio Tinto PLC*, 487 F.3d 1193, 1209 (9th Cir. 2007).

In *Saudi Arabia v. Nelson*, this Court squarely rejected the premise of the Fourth Circuit's exception. 507 U.S. 349 (1993). There, the plaintiff sued the Saudi government, alleging that Saudi officials tortured him in retaliation for complaining about unsafe conditions at a Saudi hospital. *Id.* at 351-54. In deciding that the commercial-activities exception to the FSIA did not apply, the Court concluded that these alleged acts (which undoubtedly would violate *jus cogens* norms, as defined by the Fourth Circuit) were nevertheless sovereign acts of a foreign state. *Id.* at 361. As this Court explained, "a foreign state's exercise of the power of its police[,] . . . however monstrous such abuse undoubtedly may be . . . [is] peculiarly sovereign in nature." *Id.*

In reaching this conclusion, this Court relied in part on cases applying the common-law sovereign immunity principles that the FSIA codified. *See, e.g.*, *id.* (citing *Victory Transport Inc. v. Comisaria General de*

*Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964)). And just as it is appropriate for this Court to rely on the common law to determine the scope of FSIA immunity, *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 200-01 (2007), it is similarly appropriate to rely on the FSIA to interpret the scope of common-law immunity. *Matar*, 563 F.3d at 14-15 (relying in part on case applying the FSIA to determine whether there is a *jus cogens* exception to common-law foreign official immunity). Indeed, this Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* relied in part on the policies underlying the FSIA to fashion a common-law rule governing when it is appropriate to pierce the veil of a corporation owned by a foreign state. 462 U.S. 611, 627-28 (1983); *see also Boyle v. United Techs. Corp.*, 487 U.S. 500, 511-12 (1988) (relying in part on the policies underlying the Federal Tort Claims Act to determine the scope of common-law contractor immunity).

In sum, by creating a *jus cogens* exception to foreign official immunity in civil cases, the Fourth Circuit has substantially departed from well-established domestic and international law.

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Joseph Peter Drennan
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(703) 519-3773
joseph@josephpeterdrennan.com

*Counsel for Petitioner*

# APPENDIX

APPENDIX A

**UNITED STATES DISTRICT COURT**
**Eastern district of Virginia**
**401 Courthouse Square**
**Alexandria Virginia 22314-8799**

**Chambers of**
**Leonie M. Brinkema**
**District Judge**

**Telephone (7103) 299-2116**
**Facsimile (703 299-2238**

June 21, 2013

Mary McLeod
Principal Deputy Legal Adviser
U.S. Department of State
2201 C Street NW
Washington, DC 20520

Dear Ms. McLeod:

I write regarding *Doe v. Yusuf Abdi Ali*, No. 1:05-CV-701, a civil action before me in the United States District Court for the Eastern District of Virginia.

In this litigation, two anonymous individuals have filed claims against Yusuf Abdi Ali under the Alien Tort Statute and the Torture Victim Protection Act. "John and

Jane Doe," who reside in northwest Somalia, assert that Mr. Ali was a commander in the Somali National Army under the Siad Barre regime from approximately 1984 to 1989, and that he and his soldiers targeted individuals they suspected of supporting rebel forces. Both allege that they were arrested, detained, and tortured; specifically, Jane Doe claims that she was beaten while pregnant, suffered a miscarriage, and was imprisoned in a windowless cell for six years, and John Doe states that he was shot multiple times by Mr. Ali at point-blank range. Mr. Ali, who is now a U.S. resident living in Virginia, denies these allegations.

This lawsuit was originally filed in November 2004 but was stayed to allow the State Department to advise the Court as to (1) whether it objects to this action going forward on the grounds that former Somali officials should have immunity, and (2) whether fact discovery in Ethiopia would interfere with U.S. foreign policy. The United States never filed a specific response as to this case, but did file a Statement of Interest in a related case in which it opined that a former Prime Minister and Defense Minister of Somalia does not enjoy immunity. *See Yousuf v. Samantar*, 1:04-cv-1360 (E.D. Va.). More recently, the Court also temporarily stayed the lawsuit to allow the U.S. Supreme Court to reach a decision in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), which involved the territorial reach of the Alien Tort Statute.

Given the United States' recent recognition of the Somali government, the Court has again temporarily stayed this action 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. If the State Department wishes to communicate its views on this issue, please be advised that its opinion must be received on or before September 19, 2013.

Sincerely,

/s/
Leonie M. Brinkema,
United States District Court Judge

## APPENDIX B

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

1:05-cv-701 (LMB/JFA)

JANE DOE, *et al.*,

*Plaintiffs,*

v.

YUSUF ABDI ALI,

*Defendant.*

**STATEMENT OF INTEREST SUBMITTED BY THE UNITED STATES OF AMERICA**

By letter to the Department of State dated June 21, 2013, this Court invited the views of the Department of State on whether "allowing this litigation to proceed would have any negative effect on the foreign relations of the United States."

Pursuant to 28 U.S.C. § 517,[1] the United States of America notes its appreciation for the Court's invitation, and advises that it respectfully declines to express views on the subject of the Court's inquiry. *See* Letter from Mary E. McLeod to Joseph H. Hunt (copy attached as Exhibit A).

Dated: September 19, 2013

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

KATHLEEN M. KAHOE
Acting United States Attorney

ANTHONY J. COPPOLINO
Deputy Branch Director

By: _____/s/_____
LAUREN A. WETZLER
Chief, Civil Division
Assistant United States Attorney
Justin M. Williams U.S. Attorney's Building
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Tel: (703) 299-3752
Fax: (703) 299-3983
Email: lauren.wetzler@usdoj.gov

1. 28 U.S.C. § 517 provides that "any officer of the Department of Justice[] may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States."

GREGORY DWORKOWITZ
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United States Department of Justice
Civil Division, Federal Programs
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Counsel for United States of America

**EXHIBIT A**

United States Department of State
Washington, D.C. 20520
www.state.gov

September 17, 2013

Re: *Doe v. Abdi Ali,* No. 1:05-cv-701 (E.D.Va.)

Dear Mr. Hunt:

I am writing with respect to Judge Brinkema's letter dated June 21, 2013 in the above captioned case. In that letter, Judge Brinkema provided the State Department with the opportunity to communicate its views "as to whether allowing this litigation to proceed would have any negative effect on the foreign relations of the United States." We request that the Department of Justice convey to the Court that the Department of State respectfully declines the Court's invitation to express views on this matter.

We appreciate the opportunity to comment on this matter.

Sincerely,

Mary E. McLeod
Acting Legal Adviser

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**(ALEXANDRIA DIVISION)**

Civil Action No.: 05-701

In re

JANE DOE, *et alii*,

Versus
(LMB/JFA)

YUSUF ABDI ALI,

*Defendant.*

**PRAECIPE AND NOTICE OF FILING**

Dear Mr. Clerk:

Kindly note the filing herewith of the accompanying true xerographic copy of a 30 November 2013, diplomatic letter from H.E. Abdi Farah Shirdon, Prime Minister of The Federal Republic of Somalia, addressed to the Honorable John Forbes Kerry, Secretary of State of the United States of America, by which letter Prime Minister

Shirdon has requested that the United States take all appropriate steps to validate the immunity from suit of the Defendant in the above-encaptioned cause, *viz.*, Yusuf Abdi Ali, pursuant to 28 U.S.C., § 517. This Honorable Court and the parties hereto should be advised that it is the understanding of the undersigned that the original of the said diplomatic letter has been delivered to the Secretary of State through diplomatic channels.

Thank you for your kind attention and courtesy.

Respectfully submitted,

/s/ Joseph Peter Drennan
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Virginia State Bar No. 023894
ATTORNEY AND COUNSELLOR FOR
YUSUF ABDI ALI, DEFENDANT

Ref: OPM/USSD/00677/11/13 Date: 30.11.2013

The Honorable John Forbes Kerry
United States Secretary of State
United States Department of State
2201 "C" Street, Northwest
Washington, District of Columbia 20520
United States of America

Dear Secretary of State Kerry:

The Federal Republic of Somalia presents its compliments to the Department of State. On behalf of the Government of the Federal Republic of Somalia, I, Abdi Farah Shirdon, Prime Minister of Somalia, have the distinct honor and high privilege, by this letter, of requesting. urgently, pursuant to the powers vested in me by the Federal Republic of Somalia Provisional Constitution, adopted 1 August 2012, that you use your good offices to obtain immunity for Mr. Yusuf Abdi Ali, a former Colonel in the Somali National Army, in the 1980s, in respect of certain civil litigation which is currently pending against him before the United States District Court for the Eastern District of Virginia (Alexandria Division), styled as, *Doe versus Yusuf Abdi Ali,* Civil Action No. 05-701 ("the Litigation").

The Litigation was originally filed on 10 November 2004, as Civil Action No. 04-1361, by two anonymous individuals, said to reside in Somalia, who both claim that they were specifically targeted by Mr. Ali and soldiers operating under his command of the Somali

National Army's Fifth Brigade, in the northern region of Somalia, because of their suspected support of rebel forces, and both allege that they were arrested, detained and tortured, with "Jane Doe" alleging that she was beaten while pregnant and suffered a miscarriage, and "John Doe" claiming that he was shot multiple times by the defendant at close range. Mr. Ali vigorously denies such allegations. The Government of the Federal Republic of Somalia is of the considered view that the Litigation is injurious to the historic, ongoing process of peace and reconciliation among clans and political factions within Somalia, which is being fostered by the Government of Somalia, the United Nations, and other governments, including, not least, the United States, which has earlier this year accorded formal recognition to the Federal Republic of Somalia.

I am advised that the Litigation has had a long history in the courts, not altogether unlike the course of related litigation in the civil case in the United States District Court for the Eastern District of Virginia against Mohamed Ali Samantar, who was Prime Minister of Somalia from 1987 - 1990, and Defense Minister and First Vice President of Somalia from 1982 - 1986, which the Prime Minister of the Federal Republic of Somalia, Abdi Farah Shirdon, addressed in his earlier diplomatic letter to you, dated 26 February 2013. I also understand that another difference in the procedural history of the two cases is that the case involving Mr. Ali, albeit filed, originally, on the same date as the case against Mr. Samantar, was actually dismissed by the plaintiffs, without prejudice, on 29 April 2005, and refiled, with substantially the same allegations, on 13 June

2005, with Ali's having moved to dismiss the case on each filing, and with the district court's having yet to rule on the defendant's motion to dismiss. I further understand that the district court ordered the Litigation stayed on 5 August 2005, to allow the United States Department of State to advise the district court on whether or not the Litigation would be harmful to the foreign policy interests of the United States, although, as adverted to above, the State Department did not respond to such entreaty, and the Litigation remained stayed until 21 October 2011, at which point the district court, in consideration of the holding of the Supreme Court of the United States in *Samantar v. Yusuf*, 130 S.Ct. 2278, 176 L.Ed. 2d (2010), which held that Samantar cannot assert *statutory immunity,* under the Foreign Sovereign Immunities Act, 28 U.S.C, § 1604, but left open the question of Samantar's common law immunity, as well as the Statement of Interest filed by the United States with the district court, in the Samantar case, on 14 February 2011, which caused Samantar's claim of common law immunity from suit also to be denied, critically, because, among other things, at that time, Mr. Samantar was said in the Statement of Interest to be " . . . a formal official of a state with no currently recognized government to request immunity on his behalf, including by expressing a position on whether the acts in question were taken in an official capacity . . . ." (Statement of Interest at ¶ 9), which caused the district court to deny Mr. Samantar's common law immunity claim on that basis. I am further informed that, subsequent to the lifting of the stay in the Litigation, Mr. Samantar's claim of common law immunity from suit was affirmed, on appeal, by the United States Court of Appeals for the Fourth Circuit,

*Yousilf v. Samantar,* 699 F.3d 763 (4th Crr. 2012), and that Samantar presently has a pending petition for a writ of *certiorari* to the United States Supreme Court (Record 0.12-1078), with the most recent ruling of the Supreme

Court in respect of said matter having come on 24 June 2013, where the Solicitor General was invited to file a brief in that case, expressing the views of the United States. I am told that, whilst Mr. Samantar's common law immunity from suit defense was under appellate review, 21 September 2013. The district court reimposed a stay of the stayed the Litigation, on 6 April 2012, based upon the pendency before the United States Supreme Court of a case involving the question of extra-territoriality and the Alien Tort Statute, and, following the Supreme Court's decision in that case, *viz ., Kiobel v. Royal Dutch Petroleum,* 133 S.Ct. 1659 (2013), the district court continued the stay and continued the Ali case to a status hearing on this Friday, 20 September 2013, in order to provide the State Department an opportunity to communicate its views as to " . . . whether allowing [the Litigation] to proceed would have any negative effect on the foreign relations of the United States. Thereafter, the United States filed a Statement of Interest in the Litigation, essentially, declining to respond in a substantive way to the requestion of the district court, and, on 20 September 2013, the district court further extended the stay in the Litigation for 120 days.

It is my understanding that, in the event that the district court was to lift the stay of the Litigation, Mr. Yusuf Abdi Ali would assert common law immunity from

suit as a former official of the Somali National Army. Thus, by this letter, the Federal Republic of Somalia hereby affirms and ratifies Mr. Ali's plea of common law immunity from suit, and, furthermore, finds that all of his actions undertaken in Somalia, as commander of the Fifth Brigade, were undertaken in his official capacity with the Government of Somalia. I would hasten to add that the Federal Republic of Somalia rejects the notion that Colonel Ali's actions were contrary to the law of Somalia or the law of nations, much less that he may be fairly said to be liable under any of the theories propounded in the Complaint filed in the district court.

The good will of the family of nations represented at the London Somalia Conference, held on 23 February 2012, has served as a catalyst to the strengthening of the Federal Republic of Somalia and of the Somali civil society. the rule of law, and the Somali economy, whereas the Litigation, which, interestingly, was filed, literally, one month to the day following the formation of the Transitional Federal Government of Somalia, under the auspices of the United Nations, in Nairobi, Kenya, in 2004, hearkens to the era of inter-clan conflict and strife, which has devastated Somalia in recent decades and poses a real threat to the progress that has been made.

As Prime Minister Shirdon mentioned in his 26 February 2013 diplomatic letter to you, importuning immunity for Samantar, the recognition of the Federal Republic of Somalia by the United States, on 17 January 2013, represents an important milestone in the relations between our nations. Indeed, as the Honorable Hillary

Clinton stated, in summing up her remarks at the press conference held after the meeting between Secretary Clinton and myself on said date: "So we have moved into a normal sovereign nation to sovereign nation position, and we have moved into an era where we're going to be a good partner, a steadfast partner, to Somalia as Somalia makes the decisions for its own future." Indeed, further indications of the profound and sustained cooperation and support of the United States for the independence and sovereignty of Somalia may be found in the support of the United States for the unanimous approval of United Nations Security Council Resolution 2093, on 6 March 2013, to suspend the twenty-one year arms embargo on Somalia.

To that end, the Federal Republic of Somalia specifically understands that this designation of immunity for Mr. Yusuf Abdi Ali should come in the form of a Statement of Interest of the United States, to be submitted to the district court, by the Attorney General, or his designee, pursuant to 28 U.S.C. § 517, and that the Department of State should move with dispatch to take all necessary steps to validate the immunity from suit to which Mr. Yusuf Abdi Ali is entitled, as a former government official of Somalia, and obtain for him a dismissal of the subject civil proceedings against him.

On behalf of the Federal Republic of Somalia, I wish to stress the critical importance of the instant request, and our deep appreciation of the prompt attention of the Department of State.

Respectfully yours,

H.E. Abdi Farah Shirdon
Prime Minister
The Federal Republic of Somalia

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APPENDIX D

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**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**ALEXANDRIA DIVISION**

Civil Action No. 1:05cv701

JANE DOE, *et al.*,

*Plaintiffs,*

vs.

YUSUF ABDI ALI,

*Defendant.*

ALEXANDRIA, VIRGINIA
July 25, 2014
10:27 a.m.

**TRANSCRIPT OF MOTION HEARING**
**BEFORE THE HONORABLE**
**LEONIE M. BRINKEMA**
**UNITED STATES DISTRICT JUDGE**

**COMPUTERIZED TRANSCRIPTION**
**OF STENOGRAPHIC NOTES**

**PROCEEDINGS**

THE CLERK: Civil Action 05-701, Jane Doe, et al. v. Yusuf Abdi Ali. Would counsel please note their appearances for the record.

MS. ROBERTS: Good morning, Your Honor. I'm Kathy Roberts from the Center for Justice and Accountability, for the plaintiff. I'm joined here by Tara Lee from DLA Piper and Nushin Sarkarati, also from the Center for Justice and Accountability.

THE COURT: Good morning.

MR. DRENNAN: Good morning, Your Honor. Joseph Peter Drennan on behalf of the defendant, Yusuf Abdi Ali, who is also present before the Court.

THE COURT: Good morning, Mr. Drennan. All right, this comes before the Court on the

Defendant's renewed motion to dismiss. As you both know, we issued an order earlier this week.

I was quite surprised, Mr. Drennan, given how thorough you tend to be in your pleadings, that you had not, you know, right up front in bold print brought up the *Kiobel* decision and asked the Court to at least dismiss that portion of the case that's based upon the ATS. Obviously, we notified both sides that we felt that that ruling by the Supreme Court would be dispositive of the issue.

You've each given us a brief, not even a response. I mean, the plaintiff has brought the *Al-Shimari* decision of the Fourth Circuit to our attention. *Al-Shimari*, in my view, is factually significantly different from this case because CACI is an American corporation that was running the Abu Ghraib prison at the direction of the U.S. government. There's clearly recognized by the Fourth Circuit a direct connection between the United States and the events at that prison sufficient to allow for jurisdiction.

We don't have anything like that in this case. There is absolutely no connection between the United States and this defendant's conduct in Somalia, and so I am on the basis of *Kiobel* as well as, quite frankly, *Al-Shimari* going to dismiss the ATS claims from this case, but that still leaves the TVPA claims in Counts 1 and 2, correct?

MR. DRENNAN: Yes, Your Honor, but I'd like to address that as well in light of *Kiobel*, because the Torture Victim Protection Act is a statute that sets forth a cause of action. It does not establish jurisdiction. Jurisdiction was premised on the ATS, so all the TVPA claims are tied to the ATS for purposes of jurisdiction. At least, that's our position.

THE COURT: What case law do you have that explicitly says that?

MR. DRENNAN: I don't have any that explicitly says that.

THE COURT: Well, then all right. I mean, you're very articulate when you say that, but, I mean, I don't see a legal basis for that.

Let me interrupt this proceeding for one minute.

(Recess from 10:13 a.m., until 10:14 a.m.)

THE COURT: Go ahead, Mr. Drennan.

MR. DRENNAN: Yes, Your Honor. I understand the Court's position with regard to the TVPA claims.

THE COURT: Well, I'm trying to understand your position. Where – from whence do you draw your authority for the position you've taken on the relationship between the two statutes?

MR. DRENNAN: Well, the *Karadzic* decision from a decade ago basically draws – drew that distinction, that there is, that a distinction be drawn between the two. That's why they're pled in tandem, because the TVPA creates a federal cause of action, whereas the ATS merely represents a jurisdictional predicate for bringing claims, and *Kiobel*, as the Court has pointed out correctly, I think, clearly has no basis as a predicate for jurisdiction here, so the ATS claims all fall out of the case.

But I'll just submit on that. I understand the Court's position –

THE COURT: All right.

MR. DRENNAN: – that the Court is not inclined to dismiss the TVPA claims based upon *Kiobel*, and I would apologize to the Court for not invoking *Kiobel* in

my renewed motion to dismiss, but as the Court may recall, I initially brought *Kiobel* to the attention of the Court, asking for a stay when the Supreme Court ordered reargument based on the extra territoriality question a couple of years ago.

But with regard to our other – the other aspects of our motion, we believe that the motion is well taken. This is a stale claim, and we –

THE COURT: Well, in terms of being stale, I mean, there is a factual dispute as to whether or not these claims could have been brought in Canada, right?

MR. DRENNAN: There's a factual dispute as to whether they could have been brought in Canada. There is a factual dispute with regard to the issue of equitable tolling.

THE COURT: All right, there are factual disputes. That answers the question. That means you don't dismiss. The matter will go to trial, and the issue as to the tolling and as to the statute of limitations are legitimate issues for the trial, when evidence can be presented and the trier of fact, whoever that is, can make the determinations. I mean, it may be a mixed question of fact and law, but the simple fact is there are material facts in dispute at this point, and so it's not proper at a motion to dismiss level to be moving on that.

MR. DRENNAN: Very well. Your Honor, I would note another issue, I understand the Court's position, but as

we've pointed out in earlier filings before the Court, the government of Somalia has requested immunity for my client, and that request for immunity remains pending with the State Department, and it's possible and hopeful from Mr. Ali's standpoint that the State Department ultimately will entertain favorably that request and request that the case be dismissed.

THE COURT: Well, that's one of the risks, you know, the plaintiff is taking, I mean, in terms of the costs of going on with litigation. I recognize that, and I will say right now for the record that if the Department of State voices a concern about this case and asks this Court to not proceed with it, most likely I will stop the case and dismiss it at that point, but as you know, I have delayed this case and I delayed the *Samantar* case an extensive period of time, almost unheard of for this Court, to allow the State Department, the executive branch of the United States government, to take a position, because I do think that there are potentially sensitive issues that this case might impact.

You know, the need for reconciliation in countries that have been torn apart like this is very important, and I can recall in earlier pleadings, you know, evidence, certainly some people with expertise in the area concerned that this type of litigation might simply continue the tensions and the animosities, and that goes against a genuine effort at reconciliation, but those reconciliation efforts are not yet in place from what I can tell, and the Department of State has not taken a position.

They have not asked us to hold on this case, and we've given them many opportunities to do so. So until we receive such an indication from the Department of State, this case will go forward, but I do caution the plaintiff that if we get that kind of concern, it is highly likely at that point this Court will go ahead and dismiss the case or stop the proceedings. So that's how we're going to leave it.

So I'm going to deny the motion to dismiss the torture victim claims, but any claims based on the ATS are out of this case at this point. They are dismissed. And we will go forward then with the what will most likely be not insignificant problems with discovery, all right?

I believe a scheduling order, has it been issued in this case? If not –

MR. DRENNAN: No, it has not, Your Honor.

THE COURT: All right, I'm going to issue one today.

MR. DRENNAN: All right.

THE COURT: And hopefully, you can work things out with the discovery. If not, the magistrate judge on this case is Judge Anderson, and he will assist you with any discovery problems that may arise.

MR. DRENNAN: All right. Your Honor, I understand the Court's position. I would also advise the Court preliminarily that we are contemplating an interlocutory appeal on the immunity claim and would ask that the proceedings be stayed upon filing of that appeal.

THE COURT: What's the plaintiffs' position on that?

MS. ROBERTS: Your Honor, I think we will likely also be filing an appeal on the ATS claims, but I would request the opportunity if it's possible to address the nationality of the defendant in this case and its relevant connection to U.S. territory or at least to supply briefing after the hearing with respect to some of these very difficult questions.

I understand very well why the Court would be interested in this case, where you have the Supreme Court with four concurring opinions, only one of those opinions by only two justices would have gotten rid of a case like this, which has a 30-year line of authorities supporting it, cases against U.S. residents, natural persons that are not addressed by the corporate cases that have been laid before the Court.

THE COURT: Well, the only thing is the corporations in the *Kiobel* case, while they were not U.S. corporations, did have some connections to the United States as corporations, and that was not enough to persuade the Supreme Court that there was sufficient nexus.

MS. ROBERTS: Your Honor –

THE COURT: And these days, with the trend being to look at corporations just like people, I don't really see how there'll be a material change in the jurisprudence on that issue.

But in any case, this is, this is premature. Nothing yet has happened. There hasn't been an appeal filed either way. I'm not going to, you know, predict whether I'll issue a stay or not. You-all might agree that if both sides are going to appeal, that a stay is the most appropriate thing, because the discovery is not going to be easy in this case. There are logistical problems that I can see coming down the pike.

But in any case, my ruling today is what it is, and we'll take up those other issues if and when they occur. Thank you.

MS. ROBERTS: Thank you, Your Honor.

MR. DRENNAN: Thank you, Your Honor.

THE COURT: Anything further on the docket?

(No response.)

THE COURT: No? We'll recess court for today then.

(Which were all the proceedings had at this time.)

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## APPENDIX E

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

| | | |
|---|---|---|
| FARHAN MOHAMOUD TANI WARFAA, | ) | |
| Plaintiff, | ) | |
| v. | ) | 1:05cv701 (LMB/JFA) |
| YUSUF ABDI ALI, | ) | |
| Defendant. | ) | |

### MEMORANDUM OPINION

Before the Court is defendant's Renewed Motion to Dismiss. For the reasons that follow, in addition to the reasons stated in open court, defendant's motion will be granted in part and denied in part.

### I. BACKGROUND

This civil action arises out of events that occurred in Somalia during the tumultuous regime of Mohamed Siad Barre. Plaintiff Farhan Mohamoud

Tani Warfaa ("plaintiff" or "Warfaa") is a Somali national who was allegedly tortured based on his membership in a clan opposed to Barre's regime. Defendant Yusuf Abdi Ali ("defendant" or "Ali") is a former officer of the Somali National Army, now living in the United States, who allegedly directed and participated in plaintiff's torture.

The facts alleged in the Amended Complaint are as follows. In 1987, plaintiff was a farmer living in northern Somalia. Am. Compl. ¶ 17. At that time, defendant was a Colonel in the Somali National Army, serving in the Fifth Battalion, which operated out of the nearby city of Gebiley, Somalia. *Id.* ¶¶ 6, 15. In December 1987, pursuant to defendant's orders, Fifth Battalion soldiers abducted plaintiff from his home at gunpoint and took him to the Army's regional headquarters. *Id.* ¶¶ 17-18. Over the course of the next three months, plaintiff's arms and legs were bound, he was stripped naked, and he was beaten to the point of unconsciousness at least nine times. *Id.* ¶¶ 20-24. Defendant was present and witnessed at least some of plaintiff's torture. *Id.* ¶ 25. In March 1988, defendant personally interrogated plaintiff, at the end of which defendant took out a pistol and shot plaintiff five times. *Id.* ¶ 26. Assuming plaintiff was dead, defendant ordered his subordinates to bury the body. *Id.* The soldiers quickly discovered that plaintiff was not dead, however, and they agreed to release him in exchange for a significant bribe. *Id.* ¶ 27.

In 1990, anticipating the overthrow of Barre's regime, defendant entered Canada through the United States. *Id.* at ¶ 7. In 1992, Canada deported

defendant back to the United States for gross human rights abuses in Somalia. *Id*. ¶ 8. In 1994, the United States similarly threatened defendant with deportation, and he voluntarily departed for Somalia in July 1994. Id. Defendant nonetheless returned to the United States in December 1996 and has been living here ever since as a lawful resident alien. *See id*.

On November 10, 2004, two plaintiffs, proceeding anonymously as Jane and John Doe, filed suit against defendant in federal court. Pursuant to an Order of the Court, issued on April 29, 2005, their complaint was voluntarily dismissed. On June 13, 2005, the same plaintiffs initiated the instant action. The Complaint alleged that defendant is liable for engaging in attempted extrajudicial killing, torture, degrading treatment, arbitrary detention, crimes against humanity, and war crimes, in violation of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991 ("TVPA"), 106 Stat. 73, 28 U.S.C. § 1350 note.

This action has been subject to a number of stays, mostly to give the United States Department of State an opportunity to express its views on defendant's claim of immunity and to give the Supreme Court an opportunity to decide related issues in a companion case, *Samantar v. Yousuf*, 560 U.S. 305 (2010). The final stay was lifted on April 25, 2014, one day after the Court received a Statement of Interest Submitted by the United States of America, explaining that the "United States is not in a position to present views to the Court concerning this matter at this time." On May 9, 2014, plaintiff

Farhan Mohamoud Tani Warfaa filed an Amended Complaint using his true name and restating his claims against defendant; the other plaintiff, Jane Doe, elected not to proceed with this action, which has been recaptioned to reflect these changes.

## II. DISCUSSION

Defendant moves to dismiss the Amended Complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction and under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

### A. *Standard of Review*

Under Rule 12(b)(1), a court must dismiss an action if it finds subject-matter jurisdiction lacking. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). The burden rests with the plaintiff to establish that such jurisdiction exists. *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 370-71 (4th Cir. 2012). Under Rule 12(b)(6), a court must begin by assuming that the facts alleged in the complaint are true and by drawing all reasonable inferences in the plaintiff's favor. *Burbach Broad. Co. of Del, v. Elkins Radio Corp.*, 278 F.3d 401, 406 (4th Cir. 2002). "Judgment should be entered when the pleadings, construing the facts in the light most favorable to the nonmoving party, fail to state any cognizable claim for relief." *O'Ryan v. Dehler Mfg. Co.*, 99 F. Supp. 2d 714, 718 (E.D. Va. 2000). In other words, to avoid dismissal, the factual allegations in the complaint, taken as true, "must be enough to raise a right of relief above the speculative level." *Bell Atl. Corp. v.*

*Twombly*, 550 U.S. 544, 555 (2007). That means a plaintiff must "nudge[] [his] claims across the line from conceivable to plausible." Id. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

### B. *Alien Tort Statute Claims*

Although defendant failed to raise the issue in his papers, the Court must address the effect of *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), on plaintiff's ATS claims.[1] The ATS provides

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[1] On July 22, 2014, three days before oral argument on defendant's motion, the Court issued an Order instructing plaintiff to present "at the scheduled hearing any argument that his ATS claims are not barred" by *Kiobel*. On July 23, 2014, plaintiff submitted, without comment, a Notice of Supplemental Authority, which simply directed the Court's attention to *Al Shimari v. CACI Premier Tech., Inc.*, No. 13-1937, 2014 WL 2922840 (4th Cir. June 30, 2014). In *Al Shimari*, the Fourth Circuit declined to dismiss ATS claims brought by foreign nationals against an American corporation for torture and mistreatment at the Abu Ghraib prison in Iraq. *Id.* at *1. The foreign nationals alleged that their torture and mistreatment came at the hands of United States citizens employed pursuant to a contract with the United States government at a facility administered by the United States military. *Id.* at *9-*12. Plaintiff fails to address any of the obvious factual dissimilarities with his case, most notably that Al Shimari involved conduct allegedly sanctioned on American soil by the federal government and a domestic corporation. Plaintiff does not come close to alleging a similarly contemporaneous

"original jurisdiction" in the federal district courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The Supreme Court has clarified that the ATS is a jurisdictional grant for only a limited category of claims premised on violations of internationally accepted norms. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004). In *Kiobel*, the Supreme Court further clarified that such claims, generally speaking, must be based on violations occurring on American soil. 133 S. Ct. at 1669 (concluding that "relief [under the ATS] for violations of the law of nations occurring outside the United States is barred" (citing *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010))). In other words, the Supreme Court held that a cognizable ATS claim may not "reach conduct occurring in the territory of a foreign sovereign." *Id.* at 1664.

Here, "[a]ll the relevant conduct" alleged in the Amended Complaint occurred in Somalia, *id.* at 1669, carried out by a defendant who at the time was not a citizen or resident of the United States. Plaintiff has alleged no facts showing that defendant's violations of international law otherwise "touch[ed] and concern[ed] the territory of the United States." *Id.* Because the extraterritoriality analysis set forth in *Kiobel* appears to turn on the location of the relevant conduct, not the present location of the defendant, a straightforward application to the instant action leads the Court to

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connection between the United States and defendant's conduct.

conclude that plaintiff's ATS claims are "barred" and must be dismissed.

### C. *Torture Victim Protection Act Claims*

Plaintiff's TVPA claims are not subject to the same analysis. Unlike with the ATS, there are strong indications that the TVPA was intended to have extraterritorial application. The language of the TVPA, which creates civil liability for extrajudicial killing and torture carried out by an individual with "actual or apparent authority, or color of law, of any foreign nation," naturally contemplates conduct occurring in the territory of a foreign sovereign. 28 U.S.C. § 1350 note. Moreover, the Supreme Court did not purport to curb the extraterritorial reach of the TVPA in *Kiobel*. *See* 133 S. Ct. at 1669 (noting that the TVPA addresses "human rights abuses committed abroad" (Kennedy, J., concurring)); *see also Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 51 (2d Cir. 2014) (concluding that there was "no bar on the basis of extraterritoriality to [the plaintiff's] TVPA claim"). Accordingly, the Court will consider defendant's many defenses to plaintiff's TVPA claims.

#### 1. Threshold Issues

Defendant challenges plaintiff's ability to have these claims adjudicated in federal court on the grounds that they implicate nonjusticiable political questions and acts of state, and that plaintiff is immune from suit in any event. Br. in Supp. of Def.'s Renewed Mot. to Dismiss ("Def.'s Br."), at 6-14. Although defendant purports to raise these

arguments under Rule 12(b)(1), none of the three doctrines on which he relies are strictly jurisdictional.

**a. Political Question Doctrine**

Federal courts have long been reluctant to decide issues that might infringe upon the province of the Executive Branch. It was Chief Justice Marshall who first remarked that "questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made" in federal courts. *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 170 (1803). This is the essence of the political question doctrine. The Supreme Court elaborated on the doctrine *in Baker v. Carr*, 369 U.S. 186 (1962), describing it as a function of the separation of powers and setting forth six factors for lower courts to consider, the presence of any one of which requires dismissal if the factor is "inextricable from the case at bar." *Id.* at 217. According to defendant, two of the Baker factors are especially relevant here:

> [4] "the impossibility of a court's undertaking independent resolution without expressing ack of the respect due coordinate branches of government"; [and]

> [6] "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

*Id*.

It is true that the Supreme Court has singled out the foreign affairs context as one to which the political question doctrine will normally apply: "[n]ot only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views." *Id*. at 211. Even so, it remains possible for an action to touch on foreign affairs without necessarily raising a nonjusticiable political question. *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 841 (D.C. Cir. 2010) ("[T]he political question doctrine does not bar a claim that the government has violated the Constitution simply because the claim implicates foreign relations."). Accordingly, courts are directed to undertake "a discriminating analysis of the particular question posed" in view of the unique circumstances of the case to determine whether the political question doctrine prevents a plaintiff's claims from going forward. *Baker*, 369 U.S. at 211.

Here, such analysis weighs against applying the political question doctrine to plaintiff's TVPA claims. First, there is no danger that this Court will express a lack of respect for the Executive Branch by adjudicating plaintiff's claims because foreign

affairs, as such, are not directly implicated. *See id*. In other words, the Court need not reconsider the wisdom of discretionary decisions made by the Executive Branch (or the Legislative Branch, for that matter) regarding our nation's relationship with the government of Somalia. Nor would resolution in any way call into question the prudence of the Executive Branch in a matter of foreign affairs constitutionally committed to its discretion. To the contrary, defendant cannot identify a single decision of the Executive Branch that might justify application of the political question doctrine because no such decision has in fact been made, setting this case apart from those cited in defendant's papers, all of which involved some affirmative policy decision made by a political branch. *See, e.g., Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007) (noting that the "decisive factor" favoring application of political question doctrine was that the weapon "sales [at issue] to Israel were paid for by the United States"); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 22 (D.D.C. 2005) (holding that "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States" after the State Department advised the court that the lawsuit should not proceed). Plaintiff's claims present purely legal issues, and therefore do not implicate any decisions made by coordinate branches. Moreover, it is well established that the resolution of claims brought under the TVPA has been constitutionally committed to the Judiciary. See *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995).

Second, there is only a slight risk of embarrassment from multifarious pronouncements by different branches on the subject of the instant litigation. *See Baker*, 369 U.S. at 211. This factor is decisive in cases where "judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." *Kadic*, 70 F.3d at 249; *see also Sosa*, 542 U.S. at 733 n.21 (explaining that "federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"). But, again, no contradictory decisions have been made here. The Court has afforded the Executive Branch three opportunities to "express its views on defendant's claim of immunity"; each time the Executive Branch has declined.[2] The Executive Branch has similarly declined to inform the Court of any potential adverse impact on foreign affairs in light of the uncertain political and security situation in Somalia.[3] Allowing plaintiff's claims to go forward in no way contradicts a clear statement of interest from the Executive Branch, much less poses the threat of seriously interfering in the conduct of foreign affairs. Accordingly, there is no definite basis

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[2] Defendant suggests that the Executive Branch may request immunity pending the outcome of negotiations with the transitional government of Somalia. Rather than deal in speculation, the Court can always revisit the issue if and when such a request is made.

[3] It is worth noting that the United States does not currently have an ambassador to or embassy in Somalia; our nation's interests are represented instead by a Special Representative for Somalia based in the United States Embassy in Nairobi, Kenya.

at present to believe that adjudicating the claims before the Court might infringe on the province of a coordinate branch. *See Baker*, 369 U.S. at 211 (explaining that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance").

Defendant's position – that the political uncertainty itself and the potential for an immunity request from the newly formed Somali government justifies application of the doctrine – conflates political questions with political cases. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (cautioning that a political question does not arise "merely because [a] decision may have significant political overtones"). Because there is no authority for the proposition that mere political uncertainty, unaccompanied by a statement of interest from a coordinate branch, renders a case nonjusticiable, the political question doctrine does not apply here.

**b. Act of State Doctrine**

The "act of state" doctrine prevents federal courts "from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). Like the political question doctrine, the act of state doctrine is derived in part from the concern that the Judiciary, by questioning the validity of such acts, could interfere with the Executive Branch's conduct of foreign affairs. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 4 93 U.S. 4 00, 404

(1990). Accordingly, a plaintiff's claim may be barred to the extent that it challenges (1) an "official act of a foreign sovereign performed within its own territory"; and (2) "the relief sought or the defense interposed [would require] a court in the United States to declare invalid the [foreign sovereign's] official act." *Id.* at 405.

Here, application of the act of state doctrine fails at the first step. To understand why, it is necessary to understand the concept of *jus cogens* norms of international law, which are certain "universally agreed-upon norms" "accepted and recognized by the international community of States as a whole." *Yousuf v. Samantar*, 699 F.3d 763, 774 (4th Cir. 2012), *cert. denied*, 134 S. Ct. 897 (2014) (internal quotation marks and citations omitted). As a result, acts that violate *jus cogens* norms are not officially authorized by any foreign sovereigns. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992) ("International law does not recognize an act that violates *jus cogens* as a sovereign act [.]"). It follows that an act that violates *jus cogens* norms cannot serve as a basis for the act of state doctrine.

Because plaintiff's TVPA claims are premised on alleged acts that violate *jus cogens* norms, the act of state doctrine is inapplicable. Extrajudicial killing has long been condemned by international law. *See Doe I v. UNOCAL Corp.*, 395 F.3d 932, 959 (9th Cir. 2002); *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 345 (S.D.N.Y. 2003). The Amended Complaint alleges that defendant attempted to kill plaintiff by

"[taking] out his pistol and fir[ing] five shots," several of which hit plaintiff, at the conclusion of an interrogation session. Am. Compl. ¶ 26. These allegations, which must be accepted as true at this stage in the litigation, constitute *jus cogens* violations and therefore are not recognized as official sovereign acts. Likewise, the right to be free from torture "is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*." *Siderman de Blake*, 965 F.2d at 717 (surveying case law, statutes, and scholarly literature). The Amended Complaint alleges that defendant and subordinate members of the Somali National Army at various points bound plaintiff's arms and legs, stripped him naked, and beat him until he lost consciousness. Am. Compl. ¶¶ 21-22; *see also* The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85 (defining torture for purposes of international law). Again, such allegations amount to *jus cogens* violations which would not constitute sovereign acts.

Even if defendant could make the required two-part showing, the Court would still have discretion not to apply the act of state doctrine where the underlying policies weigh against its application. The Supreme Court articulated three such policies in *Sabbatino*:

> [1] [T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary

> to render decisions regarding it . . . . [2] [T]he less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. [3] The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence.

*Id*. at 428. None of these policies would be served by applying the act of state doctrine to plaintiff's TVPA claims. First, the consensus against extrajudicial killing and torture is foundational in international law. Second, for reasons discussed above, plaintiff's claims do not implicate any important issues of foreign affairs. Third, Barre's regime was toppled long ago, meaning the present suit is less likely to give rise to any new hostilities or political tensions. It is therefore clear that application of the act of state doctrine is not appropriate.

**c. Official Acts Immunity**

Defendant also invokes "official acts" immunity to the extent plaintiff seeks to hold him liable for acts committed pursuant to his official duties as a Colonel in the Somali National Army. See Restatement (Second) of Foreign Relations Law § 66(f) (stating that "[t]he immunity of a foreign state . . . extends to . . . any . . . public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state"); *see also Matar v. Dichter*, 563 F.3d 9, 14

(2d Cir. 2009) ("At the time the FSIA was enacted, the common law of foreign sovereign immunity recognized an individual official's entitlement to immunity for acts performed in his official capacity." (internal quotation marks omitted)). Official acts immunity is conduct-based and is generally available to both current and former foreign officials. *See Matar*, 563 F.3d at 14 ("An immunity based on acts – rather than status – does not depend on tenure in office.").

Any claim defendant had to official acts immunity was squarely foreclosed by the Fourth Circuit's decision in *Yousuf v. Samantar*, 699 F.3d 763, 774 (4th Cir. 2012), *cert. denied*, 134 S. Ct. 897 (2014). In *Samantar*, the Fourth Circuit delineated an important limit on official acts immunity: "a foreign official may assert immunity for official acts performed within the scope of his duty, but not for private acts where the officer purports to act as an individual and not as an official, such that a suit directed against that action is not a suit against the sovereign." *Id.* at 775 (internal quotation marks, alteration, and citation omitted); *see also Samantar v. Yousuf*, 560 U.S. 305, 322 n.17 (2010) (noting that official acts immunity is not available to "an official who acts beyond the scope of his authority"). The Fourth Circuit then held that a foreign official exceeds the scope of his authority any time he engages in an act that violates *jus cogens* norms. *See Samantar*, 699 F.3d at 777 ("We conclude 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.").

Because plaintiff alleges that defendant did exactly that, defendant's acts could not have been sanctioned by a foreign sovereign notwithstanding his position in the Somali National Army. Accordingly, just as in Samantar, defendant is not entitled to official acts immunity.

Defendant resists this conclusion by asking the Court to disregard the Fourth Circuit's decision, which obviously it cannot do. Defendant also seems to suggest that Somalia, as a sovereign state, ratified his acts at some point after they were committed. Even if defendant had some persuasive evidence of ratification, prohibitions against extrajudicial killing and torture are foundational international norms, meaning that no state – Somalia included – may condone such acts. Defendant's arguments, weak as they are, simply confirm that the common law affords him no immunity in light of plaintiff's allegations.

**d. Statute of Limitations**

Finally, defendant argues that the statute of limitations applicable to plaintiff's claims has run and that it is not subject to equitable tolling. Def.'s Br., at 17-23. Under the TVPA, a plaintiff has ten years from the date a cause of action arises to bring suit for extrajudicial killing or torture. 28 U.S.C. § 1350 note ("No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose."). The alleged attempted extrajudicial killing and torture giving rise to plaintiff's claims occurred between December 1987 and March 1988. Am. Compl. ¶¶ 17-26. Plaintiff did

not file suit until November 10, 2004, well more than ten years after his cause of action arose. Accordingly, the dispositive question is whether the doctrine of equitable tolling permits plaintiff's claims to go forward notwithstanding the delay.

This Court answered the same question in the affirmative in *Yousuf v. Samantar*, No. 1:04cvl360, 2012 WL 3730617, at *4-*6 (E.D. Va. Aug. 28, 2012). To begin, statutory limitations periods "are customarily subject to equitable tolling" in civil suits between private litigants. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990) (internal quotation marks and citation omitted). Whether equitable tolling is appropriate in any particular case depends on a finding of extraordinary circumstances that are both beyond the plaintiff's control and unavoidable even with diligence. *See id*. at 95-96. Federal courts have applied this usual rule to the TVPA's limitations period, *see, e.g., Jean v. Dorelien*, 431 F.3d 776, 779 (11th Cir. 2005); Papa v. United States, 281 F.3d 1004, 1012-13 (9th Cir. 2002), as did this Court, *see Samantar*, 2012 WL 3730617, at *4-*6. Tolling the TVPA's limitations period is consistent with the Act's underlying policy: absent a remedy in courts of the United States, some of the most egregious cases of human rights violations might go unheard because the regimes responsible often possess the most inadequate legal mechanisms for providing redress. *See Arce v. Garcia*, 434 F.3d 1254, 1261-62 (11th Cir. 2006). Allowing tolling is also consistent with the Act's legislative history:

> [The TVPA] provides for a 10-year statute of limitations, but explicitly

> calls for consideration of all equitable tolling principles in calculating this period with a view toward giving justice to plaintiff's rights. Illustrative, but not exhaustive, of the types of tolling principles which may be applicable include the following. The statute of limitations should be tolled during the time the defendant was absent from the United States or from any jurisdiction in which the same or similar action arising from the same facts may be maintained by the plaintiff, provided that the remedy in that jurisdiction is adequate and available. Excluded also from calculation of the statute of limitations would be the period when a defendant has immunity from suit. The statute of limitations should also be tolled for the period of time in which the plaintiff is imprisoned or otherwise incapacitated. It should also be tolled where the defendant has concealed his or her whereabouts or the plaintiff has been unable to discover the identity of the offender.

S. Rep. No. 102-249, at 10-11 (footnote omitted). Taken together, general principles of equitable tolling and Congress's explicit guidance on the matter provide multiple bases for tolling the limitations period under the TVPA. The same considerations that justified equitable tolling in Samantar are present here. First, based on plaintiff's pleadings, the limitations period should be

tolled during the periods in which extraordinary circumstances– namely, sectarian violence and political upheaval in Somalia – prevented plaintiff from filing his claims. *See Irwin*, 498 U.S. at 95. There is a consensus among the federal courts that civil war and a repressive authoritarian regime constitute "extraordinary circumstances" for purposes of tolling the TVPA's limitations period. *See Jean*, 431 F.3d at 780-81 (collecting cases). Plaintiff has alleged that Barre's regime targeted members of his clan for human rights abuses throughout the 1980s. See Am. Compl. ¶ 36. Plaintiff has further alleged that the civil war following the overthrow of Barre's regime in 1991 pushed Somalia into a state of "increasing chaos," resulting in "the killing, displacement, and mass starvation of tens of thousands of Somali citizens." *Id*. ¶ 37. Conditions began to improve slightly in 1997, when plaintiff's regional government (Somaliland) achieved semi-autonomous status and was able to "exercise a modicum of authority over its terrority." *Id*. ¶ 40. Plaintiff has therefore pleaded adequate facts to show that it was impossible for him to file suit until at least 1997, when the extraordinary circumstances finally abated such that he could pursue his cause of action without fear in the United States or elsewhere. Because plaintiff did file by 2004, his claims are timely on this basis alone.

The limitations period should also be tolled during the periods in which defendant did not reside in the United States and therefore personal jurisdiction could not be obtained. *See* S. Rep. No. 102-249, at 7 (stating that "only defendants over which a court in the United States has personal

jurisdiction may be sued"). Plaintiff has alleged that he filed suit within ten years of defendant's continuous presence in the United States following the overthrow of Barre's regime in Somalia. At that time, defendant was living in Canada. See Am. Compl. ¶ 7. In 1992, Canada deported defendant to the United States for gross human rights abuses in Somalia. *Id*. ¶| 8. In 1994, the United States similarly threatened defendant with deportation, and he voluntarily departed for Somalia in July 1994. *Id*. Defendant nonetheless returned to the United States in December 1996 and has been living here ever since as a lawful resident alien. *See id*. Accepting these allegations as true, the limitations period had not yet expired when plaintiff first filed suit on November 10, 2004, because defendant had been present in the United States and subject to the reach of its courts for slightly less than ten years.

Defendant responds that the limitations period continued to run while he lived in Canada, which has a similarly fair legal system providing an alternative forum for plaintiff's claims, meaning this suit was filed at least a year too late. *See* S. Rep. No. 102-249, at 10-11 (noting that the "statute of limitations should be tolled during the time the defendant was absent from the United States or from any jurisdiction in which the same or similar action arising from the same facts may be maintained by the plaintiff"). The parties have submitted competing reports by Canadian lawyers regarding the availability of an adequate remedy there. Plaintiff's expert plausibly asserts that Canada's legal system does not afford an adequate remedy. On this record, defendant's motion will be

denied, although the factual dispute as to whether plaintiff could have brought his claims in Canada is appropriate for adjudication at trial.

In sum, plaintiff has alleged sufficient facts to avoid dismissal of his TVPA claims at this stage on statute-of-limitations grounds.

**2. Adequacy of the Pleadings**

The TVPA authorizes a cause of action against "[a]n individual" for acts of extrajudicial killing and torture committed under authority or color of law of any foreign nation. 28 U.S.C. § 1350 note. The Act defines "extrajudicial killing" as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id*. The Act defines "torture" as "any act, directed against any individual in the offender's custody or physical control, by which severe pain or suffering . . . , whether physical or mental, is intentionally inflicted on that individual" for a number of different purposes. *Id*. In addition, the Act imposes an exhaustion requirement, which bars adjudication "if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." *Id*. Accordingly, to state a claim under the TVPA, plaintiff must adequately allege (1) that defendant possessed power by dint of his position in the Somali National Army; (2) that the offending acts (i.e., attempted extrajudicial killing and torture) derived from an

exercise of that power; and (3) that plaintiff exhausted all available remedies in Somalia.

The allegations in the Amended Complaint contain all three necessary ingredients. Plaintiff has alleged that defendant "served as Commander of the Fifth Battalion of the Somali National Army" from 1984 to 198 9, which covers the relevant period, Am. Compl. ¶ 6; that defendant committed the offending acts and directed other soldiers to commit the offending acts in that capacity, *id*. ¶¶ 22-26; and that there has been an absolute absence of remedies in Somalia since his claims arose, *id*. ¶¶ 41-42. Similarly, plaintiff has alleged both offending acts with requisite specificity, describing in graphic detail the nature of the torture he endured and defendant's "deliberated" attempt to kill him without process. *See id*. ¶¶ 18-27, 45. Defendant responds that the offending acts are beyond the reach of the TVPA because they were committed before the TVPA was enacted in 1991. This line of argument has been considered and rejected by several courts on the grounds that extrajudicial killing and torture have clearly contravened established international law for decades. *See, e.g., Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (upholding jury verdict in favor of a plaintiff who brought ATS and TVPA claims based on offending acts that occurred in 1973). Defendant has provided no compelling reason to create a new rule here.

In addition to direct liability, plaintiff seeks relief against defendant under three theories of secondary liability: command responsibility, aiding and abetting liability, and joint criminal enterprise.

The Supreme Court has recently affirmed that "the TVPA contemplates liability against officers who do not personally execute the torture or extrajudicial killing." *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1709 (2012) (citation omitted). Even before *Mohamad*, "virtually every court to address the issue" has "recogniz[ed] secondary liability for violations of international law since the founding of the Republic." *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 396 (4th Cir. 2011) (internal quotation marks and alterations omitted); *accord Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 19 (D.C. Cir. 2011); *Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254, 260 (2d Cir. 2007) (per curiam). Here, plaintiff's allegations are sufficient to support each theory of secondary liability. Plaintiff has alleged facts showing defendant not only knew that members of his battalion were torturing plaintiff, but that defendant personally participated in plaintiff's torture and further attempted to kill him by shooting him five times. *See* Am. Compl. ¶ 28, 32, 34. Such allegations leave little question whether the act and state-of-mind requirements for imposing secondary liability are met. *See Samantar*, 2012 WL 3730617, at *11-*12 (articulating the relevant standards).

## III. CONCLUSION

For these reasons, defendant's Renewed Motion to Dismiss will be granted as to all claims brought under the Alien Tort Statute and denied as to the claims brought under the Torture Victim Protection Act by an appropriate Order to be issued with this Memorandum Opinion.

Entered this 29th day of July, 2014.

Alexandria, Virginia

/s/
Leonie M. Brinkema
United States District Judge

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## APPENDIX F

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

| | | |
|---|---|---|
| FARHAN MOHAMOUD TANI WARFAA, | ) | |
| Plaintiff, | ) | |
| v. | ) | 1:05cv701 (LMB/JFA) |
| YUSUF ABDI ALI, | ) | |
| Defendant. | ) | |

ORDER

For the reasons stated in the accompanying Memorandum Opinion and in open court, defendant's Renewed Motion to Dismiss [Dkt. No. 90] is GRANTED IN PART and DENIED IN PART, and it is hereby

ORDERED that all claims brought under the Alien Tort Statute, including Counts I and II in part and Counts III, IV, V, and VI in full, be and are DISMISSED; and it is further

ORDERED that the claims in Counts I and II brought under the Torture Victim Protection Act will go forward.

The Clerk is directed to forward copies of this Order and the accompanying Memorandum Opinion to counsel of record.

Entered this 29th day of July, 2014.

Alexandria, Virginia

/s/
Leonie M. Brinkema
United States District Judge

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**APPENDIX G**

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**PUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 14-1810**

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FARHAN MOHAMOUD TANI WARFAA,

Plaintiff - Appellee,

v.

YUSUF ABDI ALI,

Defendant - Appellant.

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**No. 14-1934**

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FARHAN MOHAMOUD TANI WARFAA,

Plaintiff - Appellant,

v.

YUSUF ABDI ALI,

Defendant - Appellee.

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Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (1:05-cv-00701-LMB-JFA)

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Argued: September 16, 2015 Decided: February 1, 2016

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Before GREGORY, AGEE, and DIAZ, Circuit Judges.

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Affirmed by published opinion. Judge Agee wrote the majority opinion, in which Judge Diaz joined. Judge Gregory wrote a separate opinion dissenting in part.

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Affirmed by published opinion. Judge Agee wrote the majority opinion, in which Judge Diaz joined. Judge Gregory wrote a separate opinion dissenting in part. **ARGUED:** Joseph Peter Drennan, Alexandria, Virginia, for Appellant/Cross-Appellee. Tara Melissa Lee, DLA PIPER LLP (US), Reston, Virginia, for Appellee/Cross-Appellant. **ON BRIEF:** Joseph C. Davis, Reston, Virginia, Paul D. Schmitt, Mason Hubbard, DLA PIPER LLP (US), Washington, D.C.; Laura Kathleen Roberts, Nushin Sarkarati, Scott A. Gilmore, CENTER FOR JUSTICE & ACCOUNTABILITY, San Francisco, California, for Appellee/Cross-Appellant.

Affirmed by published opinion. Judge Agee wrote the majority opinion, in which Judge Diaz joined. Judge Gregory wrote a separate opinion dissenting in part. **ARGUED:** Joseph Peter Drennan, Alexandria, Virginia, for Appellant/Cross-Appellee. Tara Melissa Lee, DLA PIPER LLP (US), Reston, Virginia, for Appellee/Cross-Appellant. **ON BRIEF:** Joseph C. Davis, Reston, Virginia, Paul D. Schmitt, Mason Hubbard, DLA PIPER LLP (US), Washington, D.C.; Laura Kathleen Roberts, Nushin Sarkarati, Scott A. Gilmore, CENTER FOR JUSTICE & ACCOUNTABILITY, San Francisco, California, for Appellee/Cross-Appellant.

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AGEE, Circuit Judge:

Farhan Warfaa alleges that in 1987, a group of soldiers kidnapped him from his home in northern Somalia. Over the next several months, Warfaa claims he was beaten, tortured, shot, and ultimately left for dead at the direction of Yusuf Ali, a colonel in the Somali National Army at the time. Warfaa later sued Ali under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note), alleging several violations of international law.

After lifting a multi-year stay, the district court dismissed Warfaa's ATS claims, finding they did not sufficiently "touch and concern" the United States so as to establish jurisdiction in United States courts under Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013). The district court allowed Warfaa's TVPA claims to proceed after holding that Ali was not entitled to immunity as a foreign official. Both Warfaa and Ali appeal. For the reasons set forth below, we affirm the judgment of the district court.

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I.
Throughout the 1980s, Somalia experienced a period of political upheaval.1 A military dictatorship led by Siad Barre controlled the country's government, and Barre's dictatorship employed violence and intimidation to maintain control and stay in power. Among other things, the Somali government targeted members of certain opposition "clans" through killings, torture, and property destruction. Warfaa's clan, the Isaaq, was targeted.
1 Because this appeal stems from the grant of a motion to dismiss, we accept as true all well-pled facts in Warfaa's complaint and construe them in the light most favorable to him. United States v. Triple Canopy, 775 F.3d 628, 632 n.1 (4th Cir. 2015).
Ali supported the Barre regime and commanded the Fifth Battalion of the Somali National Army stationed in Gebiley, the area where Warfaa lived. Early one morning in December 1987, two armed soldiers from the Fifth Battalion appeared at Warfaa's hut, roused him from his sleep, and forced him to a nearby collection point. There, Warfaa and several other local farmers learned that they were accused of supporting an opposition organization, the Somali National Movement ("SNM"). Soldiers then forced the men to march to another village where an army truck drove them to Fifth Battalion headquarters. Some of the other farmers were freed, but Warfaa, as a member of the Isaaq

clan, was detained and placed in a small, windowless cell with ten other prisoners.

Warfaa alleges he was subjected to many acts of violence during his detention at the direction of Ali. For instance, Warfaa claims that soldiers hit him with the butt of a gun, tied him in a painful position, kicked him, and stripped him naked. He was taken to Ali's office, where Ali personally questioned him about his supposed support of SNM and his rumored involvement in the theft of a water truck. Later, soldiers again stripped Warfaa naked, beat him to unconsciousness, woke him with cold water, and then beat him again. Once more, Ali interrogated Warfaa after this torture, this time with Warfaa's hands and feet chained. During the early months of 1988, Ali and his soldiers committed similar acts of torture against Warfaa at least nine times.

In March 1988, SNM fighters attacked Fifth Battalion headquarters while Ali was interrogating Warfaa. After ordering his soldiers to defend the base, Ali shot Warfaa in the wrist and leg, causing him to fall unconscious. Ali thought he had killed Warfaa and ordered his guards to bury the body. When Warfaa regained consciousness, however, he convinced the guards to accept a bribe, and they released him. Warfaa still resides in Somalia today.

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The Barre regime collapsed in 1991, but Ali had departed the country in advance of the fall and immigrated to Canada in December 1990. Canada deported Ali two years later for serious human rights abuses, and he then came to the United States. The United States began deportation proceedings soon thereafter, but Ali voluntarily left the country in 1994. For reasons not explained in the record, Ali returned to the United States in December 1996 and now resides in Alexandria, Virginia.2

2 It is unclear from the record why Ali came to the United States after deportation by Canada and why he remains in the United States. Ali was arrested in 1998 by agents of the Immigration and Naturalization Service, who indicated he was responsible for "genocidal acts" that "led to the deaths of thousands of people." See David Stout, Ex-Somali Army Officer Arrested in Virginia, N.Y. Times, Feb. 28, 1998, at A4. The record contains no evidence explaining the disposition of these claims.

Warfaa, identified only as a John Doe, and a Jane Doe originally filed suit against Ali in the United States District Court for the Eastern District of Virginia in 2004. Plaintiffs voluntarily dismissed the complaint and refiled it in June 2005.

For most of its duration, this case has been stayed. In August 2005, the district court stayed the case until a party could provide a declaration from the United States Department of State indicating that the action would not interfere with U.S. foreign policy. In April 2012, after the case briefly resumed, the district court granted a consent motion to further stay the

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J.A. 17, 22.

basis separate from the ATS. See 28 U.S.C. § 1350 note; Kiobel, 133 S. Ct. at 1669 (Kennedy, J., concurring) (noting the TVPA addresses "human rights abuses committed abroad").

Ali filed a motion to dismiss the amended complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Although the motion did not address Kiobel, the district court subsequently ordered Warfaa to explain "at [a] scheduled hearing" why his ATS claims were not barred by the Supreme Court's ruling. See J.A. 56-57. At the hearing on the motion to dismiss, the district court stated that it was "going to dismiss the ATS claims from this case" "on the basis of Kiobel" because "[t]here is absolutely no connection between the United States and [Ali]'s conduct in Somalia." J.A. 66. It further indicated that it was not inclined to dismiss the TVPA claims. In a subsequent written opinion, the district court granted Ali's motion to dismiss as to the ATS claims, but denied the motion as to the TVPA claims. The district court dismissed the ATS claims because "such claims, generally speaking, must be based on violations occurring on American soil." J.A. 78. In this case, however, "all the relevant conduct . . . occurred in Somalia, carried out by a defendant who at the time was not a

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The district
court rejected Ali's motion to dismiss the TVPA counts, concluding that Ali could not claim "official acts" immunity because his alleged acts violated jus cogens norms.

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II.
Whether the ATS bars claims related to extraterritorial conduct presents an issue of subject matter jurisdiction, Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 520 (4th Cir. 2014), which the Court considers de novo. Johnson v. Am. Towers, LLC, 781 F.3d 693, 701 (4th Cir. 2015). Likewise, the district court's denial of foreign official immunity presents a question of law that the Court must decide de novo. See Smith v. Ray, 781 F.3d 95, 100 (4th Cir. 2015) (reviewing a district court's decision to deny qualified immunity de novo); Wye Oak Tech., Inc. v. Repub. of Iraq, 666 F.3d 205, 212 (4th Cir. 2011) (considering a question of immunity under the Foreign Sovereign Immunities Act de novo).
III.
The ATS "does not expressly provide any causes of action." Kiobel, 133 S. Ct. at 1663. Rather, it grants district courts "original jurisdiction" over "any civil action by an alien for a tort . . . committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.
"Passed as part of the Judiciary Act of 1789, the ATS was invoked twice in the late 18th century, but then only once more

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circumstance Filártiga may have, if any, would not apply in a case like Warfaa's, where the only pled event to "touch and concern" the United States is the defendant's post-conduct residency in the United States.

Alien plaintiffs, like Warfaa, have sought to invoke the ATS as a means to seek relief for alleged international human-rights violations. The Supreme Court has explained, however, the reach of the ATS is narrow and strictly circumscribed. Kiobel, 133 S. Ct. at 1664.

In Kiobel, the Supreme Court considered whether an ATS claim "may reach conduct occurring in the territory of a foreign sovereign." Id. The answer, for the most part, is "no," as the Supreme Court has applied a "presumption against extraterritorial application." Id. The presumption "provides that when a statute gives no clear indication of an extraterritorial application, it has none, and reflects the presumption that United States law governs domestically but does not rule the world." Id. A court that applies the ATS extraterritorially risks interference in United States foreign policy. Id. at 1664-65 ("[T]he principles underlying the [presumption] similarly constrain courts considering causes of action that may be brought under the ATS."). Accordingly, in Kiobel, the "petitioners' case seeking relief for violations of the law of nations occurring outside the United States [wa]s

barred." Id. at 1669. The Supreme Court emphasized that the ATS can create jurisdiction for such claims only where they "touch and concern" United States territory "with sufficient force to displace the presumption against extraterritorial application." Id. This Court has applied Kiobel only once, in Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 529 (4th Cir. 2014). In that case, four plaintiffs sued an American military contractor and several of its employees who were alleged to be American citizens directly responsible for abusive mistreatment and torture at the Abu Ghraib prison in Iraq. Id. at 520-21. We recognized that "the clear implication of the [Supreme] Court's 'touch and concern' language is that courts should not assume that the presumption categorically bars cases that manifest a close connection to United States territory." Id. at 528. To find that the presumption against extraterritoriality applies, "it is not sufficient merely to say that . . . the actual injuries were inflicted abroad." Id. Instead, courts should conduct a "fact-based analysis." Id. Applying this analytical framework, we found that the Al Shimari plaintiffs alleged "extensive 'relevant conduct' in United States territory," which distinguished their case from Kiobel. Id. Based on that "extensive relevant conduct," the plaintiffs' claims sufficiently "touch[ed] and concern[ed]" the

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Id. at
529.

782 F.3d 576, 592 n.23 (11th Cir. 2015) ("[I]f no relevant aspects of an ATS claim occur within the United States, the presumption against extraterritoriality prevents jurisdiction[.]"); Mujica v. AirScan Inc., 771 F.3d 580, 592 (9th Cir. 2014) ("The allegations that form the basis of Plaintiffs' claims exclusively concern conduct that occurred in Colombia."); Chowdhury v. Worldtel Bangl. Holding, Ltd., 746 F.3d 42, 49 (2d Cir. 2014) ("[A]ll the relevant conduct set forth in plaintiff's complaint occurred in Bangladesh, and therefore plaintiff's claim brought under the ATS is barred."); Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1191 (11th Cir. 2014) (holding that the presumption applied because the alleged torture "occurred outside the territorial jurisdiction of the United States"); Balintulo v. Daimler AG, 727 F.3d 174, 189 (2d Cir. 2013) ("Kiobel forecloses the plaintiffs' claims because the plaintiffs have failed to allege that any relevant conduct occurred in the United States."). Warfaa's cross-appeal asks the Court to apply Kiobel and Al Shimari to permit a claim against a U.S. resident, Ali, arising out of conduct that occurred solely abroad. We analyze that claim by beginning with Kiobel's strong presumption against extraterritorial application of the ATS, recognizing Al Shimari is the rare case to rebut the presumption.

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As with Kiobel, in this case, "all of the relevant conduct
took place outside the United States," in Somalia. Kiobel, 133
S. Ct. at 1669. Nothing in this case involved U.S. citizens, the U.S. government, U.S. entities, or events in the United States. The alleged campaign of torture and intimidation was launched, managed and controlled by the Somali army. Ali inflicted all the injuries against Warfaa in Somalia. Warfaa's ultimate escape -- thus ending the violation -- occurred in Somalia, as well.

17
Mere happenstance of residency, lacking any connection to the relevant conduct,

Warfaa's claims fall squarely within the ambit of Kiobel's broad presumption against extraterritorial application of the ATS.

8 As with Kiobel, in this case, "all of the relevant conduct took place outside the United States," in Somalia. Kiobel, 133 S. Ct. at 1669. Nothing in this case involved U.S. citizens, the U.S. government, U.S. entities, or events in the United States. The alleged campaign of torture and intimidation was launched, managed and controlled by the Somali army. Ali inflicted all the injuries against Warfaa in Somalia. Warfaa's ultimate escape -- thus ending the violation -- occurred in Somalia, as well.

The only purported "touch" in this case is the happenstance of Ali's after-acquired residence in the United States long

8 The dissent suggests that Kiobel applies only to corporate defendants, not natural persons like Ali. Nothing in Kiobel lends support to that argument. Instead, the Supreme Court painted with broad strokes when discussing the scope and purposes of the presumption against extraterritorial application of the ATS, purposes which apply with equal force when it comes to natural person defendants. Further, the dissent correctly recognizes that post-Kiobel no Circuit Court has permitted an ATS claim premised on individual liability to proceed in the absence of any cognizable "touches" within the United States. Dissenting Op. 21. Nonetheless, the dissent relies on Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304 (D. Mass. 2013), for the proposition that citizenship status distinguishes this case from Kiobel. Ali, however, is not a United States citizen, and the facts alleged in Lively have no correlation to the allegations pled in this case. For

example, in Lively, "the Amended Complaint allege[d] that the tortious acts committed by Defendant took place to a substantial degree within the United States, over many years, with only infrequent actual visits to Uganda." Id. at 321.


after the alleged events of abuse.
9 Mere happenstance of residency, lacking any connection to the relevant conduct, is not a cognizable consideration in the ATS context. See Kiobel, 133 S. Ct. at 1669 (indicating the defendant's "mere . . . presence" in the United States does not afford jurisdiction). "Kiobel's resort to the presumption against extraterritoriality extinguishes . . . ATS cases [with foreign parties and conduct], at least where all of the relevant conduct occurs outside the United States, even when the perpetrator later moves to the United States." Bechky, supra, at 343.10
In sum, Warfaa has pled no claim which "touches and concerns" the United States to support ATS jurisdiction. The district court thus did not err in granting Ali's motion to dismiss the ATS counts in the complaint for lack of jurisdiction.11
9 The dissent's representation that Ali has sought "safe haven" here, Dissenting Op. 21, 28, is the dissent's characterization alone, and is not reflected in Warfaa's pleadings or the record in this case.
10 The dissent implies some sort of military aid by the United States to Ali. Dissenting Op. 26-27. Such a claim was never pled, briefed or argued by Warfaa, and derives only from a factual reference in Ali's brief. Ali's Opening Br. 8. The record is devoid of any

connection between Ali's alleged conduct in Somalia and some U.S. Military contact. The dissent's comments in this regard are pure speculation.

11 To the extent the district court's opinion reads Kiobel as creating a categorical rule barring the ATS' application to conduct solely outside the United States, that reading is overbroad. Al Shimari makes clear that extensive and direct

(Continued)



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IV.

The district court allowed Warfaa's TVPA claims to go forward, finding Ali lacked foreign official immunity for jus cogens violations under Yousuf v. Samantar, 699 F.3d 763, 777 (4th Cir. 2012). In Samantar, we held that foreign official immunity could not be claimed "for jus cogens violations, even if the acts were performed in the defendant's official capacity." Id. Ali does not contest that the misdeeds alleged in the complaint violate jus cogens norms; he concedes that they do. Rather, his challenge is a simple one: Samantar was wrongly decided, and jus cogens violations deserve immunity.

Ali would have us overrule Samantar entirely, but that course is not open to us. One panel's "decision is binding, not only upon the district court, but also upon another panel of this court -- unless and until it is reconsidered en banc." Doe v. Charleston Area Med. Ctr., Inc., 529 F.2d 638, 642 (4th Cir. 1975); see also, e.g., United States v. Spinks, 770 F.3d 285, 289-90 (4th Cir. 2014). True, the Court has the "statutory and constitutional power" to reconsider its own

decisions. McMellon v. United States, 387 F.3d 329, 334 (4th Cir. 2004) (en banc).
"touches" involving the United States may rebut the presumption in some cases. Warfaa simply has none.

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But we have decided collectively not to exercise that power as a "matter of prudence" outside the en banc context. Id. The district court properly concluded Samantar forecloses Ali's claim to foreign official immunity.
V.
For the reasons described above, the district court correctly held that Warfaa's ATS claims lacked a sufficient nexus with the United States to establish jurisdiction over those claims. The district court also correctly rejected Ali's claim of foreign official immunity. The district court's judgment is therefore AFFIRMED.

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GREGORY, Circuit Judge, concurring in part and dissenting in part:
I write separately to dissent from Part III of the majority opinion, as I would hold that the Supreme Court's decision in Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013), does not foreclose the possibility of relief under the Alien Tort Statute ("ATS") here.
I.
In Kiobel, a group of Nigerian political asylees brought suit against Royal Dutch Petroleum Company, Shell Transport and Trading Company,

and their joint subsidiary, Shell Petroleum Development Company of Nigeria, alleging that these companies aided and abetted the Nigerian government in committing human rights abuses against them. 133 S. Ct. at 1662-63. The defendants' only contacts with the United States were "listings on the New York Stock Exchange and an affiliation with a public relations office in New York." Mujica v. AirScan Inc., 771 F.3d 580, 591 (9th Cir. 2014) (citing Kiobel, 133 S. Ct. at 1662-63; id. at 1677-78 (Breyer, J., concurring)). The Court explained that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices" to displace the presumption against extraterritoriality. Kiobel, 133 S. Ct. at 1669. The Court,





however, was "careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute." Id. (Kennedy, J., concurring).

Following Kiobel, a number of our sister circuits have considered and rejected ATS claims brought against U.S. corporations and their corporate officers for aiding and abetting foreign actors who commit human rights abuses. See Maj. Op. 14-15 (citing Doe v. Drummond Co., 782 F.3d 576, 601 (11th Cir. 2015); Chowdhury v. Worldtel Bangladesh Holding, Ltd., 746 F.3d 42, 45 (2d Cir. 2014); Cardona v. Chiquita Brands Int'l Inc., 760 F.3d 1185, 1188-89 (11th Cir. 2014); Mujica, 771 F.3d at 596; Balintulo v. Daimler AG, 727 F.3d 174, 179 (2d Cir. 2013)). But no circuit court has decided a post-Kiobel ATS

case premised on principal liability brought against an individual defendant who has sought safe haven in the United States, a key difference the majority does not address. This is not to suggest that Kiobel applies only to corporate defendants, see Maj. Op. 16 n. 8, but that the analysis and relevant considerations may differ where the defendant is a natural person.

Several cases brought prior to Kiobel considered situations involving individual, natural-person defendants—facts more akin to those presented here. In Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980), two Paraguayan citizens brought an





action against Pena-Irala ("Pena"), a Paraguayan police officer, for the torture and death of a relative. Pena had come to the United States, overstayed his visitor's visa, and had been residing in the United States for over nine months when one of the plaintiffs served him with a summons and civil complaint. Id. at 878-79. While acknowledging that "the Alien Tort Statute ha[d] rarely been the basis for jurisdiction during its long history," the Second Circuit found "little doubt" that the action was properly in federal court. Id. at 887. "This is undeniably an action by an alien, for a tort only, committed in violation of the law of nations." Id. Thus, jurisdiction under the ATS was proper. Id. at 889; see also Kadic v. Karadzic, 70 F.3d 232, 236-37 (2d Cir. 1995) (finding jurisdiction for ATS claims brought by Croat and Muslim citizens of Bosnia-Herzegovina against Bosnian-Serb leader for violations of the law of nations committed during the

Bosnian civil war); In re Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 503 (9th Cir. 1992) (finding jurisdiction for ATS claim brought by Philippine citizen against former Philippine official for violations of the law of nations committed abroad).

The majority states that "recent Supreme Court decisions have significantly limited, if not rejected, the applicability of the Filartiga rationale." Maj. Op. 11 (citing Kiobel, 133 S. Ct. at 1664; Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004)). Appeal: 14-1810 Doc: 46 Filed: 02/01/2016 Pg: 22 of 30

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Nothing in those opinions, however, explicitly overrules Filartiga or its progeny. In fact, the Supreme Court in Sosa "referred to [Filartiga and Marcos] with approval, suggesting that the ATS allowed a claim for relief in such circumstances." Kiobel, 133 S. Ct. at 1675 (Breyer, J., concurring) (citing Sosa, 542 U.S. at 732). Even Congress has recognized that Filartiga was "met with general approval." H.R. Rep. No. 102-367, pt. 1, at 4 (1991); S. Rep. No. 102-249, at 4 (1991). Therefore, Filartiga is still good law, and its reasoning is instructive here.

II.

This case involves "allegations of serious violations of international law" committed by a natural person who has sought safe haven within our borders and includes claims that are not covered by the Torture Victim Protection Act nor "the reasoning and holding" of Kiobel. Id. at 1669 (Kennedy, J., concurring). Thus, the "proper implementation of the presumption against extraterritorial application" in this case requires "further elaboration and

explanation." Id. Blithely relying on the fact that the human rights abuses occurred abroad ignores the myriad ways in which this claim touches and concerns the territory of the United States.





As the majority correctly states, "claims" are cognizable under the ATS where they "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." Maj. Op. 13 (citing Kiobel, 133 S. Ct. at 1669). The Supreme Court's use of "claim"—rather than conduct—to describe the circumstances in which the presumption may be displaced, however, "suggest[s] that courts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action." Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 527 (4th Cir. 2014).

If we consider, as we must, a "broader range of facts than the location where the plaintiff[] actually sustained [his] injuries," there are three facts that distinguish this case from Kiobel. Id. at 529. First, Ali's status as a lawful permanent resident alone distinguishes this case from Kiobel, where the corporate defendant was merely "present." Kiobel, 133 S. Ct. at 1669. This Court found a defendant's citizenship status to be a relevant "touch" in Al Shimari, where we observed that such "case[s] do[] not present any potential problems associated with bringing foreign nationals into United States courts to answer for conduct committed abroad, given that the defendants are United States citizens." Al

Shimari, 758 F.3d at 530 (citing Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 322 (D.


Mass. 2013) (holding that Kiobel did not bar ATS claims against an American citizen, in part because "[t]his is not a case where a foreign national is being hailed into an unfamiliar court to defend himself")). To the extent that we rely on citizenship status as a factor, we do so in the good company of our dear colleagues sitting on this very Court. See Maj. Op. 16, n. 8. As a legal permanent resident, Ali "has a binding tie to the United States and its court system." Yousuf v. Samantar, 699 F.3d 763, 778 (4th Cir. 2012); see also id. at 767 (finding relevant the fact that U.S. residents "who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of the courts").

Second, Ali's "after-acquired residence" in this country is not mere "happenstance." Maj. Op. 16. Ali was in the United States when he "realiz[ed] that the Barre regime was about to fall." Decl. of Ali ¶ 15, Br. in Supp. of Def.'s Renewed Mot. to Dismiss at 1, Warfaa v. Ali, 33 F. Supp. 3d 653 (2014) (No. 1:05-cv-701), ECF No. 91. He initially sought refugee status in Canada. Id. at ¶ 15. Canada deported Ali back to the United States for gross human rights abuses committed in Somalia. Id. at ¶ 18; J.A. 74. When confronted with deportation proceedings upon entering the United States, he voluntarily departed, only to return two years later on a spousal visa. Decl. of Ali ¶ 22. In 1997, Ali was confronted with deportation proceedings yet

again but prevailed at trial to have proceedings terminated. Id. at ¶ 23. The government did not appeal. Id. He has been living here as a lawful permanent resident, availing himself of the benefits and privileges of U.S. residency since 1996.

Lastly, when the alleged acts of torture took place, Ali was serving as a commander in the Somali National Army. In that same capacity, he received extensive military training, on numerous occasions, in the United States. The details of these contacts, which took place prior to and following the alleged acts, are laid out by Ali himself in a declaration to the district court.1 In 1984, Ali received special military training with the Officers' Advanced Military Course at Fort Benning, Georgia. Decl. of Ali ¶ 8, Br. in Supp. of Def.'s Renewed Mot. to Dismiss at 1, Warfaa v. Ali, 33 F. Supp. 3d 653 (2014) (No. 1:05-cv-701), ECF No. 91. Later that year, he returned to Fort Benning where he completed six months of intensive military training. Id. at ¶ 10. In 1985, he was invited by a representative of the Defense Intelligence Agency to pursue further military training at Fort Leavenworth, where he spent a

1 Ali's military training in the United States is a relevant "touch" and the fact that it was brought to the Court's attention solely by Ali himself does not insulate it from our consideration. Cf. United States v. Wilson, 699 F.3d 789, 793 (4th Cir. 2012) ("[W]hen a requirement goes to subject-matter jurisdiction, courts are obligated to consider sua sponte issues that the parties have disclaimed or have not

presented." (quoting Gonzalez v. Thaler, 132 S. Ct. 641, 648 (2012)).





year, before returning to Somalia in July of 1986. Id. Finally, he received training in management studies with the U.S. Air Force at Keesler Air Force Base a mere two years after the acts alleged against him in this case. Id. at ¶ 10. This is not to suggest that the U.S. government condoned or endorsed defendant's conduct, but these contacts are clearly relevant to a test that requires us to consider whether a claim "touch[es] and concern[s] the territory of the United States."

2 Kiobel, 133 S. Ct. at 1669. When pressed at oral argument, even counsel for Ali did not deny that a "prior relationship," such as the military training at issue here, would "perhaps" be something to consider as part of the touch and concern inquiry. Oral Argument at 34:44.

Whatever the extent of the relationship between Ali and the U.S. military, it cannot be fairly said that "[t]he only purported 'touch' in this case is the happenstance of Ali's after-acquired residence in the United States long after the alleged events of abuse." Maj. Op. 16-17.

2 See George James, Somalia's Overthrown Dictator, Mohammed Siad Barre, Is Dead, N.Y. Times, Jan. 3, 1995, at C41 ("Somalia received military and economic aid from the United States for a promise of American use of the port of Berbera on the Gulf of Aden. But aid declined drastically as allegations of human rights abuses rose.").

III.

The majority today allows a U.S. resident to avoid the process of civil justice for allegedly "commit[ting] acts abroad that would clearly be crimes if committed at home." United States v. Bollinger, 798 F.3d 201, 219 (4th Cir. 2015) (upholding the constitutionality of 18 U.S.C. § 2423(c) under the Foreign Commerce Clause). The precedential effect of this holding "could undoubtedly have broad ramifications on our standing in the world, potentially disrupting diplomatic and even commercial relationships." Id.

It is not the extraterritorial application of the ATS in the instant case that "risks interference in United States foreign policy," but rather, providing safe haven to an individual who allegedly committed numerous atrocities abroad. Maj. Op. 12. This was the case in Filartiga, where, as here, "[t]he individual torturer was found residing in the United States." Suppl. Br. for United States as Amicus Curiae in Partial Supp. of Affirmance at 4, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491). These are "circumstances that could give rise to the prospect that this country would be perceived as harboring the perpetrator," thereby "seriously damag[ing] the credibility of our nation's commitment to the protection of human rights." Id. at 19 (citing Mem. for the United States as Amicus Curiae at 22-23,

Filartiga v. Pena-Irala, 630 F.2d 876 (2d. 1979) (No. 79-6090)). Such concerns are precisely what led the United States, writing as amicus in Kiobel, to conclude that "allowing suits based on conduct occurring in a foreign country in the circumstances presented in Filartiga is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights." Suppl. Br. for the United States in Partial Supp. of Affirmance at 4-5, Kiobel, 133 S. Ct. 1659 (2013) (No. 10-1491).

The ATS has not been completely abrogated by Kiobel. It is still a statute, and Congress meant something by it. The fact that the alleged torts occurred outside our borders cannot be the end of the story; what we are dealing with, after all, is the Alien Tort Statute.

Ali is alleged to have committed gross human rights abuses, for which he was deported from Canada, and is now a lawful permanent resident. The United States is the sole forum in which he is amenable to suit. The atrocious nature of these allegations, the extensive contacts with the United States, and the context of those contacts renders jurisdiction proper under the ATS. I would reverse the district court's summary dismissal of the ATS claims and find that Warfaa has pleaded sufficient facts showing that his claim touches and concerns the territory



of the United States. I respectfully dissent from the majority's holding on this issue.

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**APPENDIX H**

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Filed: Febuary 1, 2016

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 14-1810 (L)
(1:05-cv-00701-LMB-JFA)

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FARHAN MOHAMOUD TANI WARFAA

Plaintiff - Appellee

v.

YUSUF ABDI ALI

Defendant - Appellant

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No. 14-1934
(1:05-cv-00701-LMB-JFA)

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FARHAN MOHAMOUD TANI WARFAA

Plaintiff - Appellant

v.

YUSUF ABDI ALI

Defendant – Appellee

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J U D G M E N T

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In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

## APPENDIX I

28 U.S.C. § 1330 provides:

**§ 1330. Actions against foreign states**

**(a)** The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

**(b)** Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

**(c)** For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. § 1350 provides:

**§ 1350. Alien's action for tort**

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350 note provides:

**Note**

**Section 1. Short Title.**

This Act may be cited as the "Torture Victim Protection Act of 1991".

**Sec. 2. Establishment of Civil Action.**"

**(a) Liability.**—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

**(1)** subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

**(2)** subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

**(b) Exhaustion of Remedies.**—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

**(c) Statute of Limitations.**—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

**Sec. 3. Definitions.**

**(a) Extrajudicial Killing.**—For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

**(b) Torture.**—For the purposes of this Act—

**(1)** the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

**(2)** mental pain or suffering refers to prolonged mental harm caused by or resulting from—

**(A)** the intentional infliction or threatened infliction of severe physical pain or suffering;

**(B)** the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

**(C)** the threat of imminent death; or

**(D)** the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

28 U.S.C. § 1602 provides:

**§ 1602. Findings and declaration of purpose**

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned,

and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603 provides:

**§ 1603. Definitions**

For purposes of this chapter—

**(a)** A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

**(b)** An "agency or instrumentality of a foreign state" means any entity—

**(1)** which is a separate legal person, corporate or otherwise, and

**(2)** which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

**(3)** which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

**(c)** The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

**(d)** A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

**(e)** A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604 provides:

**§ 1604. Immunity of a foreign state from jurisdiction**

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605 provides:

**§ 1605. General exceptions to the jurisdictional immunity of a foreign state**

**(a)** A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

**(1)** in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

**(2)** in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

**(3)** in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

**(4)** in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

**(5)** not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

**(A)** any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

**(B)** any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

**(6)** in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made

pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

**(7)** Repealed. Pub.L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

**(b)** A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

**(1)** notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of

the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

**(2)** notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

**(c)** Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in

the same action brought to enforce a maritime lien as provided in this section.

**(d)** A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

**(e), (f)** Repealed. Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341

**(g) Limitation on discovery.—**

**(1) In general.—**

**(A)** Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

**(B)** A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

**(2) Sunset.—**

**(A)** Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

**(B)** After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

**(i)** create a serious threat of death or serious bodily injury to any person;

**(ii)** adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

**(iii)** obstruct the criminal case related to the incident that gave rise to the cause of

action or undermine the potential for a conviction in such case.

**(3) Evaluation of evidence.**—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

**(4) Bar on motions to dismiss.**—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

**(5) Construction.**—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

28 U.S.C. § 1606 provides:

**§ 1606. Extent of liability**

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only

punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1608 provides:

**§ 1608. Service; time to answer; default**

**(a)** Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

**(1)** by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

**(2)** if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

**(3)** if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

**(4)** if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

**(b)** Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

**(1)** by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

**(2)** if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States;

or in accordance with an applicable international convention on service of judicial documents; or

**(3)** if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

**(A)** as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

**(B)** by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

**(C)** as directed by order of the court consistent with the law of the place where service is to be made.

**(c)** Service shall be deemed to have been made—

**(1)** in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

**(2)** in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

**(d)** In any action brought in a court of the United States or of a State, a foreign state, a

political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

**(e)** No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.