RECORD NO. 14-1810(L)
CROSS APPEAL NO. 14-1934

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

FARHAN MOHAMOUD TANI WARFAA,
Plaintiff-Appellant/Cross-Appellee,

v.

YUSUF ABDI ALI,
Defendant-Appellee/Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Honorable Leonie M. Brinkema, U.S.D.J.

OPENING BRIEF OF APPELLANT FARHAN MOHAMOUD TANI WARFAA

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 14-1810 Caption: Farhan Mohamoud Tani Wartaa v. Yusuf Abdi Ali

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Yusuf Abdi Ali

(name of party/~~amicus~~)

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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☒NO
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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Joseph Peter Stemmer Date: 27th/1 August 2014

Counsel for: Yusuf Abdi Ali, Appellant

CERTIFICATE OF SERVICE

****

I certify that on 27 August 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Joseph Peter Stemmer (signature)

27 August 2014 (date)

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JURISDICTIONAL STATEMENT

The district court purported to exercise jurisdiction over the instant matter under the provisions of 28 U.S.C., § 1350, and, by its Order of 29 July 2014 (J.A. at 100), the district court struck your Appellant's claim of common law immunity from suit. Appellant thereupon timely interposed, on 13 August 2014, his Notice of Appeal to this Honorable Court. (J.A. at 101 – 102). Accordingly, this Honorable Court may retain jurisdiction to hear and adjudicate the instant appeal under the provisions of 28 U.S.C., § 1291.

QUESTIONS PRESENTED

1.) Is your Appellant, *viz*., Yusuf Abdi Ali (hereinafter referenced *qua* "Ali"), entitled to common law immunity from suit for the acts alleged against him which were all said to have occurred in the sovereign territory of the Federal Republic of Somalia where Ali, at all times relevant herein, was a Colonel in the Somali National Army, acting as the Commander of the Somali National Army's Fifth Brigade, confronting an armed insurrection against Somalia?

2.) Do Ali's alleged actions as a colonel in the Somali National Army within the territory of Somalia vis-á-vis Somali nationals, like Appellee, constitute non-justiciable political questions?

STATEMENT OF THE CASE

Your Appellee, Farhan Mohamoud Tani Warfaa (hereinafter referenced *qua* "Warfaa"), a Somali national, domiciled in Somalia, then proceeding anonymously, in tandem with another Somali national, also said to be domiciled in Somalia, filed a Complaint against Ali in the United States District Court for the Eastern District of Virginia, *qua* Civil Action No. 05-701, on 13 June 2005.[1] The Complaint, couched in sweeping allegations, essentially alleged that Ali violated the human rights of residents of Somalia, including those of Warfaa and his anonymous co-plaintiff, giving rise to Ali's supposed liability under the Torture Victim Protection Act of 1991 (hereinafter referenced *qua* "TVPA"), 28 U.S.C., § 1350, note, and the Alien Tort Statute (hereinafter referenced *qua* "ATS"), 28 U.S.C., § 1350, while Ali served as a Colonel in the Somali National Army in the 1980s, and the Commander of the Fifth Brigade of the Somali National Army, as it waged a counterinsurgency campaign against a rebel force in Somalia known as the Somali National Movement. [Docket Entry No. 1] (J.A. at 4).

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1 Warfaa had earlier filed another action against Ali in the United States District Court for the Eastern District of Virginia, on 10 November 2004, *qua* Civil Action No. 04-1361, also proceeding anonymously, with the same anonymous co-plaintiff, raising virtually the same allegations against Ali, but was afforded leave to take a dismissal without prejudice in said antecedent action, with leave to refile within forty-five days, upon certain stated preconditions conditions. [C.A. No. 1361, Docket Entry No. 83].

Ali filed a Motion to Dismiss the Complaint on 20 July 2005 [Docket Entry No. 23] (J.A. at 6), and, at a hearing held on 5 August 2005, the district court continued the Motion to Dismiss, and, *sua sponte*, ordered the cause stayed until either party were to " (provide) the Court with a declaration from the Department of State that it does not have any objection to this action going forward and that taking discovery in Ethiopia will not interfere with United States foreign policy." [Docket Entry No. 26] (J.A. at 6).

Excepting motions of Warfaa's initial counsel to withdraw and the entry of several new counsel, in 2010 and 2011, the cause remained dormant and quiescent on the district court docket for over six (6) years. Then, on 14 October 2011, Warfaa, stillproceeding anonymously along with a "Jane Doe" co-plaintiff, moved to lift the stay.[Docket Entry No. 40] (J.A. at 7). Ali opposed lifting the stay, [Document 44] (J.A. at 7), but, on 21 October 2011, the district court lifted the stay. [Document 47] (J.A. at 8). However, on 6 April 2012, Ali filed a *consent* motion to stay proceedings pending judicial review by the Supreme Court of the United States of the case of *Kiobel v. Royal Dutch Petroleum*, Record No. 10-1491 [Docket Entry No. 54] (J.A. at 9), and, on that same day, the district court stayed the cause again, until further order of court. [Docket Entry No. 57] (J.A. at 9). Following the resolution of *Kiobel, supra*, by the Supreme Court, the district court held a status conference on 17 May 2013, whereat the district court continued the

stay for an additional 120 days in light of the then recent recognition of the Government of the Federal Republic of Somalia, on 17 January 2013 [Docket Entry No. 66] (J.A. at 10). At the said status hearing, the district court also directed counsel for the parties to prepare for the court a draft letter that the court could send to the State Department, requesting that the State Department advise the court by 19 September 2013, as to whether, *vel non*, the lifting of the stay would have any negative effects on the foreign policy of the United States; counsel for the parties complied, and, on 21 June 2013, the district court did send such a letter to the State Department. [Docket Entry No. 71] (J.A. at 10). In response, the United States did, on 19 September 2013, file a Statement of Interest with the district court, pursuant to 28 U.S.C., § 517, [Docket Entry No. 75] (J.A. at 17 – 21), wherein, essentially, the Government declined to state a position on the matter. At the status hearing the following day, the district court, *inter alia*, continued the stay a further one hundred and twenty days. [Docket Entry No. 77] (J.A. at 11).

On 4 December 2013, undersigned counsel for Ali filed with the district court a true copy of a 30 November 2013, diplomatic letter from H.E. Abdi Farah Shirdon, the then Prime Minister of the Federal Republic of Somalia, which had been addressed and delivered to Secretary of State John Forbes Kerry, requesting that the United States take all appropriate steps to validate the immunity from suit of Ali in respect of the case *sub judice*. [Docket Entry No. 78](J.A. at 11). At the

subsequent status hear, held on 24 January 2014, the district court extended the stay a further one hundred and twenty days in order to afford counsel an opportunity to obtain a Statement of Interest from the State Department respecting the said diplomatic request for immunity from suit for Ali that had been issued by the Somali Government in November of 2013. [Docket Entry No. 82] (J.A. at 12).

The United States did file what was its second Statement of Interest in respect of the case *sub judice* on 24 April 2014 [Docket Entry No. 85] (J.A. at 22 – 31) . However, in said second Statement of Interest, the Government, citing the then difficult security situation in Somalia, together with the lack of an American Embassy in Somalia, basically proclaimed that it had been stymied in its efforts to engage the Somali Government in substantive discussions regarding the claim of immunity from suit for Ali, and, therefore, was not in a position to make a determination but that, "[i]n April 2014 the Department of State has continued to engage with the Government of Somalia concerning this matter, and seeks to begin substantive discussions concerning the immunity of [Ali] as soon as practicable." (J.A. at 24).

The foregoing advisory notwithstanding, the district court went ahead and lifting the stay anyway on day following the filing of the Government's second Statement of Interest, and, concomitantly, granted the plaintiffs leave to file an Amended Complaint so as to reflect drop Jane Doe's having been dropped from the

subject action and to substitute Warfaa's supposed real name for the "John Doe" pseudonym under which he had proceeded incognito in the case *sub judice* for nearly nine years. [Docket Entry No. 87] (J.A. at 12).

Warfaa thereupon filed his Amended Complaint on 9 May 2014 (J.A. At 32 – 51), which otherwise merely restated the allegations ingravidated in the Complaint, to which Ali filed on 30 May 2014 a Renewed Motion to Dismiss. (J.A. at 52 – 54).

However, prior to the noticed hearing on the Renewed Motion to Dismiss, the district court did, on 22 July 2014, issue an Order, requesting the parties to be prepared to address the question of whether, *vel non*, Warfaa's ATS claims could remain viable in light of the holding of the Supreme Court in the case of *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013). Both Warfaa and Ali thereupon made respective submissions of supplemental authority on the said question. (J.A. at 58 – 63).

At the hearing on the Renewed Motion to Dismiss, the district court dismissed Warfaa's ATS claims, citing *Kiobel, supra*, but also, by implication, summarily denied Ali's plea of common law immunity from suit as well. (J.A. at 64 – 100, *passim*).

Ali thereupon did, on 13 August 2014, timely appeal to this Honorable Court (J.A. at 101 – 102) from the 29 July 2014 Order of the district court (J.A. at 100)

which, *inter alia*, struck his claim of common law immunity from suit,[2] which appeal was assigned Record No. 14- 1810 by this Honorable Court. [Docket No. 111] (J.A. at 15). Ali then moved, on 15 August 2014, the district court for a stay of proceedings pending appeal, pursuant to the provisions of Rule 8 (a) (1) (A) of the Federal Rules of Appellate Procedure, [Docket Entry No. 112] (J.A. at 15), and also agreed to Warfaa's 21 August 2014 motion to the district court under F. R. Civ. P. 54 (b) to enter final judgment as to Warfaa's ATS claims and thereby facilitate an interlocutory appeal by Warfaa of the district court's dismissal of said claims. (J.A. at 103 – 105). On 28 August 2014, the district court granted Warfaa's motion for entry of final judgment on his ATS claims and coevally stayed the cause pending resolution of the instant appeal. (J.A. at 106 – 107). Warfaa thereafter cross=appealed the dismissal of his ATS claims on 5 September 2014 (J.A. at 108 – 110), and was, in due course,, on 9 September 2014, assigned the designation of Record No. 14-1934 for his cross-appeal by this Honorable Court {Docket Entry No. 121] (J.A. At 15). This Honorable Court has consolidated the two subject appeals [Docket Entry No. 122] (J.A. at 16).

2 Ali filed an *Erratum* Notice [Document 109] (J.A. at 14) just after filing his Notice of Appeal [Document 108] (*Id.*) in order to correct an incidental erratum in the title of the said Notice of Appeal pleading.

STATEMENT OF FACTS

From May of 1987 until October of 1988, Ali was a duly commissioned colonel in the Somali National Army, during the period in which Somalia was governed by the regime of Mohamed Siad Barre[3], Declaration of Yusuf Abdi Ali [Docket Entry No. 23 (Memorandum in Support of Renewed Motion to Dismiss, Exhibit "1", Declaration of Yusuf Abdi Ali, at ¶ 13)]and all of the alleged wrongs raised against him in the Amended Complaint by Warfaa, a Somali national domiciled in Somalia (J.A. at 32 – 51, *passim*) addressed Ali's service as the Commander of the Fifth Brigade, waging acounter-insurgency campaign in Northern Somalia during the time of an armed insurrection against the Barre regime. (*Id.*) Upon the imminent collapse of the Barre regime, in December of 1990, Ali was in the United States, detailed to Keesler Air Force Base, in Biloxi, Mississippi, where he had been training, with the United States Air Force, in management studies, a billet which had been foreshortened because of the build up by the U.S. Military in advance of the First Gulf War (Operation Desert Storm), whereupon Ali traveled to Canada seeking refugee status there. Declaration of Yusuf Abdi Ali, at ¶ ¶14,15. Upon his arrival in Canada, Ali lived openly in Canada, from December of 1990 until October of 1992, when Ali was deported from Canada to the United States. *Id*. at ¶ ¶ 15-18. Ali then lived openly in the

3 Somali: *Maxamed Siyaad Barre*; Arabic: محمد سياد بري

United States, in Arlington, Virginia, from October of 1992 until July of 1994, whereupon he moved to Addis Ababa, Ethiopia, where he lived openly until December of 1996, at which point he returned to the United States, thus time, to Alexandria, Virginia, where he has lived, continuously and openly, to the present. *Id*. at, *inter loci*, ¶ ¶ 16-22.

SUMMARY OF ARGUMENT

The *gravamen* of the instant argument is that the decision of this Honorable Court is that the *jus cogens* exception to common law immunity from suit proclaimed in the case of *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012)[4], *cert. den*. (on interlocutory appeal[5]), upon which the district court relied primarily in striking Ali's common law immunity from suit defense, There is currently pending before the Supreme Court a petition for *certiorari* from the default judgment entered in Samantar, which was filed with the Supreme Court of the United ***States on 5 May 2014.*** *Samantar v. Yousuf*, 2014 WL 1916750 (Petition for *Certiorari*, filed May 5, 2014), and it bears mention that, on 14 October 2014, following the

4 The undersigned is counsel to Samantar.

5 For an interesting observer's view of the denial of *certiorari* from the interlocutory Samantar Fourth Circuit appeal, and the currently pending appeal from the affirmance by the Fourth Circuit of the default judgment, *see generally*: John Bellinger, "Samantar Again Seeks Supreme Court Review", *Lawfare*, 11 May 2014, at URL: http://www.lawfareblog.com/2014/05/samantar-again-seeks-supreme-court-review/ (Last visited on 12 December 2014).

consideration of the subject Petition at the 10 October 2014 conference of the Court, the Court issued an Order requesting of the Solicitor General the views of the United States as regards the subject, pending Petition. Ali respectfully urges, therefore, that *Samantar, supra*, is an outlier, contrary to the weight of precedent and should, therefore, be revisited by this Honorable Court in the context of the instant appeal. Perforce, Ali further urges that the fact that the subject matter of the instant litigation also presents a non-justiciable political question and an act of state confer further reasons for reversal of the subject Order appealed from.

ARGUMENT

THE FOURTH CIRCUIT'S DECISION IN SAMANTAR CREATES A CIRCUIT SPLIT OVER THE IMPORTANT QUESTION OF WHETHER ALLEGED *JUS COGENS* VIOLATIONS DEFEAT FOREIGN OFFICIAL IMMUNITY:

The Fourth Circuit's Decision Conflicts With The Decisions Of Other Circuits:

As the Solicitor General previously recognized in the Government's CVSG brief, which was filed in the 2012 Samantar interlocutory appeal, *see*: U.S. Br. 11, 19-22, the Fourth Circuit, in *Samantar*, fashioned a "per se" rule—a "categorical judicial exception to conduct-based immunity for cases involving alleged violations of *jus cogens* norms." The Second, Seventh, and D.C. Circuits have reached the opposite conclusion. *See Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009) (rejecting the argument that a foreign official "should be deemed to have

forfeited [his] sovereign immunity whenever [he] engages in conduct thatviolates fundamental humanitarian standards" (emphasis and citation omitted)); *Belhas*, 515 F.3d at 1287, *abrogated on other grounds by* Samantar, 560 U.S. at 308; *Ye v. Zemin*, 383 F.3d 620, 625 (7th Cir. 2004).

1. As the Solicitor General told the Supreme Court in the within-referenced 2012 interlocutory Petition for Certiorari in Samantar, *supra*, , the Fourth Circuit's decision "conflicts with the Second Circuit's decision in *Matar*." U.S. Br. 22 (citing *Matar*, 563 F.3d 9), whereas the Fourth Circuit created "a categorical exception to official immunity whenever *jus cogens* violations are alleged," *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, *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 27-33, *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, in *Samantar*, the Government previously recommended that Samantar not be granted immunity, *see* Pet. App. 94a, while, in *Matar*, the Government suggested that the defendant be immunized from suit, *see* U.S. Amicus in *Matar* at 2. But in both cases, the Government argued against a *jus cogens* exception to immunity. *See* Pet. App. 111a n.3.[6] Making this conflict even more apparent, lower courts have recognized this division of authority concerning *jus cogens* violations and

[6] 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 27-34, *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*, 566 F. Supp. 2d 35 (D.D.C. 2008) (No. 04-0649), http://www.state.gov/documents/organization/98772. pdf.

have expressly looked to this Court for guidance on this "complicated" question. *See, e.g.*, *Rosenberg v. Lashkar-e-Taiba*, No. 10-CV-5381, 2013 WL 5502851, at *6-*7 (E.D.N.Y. Sept. 30, 2013).

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 the 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 alleged "*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 the Supreme Court's first decision in *Samantar*, considered whether a *jus cogens* exception applied to an individual official's immunity under the Foreign Sovereign Immunities Act (hereinafter: "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 the Supreme 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, 251 (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*, No. 11-7118, 2012 WL 5882566 (D.C. Cir. Oct. 23, 2012) (unpublished).

3. Finally, the decision below is also at odds with the Seventh Circuit's decision in *Ye*, 383 F.3d at 625. 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, and 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* U.S. Amicus in *Giraldo* at 8 (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" (emphasis added)).

This Important Question Warrants This Court's Careful Review:

The circuit split that the Fourth Circuit in *Samantar, supra*, created involves an exceptionally important question that warrants this Court's immediate corrective

intervention. By affording reversal relief to Ali. As the Solicitor General put it, the Fourth Circuit's ruling should not be "left standing" because it "could have negative consequences for the United States' foreign-relations interests," including by risking reciprocal treatment of U.S. officials. U.S. Br. 12. The decision in *Samantar*, as followed in *Ali, supra*, 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. 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 *Samantar* decision below is allowed to stand, by, inter alia, an affirmance in the case *sub judice*, the Fourth Circuit will invariably 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, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05 Civ.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, 10-11 (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 decision in *Samantar*, as well as the district court decision in *Ali, supra*, 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.[7] Indeed, based on a Westlaw search of cases published between

[7] *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 arbitrarily detained plaintiffs); *Paul v. Avril*, 812 F. Supp. 207, 209 (S.D. Fla. 1993) (alleging former

March 1, 2010 and May 1, 2014 involving ATS and TVPA claims against foreign states and/or foreign officials, 92% (33 out of 36 cases) involved alleged conduct that would violate *jus cogens* norms, as the Fourth Circuit defined that term. The Fourth Circuit's opinion invites even 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*, 912 F.2d at 1102), contrary to this Court's decision in *Samantar*, *see id*. 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*

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head of Haitian military authorized torture and arbitrary detention).

cogens exception to FSIA 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, *id*.

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 or targeted assassinations. 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 Solicitor General has reiterated that point when advising the Supreme Court that the decision below should not be "left standing." U.S. Br. 12.The Fourth Circuit's erroneous decision in *Samantar*, and the knock-on decision in *Ali,* thus create a circuit split on a significant and recurring issue, and warrants this Honorable Court's immediate

corrective action.

This Appeal Presents A Good Vehicle To Consider The Questions Presented:

This case presents an excellent vehicle to consider the Questions Presented. This Honorable Court's decision in Samantar, while wrong, is thoroughly reasoned.

And the Government's previous CVSG filing makes clear that the Fourth Circuit's ruling creates a circuit split and threatens important national interests.Also, the case *sub judice* appears to be the first district court to apply the *jus cogens* exception to immunity annunciated in *Samantar*.

First, Respondents in Samantar previously suggested that the Supreme Court might lack jurisdiction to review the Fourth Circuit's *interlocutory* ruling on immunity because the district court had already issued its final judgment. *See* Resp. Supp. 4-5. But, as pointed out *supra*, *Samantar* is now seeking certiorari from the Fourth Circuit's *final* judgment. The Fourth Circuit's interlocutory immunity determination has merged into—and, indeed, was expressly the basis for, Pet. App. 2a—that final judgment. As Respondents themselves in *Samantar* previously contended: "once a final judgment issues, challenges to interlocutory rulings, including specifically denials of immunity, must proceed through review of the final judgment into which all interlocutory rulings have merged." Resp. Supp. 4 (citing *Ortiz v. Jordan*, 131 S. Ct. 884 (2011)). It is therefore undisputed that this Court's review of the Fourth Circuit's immunity determination is now jurisdictionally proper. Thus, Samantar appears to have a clear path to correction by the Supreme Court, but Ali need not wait to receive relief.

Second, the Government previously sought a GVR in *Samantar* in the Supreme Court to "allow an opportunity for further consideration . . . by the Executive

Branch" of developments since the Fourth Circuit's decision, including the then-Somali Prime Minister's "expected . . . removal from office." U.S. Br. 11, 23 & n.5. Relatedly, immediately after the election of a new Prime Minister and days before the certiorari petition was set for Conference, Respondents in *Samantar* attempted to cast doubt on Somalia's position by submitting what turned out to be an unauthorized letter from a so-called Legal Adviser to the Somali President, purporting to waive Petitioner's immunity from suit. *See supra* pp. 11-12. But there can no longer be any gainsaying about the position of the recognized Somali government. The Somali Prime Minister is "the Head of the Federal Government." Provisional Constitution, Fed. Rep. of Somalia, Art. 100, *available at* http://unpos.unmissions.org/LinkClick.aspx?fileticket=RkJTOSpoMME=. The current Prime Minister, Abdiweli Sheikh Ahmed Mohamed, has reaffirmed in a letter to Secretary of State Kerry that "[t]he position of the Federal Government of Somalia has not changed from the letter [of] February 26, 2013." Letter of Prime Minister Abdiweli Sheikh Ahmed Mohamed, Pet. App. 73a. "[T]he Federal Republic of Somalia affirms and ratifies Mr. Samantar's plea of common law immunity from suit, finding that his acts in question were all undertaken in his official capacity with the Government of Somalia." *Id*. at 38a. In any event, the alleged prior doubts about Somalia's position provided no basis for denying review to Samantar in the Supreme Court. Thus, the Supreme Court can address the legal question

presented—whether *jus cogens* allegations categorically preclude common-law immunity—and then remand for application of the appropriate legal rule, taking into account the position of the Somali government. In sum, the asserted reasons for denying certiorari when Samantar sought the Supreme Court's review of an interlocutory order no longer exist. Samantar now seeks review of the Fourth Circuit's *final* judgment, and the Somali government has reaffirmed its unwavering request for immunity for Petitioner. This redoubled effort should result in full review of Samantar's matter but would apply perforce to benefit Ali as well.

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.

The Fourth Circuit's Decision Is Contrary To International Law:

The Solicitor General has explained 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. "[I]nternational law has shaped the development of the common law of foreign sovereign immunity." Pet. App. 58a. 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 recently rejected a *jus cogens* exception to immunity in civil suits brought in an Italian court against Germany and German officials for war crimes that occurred in Italy during World War II. *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. 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*. ¶ 83, and 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*. ¶ 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*. ¶ 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*. ¶ 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* 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) ¶ 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) ¶ 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 decision dramatically departs from customary international law and creates a significant risk of reciprocal treatment of U.S. officials by foreign nations.

The Fourth Circuit's Decision Is Contrary To Domestic Law, Including Decisions Of The Supreme 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." Pet. App. 65a (quoting *Sarei v. Rio Tinto PLC*, 487 F.3d 1193, 1209 (9th Cir. 2007). In *Saudi Arabia v. Nelson*, the Supreme Court squarely rejected the premise of the Fourth Circuit's decision. 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 the Supreme 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, the Supreme 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, *see 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, this Honorable Court, in Samantar, substantially departed from well-established domestic and international law. But, we respectfully submit that it can, and should correct its position in the case *sub judice*, by recognizing Ali's common

law immunity from suit

CONCLUSION

For the foregoing reasons, the decision in the case *sub judice* striking Ali's common law immunity should be vacated and reversed, with the end result that the subject, long pending action be dismissed with prejudice.

Dated: 12 December 2014

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Upon information and belief, your Appellee, *viz.*, Yusuf Abdi Ali, respectfully submits that this Honorable Court's decisional process may be aided significantly by oral argument. Accordingly, Ali hereby requests to be heard at oral argument.

Dated: 12 December 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In re: Fourth Circuit Record No. 14-1810;

FARHAN MOHAMOUD TANI WARFAA versus YUSUF ABDI ALI.

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so to request, I would gladly furnish this Honorable Court with an electronic version of the instant Brief and/or a word-count printout of same.

Dated: 12 December 2014

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FILING CERTIFICATE AND CERTIFICATE OF SERVICE

I, Joseph Peter Drennan, undersigned, hereby and herewith certify that, on this 12th day of the month of December 2014, I caused to be filed, electronically, with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, utilizing this Honorable Court's CM/ECF System, the Opening Brief of the Appellant and the Joint Appendix, and that I caused to be dispatched by carriage of First Class Post, through the United States Postal Service, enshrouded in suitable wrappers, the required number of copies of the Opening Brief of the Appellant and the Joint Appendix unto the following, *viz.*:

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