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-Appellee/Cross-Appellant,

v.

YUSUF ABDI ALI,

Defendant-Appellant/Cross-Appellee.

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

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

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TABLE OF CONTENTS

Page

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 1

I. Factual Background 1

II. Procedural History 3

III. The District Court's Ruling 6

SUMMARY OF ARGUMENT 9

ARGUMENT 11

I. Standard of Review 11

II. The District Court Erred By Summarily Dismissing Warfaa's Alien Tort Statute Claims. 12

A. *Kiobel* Requires a Fact-Based Analysis to Determine Whether ATS Claims "Touch and Concern" the United States, and the District Court Failed to Apply That Standard. 13

B. Warfaa's ATS Claims Touch and Concern the United States Because Ali Is a Longtime U.S. Resident, Has Sought Safe Haven in the United States After Committing War Crimes Abroad, and Is Not Subject to the Jurisdiction of Any Other Court. 18

1. Absent Any Unintended Clashes with Foreign Law or Policy, as a U.S. Lawful Permanent Resident, Ali Is Subject to the Jurisdiction of U.S. Courts. 19

2. Ali Sought Safe Haven in the United States After Committing War Crimes in Somalia and Being Expelled from Canada as a Result. 22

3. Unlike the Multinational Corporation in Kiobel, Ali Is Only Amenable to Suit in the United States 25

III. Ali Is Not Entitled to Immunity. 27

A. *Samantar* Is Binding Precedent on This Court. 28

TABLE OF CONTENTS
(continued)

Page

B. The District Court Correctly Denied Ali Immunity on the Merits. 30

1. As a Former, Mid-Level Officer, Ali Has No Claim to Head-of-State Immunity. 30

2. The Nature of Ali's Crimes Forecloses a Claim to "Official-Acts" Immunity. 31

3. The United States has Repeatedly Declined to Suggest Immunity in This Case. 37

4. The District Court's Application of *Samantar* Comports with Federal and International Precedent. 38

CONCLUSION 45

REQUEST FOR ORAL ARGUMENT 45

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) OF THE FEDERAL RULES OF APPELLATE PROCEDURE 47

TABLE OF AUTHORITIES

Page

CASES

AGI Associates, LLC v. City of Hickory, N.C.,
--- F.3d ---, 2014 WL 6981327 (4th Cir. Dec. 11, 2014) 11

Ahmed v. Magan,
No. 2:10-CV-00342, 2013 WL 4479077 (S.D. Ohio Aug. 20, 2013)....20, 25, 36

Al Shimari v. CACI Premier Tech., Inc.,
758 F.3d 516 (4th Cir. 2014) ..... *passim*

Al-Quraishi v. Nakhla,
728 F. Supp. 2d 702 (D. Md. 2010).....32

Belhas v. Ya'alon,
515 F.3d 1279 (D.C. Cir. 2008).....39

Cabiri v. Assasie-Gyimah,
921 F. Supp. 1189 (S.D.N.Y. 1996) 34

Chavez v. Carranza,
559 F.3d 486 (6th Cir. 2009) 24

Chuidian v. Philippine Nat'l Bank,
912 F.2d 1095 (9th Cir. 1990) 31

Ex Parte Young,
209 U.S. 123 (1908).....33

Figg v. Schroeder,
312 F.3d 625 (4th Cir. 2002) 29

Filártiga v. Peña-Irala,
630 F.2d 876 (2d Cir. 1980) .....*passim*

First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,
462 U.S. 611 (1983).....38

In re Estate of Ferdinand E. Marcos Human Rights Litig.,
978 F.2d 493 (9th Cir. 1992) 22, 24

TABLE OF AUTHORITIES
(continued)

Page

In re Estate of Ferdinand Marcos, Human Rights Litig.,
25 F.3d 1467 (9th Cir. 1994) 32

Kadic v. Karadzic,
70 F.3d 232 (2d Cir. 1995) 22, 24, 33

Kiobel v. Royal Dutch Petroleum Co.,
621 F.3d 111 (2d Cir. 2010) .....*passim*

Kiobel v. Royal Dutch Petroleum Co.,
133 S. Ct. 1659 (2013).....*passim*

Lafontant v. Aristide,
844 F. Supp. 128 (E.D.N.Y. 1994) 30

Larson v. Domestic & Foreign Commerce Corp.,
337 U.S. 682 (1949).....33, 35

Matar v. Dichter,
563 F.3d 9 (2d Cir. 2009) ..... *passim*

McMellon v. United States,
387 F.3d 329 (4th Cir. 2004) 27, 29

Medellin v. Texas,
552 U.S. 491 (2008).....42

Mohamad v. Palestinian Auth.,
132 S. Ct. 1702 (2012).....24

Paul v. Avril,
812 F. Supp. 207 (S.D. Fla. 1993) 34

Princz v. Federal Republic of Germany,
26 F.3d 1166 (D.C. Cir. 1994).....39

Republic of Mexico v. Hoffman,
324 U.S. 30 (1945).....37

TABLE OF AUTHORITIES
(continued)

Page

Rosenberg v. Lashkar-e-Taiba,
No. 10-cv-5381, 2013 WL 5502851 (E.D.N.Y. Sept. 30, 2013).....28

S.C. Wildlife Fed'n v. Limehouse,
549 F.3d 324 (4th Cir. 2008) 12

Samantar v. Yousuf,
560 U.S. 305 (2010).....*passim*

Sampson v. Federal Republic of Germany,
250 F.3d 1145 (7th Cir. 2001) 39

Saudia Arabia v. Nelson,
507 U.S. 349 (1993).....39

Sexual Minorities Uganda v. Lively,
960 F. Supp. 2d 304 (D. Mass. 2013).....20

Siderman de Blake v. Republic of Argentina,
965 F.2d 699 (9th Cir. 1992) 33, 39

Smith v. Socialist People's Libyan Arab Jamahiriya,
101 F.3d 239 (2d Cir. 1996) 39

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004).....14, 24, 25

The Schooner Exchange v. McFaddon,
11 U.S. (7 Cranch) 116 (1812) 37

Tobey v. Jones,
706 F.3d 379 (4th Cir. 2013) 12

Weixum v. Xilai,
568 F. Supp. 2d 35 (D.D.C. 2008).....40, 41

Xuncax v. Gramajo,
886 F. Supp. 162 (D. Mass. 1995).....33

TABLE OF AUTHORITIES
(continued)

Page

Ye v. Zemin,
383 F.3d 620 (7th Cir. 2004) 30, 40

Yousuf v. Samantar,
699 F.3d 763 (4th Cir. 2012) ..... *passim*

STATUTES

28 U.S.C. § 1350 .....3, 24, 32

OTHER AUTHORITIES

41 Am. J. Int'l L. 172 (1947) 42

Affaire Bernard Ntuyahaga, Cour d'Assises de Bruxelles, 005417 (July 5, 2007) 44

A v. Ministère Public de la Confédération, B and C, (Khaled Nezzar), Fed. Crim. Ct. of Switzerland, B.2011.140, (July 25, 2012).....43

Ashraf Ahmed El-Hojouj v. Harb Amer Derbal, et al.,
LJN BV9748, Rechtbank's-Gravenhage, 400882 / HA ZA 11-2252 (March 21, 2012) 44

Black's Law Dictionary 281 (9th ed. 2009) 14

Dolly Filártiga, *American Courts, Global Justice*, N.Y. Times, Mar. 30, 2004.....23

H.R. Rep. No. 102-367 (1991).....25

Jurisdictional Immunities of State (Ger. v. Italy),
2012 I.C.J. 99 (Feb. 3) 41, 42, 43

Kovac et al. v. Karadžic et al.,
Tribunal de Grande Instance de Paris, Judgment of March 14, 2011, No. 05/10617 44

Red Cross, *States Party to the following International Humanitarian Law and other Related Treaties as of 4-Jun-2014* 34

TABLE OF AUTHORITIES
(continued)

Page

S. Rep. No. 102-249 (1991) 24, 35

Somali Const. Art. 19.....34

Somali Const. Art. 26.1.....34

Somali Const. Art. 27.....34

JURISDICTIONAL STATEMENT

Plaintiff-Appellee/Cross-Appellant Farhan Mohamoud Tani Warfaa ("Warfaa") agrees with Defendant-Appellant/Cross-Appellee Yusuf Abdi Ali ("Ali") that this Court has jurisdiction for purposes of this appeal.

STATEMENT OF ISSUES

The issues on appeal are:

1. Did the district court err by summarily dismissing Warfaa's Alien Tort Statute claims solely because Ali's crimes occurred in Somalia, despite the fact that Ali subsequently sought safe haven and permanent residency in the United States, and continues to reside here?
2. Did the district court err by holding that Ali was not entitled to immunity for *jus cogens* violations of international law that were neither authorized under Somali law, nor recognized as "official acts" by the United States in a suggestion of immunity?

STATEMENT OF THE CASE

I. Factual Background

Warfaa's claims against Ali are as straightforward as they are distressing. In late 1987, Warfaa was a farmer living in a small village near Gebiley, Somalia. J.A. 36, ¶ 16. At that time, Ali was a Colonel in the Somali National Army. *Id.* at ¶ 15. He commanded Somali Army soldiers stationed near Gebiley. *Id.* In

December 1987, without cause and on Ali's orders, Warfaa was abducted from his home at gunpoint. *Id.* at ¶¶ 17-18. He was taken to Ali's headquarters. *Id.* at ¶ 19. There, Warfaa was thrown in a cell, beaten until unconscious, and tortured on multiple occasions over the course of more than three months. J.A. 36-37 at ¶¶ 20-24. Ali was present on more than one occasion while Warfaa was physically tortured. J.A. 37 at ¶ 25.

In March 1988, Ali interrogated Warfaa for the last time. J.A. 38 at ¶ 26. Then, Ali took out a pistol and shot at Warfaa five times, hitting Warfaa on the wrist and right leg. *Id.* Assuming Warfaa was dead, Ali ordered his guards to bury Warfaa's body. *Id.* Remarkably, Warfaa survived this heinous attack. *Id.* at ¶ 27. After discovering Warfaa was alive, the guards released him once Warfaa promised to pay them to let him go. *Id.*

In 1990 Ali entered Canada through the United States. J.A. 34 at ¶ 7.; Decl. of Yusuf Abdi Ali at ¶ 13, Def.'s Mem. Ex. 1, ECF No. 91-1. Ali was deported from Canada for gross human rights abuses in Somalia and was sent to the United States in 1992. J.A. 34 at ¶ 8. After deportation proceedings in the United States were initiated against him, Ali departed the United States in 1994 and returned to the United States in December 1996. *Id.* He has been a continuous resident in the United States since 1996. *Id.*

II. Procedural History

Warfaa initiated this action almost a decade ago. His initial complaint was filed on November 10, 2004. Compl., *Does v. Ali*, No. 1:04cv1361 (E.D. Va. Nov. 10, 2004), ECF No. 1. Pursuant to the district court's April 29, 2005 order, that complaint was voluntarily dismissed, and the action was refiled on June 13, 2005.[1] Warfaa brought six causes of action against Ali: (1) attempted extrajudicial killing; (2) torture; (3) cruel, inhuman or degrading treatment or punishment; (4) arbitrary detention; (5) crimes against humanity; and (6) war crimes. These claims arise under the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350, note, or the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350.

For most of the past ten years, this action has been stayed. On August 5, 2005, the district court first stayed it until "either party provides the Court with a declaration from the Department of State that it has no objection to the action going forward and that taking discovery in Ethiopia will not interfere with United States foreign policy." Order, Aug. 5, 2005, ECF No. 26. Six years later, the

[1] The original complaint included two Plaintiffs, John Doe – now identified as Farhan Mohamoud Tani Warfaa, and Jane Doe. On April 25, 2014, counsel informed the district court that the Jane Doe plaintiff had decided not to continue with her claims against Ali. Status Conf. Hr'g Tr., Apr. 25, 2014, ECF No. 88. Counsel requested permission to file an amended Complaint that removed Jane Doe as a plaintiff, and identified John Doe's real name. *Id.* The district permitted the filing of such an amended complaint but with the caveat that no changes other than those two were to be made to the Complaint. Order, Apr. 25, 2014, ECF No. 87.

action resumed, but only briefly. Order, Oct. 21, 2011, ECF No. 45. On April 6, 2012, Ali filed a consent motion to again stay the proceedings "pending full judicial review by the Supreme Court" of the Second Circuit's ruling in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). Later that day, the district court granted the consent motion and stayed this action. Order, Apr. 6, 2012, ECF No. 57. The Supreme Court issued its opinion in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), on April 17, 2013.

On May 17, 2013, the district court extended the stay by an additional 120 days in order to give "the State Department an opportunity to advise it as to whether allowing this litigation to proceed would have any negative effect on the foreign relations of the United States." Letter from the Ct. to U.S. Dep't of State, June 21, 2013, ECF No. 71; Minute Entry, May 17, 2013, ECF No. 65. On September 19, 2013, the United States informed the district court that it "respectfully decline[d] to express views on the subject of the Court's inquiry." J.A. 17–19. The next day the district court extended the stay for an additional 120 days. Order, Sept. 20, 2013, ECF No. 77.

On January 24, 2014, the district court again extended the stay for 120 days, "to allow counsel to seek a response from the United States Department of State regarding the diplomatic letter sent by the Federal Republic of Somalia on November 11, 2013, in which the Prime Minister requests 'foreign official'

immunity for defendant Yusuf Abdi Ali." Order, Jan. 24, 2014, ECF No. 82. On April 24, 2014, the United States informed the district court that it was "not in a position to present views to the Court concerning this matter at this time." J.A. 22-26.

On April 25, 2014, the district court lifted the stay and ordered Warfaa to file an amended complaint. Order, Apr. 25, 2014, ECF No. 87. He did so on May 9, 2014. J.A. 32-51. Ali filed his motion to dismiss on May 30, 2014, and his memorandum in support thereof the following day.[2] Defendant's Motion and Mem. In Supp. Of Mot. to Dismiss ("Def.'s Mem."), ECF Nos. 90, 91.

Although Ali made no argument as to the potential effect of the Supreme Court's *Kiobel* decision on the outcome of this action in his motion to dismiss, the district court observed in a July 22, 2014 Order that "it appears that this Court lacks subject-matter jurisdiction to entertain [Warfaa's] ATS claims" in light of *Kiobel*. J.A. 56. The district court then ordered Warfaa to "present to the Court at the scheduled hearing any argument that his ATS claims are not barred." J.A. 57. In advance of oral argument, held on July 25, 2014, Warfaa filed a Notice of

[2] Pursuant to Rules 6(d) and 15(a)(3) of the Federal Rules of Civil Procedure, Ali was required to file his response to the Amended Complaint on or before May 27, 2014. Ali failed to do so, and instead filed his motion three days late. *After* filing his motion, Ali filed a motion requesting "Leave to File Instanter Renewed Motion to Dismiss." Mot. for Leave, June 2, 2014, ECF No. 92. The Court granted the Motion for Leave on June 11, 2014, before Warfaa's deadline to respond. Order, June 11, 2014, ECF No. 96.

Supplemental Authority, referring the district court to this Court's published opinion in *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014).[3] J.A. 58-60. In that decision, this Court held that the Eastern District of Virginia erred in dismissing the plaintiffs' claims under the ATS for lack of subject matter jurisdiction, and noted that, in considering ATS claims, "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*, 758 F.3d at 527.

III. The District Court's Ruling

The District Court held a hearing on Ali's motion to dismiss on July 25, 2014. At the outset of that hearing, without allowing Warfaa the opportunity to present arguments on the issue of the ATS claims as promised in the court's July 22, 2014 Order, the court found that "[t]here is absolutely no connection between the United States and this defendant's conduct in Somalia" and therefore dismissed the ATS claims based on *Kiobel* and this Court's ruling in *Al Shimari*.[4] J.A. 66:9-13. The court memorialized that ruling in a July 29, 2014 Memorandum Opinion. Relying on *Kiobel*, the court stated that an ATS claim cannot reach conduct

[3] Ali also filed a Notice of Supplemental Authority the same day. J.A. 61-63.

[4] Curiously, despite refusing to hear Warfaa's ATS arguments and having never ordered or permitted briefing on the *Kiobel* issue subsequent to the July 22, 2014 Order, the Court criticized Warfaa in its July 29, 2014 Opinion for submitting his Notice of Supplemental Authority "without comment" and "fail[ing] to address any of the obvious factual dissimilarities with his case" and *Al Shimari*. J.A. 77.

occurring in the territory of a foreign sovereign, and noted that all the relevant conduct alleged in the Amended Complaint occurred in Somalia. J.A. 78. Accordingly, the district court held that "the extraterritoriality analysis set forth in *Kiobel* appears to turn on the location of the relevant conduct, not the present location of the defendant" – thus barring Warfaa's ATS claims. J.A. 78-79.

Although the district court dismissed the ATS claims, its ruling left intact the remainder of Warfaa's claims under the Torture Victims Protecting Act. Of relevance to this appeal, the court held that Ali was not entitled to "official acts" immunity from the TVPA claims because, under this Court's ruling in *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012), he exceeded the scope of his authority and thus violated *jus cogens* norms of international law against extrajudicial killing and torture. In other words, because his actions against Warfaa were not official acts performed within the scope of Ali's authority, nor could they have been ratified as such, Ali could not invoke common-law immunity. J.A. 88-91.

The district court similarly held that Warfaa's TVPA claims were not barred by the political question or act of state doctrines. With regard to the political question doctrine, the court held that Warfaa's claims did not require the court to question the relationship of the United States with Somalia, as the executive branch had three opportunities to express an opinion on Ali's claim of immunity and inform the Court of any potential adverse impact on foreign affairs, but declined to

do so. J.A. 80-85. Turning to the act of state doctrine, which prevents federal courts from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory, the court held that a *jus cogens* violation of international law cannot serve as a basis for the doctrine. The court explained that because both torture and extrajudicial killing violated *jus cogens* norms of international law and were not recognized as official sovereign acts, adjudication of such claims would not require the court to inquire into the validity of the acts of the foreign sovereign regime in Somalia, which, in any event, was no longer in power. J.A. 85-88.

Finally, the district court held that the statute of limitations did not bar Warfaa's TVPA claims, because the doctrine of equitable tolling applied. The court explained that Somalia had been in a state of war for several years after Ali injured Warfaa, and Ali was not subject to personal jurisdiction by American courts for the period of time he resided outside of the United States. As the district court reasoned, equitable tolling of the limitations period of TVPA claims is consistent with the Act's underlying policy, because 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. J.A. 90-95.

Ali noticed an interlocutory appeal as to the district court's rejection of Ali's "plea of common law immunity from suit" on August 13, 2014. J.A. 101-02. By agreement of the parties, J.A. 103-05, the district court entered final judgment in favor of Ali on all of Warfaa's ATS claims. J.A. 106-07. Warfaa appealed the district court's dismissal of the ATS claims on September 5, 2014. J.A. 108.

SUMMARY OF ARGUMENT

The district court erred by failing to properly apply the Supreme Court's ruling in *Kiobel* and this Court's ruling in *Al Shimari* as to claims under the Alien Tort Statute. In *Kiobel*, the Supreme Court endorsed a presumption against the extraterritorial application of ATS claims, but specifically noted that the presumption may be overcome when claims "touch and concern" the United States. Whether the presumption against extraterritoriality is overcome in any given case requires a full factual analysis. Specifically, *Kiobel* requires that a trial court confronted with an ATS claim review two questions: first, whether the claim is in fact based on extraterritorial conduct, and if so, whether the presumption is displaced by the aggregate of facts that "touch and concern" the United States.

The district court failed to apply this fact-based analysis. Instead, the court found that the violations of international law occurred wholly in Somalia and dismissed Warfaa's ATS claims solely on that basis, without going any further. Notably, the district court did not consider Ali's residence or other ties to the

United States. In other words, the court applied the fixed rule of Justice Alito and Justice Thomas's concurring opinion in *Kiobel*, which would bar all ATS claims involving foreign conduct, rather than the displaceable presumption announced by *Kiobel*'s majority opinion.

This misreading of *Kiobel* was reversible error. This Court's decision in *Al Shimari* instructs courts to analyze a "broader range of facts than the location where the plaintiffs actually sustained their injuries." *Al Shimari*, 758 F.3d at 529. The facts in the record show that this case is indistinguishable from *Filártiga v. Pena-Irala*, the landmark ATS case cited with approval by the Supreme Court and hailed by Justice Kennedy as an "important precedent" at oral argument in *Kiobel*.[5] Because Ali, like the defendant in *Filártiga*, sought safe haven and residency in the United States after committing international crimes abroad, this case manifests the "close connection to United States territory" that *Al Shimari* required to satisfy *Kiobel*'s touch and concern test. Accordingly, *Kiobel*, as applied to the facts in the record, permits Warfaa's ATS claims to proceed. In the alternative, this Court should remand the case to the district court with an order to analyze the totality of facts required by *Kiobel* and *Al Shimari*.

[5] Oral Argument Tr. 13, *Kiobel v. Royal Dutch Petroleum Co.*, Feb. 28,2012, , *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf.

The district court, however, was correct to apply this Court's *Samantar* decision and deny Ali's claim to common-law immunity. In *Samantar*, this Court held that absent an Executive Branch suggestion to the contrary, international crimes such as torture, extrajudicial killing, or crimes against humanity are not shielded by foreign official immunity because, by definition, they cannot be legally authorized. Such crimes are precisely what Warfaa has alleged: (1) Ali was a mid-level officer, not a head-of-state; (2) his alleged acts of torture, attempted extrajudicial killing and crimes against humanity far exceeded the lawful scope of his authority; and (3) the United States has repeatedly declined to file a suggestion of immunity on his behalf. Since *Samantar* and the decision below are entirely in line with domestic and international authority, the denial of immunity should be affirmed.

ARGUMENT

I. Standard of Review

Whether claims based on extraterritorial conduct are barred under the Alien Tort Statute is a question of subject matter jurisdiction. *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516, 528 (4th Cir. 2014). "Questions of subject matter jurisdiction are reviewed *de novo*." *AGI Associates, LLC v. City of Hickory, N.C.*, --- F.3d ---, 2014 WL 6981327, at *2 (4th Cir. Dec. 11, 2014).

A district court's denial of immunity is a question of law that this Court reviews *de novo*. *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 332 (4th Cir. 2008); *Tobey v. Jones*, 706 F.3d 379, 385 (4th Cir. 2013).

II. The District Court Erred By Summarily Dismissing Warfaa's Alien Tort Statute Claims.

In summarily dismissing Warfaa's ATS claims, the district court erred by failing to apply *Kiobel* and *Al Shimari*, which both held that whether the presumption against extraterritoriality is overcome in any given case requires a full factual analysis. Specifically, *Kiobel* and *Al Shimari* state that once a court determines that an ATS claim is based on extraterritorial conduct, it must determine whether the circumstances of the case "touch and concern" the United States. Instead of applying this fact-based analysis, the district court simply held that all of the relevant conduct occurred wholly in Somalia and dismissed Warfaa's ATS claims solely on that basis, without considering Ali's current residence or other ties to the United States. This ruling stands in contrast to the law of this Circuit, which has specifically found a defendant's status and residence, as well as the U.S. interest in preventing its territory from becoming a safe harbor for torturers, as relevant to the "touch and concern" analysis. The implications of the district court's ruling are particularly problematic in that they would bar claims by those seeking justice against human rights abusers who have taken refuge in the United States, as is the case here.

A. *Kiobel* Requires a Fact-Based Analysis to Determine Whether ATS Claims "Touch and Concern" the United States, and the District Court Failed to Apply That Standard.

In *Kiobel*, the Supreme Court established a two-step approach for courts to follow when determining whether an ATS claim displaces the presumption against extraterritoriality. First, the court must determine whether the conduct giving rise to the claims is "foreign," and hence whether the presumption against extraterritoriality is triggered. Second, if the presumption has been triggered, the court must assess whether the presumption is nevertheless displaced because the claim sufficiently "touches and concerns" the United States. *Kiobel*, 133 S. Ct. at 1669. With regard to the second step, the Supreme Court looked to the principles underlying the presumption against extraterritoriality, and considered such relevant factors as (1) the defendant's nationality and residence, *id.* at 1663-64; (2) the extent of the defendant's presence in U.S. territory, *id.* at 1669; and (3) the availability of alternative fora for suit. *Id.* Here, however, the district court performed only the first part of the *Kiobel* analysis and failed to consider anything beyond the location of the challenged conduct. This was clear error.

Specifically, in dismissing Warfaa's ATS claims, the district court held that any ATS claim implicating entirely extraterritorial conduct is barred in U.S. courts. Under the court's theory, "the extraterritorial analysis set forth in *Kiobel* appears to turn on the location of the relevant conduct, not the present location of the

defendant." J.A. 79; *see also* J.A. 78 (noting that ATS claims "generally speaking, must be based on violations occurring on American soil.") (citing *Kiobel*, 133 S. Ct. at 1669); *id.* ("a cognizable ATS claim may not 'reach conduct occurring in the territory of a foreign sovereign.'") (citing *Kiobel*, 133 S. Ct. at 1664). Therefore, in the court's estimation, because "all the relevant conduct" alleged by Warfaa took place in Somalia, it did not "touch and concern" the United States, and therefore did not displace the presumption of extraterritoriality set forth in *Kiobel*. J.A. 78-79.

The district court's reasoning stands in contrast to both the holding in *Kiobel* as well as this Court's precedent.[6] As this Court has recognized, *Kiobel* "broadly stated that the 'claims,' rather than the alleged tortious conduct, must touch and concern United States territory with sufficient force . . . ." *Al Shimari*, 758 F.3d at 527 (citing *Kiobel*, 133 S. Ct. at 1669). A claim involves far more than the conduct at its core; rather, it is the "aggregate of operative facts giving rise to a right enforceable by a court." Black's Law Dictionary 281 (9th ed. 2009) (quoted

[6] The Supreme Court had previously left the door ajar to ATS claims involving foreign conduct in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724, 732 (2004). In *Sosa*, one Mexican citizen sued another for acts committed in Mexico, putting the issue of extraterritoriality squarely before the Court. 542 U.S. at 698–99. Yet *Sosa* did not impose an absolute territorial bar on ATS claims, even while dismissing claims under the Federal Tort Claims Act precisely because they occurred outside the United States. *Id.* Indeed, *Sosa*'s lengthy merits analysis of the ATS claim before the Court would have been superfluous if the location *ipso facto* precluded further consideration.

in *Al Shimari*, 758 F.3d at 527). Therefore, this Court held in *Al Shimari* that "[u]nder the 'touch and concern' language, a fact-based analysis is required . . . to determine whether courts may exercise jurisdiction over certain ATS claims." 758 F.3d at 528.

This Court has enumerated some of the factors relevant to the touch and concern analysis. In assessing an ATS claim, "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*, 758 F.3d at 527 (citing *Kiobel*, 133 S. Ct. at 1669). In *Al Shimari*, a group of Iraqi nationals brought ATS claims against a Virginia-based government contractor for allegedly engaging in torture and other brutalities at Abu Ghraib prison in Iraq. *Id.* at 521–23. Recognizing the facts that the defendant was an American corporation and that some of its employees were American citizens, this Court held that the ATS claims sufficiently touched and concerned the United States to displace the *Kiobel* presumption.[7] *Id*. at 530–31.

Here, in contrast, the district court did not consider the "aggregate of operative facts," and notably gave no weight to Ali's current residence. Instead, it

[7] In rejecting Warfaa's ATS claims, the district court stated that Warfaa failed "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." J.A. 77-78 n. 1. As discussed above, the holding in *Al Shimari* did not rely exclusively on the fact that there was tortious conduct in the United States, but also took into account the location of the defendant and some of its employees.

considered only the location of the conduct at issue. J.A. 78-79. In this regard, the district court's reasoning tracked the concurring opinion of Justices Alito and Thomas in *Kiobel*, which would have required an ATS plaintiff to allege that the violations of international law took place in the United States. 133 S. Ct at 1670 (Alito, J., concurring). The district court misstated *Kiobel*'s holding in the categorical terms used only by these two Justices. *See* J.A. 78 ("[T]he Supreme Court held [in *Kiobel*] that a cognizable ATS claim may not 'reach conduct occurring in the territory of a foreign sovereign.'"). Under the district court's approach, there is not a presumption against extraterritoriality; there is simply a rule against it. *See Kiobel*, 133 S. Ct. at 1670.

But the majority and other concurring opinions in *Kiobel* clearly rejected such a bright line rule in favor of more flexible standards. *See id.* at 1669 (holding that presumption against extraterritoriality can be displaced); *id.* (Kennedy, J., concurring) (noting that the Court was not addressing ATS claims for human rights abuses committed abroad "covered neither by the TVPA nor by the reasoning and holding of [*Kiobel*]"); *id.* at 1671 (Breyer, J., concurring) (suggesting that foreign-conduct claims are actionable where the violation "substantially and adversely affects an important American national interest"). Justices Alito and Thomas themselves acknowledged that the majority rejected their bright line approach. *Id.* at 1669-70 (Alito, J., concurring) ("[P]erhaps there is wisdom in the Court's

preference for this narrow approach [referring to the Court's touch and concern standard]."). Indeed, this Court rejected the Alito-Thomas minority approach in its *Al Shimari* decision. *See* 758 F.3d at 528 ("the clear implication of the 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.").

Despite the clear holdings in *Kiobel* and *Al Shimari*, the district court committed a series of reversible errors. First, it applied the minority Alito-Thomas rule rather than the *Kiobel* majority's touch and concern test. Then, it analyzed one fact alone – the location of the tortious conduct in Somalia – without considering the relevant facts that Ali voluntarily sought safe haven in the United States, adopted U.S. permanency residency, and was not amenable to suit in any other forum. Finally, it refused to give Warfaa an opportunity to present evidence or briefing to overcome the presumption and instead applied its truncated analysis, under the wrong standard. This Court should apply *de novo* the touch-and-concern analysis to the facts in the record, which evince a substantial connection between the ATS claims and the territory of the United States with sufficient force to displace the *Kiobel* presumption. In the alternative, this Court should remand the case with directions that the district court conduct the full factual inquiry that *Kiobel* requires.

B. Warfaa's ATS Claims Touch and Concern the United States Because Ali Is a Longtime U.S. Resident, Has Sought Safe Haven in the United States After Committing War Crimes Abroad, and Is Not Subject to the Jurisdiction of Any Other Court.

In limiting its analysis to the location of the tortious conduct, the court overlooked the other substantial connections between Warfaa's claims and the United States. Indeed, the *Kiobel* opinion was careful to delineate that courts must look to whether the "claims" – not simply the tortious conduct – touch and concern the United States. *Kiobel*, 133 S. Ct. at 1669. As this Court explained, the "choice of such broad terminology was not happenstance." *Al Shimari*, 758 F.3d at 527. Accordingly, "it is not sufficient merely to say that because the actual injuries were inflicted abroad, the claims do not touch and concern United States territory." *Id.* at 528.

Upon close reading of *Kiobel*, this Court found residence of the defendant and principles underlying the presumption against extraterritoriality—namely, whether application of ATS jurisdiction would create international discord, or interfere with U.S. foreign policy—relevant in determining whether a plaintiff's claims bear a significant relationship to the territory of the U.S. *Id* at 530-31. Applying the facts in *Al Shimari*, this Court found that extending ATS jurisdiction to plaintiffs' claims would not create any "unintended clashes between our laws and those of other nations" because plaintiffs were simply seeking to enforce the customary law of nations, which is universally accepted, rather than a federal

conduct-regulating statute. *Id.* at 530 (quoting *Kiobel*, 133 S. Ct. at 1664). Moreover, plaintiffs were bringing claims against a U.S. national before a U.S. court for conduct committed abroad, and thereby did not face any unintended consequences associated with bringing foreign nationals before unfamiliar courts to defend themselves. Lastly, the Court found that the ATS claims would not require any "unwarranted judicial interference in the conduct of foreign policy" because all three political branches have "indicated that the United States will not tolerate acts of torture, whether committed by United States citizens or by foreign nationals." *Id.*

Similar to the claims in *Al Shimari*, Warfaa's claims manifest a close connection to U.S. territory; namely, the claims are brought against a longtime Virginia resident and U.S. Lawful Permanent Resident, subject only to the jurisdiction of U.S. courts, for claims that are universally prohibited and expressly condemned by all three political branches in the U.S. Warfaa's claims here bear significantly greater ties to the territory of the U.S. than the "mere presence" of multinational corporations that was deemed insufficient in *Kiobel*.

1. Absent Any Unintended Clashes with Foreign Law or Policy, as a U.S. Lawful Permanent Resident, Ali Is Subject to the Jurisdiction of U.S. Courts.

Ali's status as a U.S. Lawful Permanent Resident deeply touches and concerns the United States. *See Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d

at 530 (holding that defendant CACI's status as a U.S. corporation, and individual defendants' status as U.S. citizens are relevant factors that touch and concern the territory of the United States). Ali has chosen to live "continuously and openly" in the United States since 1996, availing himself of the benefits of U.S. law, while seeking to escape its burdens through the *Kiobel* presumption. J.A. 34 at ¶ 8. Consequently, this case does not "present any potential problems associated with bringing foreign nationals into United States courts to answer for conduct committed abroad" since Ali is a U.S. resident. *Al Shimari*, 758 F.3d at 530. Further, like *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013), a case that upheld ATS claims against an American citizen for conspiring to commit crimes against humanity in Uganda, "[t]his is not a case where a foreign national is being hailed into an unfamiliar court to defend himself." *Id.* at 322–24.

Nor is this a case that would require "unwarranted judicial interference in the conduct of foreign policy." *Al Shimari*, 758 F.3d at 530 (quoting *Kiobel*, 133 S.Ct. at 1664). In cases with similar facts, the State Department has explained that "U.S. residents who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of the courts." *Ahmed v. Magan*, No. 2:10-CV-00342, 2013 WL 4479077, at *2 (S.D. Ohio Aug. 20, 2013). *See, e.g.*, Statement of Interest by the U.S. at 9, *Yousuf v. Samantar*, No. 1:04-cv-1360 (E.D. Va.), Feb. 14, 2011, Dkt. No. 147. And as this Court noted in *Al Shimari*, the "political branches already

have indicated that the United States will not tolerate acts of torture, whether committed by United States citizens or by foreign nationals." 758 F.3d at 530.

For example, the Executive Branch stated unequivocally in its briefing in *Kiobel* that "recognizing a cause of action in the circumstances of *Filártiga* [viz., foreign plaintiffs, foreign conduct, defendant residing in the U.S.] is consistent with the foreign relations interests of the United States." Supp. Br. of the United States as Amicus Curiae in *Kiobel*, No. 10-1491, 2012 WL 2161290, at *13 (U.S. June 11, 2012). Thus, denying a cause of action against perpetrators found in the United States could risk "international discord," *Kiobel*, 133 S. Ct. at 1664, and "give rise to the prospect that this country would be perceived as harboring the perpetrator." Supp. Br. of the United States as Amicus Curiae in *Kiobel*, 2012 WL 2161290, at *4.

Indeed, mechanically barring all ATS claims involving foreign conduct would slam the courthouse door in the faces of human rights abuse survivors such as Warfaa, whose abuser is physically present in the United States. As this Court recognized in *Al Shimari*, Congress has previously expressed its "distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind." *Al Shimari*, 758 F.3d at 530 (quoting *Kiobel*, 133 S. Ct. at 1671, Breyer, J., concurring). Allowing the district court's decision to stand would effectively

undermine this fundamental purpose. In short, Ali's "binding tie to the United States and its court system," *Samantar*, 699 F.3d at 778, is an added factor that touches and concerns the United States.

2. Ali Sought Safe Haven in the United States After Committing War Crimes in Somalia and Being Expelled from Canada as a Result.

The claims against Ali are exactly the same as those upheld in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) and its progeny, a line of cases that were expressly endorsed by Congress and the Supreme Court, and are still good law following *Kiobel*. For more than two decades, Ali has voluntarily sought safe harbor in the United States to escape the consequences of his actions in Somalia. Fleeing Somalia after the collapse of the former Siad Barre dictatorship, Ali entered Canada through the United States in 1990. J.A. 34 at ¶ 7. Two years later, Canada deported Ali for gross human rights abuses in Somalia and he once again entered the United States, where he has been continuously residing since 1996. J.A. 34 at ¶ 8.

Ali is thus substantially similar to the defendants in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) and its progeny—cases where defendants abused human rights overseas and later sought safe haven in the United States. *See, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (upholding ATS claims against Bosnian Serb leader found in New York for war crimes in Bosnia) and *In re Estate*

of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493 (9th Cir. 1992) (upholding ATS claims against deposed head of state who fled to United States for torture committed in the Philippines). In *Filártiga*, plaintiff Dolly Filártiga's brother Joelito was kidnapped and tortured to death in Paraguay by Américo Norberto Peña-Irala, the Inspector General of Police of Asunción, in retaliation for his father's outspoken criticism of Paraguay's dictator, General Alfredo Stroessner. 630 F.2d at 878–79. Upon discovering that her brother's torturer was residing in the United States, Dolly Filártiga and her father filed suit under the ATS and became the first to use the statute successfully to seek justice for human rights violations.

In a landmark decision, the Second Circuit recognized the Filártiga family's claims under the ATS. *Id.* at 878. The plaintiffs were able to demonstrate all three of the jurisdictional prerequisites of the statute: they were aliens, their action sounded "in tort only," and the torture that they alleged was a violation of the law of nations, even when committed by a foreign government official against a citizen of the same nation. Twenty-five years later, Ms. Filártiga warned that without the ATS, "torturers like Américo Peña-Irala would be able to travel freely in the United States." Dolly Filártiga, *American Courts, Global Justice*, N.Y. Times, Mar. 30, 2004, at A21.

The Supreme Court has repeatedly affirmed *Filártiga* and similar cases involving claims against individual defendants for human rights abuses committed abroad.[8] *See Sosa*, 542 U.S. at 731-33 (citing with approval *Filártiga* and two other ATS cases, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), and *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992)); *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1709 (2012) (citing *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (upholding ATS and TVPA claims against a naturalized U.S. citizen for abuses committed in El Salvador)); *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) (holding that the Foreign Sovereign Immunities Act did not bar ATS and TVPA claims against a U.S. legal permanent resident who had committed abuses in Somalia).

Congress has agreed. It endorsed the *Filártiga* line of cases when it extended the right to U.S. citizens to bring similar claims under the TVPA,[9] signed into law by President George H.W. Bush in 1992. *See* S. Rep. No. 102-249, at 3–5

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[8] Notably, *Kiobel* reaffirmed *Sosa* without distinguishing – much less overturning – *Filártiga*. 133 S. Ct. at 1661. In his concurrence Justice Breyer, joined by three other justices, found that the facts of *Filártiga* would overcome any presumption against extraterritoriality that might otherwise arise, as Filártiga's torturer was residing in New York City. *Id*. at 1675 (Breyer, J., concurring). In *Kiobel*, by contrast, the corporate defendants had only a "minimal and indirect American presence" that did not implicate a distinct interest of this country, such as denying safe haven to an "'enemy of mankind.'" *Id*. at 1678 (Breyer, J., concurring).

[9] The Alien Tort Statute limits its coverage to "any civil action brought by an alien, in tort only . . . ." 28 U.S.C. § 1350.

(1991) ("The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act)"); H.R. Rep. No. 102-367, at 4 (1991) (the ATS "should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.").

Because *Kiobel* did not overturn *Sosa*, or its incorporation of the *Filártiga* line of cases, *Kiobel*'s touch-and-concern test should be read in light of this authority. Therefore, the physical presence of a natural person defendant on U.S. soil – unlike "mere corporate presence" – is a sufficient nexus to the United States to support an ATS cause of action. *See Ahmed v. Magan*, 2013 WL 4479077, at *2 (holding that the *Kiobel* presumption was overcome, even though the acts of torture had occurred in Somalia, because the individual defendant had adopted residency in the United States).

Here, Ali sought safe haven in the United States after being expelled from Canada for the very human rights abuses at the heart of this case. Under *Filártiga*, this is one form of relevant conduct that weighs in favor of recognizing a claim under ATS jurisdiction.

3. Unlike the Multinational Corporation in *Kiobel*, Ali Is Only Amenable to Suit in the United States.

Another factor overcoming the *Kiobel* presumption is the fact that the United States is the sole forum in which Ali is amenable to suit. As noted in the majority

opinion's analysis, the defendant in *Kiobel* was a multinational corporation, present in several countries at once, incorporated in Europe, and subject to several overlapping jurisdictions. *Kiobel*, 133 S. Ct. at 1669. In contrast, Ali is an individual, present only in Virginia and subject only to the jurisdiction of that state's district courts. Like the claims in *Al Shimari*, Warfaa's claims do not seek to impose U.S. laws on foreign countries, nor is Warfaa attempting to bring a non-resident foreign national into U.S. courts to account for extraterritorial conduct.

Instead, Warfaa's claims "seek to enforce the customary law of nations through a jurisdictional vehicle provided under United States law, the ATS, rather than a federal statute that itself details conduct to be regulated or enforced." *Al Shimari*, 758 F.3d at 530. As this Court observed, "any substantive norm enforced through an ATS claim necessarily is recognized" by Somalia and the international community "as being actionable." *Id.* There is thus no risk of "unintended clashes between our laws and those of other nations," nor of the "international discord" which might otherwise result. *Kiobel*, 133 S. Ct. at 1664. The same international norms prohibiting torture and crimes against humanity apply in Somali or U.S. territory. *See Al Shimari*, 758 F.3d at 530. The fact that the United States is the sole available forum for these claims weighs even further in favor of displacing the *Kiobel* presumption.

In sum, *Kiobel* and *Al Shimari*, far from imposing a categorical bar on claims based on foreign conduct, required the district court to engage in a multi-factor analysis of the extent to which Warfaa's ATS claims touch and concern the United States. Because Ali is physically present in this country, and has adopted U.S. residency, subjected himself to U.S. jurisdiction, and evaded being held accountable in any other judicial forum, the claims for gross human rights abuses in this case are sufficiently connected to the territory of the United States to overcome the *Kiobel* presumption. Accordingly, this Court should correct the district court's erroneous and truncated analysis and find that Warfaa's ATS claims are actionable. In the alternative, the Court should remand the case and direct the district court to conduct the full factual inquiry that *Kiobel* requires.

III. Ali Is Not Entitled to Immunity.

In his Opening Brief, Ali requests that this Court "revisit[]" its precedent in the case of *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012), *cert. denied*, 134 S. Ct. 897 (2014). Ali Br. 10. In support, Ali argues that (1) this Circuit's decision conflicts with the decisions of other circuits; and (2) this Circuit's decision was wrongly decided and contrary to domestic and international law. But this Court is bound to uphold the precedent of its prior decision in *Samantar* and thus Ali's request is without merit. *See McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004).

Samantar forecloses Ali's claim to immunity on the merits because (1) he was never a head of state; (2) his acts of torture and crimes against humanity were outside his lawful scope of authority; and (3) the United States has declined to suggest immunity. Finally, contrary to Ali's claims, *Samantar* is consistent with decisions outside of this Circuit – and a long line of international authority.

A. *Samantar* Is Binding Precedent on This Court.

Yousuf v. Samantar, 699 F.3d 763, 775-76 (4th Cir. 2012) is the law of this Circuit and bars Ali's claim to immunity. Writing for a unanimous panel of this Court, Chief Judge Traxler squarely held that foreign officials committing *jus cogens* violations of international law were not subject to common law immunity – particularly when the United States declines to suggest immunity. Apparently mistaking his opening brief for a cert petition,[10] Ali argues that this Court's

[10] Indeed, Ali's brief is replete with passages suggesting that it is written with the Supreme Court, not this Court, as the intended audience. *See* Ali Br. 12-13 (stating that "lower courts have recognized this division of authority concerning *jus cogens* violations and have expressly looked to this Court for guidance on this 'complicated' question" and citing *Rosenberg v. Lashkar-e-Taiba*, No. 10-cv-5381, 2013 WL 5502851, at *6-7 (E.D.N.Y. Sept. 30, 2013), which discusses Supreme Court jurisprudence, not this Court's); Ali Br. 17 (referring to *Samantar v. Yousuf*, 560 U.S. 305 (2010) as "this Court's decision in *Samantar*"); Ali Br. 19 ("It is therefore undisputed that this Court's review of the Fourth Circuit's immunity determination is now jurisdictionally proper.").

decision in *Samantar* conflicts with decisions reached in other circuits, and urges this Court to reconsider *Samantar* so as to eliminate the split.[11] Ali Br. 10.

Ali's request ignores the fact that the *Samantar* opinion is binding precedent on this Court.[12] Sitting *en banc*, this Court announced in *McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004), the basic tenet that "one panel cannot overrule a decision issued by another panel." *Accord Figg v. Schroeder*, 312 F.3d 625, 643-44 (4th Cir. 2002) (holding that the Court was "bound to recognize and follow" precedent where a case was not distinguishable on the merits from an earlier decision). Although a three-judge panel, such as the present one, "has the statutory and constitutional power to overrule the decision of another three-judge panel . . . as a matter of prudence a three-judge panel of this court should not exercise that power." *McMellon*, 387 F.3d at 334. Accordingly, "the first case to decide the issue is the one that must be followed, unless and until it is overruled by this court sitting *en banc* or by the Supreme Court." *Id.* at 334. Ali's request for this Court to overturn *Samantar* is thus meritless.

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[11] Despite Ali's emphasis on his claim that *Samantar* is an "outlier" amongst related jurisprudence found elsewhere in the federal court system, *see* Ali Br. 10, that *Samantar* is distinguishable or even contrary to decisions issued in other jurisdictions is of no consequence. This Court is under no obligation to align itself with interpretations of other federal circuit courts.

[12] Ali notes that a petition for certiorari has been filed with the Supreme Court in the *Samantar* case. Ali Br. 9. Unless the Supreme Courts grants the petition and overrules *Samantar*, the petition is irrelevant to this case.

B. The District Court Correctly Denied Ali Immunity on the Merits.

Ali next argues that the decision reached by this Court in *Samantar* was incorrect under domestic and international law, and therefore the Court should "correct its position" and recognize "Ali's common law immunity from suit." Ali Br. 27-28. Ali is mistaken. As the district court explained, Ali is not entitled to common law immunity under the head-of-state or official-acts doctrines because (1) he was never a head of state; and (2) the acts of torture, attempted extrajudicial killing and crimes against humanity of which he is accused far exceeded the lawful scope of his authority and thus were not "official acts" to which immunity could attach; and (3) the United States has declined to file a suggestion of immunity on Ali's behalf.[13]

1. As a Former, Mid-Level Officer, Ali Has No Claim to Head-of-State Immunity.

First, Ali cannot invoke head-of-state immunity because the United States has not recognized him as a head of state. This standard has been articulated in *Samantar* and beyond. *See e.g. Ye v. Zemin*, 383 F.3d 620, 625 (7th Cir. 2004); *Lafontant v. Aristide*, 844 F. Supp. 128, 132 (E.D.N.Y. 1994) ("The immunity extends only to the person the United States government acknowledges as the

[13] As discussed below, *see infra* at 38-40, Ali conflates immunity under the FSIA with common law immunity throughout his brief. Because common law immunity, not FSIA immunity, governs the actions of individual foreign officers, *see* Samantar, 699 F.3d 767, any such argument is meritless.

official head-of-state."). By Ali's own admission, he was Commander of the Fifth Brigade of the Somali National Army, and therefore was a mid-level officer with authority circumscribed by military law and hierarchy. Ali Br. 2. Ali's rank is significant; as the court below acknowledged, immunity "certainly doesn't apply to every low-level official." Status Conf. Hr'g. Tr. 11:3-4, *Warfaa v. Ali*, No. 1:05-cv-701-LMB-JFA (E.D. Va.), Apr. 25, 2014, ECF No. 88; *accord Samantar*, 699 F.3d at 769.

2. The Nature of Ali's Crimes Forecloses a Claim to "Official-Acts" Immunity.

At common law, as articulated by the Supreme Court, "foreign sovereign immunity extends to an individual official 'for acts committed in his official capacity' but not to 'an official who acts beyond the scope of his authority.'" *Samantar v. Yousuf*, 560 U.S. 305, 322 n.17 (2010) (citing *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103, 1106 (9th Cir. 1990)). Applying this principle, this Court recognized in *Samantar* that international criminal law limits the scope of a foreign official's authority. *Samantar*, 699 F.3d at 776–77. Therefore, acts of torture, extrajudicial killing, crimes against humanity or other international crimes are not shielded by foreign official immunity because, by definition, they cannot be legally authorized. *Id.* at 777 ("[U]nder international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity.").

Such violations are precisely what Warfaa has alleged here, and consequently, Ali cannot claim official-acts immunity.

Ali asserts a right to immunity based on the undisputed fact that "all of the alleged wrongs raised . . . in the Amended Complaint" occurred while he acted in the position of Commander of the Fifth Brigade in the Somali National Army. Ali Br. 8. However, even if committed by Ali during his military service, the international crimes alleged in the complaint can never be legally authorized as official acts. *Samantar*, 699 F.3d at 776-77; *see also Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 753 (D. Md. 2010) ("[T]here is no contradiction in finding that Defendant[] acted under color of law but that [his] actions were individual and not official actions.").

Indeed, the Torture Victim Protection Act *requires* a showing that the defendant acted "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350, note, § 2(a). If official capacity is a prerequisite for TVPA liability, then it cannot also be a complete defense. Thus, Ali would have this Court read the TVPA as a dead letter.

Rather, as articulated by *Samantar* and a longer history of federal authority, extrajudicial killing and torture cannot be considered authorized or "official acts" because they are contrary to clear and universally recognized principles of international law. For example, in *In re Estate of Ferdinand Marcos, Human*

Rights Litig., 25 F.3d 1467, 1472 (9th Cir. 1994), the Ninth Circuit held that "acts of torture, execution, and disappearance were clearly acts outside of [defendant's] authority as President" and that acts "not taken within any official mandate" are "not the acts of . . . a foreign state." *Accord Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) ("[N]o state claims a sovereign right to torture its own citizens.").[14]

Like the Ninth Circuit, the Second Circuit has refused to recognize well-pleaded international crimes as official acts of state, at least where the United States has not intervened on a foreign official's behalf. *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) (doubting "that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state.").

This reasoning extends beyond the act of state doctrine to immunity. Thus, the district court in *Xuncax v. Gramajo*, 886 F. Supp. 162, 176 (D. Mass. 1995) rejected a plea of FSIA immunity, holding that torture and summary execution

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

"exceed anything that might be considered to have been lawfully within the scope of [a Guatemalan officer's] official authority." Similarly, *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996), held that a defendant's acts of torture fell beyond the scope of his authority as Deputy Chief of National Security of Ghana and denied FSIA immunity. *See also Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) (acts of torture, cruel, inhuman and degrading treatment, and arbitrary detention in violation of customary international law "hardly qualify as official public acts.").

Here, Ali's acts were not authorized under Somali or international law. The Somali Constitution, adopted in 1979 and in effect throughout Ali's service in the Somali National Army, outlawed torture and extrajudicial killing. *See* Somali Const. Art. 26.1 ("Every person shall have the right to personal integrity."); *id.* Art. 27 ("A detained person shall not be subjected to physical or mental torture."); *see also id.* Art. 19 (recognizing the Universal Declaration of Human Rights and "generally accepted rules of international law"). Further, as an admitted officer of the Somali National Army, Ali was subject to the strict dictates of military law, including the Geneva Conventions of 1949, to which Somalia acceded on December 7, 1962.[15]

[15] *See* Int'l Comm. of the Red Cross, *States Party to the following International Humanitarian Law and other Related Treaties as of 4-Jun-2014*, at 5,

Nothing in the Somali Constitution or the Geneva Conventions authorized Ali to empty five rounds from his firearm into Warfaa's body during a custodial interrogation, without charge, trial, or sentence. Am. Compl. ¶ 26, *Warfaa v. Ali*, No. 1:05-cv-701-LMB-JFA (E.D. Va.), May 9, 2014, ECF No. 89; *see* Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Art. 3(1)(a), Aug. 12, 1949, 75 U.N.T.S. 287 (prohibiting "murder . . . cruel treatment and torture" against persons taking no active part in hostilities).

Nor can Ali find help in his claim that the new Federal Republic of Somalia—which did not exist in 1987—has ratified his conduct decades later. *See* Ali Br. 4. Absent intervention by the Executive Branch, torturers cannot be immunized for their actions and foreign states cannot cloak such actions with official authorization. *See Samantar*, 699 F.3d at 776; *accord Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. at 701–02 .[16] Instead, this Court has already determined to follow Congress's original intent that official-acts immunity does not shield human rights abuses under the TVPA and ATS. *See* S. REP. NO. 102-249, at 8 (explaining that TVPA is designed to govern abuses "committed by officials both within and outside the scope of their authority," given that "no state

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http://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SO.

[16] Moreover, the State Department has repeatedly declined to intervene in this case. Statement of Interest by the U.S. ¶¶ 2, 5, *Warfaa v. Ali*, No. 1:05-cv-701-LMB-JFA (E.D. Va.), Apr. 24, 2014, ECF No. 85.

officially condones torture and extrajudicial killings" and thus "few such acts, if any, would fall under the rubric of "official actions'"); *accord Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009) (noting that "the TVPA will apply to any individual official whom the Executive declines to immunize").

In addition to the fact that the very nature of Ali's alleged actions makes it impossible for him to be immunized from them, precedent confirms that denial of immunity to a resident of the United States is proper. The State Department has repeatedly explained that "U.S. residents who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of the courts." *Ahmed v. Magan*, No. 2:10-CV-00342, 2013 WL 4479077, at *2 (S.D. Ohio Aug. 20, 2013). *See, e.g.*, Statement of Interest by the U.S. 9, *Yousuf v. Samantar*, No. 1:04-cv-1360 (E.D. Va.), Feb. 14, 2011, ECF No. 147 (denying immunity, in part, because defendant was a U.S. resident). Here, Ali chose to live "continuously and openly" in the United States since 1996, availing himself of the benefits and burdens of U.S. law. Ali Br. 9. Ali's "binding tie to the United States and its court system," *Samantar*, 699 F.3d at 778, is thus an added bar to common law immunity which was properly denied in the present case.

In sum, the actions Ali undertook were "not legitimate official acts and therefore do not merit foreign official immunity . . . ." *Id.* at 776. Accordingly, the district court properly denied Ali's claim of common law immunity.

3. The United States has Repeatedly Declined to Suggest Immunity in This Case.

Denying immunity is especially appropriate here because the United States has, since 2005, repeatedly declined to intervene on Ali's behalf, including his recent request for immunity. As this Court made clear in *Samantar*, the reasonable views of the Executive Branch regarding common-law immunity "carr[y] substantial weight in our analysis of the issue." *Id.* at 773. Indeed, courts have long given substantial deference to the Executive's decision to grant or refuse common-law immunity. *See The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 132-47 (1812) (receiving and considering the view of the Executive Branch on a foreign state's immunity claim but conducting its own independent review of international law).

Here, the district court gave the United States three opportunities to express an opinion on this case, and the State Department repeatedly declined to intervene. J.A. 22–26; Statement of Interest by the U.S. ¶¶ 2, 5, *Warfaa v. Ali*, No. 1:05-cv-701-LMB-JFA (E.D. Va.), Apr. 24, 2014, ECF No. 85. The State Department's refusal to recommend immunity, in light of this Court's previous decision in *Samantar*, that no immunity would attach to allegations of *jus cogens* violations of international law, should be given "substantial weight." *Samantar*, 699 F.3d at 773. Indeed it is "not for the courts to . . . allow an immunity on new grounds which the government has not seen fit to recognize." *Republic of Mexico v.*

Hoffman, 324 U.S. 30, 35 (1945). Accordingly, rather than grant Ali an immunity that the United States has declined to offer, this Court should affirm the district court's denial of immunity.

4. The District Court's Application of *Samantar* Comports with Federal and International Precedent.

Finally, Ali overstates the purported circuit split on common law immunity and misconstrues international case law. Both lines of authority confirm that the district court reached the correct result.

Relying on the Supreme Court's ruling in *Samantar v. Yousuf*, 560 U.S. 305 (2010), this Court held in *Samantar* that "the common law, not the [Foreign Sovereign Immunities Act], governs the claims to immunity by individual foreign officials." *Samantar*, 699 F.3d at 767; *see also Samantar*, 560 U.S. at 325 ("we find nothing in the [FSIA's] origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity."). Yet, in support of his argument, Ali confuses FSIA immunity with common law immunity, and relies on decisions interpreting the FSIA to support his flawed immunity theory.[17]

[17] Ali attempts to justify his reliance on the FSIA by claiming that "it is appropriate to rely on the FSIA to interpret the scope of common-law immunity." Ali Br. 27. To support this claim, Ali cites to *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 627-28 (1983), in which he claims that the Supreme Court "relied in part on the policies underlying FSIA to fashion a common-law rule governing when it is appropriate to pierce the veil of a corporation owned by a foreign state." Ali Br. 27. However, the holding in *First Nat'l City Bank* is unrelated to common law immunity. Instead, it references a

For example, Ali cites *Belhas v. Ya'alon*, 515 F.3d 1279, 1287 (D.C. Cir. 2008), a FSIA case in which the D.C. Circuit observed that there is no "unenumerated exception for violations of *jus cogens* norms" under the FSIA. But *Belhas* construed a statute on state immunity. It did not analyze the *common law* doctrine of foreign *official* immunity, where the inquiry turns on the relation of the acts to the defendant's scope of authority. As a result, *Belhas* has little bearing.[18]

Only one appellate decision, *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), has ever applied common law immunity to an alleged *jus cogens* violation. And in that case – unlike here – the Second Circuit was faced with an affirmative

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portion of the FSIA's legislative history in the broader context of a discussion regarding the proper legal status of independent instrumentalities, such as banks, in relation to their nation of origin. *Id*. at 628. This is unrelated to the issue of common law immunity for *jus cogens* violations by an individual.

[18] Elsewhere in his brief, Ali argues that allowing *Samantar* "to stand" will cause the Fourth Circuit to become a "magnet for suits," Ali Br. 15, and cites several cases brought against foreign sovereigns for the proposition that "there is no *jus cogens* exception to a foreign state's immunity under FSIA." Ali. Br. 17 (citing *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1156 (7th Cir. 2001), *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1994), and *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242-45 (2d Cir. 1996); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 n.1 (D.C. Cir. 1994)). These cases all implicated suits against a sovereign under the FSIA and are therefore inapposite. Ali also relies on *Saudia Arabia v. Nelson*, 507 U.S. 349 (1993), in arguing that the "Supreme Court squarely rejected the premise" of the Fourth Circuit's decision in *Samantar*. Ali Br. 26. However, in *Nelson*, the Supreme Court held jurisdiction was improper because the activity in question was not a commercial activity within the meaning of the FSIA, and that there was "no dispute" that the defendants fell under the FSIA definition of foreign state. *Nelson*, 507 U.S. at 351, 356. Therefore, *Nelson* does not conflict with, nor does it "squarely reject[]" *Samantar*.

suggestion of immunity by the Executive Branch. *Id.* at 14. The *Matar* court granted immunity because the Executive Branch suggested it – not because the alleged acts of extrajudicial killing were found to be "officially authorized." *See id.* (noting that the court defers to the immunity decisions of the Executive Branch and that the "United States . . . filed a Statement of Interest . . . specifically recognizing [the defendant's] entitlement to immunity . . . ."). Since no such statement of interest has been filed in this case, *Matar* is fully consistent with the decision below. Indeed, *Matar* explicitly noted that "the TVPA *will apply* to any individual official whom the Executive declines to immunize." *Id.* at 15 (emphasis added).

Ali's final case, *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004), gives him even less support. First, *Ye* involved head-of-state, not official-acts immunity, and Ali was never head of state. *Id.* at 626. Second, in *Ye* as in *Matar*, the Executive Branch intervened to suggest immunity and the court deferred to that view. *Id.* at 627. In contrast, the present case involves no suggestion of immunity. Thus nothing in *Ye* indicates the district court was wrong to apply *Samantar* and deny immunity.[19]

[19] Ali also claims that "the Government has consistently taken the position that the common law of foreign official immunity does not recognize a *jus cogens* exception" and cites the Government's amicus brief in *Ye* and its Statement of Interest in *Weixum v. Xilai*, 568 F. Supp. 2d 35 (D.D.C. 2008). Ali Br. 12 n. 6. Neither are applicable here; as already noted, *Ye* implicated an assertion of head of

Finally, Ali's claim that international law entitles him to immunity is simply false. Ali argues that other countries "have consistently refused to recognize a *jus cogens* immunity in civil cases" and cites in support case law from Australia, New Zealand, the United Kingdom, Canada, and the ECHR. Ali Br. 22. Any such authority is not binding on U.S. courts, and, in any event, implicates the actions of the sovereign or a head of state, or the application of a foreign immunity statute, neither of which is applicable here.[20]

Moreover, Ali's reliance on the International Court of Justice case *Jurisdictional Immunities of State* (Ger. v. Italy), 2012 I.C.J. 99 (Feb. 3), is simply

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state immunity by the Executive Branch, which is not the issue here. In *Weixum*, the issue was civil liability under the FSIA, not common law immunity. *See* Further Statement of Interest of the United States in Supp. of the United States' Suggestion of Immunity 14, *Weixum v. Xilai*, No. 04-0649 (D.D.C.), Dec. 6, 2006, ECF No. 20 ("the courts have refused to recognize alleged violation of *jus cogens* norms of international law in the form of violation of human rights as an exception to a foreign State's immunity in a civil case against that State."). And, in any event, the Government urged the court in *Weixum* not to resolve the issue of immunity, as it was unnecessary. *See id.* at 14 ("this Court need not and should not address the FSIA and act of state issues because doing so would be both unnecessary and require diplomatically sensitive inquiries by the Court.").

[20] Nor does the treaty cited by Ali, the UN Convention on Jurisdictional Immunities of States and Their Property, apply here. Ali Br. 23. This treaty has not gone into effect, and the United States has neither signed nor ratified it. *See* UN Convention on Jurisdictional Immunities of States, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&Chapter=3&lang=en.

another example of his conflation of state immunity and individual immunity.[21] In *Jurisdictional Immunities*, the ICJ examined the relationship between *jus cogens* violations committed during World War II by Germany and state immunity. Although the court did not ultimately reach whether *jus cogens* violations occurred, the court held that assuming arguendo such violations existed, "state immunity" still stands under international law. *Id*. at ¶ 97. In reaching its decision, the court looked to various nations and laws—including the Foreign Sovereign Immunities Act. *Id*. at ¶ 88. But nowhere in *Jurisdictional Immunities* was individual immunity addressed, nor does Ali explain how it conflicts with *Samantar* in any way.

Accordingly, Ali's reliance on international law fails. International law does not require states to immunize foreign officials—other than sitting heads of state—for *jus cogens* violations. *See* Judgment and Opinion, International Military Tribunal at Nuremberg (Oct. 1, 1946), *reprinted in* 41 Am. J. Int'l L. 172, 220–21 (1947) ("He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.").

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

This is true for both civil and criminal liability.[22] Like this Court in *Samantar*, numerous courts in other countries have held that foreign officials can be civilly liable for injuries caused by international crimes, even if the defendant held office at the time. For example, in July 2012, a Swiss court specifically denied "official acts" immunity to a former Algerian Minister of Defense against whom victims had lodged criminal and *civil* complaints for torture, on the ground that international law does not give such protection to *jus cogens* violations.[23] In March 2012, a Dutch court awarded a Palestinian plaintiff one million euros in a

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[22] Citing *Jurisdictional Immunities* and the Government's Statement of Interest in *Matar*, Ali attempts to draw a distinction between criminal and civil liability for foreign officials who have committed war crimes, and states that civil liability is not acceptable in circumstances where criminal liability is. Ali Br. 24-26. Specifically, Ali claims that, as opposed to criminal liability, civil liability is not appropriate because (1) states cannot be held criminally liable for their acts, while individuals can be, and (2) "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." Ali Br. 24-25. These arguments are meritless. First, there is no risk that the state of Somalia will be held civilly liable for Ali's acts, as it is not a party to this suit. Second, there is no need for Somalia's "consent," nor would such consent be dispositive, as Ali's crimes are not official acts of the state. Finally, Ali's suggestion that this suit somehow lacks "safeguards" and "accountability" is entirely unsupported. Indeed, the U.S. Government's Statement of Interest in this case expressed no such concerns. Statement of Interest by the U.S. ¶¶ 2, 5, *Warfaa v. Ali*, No. 1:05-cv-701-LMB-JFA (E.D. Va.), Apr. 24, 2014, ECF No. 85; see also J.A. 21-24.

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

civil suit against former Libyan officials for torture committed in Libya,[24] and in March 2011, the Tribunal de Grande Instance de Paris held former Bosnian Serb leaders Radovan Karadzic and Biljana Plavsic liable in a civil suit for injuries suffered by a Bosnian family during the war, awarding 200,000 euros in damages to the victims.[25] Similarly, in July 2007, the Belgian Court of Assizes for Brussels entered a criminal and civil judgment against former Rwandan Major Bernard Ntuyahaga, awarding compensatory damages to his victims.[26] While none of these foreign precedents are binding on U.S. courts, each support this Court's conclusion in *Samantar* that "under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity." 699 F.3d at 777.

In short, the district court's denial of immunity aligns with federal caselaw and with international law. Ali can cite no case that compels a different result.

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

[25] *Kovac et al. v. Karadžic et al.*, Tribunal de Grande Instance de Paris, Judgment of March 14, 2011, No. 05/10617; "France court awards Bosnia civil war victims damages for injuries," Jurist, March 14, 2011, http://jurist.org/paperchase/2011/03/france-court-awards-bosnia-civil-war-victims-damages-for-injuries.php.

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

CONCLUSION

For the reasons discussed herein, Plaintiff-Appellee/Cross-Appellant Farhan Mohamoud Tani Warfaa respectfully requests that this Court reverse the district court's ruling that his ATS claims are barred and reinstate Warfaa's ATS claims, or, in the alternative, remand the case with directions that the district court conduct the full factual inquiry that *Kiobel* requires, and affirm the district court's ruling that Ali is not entitled to immunity.

REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellee/Cross-Appellant Farhan Mohamoud Tani Warfaa requests oral argument on all of the issues presented in this appeal.

Date: January 23, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,593 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

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CERTIFICATE OF FILING AND SERVICE

I certify that on this 23rd day of January 2015, I caused to be electronically filed the foregoing Opening and Response Brief of Plaintiff-Appellee/Cross-Appellant Farhan Mohamoud Tani Warfaa with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit on all parties or their counsel of record through the CM/ECF system to:

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I further certify that on this 23rd day of January 2015, I caused the required copies of the Opening and Response Brief of Plaintiff-Appellee/Cross-Appellant to be hand filed with the Clerk of the Court.

/s/ Tara M. Lee
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