

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

ALEXANDRIA DIVISION

BASHE ABDI YOUSUF, ET AL.

Plaintiffs,

v.

MOHAMED ALI SAMANTAR

Defendant

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

Civil Action No. 1:04 CV 1360

**DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S  
MOTION TO DISMISS THE FIRST AMENDED COMPLAINT FOR LACK OF  
PERSONAL JURISDICTION, FAILURE TO STATE A CLAIM UPON WHICH RELIEF  
CAN BE GRANTED, AND LACK OF SUBJECT MATTER JURISDICTION**

Defendant Mohamed Ali Samantar ("Defendant"), by and through undersigned counsel, Spierer and Goldberg, P.C. and Shaughnessy, Volzer & Gagner, P.C., hereby submits this Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss the First Amended Complaint for Lack of Personal Jurisdiction, Failure To State a Claim Upon Which Relief Can Be Granted, and Lack of Subject Matter Jurisdiction ("Reply").

Defendant adopts and incorporates by reference his Motion to Dismiss for Lack of Personal Jurisdiction and for Failure To State a Claim Upon Which Relief Can Be Granted ("Motion to Dismiss"), filed December 1, 2004, and his Reply in Support of Defendant's Motion To Dismiss for Lack of Personal Jurisdiction and for Failure To State a Claim Upon Which Relief Can Be Granted ("Reply in Support of Motion to Dismiss"), filed December 30, 2004 (corrected), as they apply to all plaintiffs listed in the First Amended Complaint.

## INTRODUCTION

Plaintiffs' Opposition to Motion to Dismiss the First Amended Complaint for Lack of Personal Jurisdiction, Failure To State a Claim Upon Which Relief Can Be Granted, and Lack of Subject Matter Jurisdiction ("Opposition") fails to demonstrate why the First Amended Complaint should not be dismissed. First, Plaintiffs fail to acknowledge that the head-of-state immunity doctrine applies to heads of government, and Defendant therefore is entitled to immunity as Somalia's Prime Minister, Defense Minister, and Vice President. Second, the head-of-state immunity doctrine does apply to a former head of state or government. Finally, Plaintiffs concede that Bashe Abdi Yousuf and Aziz Deria's claims under the Alien Tort Claims Act should be dismissed.

## ARGUMENT

### **HEAD-OF-STATE IMMUNITY ENCOMPASSES DEFENDANT'S POSITIONS AS PRIME MINISTER, FIRST VICE PRESIDENT, AND DEFENSE MINISTER**

Plaintiffs attempt to re-argue whether Defendant is entitled to immunity for his tenure as Somalia's Minister of Defense. Many of those same arguments have been made and rebutted in prior filings to this Court and the Department of State.

Plaintiffs assert that Defendant is not entitled to head of state immunity because he did not serve as Somalia's president. The head of state immunity doctrine applies equally to heads of state and heads of government. See Saltany v. Reagan, 702 F. Supp. 319 (D.D.C. 1988), order aff'd in part, rev'd in part on other grounds, 886 F.2d 438 (D.C. Cir. 1989), cert. denied, 495 U.S. 932 (1990) (granting head-of-state immunity to U.K. head of government, Prime Minister Margaret Thatcher, against claims by Libyan residents); see also Restatement (Third) of Foreign Relations § 464 n. 14 (a proceeding against a head of state or government is treated like a claim

against the state for purposes of immunity). Defendant, as a former Prime Minister and high-ranking government official, should be accorded head-of-state immunity from lawsuits in the United States courts. At a minimum, this is true for his tenure as Prime Minister (1987 to 1990) when Mr. Samantar served indisputably as Somalia's head of government.

Plaintiffs' reliance on First American Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1121 (D.D.C. 1996) fails for an additional reason not previously stated. The head-of-state immunity doctrine is limited to official acts and does not extend to private actions. Lafontant v. Aristide, 844 F. Supp. 128, 135 (E.D.N.Y. 1994). See also discussion of Notice of Changed Circumstances filed by the Department of State in Mumtaz v. Ershad, infra, p. 6. While one of the defendants in First American was indeed the then current defense minister of the United Arab Emirates, it appears that none of the actions that gave rise to the complaint was performed by him in his capacity as defense minister. As a result, the court never reached the issue whether head-of-state immunity might have been available based on the defendant's official acts as the minister of defense.

#### **A FORMER HEAD OF STATE OR GOVERNMENT IS ENTITLED TO HEAD-OF-STATE IMMUNITY**

As to whether a former head of state or government is entitled to head-of-state immunity, Plaintiffs' reliance on Dole Food Co. v. Patrickson, 538 U.S. 468, 479 (2003) and Republic of Austria v. Altmann, 541 U.S. 677, 124 S. Ct. 2240, 2259 (2004) is misplaced. While the Supreme Court in Dole Food questioned the availability of immunity to former state agencies, the Court's reasoning relied heavily on the specific language of Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332, 1391, and 1602-1611 (2004) ("FSIA"). Dole Food, 538 U.S. at 479. The FSIA does not address the immunity of foreign heads of state and government as

opposed to states and their instrumentalities. Abiola, 267 F. Supp. 2d at 913-14 (FSIA does not alter head-of-state immunity, noting that “[t]he FSIA’s definition of ‘foreign state’ noticeably omits heads of state”); Lafontant, 844 F. Supp. at 137 (“that the FSIA is inapplicable to a head-of-state comports with both the history of the FSIA and the underlying policy of comity”). The only court to consider the availability of immunity to a former head of state since the Supreme Court’s comments in Dole Food and Altmann elected to give effect to the Government’s suggestion of immunity for a former head of state. Wei Je v. Jiang Zemin, 383 F.3d 620, 625-627 (7th Cir. 2004).

While Abiola may be the only case where immunity was afforded a former head of state absent an express suggestion from the Department of State, the court in Abiola noted that courts generally enjoy that authority. Abiola, 267 F. Supp. 2d at 915. “In the absence of guidance from the Executive Branch, ‘courts may decide themselves whether all the requisites of immunity exist.’” Id. (quoting Republic of Mexico v. Hoffman, 324 U.S. 30, 34-35, 89 L. Ed. 729, 65 S. Ct. 530 (1945); citing United States v. Noriega, 117 F.3d 1206, 1212 (11<sup>th</sup> Cir. 1997); In re Doe, 860 F.2d 40, 45 (2d Cir. 1988)).

Plaintiffs incorrectly assert that Abiola conflicts with First American Corp. and El-Hadad v. Embassy of the United Arab Emirates, 69 F. Supp. 2d 69 (D.D.C. 1999), regarding the scope of the head-of-state immunity doctrine. While the findings in both of the latter cases have been distinguished in Defendant’s prior filings to the Court, the following quote from Abiola merits consideration

there is no square holding that head-of-state immunity for acts committed during one’s tenure as ruler disappears when a leader steps down. The Second Circuit has stated in dicta that “there is respectable authority for denying head-of-state immunity to former heads-of-state.” In re Doe, 860 F.2d at 45. However, the cases the court cited in support of this proposition suggest merely that a former head of state may not be entitled to

immunity 1) for his private acts, see The Schooner Exchange [v. McFaddon], 11 U.S. [116,] (7 Cranch) at 145 [1812]; Republic of Philippines v. Marcos, 806 F.2d 344, 360 (2d Cir. 1986) (stating in dicta that head-of-state immunity may not "go[] so far as to render a former head of state immune as regards his *private acts*" (emphasis added)), or 2) when the foreign state waives the immunity of its former leader, see In re Grand Jury Proceedings, 817 F.2d 1108, 1111 (4th Cir. 1987).

Abiola, 267 F. Supp. 2d at 917. Neither of these two exceptions is present in the instant case.

In Hatch v. Baez, 7 Hun 596, 599-600 (N.Y. Sup. Ct. 1876) (quoted in Underhill v. Hernandez, 65 F. 577, 580 (2d Cir. 1895), aff'd, 168 U.S. 250 (1897)), a former head of state of the Dominican Republic at the time suit was filed, was determined to be entitled to immunity for official acts. Plaintiffs' effort to distinguish Hatch fails for three reasons. First, Plaintiffs' argument that Hatch is inapplicable because it predates the current standards for head of state immunity and the FSIA, is unsupportable given the importance of earlier decided cases to the current doctrine, including The Schooner Exchange v. McFaddon, 11 U.S. 116, 138 (1812). Second, the Department of State's adoption of a restrictive policy in the 1952 "Tate Letter" only limited the immunity of a foreign government or its instrumentalities and not the immunity of heads of state or government. Letter from Jack B. Tate, Acting Legal adviser, U.S. Dept. of State, to Acting U.S. Attorney General Phillip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984-85 (1952), and in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711-15 (1976). Third, the "Tate Letter" did not mention how immunity for heads of state would be altered, and courts have continued to give conclusive deference to a State Department determination to confer immunity. Abiola, 267 F. Supp. 2d at 912.

Plaintiffs also fail to demonstrate that head-of-state immunity does not apply to charges of human rights violations. In Hilao v. Marcos, 25 F.3d 1467 (9<sup>th</sup> Cir. 1994), Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996), and Xuncax v. Gramajo, 886 F. Supp. 162, 175-76 (D. Mass. 1995), none of the defendants was entitled to head-of-state immunity. In

Marcos, the successor government waived former head-of-state immunity, and the defendants in the two other cases apparently did not seek head-of-state immunity and were held not to be entitled to immunity under the FSIA.

Heads of state, like government instrumentalities prior to the adoption of any exceptions in the FSIA, enjoy absolute immunity from suit for official acts. Abiola, 267 F. Supp. 2d at 912. As the Supreme Court noted with respect to government immunity from suit for unlawful detention or torture prior to the enactment of the relevant amendment to the FSIA, "however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature." Saudi Arabia v. Nelson, 507 U.S. 349, 361, 123 L. Ed. 2d 47, 113 S. Ct. 1471 (1993). A fortiori, the same is true for a head of state or government. Abiola, 267 F. Supp. 2d at 912. Therefore, Defendant cannot be held liable for acts taken in the course of his responsibilities as the head of Somalia's state or government.

Plaintiffs also fail to distinguish the circumstances of Mumtaz v. Ershad. Mumtaz v. Ershad, Index No. 74258/89, (N.Y. Sup. Ct. 1991), Notice of Changed Circumstances Submitted by the United States, p. 4 ("Notice") (Exhibit 1). In Mumtaz, the spouse of H. M. Ershad, the then-President of the People's Republic of Bangladesh brought a divorce action in a New York State court. The Department arranged for the filing of a suggestion of immunity, and the matter was dismissed. The President's spouse appealed the dismissal, and, while the appeal was pending, Mr. Ershad left office. In response, the Department of State filed the Notice, asserting that the President had forfeited his right to immunity since he was not longer a head of state and the case involved "a purely private matter." Id. at p. 4. The Notice submitted on behalf of the Department recited further, "[A]s a former head of state, Ershad now enjoys immunity covering

only official acts performed pursuant to governmental authority as head of state." Id. at 3. As the Notice recognizes, immunity continues for official actions after the head of state or government leaves office. Notice at passim.

**PLAINTIFFS CONCEDE THAT BASHE ABDI YOUSUF AND AZIZ DERIA ARE NOT BRINGING CLAIMS PURSUANT TO THE ALIEN TORT CLAIMS ACT**

Plaintiffs specifically state that Yousuf and Deria do not assert claims under the Alien Tort Claims Act, 28 U.S.C. § 1350. All such claims, therefore, ought to be dismissed. First Amended Complaint, ¶¶ 95, 111.

**CONCLUSION**

For the foregoing reasons, Defendant requests that this Court grant his motion to dismiss.

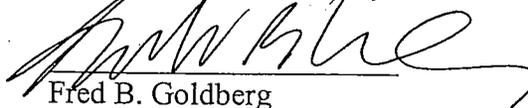
Respectfully submitted,

SHAUGHNESSY, VOLZER & GAGNER, P.C.

 Harvey J. Volzer

VSJ No. 24445  
1101 15<sup>th</sup> Street, NW  
Suite 202  
Washington, DC 20005  
(202) 828-0900

SPIRER & GOLDBERG, P.C.

 Fred B. Goldberg

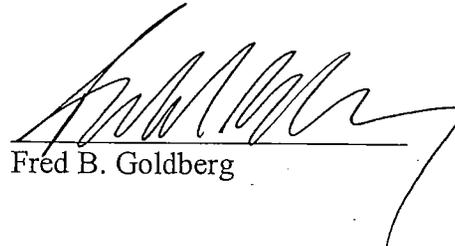
7101 Wisconsin Avenue  
Suite 1201  
Bethesda, MD 20814  
(301) 654-3300  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I, Fred B. Goldberg, hereby certify that on this 28<sup>th</sup> day of February, 2005, I caused to be served a true and correct copy of the foregoing Defendant's Reply to Plaintiffs' Opposition to Motion To Dismiss the First Amended Complaint for Lack of Personal Jurisdiction, Failure To State a Claim Upon Which Relief Can Be Granted, and Lack of Subject Matter Jurisdiction, by first-class U.S. Mail, postage pre-paid, on the following:

Robert R. Vieth, Esq.  
Scott A. Johnson, Esq.  
Tara M. Lee, Esq.  
Cooley Godward LLP  
Reston Town Center, One Freedom Square  
11951 Freedom Drive  
Reston, VA 20190-5656

Matthew Eisenbrandt  
Helene Silverberg  
Center for Justice & Accountability  
870 Market Street, Suite 684  
San Francisco, CA 94102

  
Fred B. Goldberg

# **EXHIBIT 1**

10.5.2.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X		:
MARIEUM MUMTAZ,		:
	Plaintiff,	:
	v.	:
GENERAL H.M. ERSHAD,		:
	Defendant.	:
-----X		:

Index No. 74258/89  
IAS Part 17  
JUSTICE SCHACKMAN

NOTICE OF CHANGED CIRCUMSTANCES SUBMITTED BY  
THE UNITED STATES OF AMERICA

Preliminary Statement

OTTO G. OBERMAIER, United States Attorney for the Southern District of New York, at the direction of the Attorney General of the United States, pursuant to Section 517, Title 28 of the United States Code, appears herein specially to inform the Court that the United States, which on May 30, 1990 filed a Suggestion of Immunity on behalf of defendant H.M. Ershad ("Ershad"), now no longer recognizes Ershad as a head of state. The United States therefore believes that Ershad is no longer entitled to immunity in any action that involves a purely private matter.

STATEMENT OF THE CASE

Plaintiff Marieum Mumtaz brought this suit against defendant H.M. Ershad, seeking dissolution of a marriage that allegedly occurred in Dhaka, Bangladesh, in 1982, as well as spousal maintenance and equitable distribution of marital property. At the time the complaint was filed, Ershad was President of the People's Republic of Bangladesh.

The Government of the People's Republic of Bangladesh requested that the United States suggest immunity for then-President Ershad. Upon consideration of the request, the State Department recognized that President Ershad, as head of state of the People's Republic of Bangladesh, was entitled in this action to the immunity customarily granted to heads of state. Accordingly, the State Department made a formal request to the Department of Justice to file a Suggestion of Immunity with this Court. Thereafter, pursuant to 28 U.S.C. § 517, the United States filed a Suggestion of Immunity with the Supreme Court of the State of New York, County of New York, on May 30, 1990. On June 15, 1990, the United States filed a Memorandum of Law in Support of the Suggestion of Immunity Filed on Behalf of the Defendant by the United States ("U.S. Memorandum of Law").

The Supreme Court of the State of New York, County of New York, granted defendant Ershad's motion to dismiss on June 27, 1990. In a written opinion, Justice Walter M. Schackman properly held that then-President Ershad was entitled to head-of-state immunity, noting that "[o]nce a recommendation of immunity is suggested by the government, no further examination of the details of the case is appropriate." Muntaz v. Ershad, Index No. 74258/89, Opinion dated June 27, 1990, at 5.

Plaintiff has appealed that decision and has also moved this Court for renewal of defendant's motion to dismiss the complaint based on the recent developments described below.

### RECENT DEVELOPMENTS

On December 6, 1990, President Ershad announced his resignation as President of the People's Republic of Bangladesh. Affirmation of Edward G. Abington, Country Director for Pakistan, Afghanistan and Bangladesh Affairs, Department of State (Exhibit A to Affirmation of Gideon A. Schor ("Schor Affirmation"), attached hereto). The Department of State has advised the Department of Justice that former President Ershad currently holds no official position in the Government of Bangladesh. Letter, dated January 8, 1991, from Edwin D. Williamson to Richard Thornburgh (Exhibit B to Schor Affirmation, attached hereto). Based upon these facts, the Department of State has informed the Attorney General that former President Ershad is no longer entitled to head-of-state immunity. See Exhibit B.

The United States Supreme Court has repeatedly held that suggestions made by the United States that immunity be granted or denied are conclusive on the courts. See United States v. Lee, 106 U.S. 196, 209 (1882). See also U.S. Memorandum of Law, at 5-13. Thus, the determination of the United States that Ershad is no longer entitled to head-of-state immunity is binding on this Court.

Moreover, as a former head of state, Ershad now enjoys immunity covering only official acts performed pursuant to governmental authority as head of state. See, e.g., Hatch v. Baez, 7 Hun. 596, 599-600 (N.Y. App. Div. 1876) (former-head-of-state immunity extends only to acts done by head of state in exercise of executive authority). See also Republic of Philippines v. Marcos,

et al., 806 F.2d 344, 360 (2d Cir. 1986), cert. dismissed, 480 U.S. 942 (1987); In re Doe, 860 F.2d 40, 45 (2d Cir. 1988).

The United States therefore submits that Ershad is no longer entitled to immunity in any action that involves a purely private matter. Accordingly, this Court should hold further proceedings consistent with this conclusion.

Dated: New York, New York  
March , 1991

Respectfully submitted,

STUART M. GERSON  
Assistant Attorney General

OTTO G. OBERMAIER  
United States Attorney for the  
Southern District of New York

By:

\_\_\_\_\_  
GIDEON A. SCHOR  
Assistant United States Attorney  
One St. Andrew's Plaza  
New York, New York 10007  
Tel. No.: (212) 791-0723

OF COUNSEL:

David A. Jones, Jr.  
Attorney  
United States Department of State  
Office of Legal Adviser  
Washington, D.C. 20520