

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

FILED

BASHE ABDI YOUSUF, *et al.*,)
)
 Plaintiffs,)
)
 v.)
)
 MOHAMED ALI SAMANTAR,)
)
 Defendant.)

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ALEXANDRIA DIVISION

Civil Action No. 1:04 CV 1360 (LMB/BRP)

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS SECOND AMENDED COMPLAINT**

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Plaintiffs Bashe Abdi Yousuf, Aziz Mohamed Deria,¹ John Doe I, John Doe II and Jane Doe, through undersigned counsel, respectfully submit this memorandum in opposition to the Motion by Defendant Mohamed Ali Samantar to dismiss the Second Amended Complaint (the “Complaint”).

INTRODUCTION

Prior to making his home in Virginia, Defendant directed military forces in Somalia that committed numerous acts—remarkable for their cruelty and inhumanity—that are proscribed by, and actionable under, the Torture Victim Protection Act, 28 U.S.C. § 1350 (“TVPA”) and the Alien Tort Statute, 28 U.S.C. § 1350 (“ATS”), and that were also barred by the Somali Constitution then in effect. In the 1980s and early 1990s, Defendant planned and led Somali forces in a campaign to exterminate the Issaq clan in northern Somalia. The Complaint sets forth, in stark detail, seven claims arising out of Defendant’s involvement in, and responsibility for, these acts, which included extrajudicial killing and attempted extrajudicial killing; torture; cruel, inhuman or degrading treatment or punishment; arbitrary detention; crimes against humanity; and war crimes.

Defendant’s motion to dismiss attacks these claims as beyond the Court’s jurisdiction, time barred, and inadequately pled. But Defendant consistently fails to provide this Court with relevant authority supporting his arguments for dismissal of the case. Moreover, Defendant

¹ Aziz Mohamed Deria is the personal representative of the estates of Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I, and James Doe II.

ignores the guidance provided by both the Supreme Court and the United States (in its amicus brief) in this very litigation.²

This case is before the Court on remand from the Court of Appeals for the Fourth Circuit. On August 1, 2007, this Court dismissed the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). *Yousuf v. Samantar*, No. 1:04cv1360, 2007 WL 2220579, *15 (E.D. Va. Aug. 1, 2007) (holding that the Foreign Sovereign Immunities Act (“FSIA”) deprived the Court of subject matter jurisdiction over Plaintiffs’ claims). Plaintiffs appealed, and the Fourth Circuit reversed. *Samantar*, 552 F.3d at 378. The Supreme Court granted Defendant’s petition for certiorari and affirmed the Fourth Circuit’s decision, ruling that the FSIA did not govern Defendant’s claim of immunity and remanding the case for consideration of whether Defendant is entitled to common law immunity or whether he has any other defenses to the claims at bar. *Samantar*, 130 S. Ct. at 2293.

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION

Plaintiffs assert subject matter jurisdiction under 28 U.S.C. § 1331 and the ATS. The Court has subject matter jurisdiction over an ATS claim if the plaintiff’s allegation of a violation of international law is not “immaterial” or “wholly insubstantial and frivolous,” even if the Court later determines that the complaint does not state a claim for relief. *Herero People’s Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192, 1194 (D.C. Cir. 2004).

Where a defendant contends that the complaint “fails to allege facts upon which subject matter jurisdiction may be based,” all facts alleged in the complaint “are presumed to be true”

² For summaries of the facts alleged in the Complaint, Plaintiffs respectfully refer to this Court’s prior decision in this case and the decisions of the Fourth Circuit and the Supreme Court. *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009); *Samantar v. Yousuf*, 130 S. Ct. 2278, 2293 (2010).

just as they would be under Rule 12(b)(6). *See Roe 1 v. Prince William Cnty.*, 525 F. Supp.2d 799, 803 (E.D. Va. 2007); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). If a defendant instead argues that the jurisdictional facts alleged in the complaint are not true, the Court may consider evidence submitted beyond the jurisdictional allegations of the complaint to determine whether subject matter jurisdiction exists. *Adams*, 697 F.2d at 1219. If the Court does consider factual matters outside the complaint, it should defer decision and provide Plaintiffs an opportunity to take discovery and respond with their own factual submissions. *See McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1360 n.28 (11th Cir. 2007) (“[Plaintiffs] should have an opportunity to have discovery to rebut any such extraneous evidence, before such evidence is used to dismiss the case on political question grounds.”).

A. Defendant Is Not Entitled to Common Law Immunity.

Defendant’s argument that he is entitled to immunity ignores the clear direction provided by the Supreme Court and the United States government *in this case*, which strongly indicate that immunity is inappropriate here. Instead, and in the absence of a State Department suggestion of immunity, Samantar relies almost verbatim on the arguments made under very different circumstances in *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007), *aff’d*, 563 F.3d 9, (2d Cir. 2009). *See* Brief in Support of Defendant Samantar’s Motion to Dismiss Second Amended Complaint (“Mem.”) at 7 & n.3 (referencing statement of interest filed by the State Department in *Matar*). The State Department has not granted any request for a suggestion of immunity for Samantar, decisively distinguishing this case from *Matar*.

The Supreme Court held in this case that the immunity of a former foreign government official is governed by federal common law, *Samantar*, 130 S. Ct. at 2292, and made clear that such officials are not presumptively entitled to immunity for all acts committed under color of law. *Id.* As the Supreme Court noted, in this case, plaintiffs have sued Samantar “in his personal

capacity and seek damages from his own pockets.” *Id.* Thus, Defendant cannot claim that this case falls into any of the narrow categories in which the immunity of a state also protects the official: Plaintiffs seek do not make any claim for damages or seek any other relief from Somalia, and Somalia is neither an indispensable nor necessary party to this litigation. *Id.* at 2290-92.

As the Supreme Court instructed, in the absence of a suggestion of immunity from the State Department, the Court must determine immunity by looking to common law principles as well as “the established policy of the [State Department]” for guidance. *Id.* at 2284. This Court need look no further than the record in this case for such guidance, as the Executive Branch outlined its considerations both generally and specifically with respect to Samantar’s claims of immunity in the amicus brief it filed with the Supreme Court. *See generally* Brief for the United States of America as Amicus Curiae Supporting Affirmance, *Samantar*, 130 S. Ct. 2278, 2010 WL 342031 (Jan. 27, 2010) (“U.S. Amicus”).³ As the Executive Branch explained, Samantar’s claim for immunity should be considered in light of (i) “the nature of the acts alleged – and whether they should properly be regarded as actions in an official capacity”; (ii) the Plaintiffs’ invocation of the TVPA; (iii) the residence and citizenship of the Defendant and Plaintiffs; (iv) the foreign state’s position on whether the act was in an official capacity; and (v) any assertion of immunity or waiver of immunity by the foreign state. U.S. Amicus at *24-25.

³ Samantar’s citations to the U.S. Amicus do not accurately reflect the Executive Branch’s positions. *See, e.g.*, Mem. at 12 (citing U.S. Amicus at 11, suggesting that his immunity survived his removal from office, but failing to cite the U.S. Amicus at *22, which states that “officials are usually immune only for acts taken in their official capacity”); *id.* (citing U.S. Amicus at *11, n.5 for the proposition that “[h]ead of state immunity . . . provides greater protection than[] the immunity of lower-level foreign officials,” but neglecting to mention the Executive’s recognition that “longstanding principles” dictate that head of state immunity “would not protect such officials [alleged to have committed torture or extrajudicial killing] after they left office.” U.S. Amicus at *20.

None of these elements favors immunity for Samantar. *First*, the intentional acts of torture and extrajudicial killing detailed in the Complaint, *see* ¶¶ 2, 77-83, which were directed by Samantar as part of a campaign he led against civilians in northern Somalia, cannot properly be regarded as actions taken in an official capacity.⁴ Defendant asserts that because he committed these acts in his position as Defense Minister, they automatically qualify as official acts. *See* Mem. at 8-9. But as the Supreme Court noted, “Courts of Appeals have applied the rule that 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*, 130 S. Ct. at 2291 n.17 (citing *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1103, 1106 (9th Cir. 1990)).⁵ This position is consistent with customary international law and state practice. *See* U.S. Amicus at *11-12, citing Vienna Convention on Diplomatic Relations (VCDR), *done* Apr. 18, 1961, art. 39(2), 23 U.S.T. 3227, 3245; *Report of the International Law Commission on the Work its Forty-Third Session*, at 25, U.N. Doc. A/46/10 (Supp.) (Sept. 1, 1991).

Thus, the proper question is not whether Samantar acted for his personal benefit, but whether he acted beyond the scope of his authority by using torture and extrajudicial executions as part of the campaign in northern Somalia. *See* *Wissam Abdullateff Sa’eed Al-Quraishi v. Adel Nakhla*, No. PJM 08-1696, 2010 U.S. Dist. LEXIS 76450 (D. Md. July 29, 2010) (“[T]here is no contradiction in finding that Defendants acted under color of law but that their actions were individual and not official actions.”); *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1282 (N.D. Cal.

⁴ While this section refers specifically to the first three claims for relief, which allege extrajudicial killing, attempted extrajudicial killing, and torture, the arguments herein apply equally to the other claims in the Complaint.

⁵ Though *Chuidian* and other cases decided the issue of “official capacity” as it applies to actions by a foreign official under the FSIA, the principle that immunity does not attach to acts beyond official capacity also applies in determinations of common law immunity. *See Velasco v. Gov’t of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004).

2004) (same); *see also United States v. Emmanuel*, No. 06-20758-CR, 2007 WL 2002452, at *14 (S.D. Fla. July 5, 2007) (same); *see also Velasco*, 370 F.3d at 398 (common law denies immunity for conduct in excess of authority).⁶

Samantar's only support for the proposition that his acts of extrajudicial killing and torture were authorized is a letter from a putative representative of the Somali Transitional Federal Government ("TFG"). *See* Mem. at 9 n.5; *see also id.* at 4 n.2. But, as the State Department explained, that letter is entitled to no weight at all in this Court. *See* U.S. Amicus at 31-32, n.12 ("[T]he United States does not recognize the TFG as the government of Somalia, and absent contrary guidance from the Executive Branch, the TFG is not in a position to assume that role in United States courts. *The district court therefore should not attach significance to the statements of the TFG unless the Executive Branch advises it to do so.*") (emphasis added); *see also Samantar*, 130 S. Ct. at 2284 & n.3.

Somali law makes clear that Samantar's acts were not authorized; indeed, Samantar does not argue that any provision of Somali law sanctioned the acts of torture and extrajudicial execution that he directed in northern Somalia. *See Ganzglass Dec.* ¶ 14 (Ex. 1). The Somali Constitution, adopted in 1979 and in effect throughout Samantar's service in the Barre regime,

⁶ Nor can this lawsuit be considered an action against a foreign state or an "end run around the immunity of the state," as Samantar argues, *see* Mem. at 9, 11. The Supreme Court has already rejected this argument. *See Samantar*, 130 S. Ct. at 2292 ("this case, in which respondents have sued petitioner in his personal capacity and seek damages from his own pocket, is properly governed by the common law because it is not a claim against a foreign state as the [Foreign Sovereign Immunity] Act defines that term"); *see also* U.S. Amicus at *12-13 ("Suits like this one 'seek to impose individual liability against a government officer,' not the state itself . . . To be sure, personal damage suits against foreign officials based on actions taken in their official capacity may require the court to sit in judgment of a foreign state's actions . . . But the remedial, substantive and prudential concerns raised by suits against officials and suits against the state are not identical."). Samantar's citations to cases against foreign sovereigns, such as Saudi Arabia and Israel, are therefore inapposite. *See* Mem. at 10 (citing, *e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993); *Doe v. Israel*, 400 F. Supp. 2d 86, 104 (D.D.C. 2005)).

outlawed torture and extrajudicial killing. *See* Somali Const. Art. 26.1 (“Every person shall have the right to personal integrity.”); Art. 26.2 (“No person shall be liable to any form of detention or other restrictions on personal liberty, except when apprehended in flagrante delicto or pursuant to an act of the competent judicial authority in the case and in the manner prescribed by law.”); Art. 27 (“A detained person shall not be subjected to physical or mental torture.”). The Somali Constitution also specifically recognized the Universal Declaration of Human Rights and “generally accepted rules of international law.” Art. 19. Furthermore, Somalia acceded to the Convention Against Torture.⁷

In circumstances in which officials have acted beyond their authority, federal courts have long recognized that extrajudicial killing and torture cannot be considered as authorized or “official acts.” *See, e.g., In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d at 1467, 1472 (9th Cir. 1994) (*Hilao v. Marcos*) (“acts of torture, execution, and disappearance were clearly acts outside of [defendant’s] authority as President . . . were not taken within any official mandate and were therefore not the acts of . . . a foreign state”); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993), (“[N]o state claims a sovereign right to torture its own citizens.”); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) (same); *see also Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) (assassination cannot be within an official’s “discretionary” authority); U.S. Amicus at *21 n.9 (concluding that since “all states are officially opposed to torture and

⁷ *See* UN Treaty Collection, <http://treaties.un.org> (follow “Status of Treaties” then “9. Convention against Torture”).

extra judicial killing,” such acts should not be considered to be officially authorized, citing Senate TVPA Report).⁸

Second, Plaintiffs have “invoked the statutory right of action in the TVPA.” U.S. Amicus at *25. The TVPA specifically created a right of action in United States courts against foreign officials who commit torture and extrajudicial killing while acting “under actual or apparent authority, or color of law, of any foreign nation.” TVPA § 2(a), 106 Stat. 73.⁹ Contrary to Defendant’s immunity claim, Mem. at 11, Congress was clear that claimed immunities should not protect former officials from suit under the TVPA: “The Committee does not intend these immunities [sovereign, diplomatic, and head of state] to provide former officials with a defense to a lawsuit brought under this legislation.” S. Rep. No. 102-249 (1991), 1991 WL 258662, at *7-8; *see also* U.S. Amicus at 20 (“[T]he Senate Judiciary Committee believed that . . . immunities would not protect [] officials [from liability under the TVPA] after they left office.”).

Third, in deciding Defendant’s immunity claim, this Court should consider the residence of Samantar and the Plaintiffs. *See* U.S. Amicus at *25. Samantar has chosen to live in the

⁸ To the extent they are relevant, *see* U.S. Amicus at *25, U.S. domestic precedents are in accord. *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”); *see also 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”).

⁹ At the November 12, 2010 status conference, the Court voiced concern about whether Defendant would have sufficient assets to pay any judgment in this case. First, as discovery has been stayed, Plaintiffs have not received any response from Samantar regarding his assets. Second, the legislative history of the TVPA indicates that Congress understood that many TVPA defendants may not have assets sufficient to pay large claims. Congress nonetheless stated that *any* judgment would provide justice to victims and “serve notice to individuals engaged in human rights violations that the United States will not shelter human rights violators from being accountable.” 137 CONG. REC. S1379 (Jan. 3, 1991) (statement of Sen. Specter); *see also, e.g.*, 132 CONG. REC. 7051-03 (June 6, 1986) (statement of Sen. Specter) (“[P]roviding victims of gross human rights abuses access to the courts is of both practical and symbolic importance.”).

United States, availing himself of the benefits, protections, and consequences of U.S. law, for more than thirteen years. Mem. at 1, 14. This weighs heavily against granting him immunity from a civil suit in the United States, and provides an even stronger basis for jurisdiction than in similar cases where courts have refused to recognize immunity for former foreign officials. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995) (permitting Croat and Muslim citizens of Bosnia-Herzegovina to sue, under the ATS, president of Bosnian-Serb republic of Srpska who was visiting Manhattan for United Nations meeting); *Cabiri*, 921 F. Supp. at 1198 (finding no immunity under TVPA for Ghanaian official served when in U.S. for deposition). Finally, two of the Plaintiffs are naturalized United States citizens. Compl. ¶¶ 8, 9.

Fourth and fifth, the Court should consider that there is no recognized Somali government to assert or waive immunity on behalf of itself or Samantar, or to determine whether Samantar's acts were undertaken in an official capacity. *See* U.S. Amicus at *23 n.10, *25-26 (general considerations include “the immunity of the state itself,” and in this case include “the absence of a recognized government of Somalia”). Again, this factor weighs against immunity for Samantar, “because immunity is accorded to foreign officials not for their personal benefit, but for the benefit of the foreign state.” U.S. Amicus at *26 (citing VCDR, pmbl. art. 32(1), 23 U.S.T. at 3230, 3241; Vienna Convention on Consular Relations, *done* Apr. 24, 1963, pmbl., 21 U.S.T. 77, 79; *Paul v. Avril*, 812 F. Supp. 207, 211-12 (S.D. Fla. 1992)). Samantar seeks to use immunity *entirely* for his personal benefit; he makes no cognizable argument that providing him with immunity will benefit a foreign state. Accordingly, Samantar's arguments based on customary international law of foreign sovereign immunity are irrelevant. *See* Mem. at 11-12.¹⁰

¹⁰ Samantar relies on to a number of FSIA cases that were overturned by the Supreme Court. For instance, he repeatedly cites *Herbage v. Meese*, 747 F. Supp. 60, 66 (D.D.C. 1990), Mem. at 9-

Nor is Samantar's heavy reliance on *Matar* persuasive. See Mem. at 7 & n.3. While the Second Circuit relied on principles of common law immunity to shield an Israeli official from suit in the United States, that court opted to cede jurisdiction after the United States granted Israel's request for a suggestion of immunity. *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009). This is a critical difference in this case, where no suggestion of immunity has been made for Samantar. See *id.* ("the TVPA will apply to any individual official whom the Executive declines to immunize"). Accordingly, *Matar* and other cases where the State Department suggested immunity are of no value here. E.g., *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 28 (D.D.C. 2005). Moreover, the defendant in *Matar* was charged with acts which, according to both the State Department and the Government of Israel, fell within his lawful official authority. *Matar v. Dichter*, 563 F.3d at 11, 14. Here, the acts alleged in the Complaint clearly violated both Somali law and universally accepted norms of international law.

B. Defendant Is Not Entitled to Head of State Immunity.

Samantar's argument that he is entitled to head of state immunity is also wrong. See Mem. at 12-13. First, Defendant fails to show that he ever was the Somali head of state, instead relying simply on the labels accorded his positions. The positions of Prime Minister and First Vice President were clearly subsidiary positions in the Somali government, appointed at the will of the President and at all times subsidiary to that head of state. See Ganzglass Dec. ¶¶ 13-14.

11, suggesting that it held that "[i]ndividuals 'acting in their official capacities as agents of' a foreign government are entitled to immunity 'no matter how heinous the alleged illegalities.'" Mem. at 11. What the *Herbage* court actually said was that "[t]he FSIA is absolute in this regard, no matter how heinous the alleged illegalities." 747 F. Supp. at 67 (assuming FSIA applied to individuals). Samantar's attempt to re-litigate the Supreme Court's decision in this motion to dismiss should be roundly rejected. See also Mem. at 11 (citing, e.g., *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (dismissing case on FSIA grounds); *Doe v. Israel*, 400 F. Supp. 2d 86, 104-106 (analyzing jurisdiction over individual defendants under FSIA); *Belhas v. Ya'Alon*, 466 F. Supp. 2d 127, 133 (D.D.C. 2006) (dismissing on FSIA grounds, after State of Israel confirmed defendant's actions were in official capacity)).

Second, the United States has never recognized Samantar as a head of state, and has never suggested that he is entitled to such immunity, a pre-requisite to a grant of head of state immunity. *See Ye v. Zemin*, 383 F.3d 620, 625 (7th Cir. 2004) (“the decision concerning the immunity of foreign heads of states remains vested . . . with the Executive Branch”); *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 official head-of-state. Recognition of a government and its officers is the exclusive function of the Executive Branch.”).

Third, even if Samantar could somehow show that he was the head of the Somali state, as a matter of law a *former* head of state is not entitled to head of state immunity, but rather retains only those immunities available to all foreign officials for their official acts. *See In re Grand Jury Proceedings, Doe No. 700*, 817 F.2d 1108, 1111 (4th Cir. 1987) (immunity attaches to the head of state only while he or she occupies that office); *Estate of Domingo v. Republic of the Philippines*, 694 F. Supp. 782, 786 (W.D. Wash. 1988) (same); *see also* U.S. Amicus at *11 n.5 (citing 1 *Oppenheim’s International Law* 1043-44 (Robert Jennings & Arthur Watts, eds., 9th Ed. 1996)). This is particularly true for actions under the TVPA. *See id.* at 20 (“the TVPA would not affect traditional diplomatic or head-of-state immunities, but consistent with longstanding principles . . . these immunities would not protect such officials after they left office”).

C. The Political Question Doctrine Does Not Suggest That This Case is Nonjusticiable.

Defendant argues that this case presents a nonjusticiable political question, but fails to carry his burden of demonstrating that this suit would cause embarrassment to, or show a lack of respect for, another branch of the U.S. government. The political question doctrine is a principle of intra-governmental comity that bars the judicial branch from interfering in matters that the Constitution leaves exclusively to the political branches. *Baker v. Carr*, 369 U.S. 186 (1962);

see also *Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 487 (D. Md. 2009). The Supreme Court has counseled that it is “error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” *Japan Whaling Assoc. v. Am. Cetacean Soc’y*, 478 U.S. 221, 229-30 (1986); see *Kadic*, 70 F.3d at 249 (“the department to whom this [ATS] issue has been ‘constitutionally committed’ is none other than our own—the Judiciary.”) (quotation marks omitted). This doctrine does not bar “political cases” that may stir up controversy or discomfort, but rather cases that give rise to “political questions” which, by their nature, create separation of powers concerns. See *Baker*, 369 U.S. at 217.

In identifying cases that present political questions, the Supreme Court found that nonjusticiable political questions involve at least one of the following: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it;¹¹ (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; (4) the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id.* at 217.

None of the six *Baker* factors is implicated in this case. Samantar apparently concedes that only two *Baker* factors are possibly relevant, but even these factors raise no separation of powers concerns: (4) the impossibility of a court’s undertaking independent resolution without

¹¹ See, e.g., *McMahon*, 502 F.3d at 1364 (permitting discovery related to events in Afghanistan despite “less than hospitable environment”); *Al-Quraishi v. Nakhla*, No. PMJ 08-1696, 2010 U.S. Dist. LEXIS 76450 (D. Md. 2010) (claims of “72 Iraqi citizens who were formerly detained at military prisons in Iraq” presented no difficulty under the political question doctrine).

expressing lack of the respect due coordinate branches of government; and (6) the potential for embarrassment from multifarious pronouncements by various departments on one question. *See* Mem. at 4-5. The only evidence Samantar musters in support of these factors is dated public statements by the State Department on the general political conditions in Somalia and a November 28, 2010 letter from the putative Prime Minister of the unrecognized Somali TFG to the U.S. Secretary of State. Mem. at 3-5 & n.2. The State Department’s statements—read in their totality and in light of more recent statements, and particularly in the absence of any filing by the Executive Branch in this case—do not support the conclusion that this case presents a nonjusticiable political question. *See McMahon*, 502 F.3d at 1365 (“The apparent lack of interest from the United States to this point fortifies our conclusion that the case does not yet present a political question.”); Ganzglass Dec. ¶ 26. And, as stated, in this case the statements of the foreign “government” are entitled to no weight; ironically, the *only* possibility of “embarrassment” or “lack of respect” that could be shown to the Executive Branch in this case would be to follow Samantar’s suggestion to rely on the TFG’s views. *See* U.S. Amicus at *31-32 n.12 (this Court “should not attach significance to the statements of the TFG”).

Samantar suggests that this case “poses a question similar” to one presented in *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 28 (D.D.C. 2005), in which the court dismissed a corporate defendant owned by the government of Indonesia pursuant to the political question doctrine. Mem. at 5. *Exxon* bears no helpful similarity to the situation at hand.¹² First, as Defendant admits, the Executive Branch in *Exxon* explicitly advised the district court that the

¹² The two other cases on which Samantar relies for this argument have even less in common with this case. *See* Mem. at 5 (citing *Corrie v. Caterpillar Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005) (addressing U.S. government-approved sale of Caterpillar products to Israel); *In re Refined Petroleum Prods. Antitrust Litig.*, 649 F. Supp. 2d 572 (S.D. Tex. 2009) (considering legality of OPEC price-setting actions)).

case presented a political question and “would in fact risk a potentially serious adverse impact on significant interests of the United States[.]” *Id.* Given that the political question doctrine turns on separation of powers, the Executive Branch’s statement is not merely a “benefit” to the court. *See* Mem. at 5. Rather, the lack of any suggestion from the Executive that this case will disrupt foreign relations speaks volumes on the issue of political question. *See Alperin v. Vatican Bank*, 410 F.3d 532, 555-556 (9th Cir. 2005) (“Had the State Department expressed a view, that fact would certainly weigh in evaluating this fourth *Baker* formulation.”); *Linder v. PortoCarrero*, 963 F.2d 332 (11th Cir. 1992) (political question doctrine did not bar claims against military officials for torture and extrajudicial execution).

Second, the foreign policy concerns in *Exxon* were obvious—the corporate defendant was an instrumentality of the Indonesian government. *Exxon*, 393 F. Supp. 2d at 20. Samantar, on the other hand, has had no official position with any government for nearly 20 years, and the government he served no longer exists. Samantar makes no showing that this proceeding will demonstrate any lack of respect of the Executive Branch or cause it any embarrassment. Indeed, as the Executive Branch has recognized, through the TVPA, the Legislative Branch has explicitly committed to the Judicial Branch authority over cases like this alleging torture and extrajudicial killing against former foreign officials. *See* U.S. Amicus at *20.

D. The Act of State Doctrine Does Not Bar Adjudication of This Suit.

Samantar’s argument that the act of state doctrine bars this suit ignores the fundamental principles of the doctrine enunciated by the Supreme Court. *See W.S. Kirkpatrick & Co., Inc. v. Env’tl. Tectonics Corp., Int’l*, 493 U.S. 400, 404, 406 (1990) (“Act of state issues only arise when a court *must decide* – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign.”); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398,

428 (1964). Defendant bears the burden of demonstrating the applicability of the act of state doctrine. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694 (1976).

As a threshold matter, for the reasons discussed *supra* at I.A., Samantar's acts in violation of the Somali Constitution, as alleged in the Complaint, cannot be considered "official action" by a foreign sovereign. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 889-90 (2d Cir. 1980) ("[W]e doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay . . . could properly be characterized as an act of state."); see also *Kadic*, 70 F.3d at 250 ("[I]t would be a rare case in which the act of state doctrine precluded suit under [the ATS]."). Furthermore, even if torture and extrajudicial killing could be considered "official acts," the factors outlined in *Sabbatino* all counsel against application of the doctrine: (1) the degree to which consensus has been reached regarding a particular area of international law; (2) the potential significance of deciding the issue on foreign relations of the United States; and (3) whether the government responsible for the act in question is still in power. *Sabbatino*, 376 U.S. at 428.

Each of these factors has been discussed above in detail, but to summarize: (1) in passing the TVPA, Congress recognized the international consensus against torture and extrajudicial killing, S. Rep. No. 102-249 (1991), 1991 WL 258662, at *7-8; see also U.S. Amicus at *20;¹³ (2) given all the circumstances here, and in light of the fact that the Executive Branch has not weighed in, it would appear that proceeding against Samantar does not implicate significant foreign relations concerns; and (3) the government in which Samantar served is no longer in

¹³ See also Restatement (Third) of Foreign Relations Law of the United States § 443, cmt. C (1987) ("A claim arising out of an alleged violation of fundamental human rights – for instance, a claim on behalf of a victim of torture or genocide – would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established").

power, and, indeed, no recognized government presides over Somalia today. *See Sabbatino*, 376 U.S. at 428 (“The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence . . .”).

II. PLAINTIFFS’ CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS

Samantar has not met his burden of showing that the Complaint must be dismissed as untimely. A complaint is not to be dismissed on statute of limitations grounds unless the defendant can establish that “the plaintiff cannot prove any set of facts that will support his or her claim and entitle him or her to relief.” *Krane v. Capital One Servs., Inc.*, 314 F. Supp. 2d 589, 596 (E.D. Va. 2004); *see Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (“a motion to dismiss . . . generally cannot reach the merits of an affirmative defense, such as the defense that the plaintiff’s claim is time-barred”).

A. Equitable Tolling Is Available for Claims Under the TVPA and ATS.

The Fourth Circuit permits equitable tolling if “extraordinary circumstances” beyond a plaintiff’s control prevent a suit within the limitations period. *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003). The “basic inquiry” in an equitable tolling analysis is “whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances.” *Burnett v. N.Y. Cent. R.R.*, 380 U.S. 424, 427 (1965). Unless Congress clearly indicates its intent to do otherwise, equitable tolling should be read into every federal statute of limitations. *See Holmberg v. Armbrecht*, 327 U.S. 392, 394-96 (1946); *see also Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (rebuttable presumption that statute of limitations may be equitably tolled). Generally, Congress will limit equitable tolling only to achieve a “broad[] system-related goal” and not to protect a “defendant’s case-specific interest in timeliness.” *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008).

Accordingly, courts have regularly tolled the statute of limitations for TVPA claims, particularly for periods when the defendant was absent from the United States. *See, e.g., Arce v. Garcia*, 434 F.3d 1254, 1264 (11th Cir. 2006) (claims tolled until defendants resided in U.S.); *Jean v. Dorelien*, 431 F.3d 776, 779-80 (11th Cir. 2005) (“the statute of limitations must be tolled at least until [defendant] entered the United States and personal jurisdiction could be obtained over him”); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1155 (11th Cir. 2005) (same); *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996) (holding TVPA “is subject to equitable tolling, including for periods in which the defendant is absent from the jurisdiction”) (citing S. Rep. No. 249, at 11 (1991)); *Doe v. Karadzic*, No. 93 Civ. 0878 (PKL), 2000 WL 763851, at *1 n.3 (S.D.N.Y. June 13, 2000) (same).

Samantar incorrectly argues that the House version of the TVPA explicitly rejected equitable tolling. To the contrary, the House Report on the TVPA indicates an intent to allow equitable tolling:

A ten year statute of limitations insures that the Federal Courts will not have to hear stale claims. In some instances, such as where a defendant fraudulently conceals his or her identification or whereabouts from the claimant, *equitable tolling remedies may apply* to preserve a claimant’s rights.

H.R. Rep. No. 102-367, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88 (emphasis added). Indeed, no court to have considered the issue has determined that the TVPA’s limitations period is jurisdictional. *See, e.g., Arce*, 434 F.3d at 1262; *Hilao*, 103 F.3d at 773; *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp.2d 1345, 1368 (S.D. Fla. 2001). Samantar simply fails to counter this line of cases.¹⁴

¹⁴ The single case cited by Samantar to support this argument does not even involve the TVPA, but rather construes the Quiet Title Act (QTA), 28 U.S.C. § 2409a(g). *See* Mem. at 15 (citing *United States v. Beggerly*, 524 U.S. 38 (1998)). Even if the Court’s analysis of the QTA were relevant here, it *did not* find that the QTA prohibited equitable tolling, but rather, as the QTA

B. The Statute of Limitations Was Equitably Tolled Until Samantar Entered the United States in 1997.

Samantar argues that Plaintiffs were required to follow Samantar to Italy after he fled Somalia to seek relief for these human rights violations. This argument is based on a single sentence in the Senate Report on the TVPA, stating that the statute of limitations should be tolled if a defendant is absent from a jurisdiction that provides remedies that are adequate and similar to the TVPA. *See* S. Rep. No. 102-249, 1991 WL 258662, at *11 (1991). This sentence is taken from an “illustrative . . . *not exhaustive*” list of the reasons that the statute of limitations might be tolled. *Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir. 2009) (quoting S. Rep. No. 102-249, at 10-11) (emphasis added by Sixth Circuit). Samantar does not cite to any case that has dismissed an ATS or TVPA claim based on this scrap of legislative history. He also cites no case supporting the proposition that the statute of limitations could expire before a defendant even became subject to suit, and indeed no court has ever held that a plaintiff is required to follow the defendant to a third country to effectuate his rights under the TVPA and ATS. Pursuant to the doctrine of equitable tolling set forth in ATS and TVPA jurisprudence and Congress’s intention to have equitable tolling “calculat[ed] . . . with a view toward giving justice to plaintiff’s rights,” S. Rep. No. 102-249, at *10, the statute of limitations is properly tolled for the period of time that

already allowed for tolling, that there was no basis for *additional* equitable tolling. *Id.* at 49 (Stevens, J., concurring) (“the text of the [statute] expressly allows equitable tolling”). Further, the QTA involves land ownership, and the Court emphasized that “[i]t is of special importance that landowners know with certainty what their rights are.” *Id.* These issues are not present here.

Samantar was outside of the United States.¹⁵ This suit was filed in November 2004, within ten years of Samantar's arrival in the United States, and is therefore timely.¹⁶

C. Samantar's Time In Italy Is Properly Excluded From The Statute Of Limitations Calculation Because Plaintiffs Did Not Have An Adequate Remedy In Italy During That Time Period.

Samantar asserts that he "lived openly in Italy from 1991 to 1997" and that Plaintiffs could have filed this suit in Italy during those years. *See* Mem. at 17. Even assuming that equitable tolling would require Plaintiffs to follow Samantar to Italy, Samantar has failed to show that Italy provided an adequate and available remedy to Plaintiffs between 1991 and 1997.

Samantar presents an affidavit from Cosimo Rucellai,¹⁷ asserting that foreign nationals can bring civil actions in Italian courts against persons domiciled in Italy and asserts that certain statutes of limitations would apply "if such a civil action were based on a fact considered as a crime by Italian law." Rucellai Aff. ¶¶ 4-6. Defendant's reliance on this affidavit is flawed.

¹⁵ Samantar, by his own admission, did not enter the United States until June 1997. *See* Samantar Aff. ¶ 10; Mem. at 1, 14.

¹⁶ Defendant also argues, without authority, that even if the limitations period is equitably tolled, it should not be tolled for seven years after he entered the United States. Courts applying equitable tolling to the TVPA, however, have consistently tolled for the full ten-year period after Defendant entered the U.S. *See, e.g., Arce*, 434 F.3d at 1256-57. Because Plaintiffs were not required to bring suit until Defendant entered the U.S. in 1997, the text and intent of the TVPA indicate that Plaintiffs should have 10 years from his arrival in the U.S. to file suit. Further, the Complaint alleges that fear of reprisal and inability to investigate these claims lasted until *at least* 1997 and indicates that problems in the region existed after 1997. Defendant presents no viable argument that Plaintiffs should not have had up to 10 years after Samantar entered the U.S. to file this suit. *See Krane*, 314 F. Supp. 2d at 596. Should the Court find that the facts demonstrating that Plaintiffs could not file suit are not sufficiently detailed in the Complaint, Plaintiffs would respectfully request an opportunity to amend the Complaint to address that concern.

¹⁷ Defendant previously provided this court with the affidavit of Alessandro Campo that provides the unsupported assertion that Plaintiffs could have brought an action in Italian court because Italy ratified the U.N. Convention Against Torture ("CAT"). Italy's mere ratification of CAT does not provide victims of human rights abuses with a private right of action. *See Gaeta* Dec. ¶ 9.

First, Professor Paola Gaeta has provided this Court an affidavit explaining in detail that Italian law did not provide an adequate remedy while Samantar resided in Italy. See Gaeta Dec. ¶¶ 7-14 (Ex. 2). Any doubts the Court has regarding factual disputes must be resolved in favor of the allegations recited in the Complaint. *Adams v. Bain*, 697 F.2d 1213, 1216 (4th Cir. 1982).¹⁸

Second, although the Rucellai Affidavit asserts that Italy provides a cause of action for torture and for “killing outside of the judicial system” (Rucellai Aff. ¶ 6), it does not cite *any* cases or statutes to illustrate the scope of these putative causes of action. Thus, Samantar does not come close to meeting his burden of showing that Plaintiffs could have sought a remedy in Italy for the particular violations in this case. In fact, Italy did not have a statutory definition of torture during the relevant period. See Conclusions and Recommendations of the Committee Against Torture, Italy, U.N. Doc. A.154144, ¶¶ 163-169 (1999).

Third, even assuming that Italy had applicable causes of action for torture and extrajudicial killing, Defendant does not even argue that Plaintiffs would have a cause of action in Italy for the remaining claims in this suit: cruel, inhuman, or degrading treatment; arbitrary detention; crimes against humanity; and war crimes. See Compl. ¶¶ 30, 32, 34, and 36.

Finally, Defendant does not address what remedies Italy would have provided, aside from asserting that “damages for injuries” are available. See Rucellai Aff. ¶ 6. Defendant has not “established that the level of damages available . . . is adequate – whether, for example, punitive

¹⁸ Defendant’s claim that Plaintiffs should have brought this suit in Italy relies entirely on alleged facts outside of Plaintiffs’ complaint: Samantar’s open residence, Samantar’s publicly-listed phone number in Italy, and various other factual assertions from affidavits. “If facts outside the complaint are to be considered, either party or the district court, *sua sponte*, shall cause an order to be entered converting the motion to dismiss into a motion for summary judgment.” *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1472 (4th Cir. 1991). Should the Court be inclined to convert the pending motion to dismiss into a summary judgment motion, Plaintiffs respectfully request that the Court give notice under Federal Rule of Civil Procedure 12(b) and allow Plaintiffs to conduct discovery and submit additional information.

damages are available.” *Lizarbe*, 642 F. Supp. 2d at 485. “This Court has no basis for determining what items of damages are compensable under [Italian] law or whether a civil award against [Samantar in Italy] could begin to approach the level of the [TVPA] were he to be found liable.” *Id.* For all of these reasons, Defendant has not shown that an adequate and available remedy existed in Italy that would prevent equitable tolling of the TVPA statute of limitations during the period he lived there.

D. Extraordinary Circumstances in Somalia Justify Equitable Tolling of the TVPA’s Statute of Limitations.

Extraordinary and chaotic conditions in Somalia also warrant tolling of the statute of limitations in this case.¹⁹ In human rights cases, the statute of limitations is tolled during times of extraordinary violence and danger in the home country. *See, e.g., Arce*, 434 F.3d at 1262 (“Justice may also require tolling where both the plaintiff and the defendant reside in the United States but where the situation in the home state nonetheless remains such that the fair administration of justice would be impossible, even in United States courts.”). The statute of limitations is also tolled when circumstances in the home country prevent plaintiffs from gaining access to evidence or interfere with their ability to file suit. *See Cabello*, 402 F.3d at 1155 (limitations period tolled while “the Chilean political climate prevented the Cabello family from pursuing any efforts to learn of the incidents surrounding Cabello’s murder”).

Fear of reprisals against plaintiffs and potential witnesses also justifies tolling the limitations period in ATS and TVPA cases. *Hilao*, 103 F. 3d at 773 (citing “intimidation and fear of reprisals” as factors supporting equitable tolling); *see also Doe v. Saravia*, 348 F. Supp. 2d 11 12, 1147-48 (E.D. Cal. 2004) (tolling the statute from 1980 assassination that served as basis for

¹⁹ Indeed, Defendant has abandoned his prior claim that plaintiffs should have sought a judicial remedy in Somalia or Somaliland.

complaint through filing of suit in 2003, based in part upon fear of reprisal which lasted well beyond the time El Salvadoran security forces were disbanded); *Chavez v. Carranza*, No. 03-2932 M1/P, 2006 WL 2434934 *3 (W.D. Tenn. Aug. 15, 2006) (“[T]he widespread human rights abuses carried out by the Salvadoran military against civilians during the country’s civil war and Plaintiffs’ fear of reprisal against themselves or their family members in El Salvador constitute ‘extraordinary circumstances’ sufficient to toll the statute of limitations.”), *aff’d*, 559 F.3d 486 (6th Cir. 2009).

The allegations in the Complaint – which must be taken as true at this stage of the litigation – describe the well-documented chaos, violence, and clan-based warfare that have existed in much or all of Somalia since the overthrow of the military government in 1991, as well as the lack of a functioning judicial system.²⁰ Compl. ¶¶ 86-89; *see also* Ganzglass Dec. ¶¶ 20, 23, 29-31. During that time, each of the Plaintiffs either resided in Somalia or had immediate family members there. Compl. ¶¶ 86-89. Pursuit of human rights claims, even in the United States, would have exposed the Plaintiffs, their families, or their witnesses to acts of reprisal. *Id.*

In sum, Plaintiffs have adequately alleged that, prior to 1997, victims of human rights abuses perpetrated by the Somali military could not have been expected to pursue a cause of action in *any* country because of the reasonable fear of reprisals against themselves or their

²⁰ Samantar asks this court to accept as true statements that the Plaintiffs should have no fear of reprisals because the Barre regime has disintegrated. Campo Aff. ¶ 11. The Ganzglass Declaration indicates otherwise, and Plaintiffs are entitled to discovery on these issues before the Complaint is dismissed. Further, the previously filed Abdirizak Affidavit states that there has been no stability in Mogadishu and only “brief periods” of stability in areas outside Somaliland. Abdirizak Aff. ¶ 9. Yet, Campo claims that victims of the Barre regime would have had no fear of reprisal and no difficulty in investigating a case anywhere in Somalia. Campo Aff. ¶ 6. Moreover, it appears that during the critical period of 1991 to 1997, none of Samantar’s affiants were even in Somalia.

families still residing in Somalia, and because of their inability to investigate and prepare their case. The statute of limitations must be tolled until at least 1997, which renders this suit timely.

III. THE SECOND AMENDED COMPLAINT ADEQUATELY STATES CLAIMS UPON WHICH RELIEF CAN BE GRANTED

Plaintiffs have properly pleaded claims for relief under the ATS and TVPA and have properly pleaded claims for secondary liability.

A. Each Count in the Complaint States a Claim Upon Which Relief Can Be Granted.

Samantar's perfunctory assertion that none of the causes of action asserted by Plaintiffs states a claim relies on misstatements of law and impermissible challenges to the facts alleged in the Complaint. Each of Plaintiffs' claims is cognizable under the ATS and/or the TVPA.

First, the prohibitions on both extrajudicial killing and torture were well-recognized violations of international law at the time of the events alleged in this case. *Filartiga*, the seminal ATS case, was decided in 1980 and endorsed by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004), and is only the first in a long line of cases holding that extrajudicial killing and/or torture have for decades been contrary to accepted international norms. *See, e.g., Filartiga*, 630 F.2d at 890 (torture violates accepted international norms); *Hilao*, 25 F.3d at 1475 (torture and murder committed in 1977 violated international law, also cited with approval in *Sosa*, 542 U.S. at 732); *see also Enahoro v. Abubakar*, 408 F.3d 877, 884 (7th Cir. 2005) (the "two primary categories that the *Sosa* Court specifically recognized as violations of the law of nations [were] torture and killing").

Likewise, courts both pre- and post-*Sosa* have consistently held that long-term arbitrary detention; crimes against humanity; cruel, inhuman, or degrading treatment; and war crimes are all cognizable causes of action under the ATS.

- Long-term arbitrary detention – not simply the less-than-a-day detention addressed in *Sosa* – has also been found to be a violation of international norms. See, e.g., *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) (in the case of an individual confined for more than one year, the Court stated, “no principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment.”); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (detentions of one to six months); *Paul v. Avril*, 901 F. Supp. 330, 334 (S.D. Fla. 1994) (one plaintiff was held for under ten hours, tortured, and permanently injured, while others held for months); *Xuncax v. Gramajo*, 886 F. Supp. 162, 170 (D. Mass. 1995) (detentions of 14 hours to two days while being tortured); *Liu Qi*, 349 F. Supp. 2d at 1326 (detention for three or more days without access to counsel); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987) (one plaintiff held for more than four years, another arrested and never charged or released).
- Crimes against humanity are one of the torts that is “universally condemned” and for which there is “agreement that universal jurisdiction exists to prosecute.” *Sosa*, 542 U.S. at 762 (Breyer, J., concurring); see also *Saravia*, 348 F. Supp. 2d at 1147; *Cabello*, 402 F.3d at 1161 (upholding a jury verdict for crimes against humanity); *Mehinovic*, 198 F. Supp. 2d at 1322 (finding that acts of torture, imprisonment, and CIDT committed by the defendant as part of a campaign of ethnic cleansing constituted crimes against humanity).
- “Numerous federal courts have recognized that customary international law prohibits cruel, inhuman or degrading treatment.” *Liu Qi*, 349 F. Supp. at 1321; *Taveras v. Taveras*, 397 F. Supp. 2d 908, 915 (S.D. Ohio 2005) (concluding that the law of nations prohibits CIDT); *Tachiona v. Mugabe*, 216 F. Supp. 2d 262, 281 (S.D.N.Y. 2002), *rev’d on other grounds*, 386 F.3d 205 (2d Cir. 2004); *Jama v. I.N.S.*, 22 F. Supp. 2d 353, 363 (D.N.J. 1998).
- War crimes, including carrying out “a deliberate plan . . . to massacre and exterminate . . . unarmed noncombatant civilians . . . without cause or trial . . . are recognized in international law as violations of the law of war,” *In re Yamashita*, 327 U.S. 1, 14 (1946), and accordingly are recognized as actionable under the ATS. See, e.g., *Kadic*, 70 F.3d at 242-43; *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424, 441 (D.N.J. 1999), *dismissed on other grounds*, 67 F. Supp. 2d at 491 (forced labor during World War II was a war crime).

Samantar also argues that Plaintiffs have not adequately pled facts to support their claims for extrajudicial killing, but in doing so asks this Court to make unwarranted factual inferences in his favor. That strategy is improper: “[a] Rule 12(b)(6) dismissal motion tests the sufficiency of a complaint, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.” *Moore v. Life Ins. Co. of N. Am.*, 278 F. App’x. 238, 239 (4th Cir.

2008). Moreover, the “factual allegations in the complaint must be accepted as true and those facts must be construed in the light most favorable to the plaintiff.” *Id.*; see also *Skillstorm, Inc. v. Elec. Data Sys., LLC*, 666 F. Supp. 2d 610, 615 (E.D. Va. 2009) (citing *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993)).

Rather than address these governing principles, Samantar opts to ignore and circumvent them. For instance, Samantar’s contention that the “Complaint provides no facts other than [Mustafa Mohamad] Deria’s alleged disappearance to suggest that [Mustafa] Deria was killed,” Mem. at 22, relies on an inference in Defendant’s favor that the members of the armed forces who forcibly took Mustafa from his home gave him due process of law, a fantastic notion given the circumstances. The Complaint specifically states that that members of Samantar’s armed forces advised Mustafa Deria’s family that “they were going to kill all the members of the Isaaq clan that day,” then grabbed his father and “dragged him out of the house” never to be seen again. Compl. ¶ 41. The soldiers returned later that day and reported to his family that Mustafa’s father Ali had indeed been killed,²¹ and then dragged Mustafa out of the house, just like his father, never to be seen again. Compl. ¶ 42. The inference that Defendant wants this Court to make – that these intentional, deliberated killings by his men were “authorized by a previous judgment” – is impermissible on a Rule 12(b)(6) motion.

Samantar also asks this Court to make an inference that the killings of brothers James Doe I and James Doe II were “carried out under proper judicial authority.” Mem. at 23. The Complaint alleges in detail that these summary executions were committed after a military trial of 13 men collectively, lasting less than a day, conducted within a day of the brothers’ detention

²¹ Samantar’s suggestion that these facts of Ali’s death are not sufficient to support an inference that his killing was deliberate, Mem. at 23, is even more unsupportable than his claims about Mustafa’s killing.

and torture, without any meaningful access to counsel, or an opportunity to present evidence. Compl. ¶¶ 43-48. Given these specific allegations, Samantar’s inference that “the guarantees established under our own Constitution . . . appear to have been accorded to the James Doe brothers,” Mem. at 23, is entirely inappropriate on a motion to dismiss.

B. Plaintiffs Have Stated a Claim for Relief Under the TVPA.

Defendant argues that Plaintiffs’ TVPA claims fail because torture and extrajudicial killing were not violations of “universal norms of international law” before the TVPA was enacted and therefore he cannot be held liable for any such pre-enactment conduct. Mem. at 28-29; *see* Ganzglass Dec. ¶¶ 14-15 (these acts were not condoned by the Somali Constitution). However, Congress, in enacting the TVPA, was crystal clear about the status of the norms addressed by the standard: “Official torture and summary execution violate standards accepted by virtually every nation. The universal consensus condemning these practices has assumed the status of customary international law. As the Second Circuit Court of Appeals held in 1980, “official torture is now prohibited by the law of nations.’ [*Filartiga*, 630 F.2d at 884.]” S. Rep. 102-249 (1991), 1991 WL 258662, at *3; *see also id.* (describing the TVPA as establishing an additional cause of action for claims that could also be brought under the ATS).

In determining whether the TVPA may be applied to pre-enactment conduct, courts have applied the analysis laid out by the Supreme Court in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) (holding that a statute does not have a “genuinely ‘retroactive’ effect” unless it attaches “new legal consequences” to events completed before its enactment, and that an expansion of the jurisdiction of the federal courts does not trigger the presumption against retroactivity”). In applying the *Landgraf* analysis to a claim seeking relief under the TVPA for acts that occurred in 1973, the Eleventh Circuit correctly noted that a court must ask whether the statute “would impair the rights of a party possessed when he acted, increase a party’s liability for past conduct,

or impose new duties with respect to transactions already completed.” *Cabello*, 402 F.3d at 1154 (citing *Landgraf*, 511 U.S. at 280).

The *Cabello* court found that acts of torture and extrajudicial killings were recognized as violations of U.S. and international law long before 1973, when the conduct alleged in that case took place. 402 F.3d at 1154. Therefore, the defendant had a duty to refrain from such conduct, and application of the TVPA to the alleged pre-enactment conduct neither imposed new liabilities on the defendant nor impaired his rights, and was held to be appropriate. Other courts applying the *Landgraf* analysis to the TVPA have reached the same conclusion. See *Cabiri*, 921 F. Supp. at 1196 (S.D.N.Y. 1996) (holding that defendant was on notice that torture was an unlawful act prior to the enactment of the TVPA, and therefore could be held liable for conduct occurring from 1986 to 1991); *Xuncax*, 886 F. Supp. at 177 (stating “[t]he universal condemnation of the use of torture was fully established prior to the events on which the instant claims turn”); see also *Kadic*, 70 F.3d at 243 (observing that the TVPA confirms the court’s prior holding that torture is “prohibited by universally accepted norms of international law” and extends that holding to cover extrajudicial execution).²²

Defendant suggests that *Cabello*, *Xuncax*, and *Cabiri* are inconsistent with *Sosa*. See Mem. at 28 n.10. But *Sosa* does not address the retroactivity of the TVPA at all (much less overturn *Cabello*, *Xuncax*, and *Cabiri*); instead, *Sosa* is about whether an illegal detention lasting less than one day violated any norm of well-defined international law. 542 U.S. at 738. Having not addressed the issue presented here, *Sosa* cannot control the result. Defendant nevertheless

²²Defendant misrepresents the one decision he cites as having “found” that the TVPA cannot be applied retroactively. The language cited by Defendant—“[t]he TVPA . . . has no retroactive effect”—comes from a footnote citing an argument in the defendant’s brief that was never considered by the court. *Gonzales-Vera v. Kissinger*, No. 02-02240, 2004 WL 5584578, at *8 n.16 (D.D.C. Sept. 17, 2004).

points to a “comment” in *Sosa* that the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights “do not themselves establish rules of international law.” *See* Mem. at 28 n.10. From there, he reasons that, because *Cabello*, *Xuncax*, and *Cabiri* considered the Universal Declaration and the International Covenant, those cases must be wrong. None of those decisions, however, held that the Universal Declaration and/or International Covenant themselves establish rules of international law; they merely considered those sources along with others in reaching their conclusions, an approach that is altogether consistent with *Sosa*.

Indeed, nowhere in *Sosa* does the Supreme Court question the lower courts’ holdings that torture and extrajudicial killings violate established norms of international law. To the contrary, the Court makes clear, as Defendant acknowledges, that the TVPA represents a “clear” congressional mandate allowing federal claims for torture and extrajudicial killings. 542 U.S. at 728. *Sosa* also approves the Second Circuit’s statement in 1980 that, ““for purposes of civil liability, the torturer has become—like the pirate and the slave trader before him—*hostis humani generis*, an enemy of all mankind.”” 542 U.S. at 732 (citing *Filartiga*, 630 F.2d at 890) (internal brackets omitted). In light of the overwhelming precedent against him, Defendant cannot credibly argue that his actions, as alleged in the Complaint, “fell within some prevailing legal norm.” *Xuncax*, 886 F. Supp. at 177. His motion to dismiss Plaintiffs’ TVPA claims must be denied.

C. Plaintiffs Have Adequately Pleaded Secondary Liability.

Defendant alleges that secondary liability was not recognized in customary international law in 1984 and 1989. Defendant offers no legal support, nor can he, for the notion that the claim must be dismissed for this reason. Even if it were, this contention is not true. The theories of liability here – command responsibility, aiding and abetting, conspiracy and joint criminal

enterprise – have long been recognized as proper theories of liability under customary international law. The Supreme Court affirmed command responsibility as a liability theory in *Yamashita*, 327 U.S. at 16. Since *Yamashita*, courts have consistently recognized command responsibility in the context of ATS and TVPA cases. *See, e.g., Forti*, 672 F. Supp. at 1537-38; *Xuncax*, 886 F. Supp. at 172; *Hilao*, 103 F.3d at 767. Similarly, as Defendant concedes, courts have long recognized aiding and abetting as a viable theory of liability in ATS and TVPA cases.²³ *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 257 (S.D.N.Y. 2009) (discussing a “multitude of international legal materials” dating back to at least the Nuremberg Tribunals).

Numerous courts have also held defendants liable under the ATS and the TVPA for conspiracy based on events that date back prior to the events at issue here. *See Cabello*, 402 F.3d at 1157 (holding ATCA reaches conspiracies and accomplice liability and TVPA reaches those “ordering, abetting or assisting in the violation”); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (conspiracy and aiding and abetting). Finally, the Supreme Court has also noted that joint criminal enterprise dates back to the Nuremberg era. *Hamdan v. Rumsfeld*, 548 U.S. 557, 611 n.40 (2006); *see also Lizarbe*, 642 F. Supp. at 490-91 (“the concept of civil recovery based on a theory of joint criminal enterprise has at least been acknowledged”).

²³ Despite Defendant’s assertions, Plaintiffs have properly pleaded knowledge. *See* Compl. ¶ 18 (NSS and Red Berets operated with tacit approval of Samantar); ¶ 23 (approval of indiscriminate attacks); ¶ 66 (“exercised command and effective control”); ¶ 67 (same); ¶ 71 (same); ¶ 72 (same); ¶ 77 (conspiracy and aiding and abetting); ¶ 83 (intent). Further, Plaintiffs are not required to know the precise details of the enterprise at this stage of the litigation. *Arar v. Ashcroft*, 414 F.Supp. 2d 250, 262 (E.D.N.Y. 2006).

CONCLUSION

For the reasons set forth above, the Court should deny Defendant's motion to dismiss Plaintiffs' Second Amended Complaint.

Dated: December 14, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December, 2010, I caused a copy of the foregoing Plaintiffs' Opposition to Defendant's Motion to Dismiss Second Amended Complaint to be sent via U.S Mail and via e-mail to the following persons:

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

ALEXANDRIA DIVISION

BASHE ABDI YOUSUF, *et al.*,)
)
)
 Plaintiffs,)
)
 v.) Civil Action No. 1:04 CV 1360 (LMB/BRP)
)
 MOHAMED ALI SAMANTAR,)
)
 Defendant.)

DECLARATION OF MARTIN R. GANZGLASS

I, Martin R. Ganzglass, declare as follows:

1. I am over eighteen years of age and am otherwise qualified to testify to the facts and opinions set forth below. All of the facts and opinions rendered herein are based upon my personal knowledge.

Background

2. I graduated from Harvard Law School in 1964 with an LL.B. degree. I am admitted to the Bars of the State of New York and the District of Columbia. I was a principal in the firm of O'Donnell, Schwartz & Anderson, P.C. from 1988 until 2008, when I retired. I am now Of Counsel to that firm. From 1972 until 1988 I was a principal in the firm of Delson & Gordon.

3. As described below, I have had substantial involvement with the former country of Somalia. As a result of this involvement I am very familiar with past and current conditions, and the past and current state of the legal system, in the regions of the former country of Somalia.

4. From 1966 to 1968, I was a Peace Corps Volunteer in Somalia, serving as Legal Advisor to the Somali National Police Force. I am the author of "The Penal Code of the Somali Democratic Republic: Cases, Commentary and Examples," published by Rutgers University Press in 1971. That book became the primary work on the Somali Penal Code. Rutgers University Press donated 500 copies to Somalia, and it was used at the Somali National Police Academy and was widely distributed to Somali courts.

5. I also was a contributor to *Constitutions of the Countries of the World*, Oceana Publications, Blaustein & Flanz, Editors, for the portion on Somalia in 1971, 1979 and 1981.

6. From 1972 through 1988, while I was with the law firm of Delson & Gordon, I represented the Embassy of the Somali Democratic Republic in the United States and the Somali Ministry of Mineral and Water Resources. During this time I also did occasional legal work for Somali Airlines. While I was with the firm of Delson & Gordon I made at least four visits to Somalia between 1979 and 1987.

7. In November 1992, then President George H. W. Bush authorized "Operation Restore Hope" which sent U.S. troops to Somalia to safeguard the delivery of humanitarian assistance to Somali civilians who were caught in the chaos, murder, rape and mayhem that followed the collapse of the Siad Barre regime. In April 1993, while Operation Restore Hope was ongoing, I served in Somalia as Special Assistant to U.S. Ambassador Robert Gosende and Admiral Jonathan Howe, the Special Representative of the U.N. Secretary General. Later I authored an article entitled "The Restoration of the Somali Justice System," which appeared in "Learning from Somalia: The Lessons of Armed Humanitarian Intervention," Westview Press, Clarke & Herbst, Editors, 1997.

8. I have continued to remain in contact with Somali friends in the United States and Canada and to read about developments in the former country of Somalia. I am a subscriber to and regularly receive The Journal of the Anglo-Somali Society, which reports on events in Somaliland and the former country of Somalia. I am also a member of that Society and have written a brief article for The Journal about the U.S. Supreme Court's decision in this case.

The Barre Government and the Somali Constitution

9. On October 21, 1969, Mohamed Siad Barre, who was then the General of the Somali Army, staged a coup and overthrew the duly elected Somali Government. The Constitution was suspended and the country was renamed the Somali Democratic Republic. The governing body was the Supreme Revolutionary Council, of which Mohamed Siad Barre was the President. A new Constitution was adopted in 1979. From 1969 until 1991, Mohamed Siad Barre was the President of the Somali Democratic Republic, either as President of the Supreme Revolutionary Council, or as President of the Somali Democratic Republic under the 1979 Constitution. As President, Mohamed Siad Barre served as the head of the Somali state.

10. A copy of the 1979 Constitution of the Somali Democratic Republic is attached hereto as Exhibit A. To the best of my knowledge this Constitution remained in effect in Somalia until 1991, when the Barre regime collapsed.

11. Article 79 of the Constitution clearly provides the President served as Head of State of the Somali Democratic Republic. To the best of my knowledge, from the time Mohamed Siad Barre took power until the time his government was overthrown in 1991, I do not believe there ever was an occasion when Mohamed Siad Barre stepped down from his office as President or the powers of the presidency were transferred to any other individual.

12. During the time the government of Mohamed Siad Barre was in power, the defendant Mohamed Ali Samantar held high ranking positions in the government, including Prime Minister, but was never the head of state or head of government. The position of Prime Minister was constitutionally subordinate to that of President. The Somali Constitution did not even require there be a prime minister. Article 86.4 of the Constitution stated that the President “may appoint a Prime Minister” if he deemed it “appropriate”. While the Prime Minister served on the Council of Ministers, pursuant to Article 86.3 the Somali President was the Chairman of the Council.

13. The Somali Constitution made clear that Mohamed Ali Samantar was likewise subordinate to President Mohamed Siad Barre during the former's tenure as Somali Defense Minister and First Vice President. The Somali Constitution granted the President the power to appoint and dismiss Ministers and senior state officials. Specifically, Article 82.7 of the Somali Constitution granted the President the sole power to appoint and dismiss Ministers, without having heard the Council of Ministers and Article 82.8, the authority to appoint and dismiss senior state officials, having heard the opinion of the Council of Ministers. Article 84.1 stated that the President “may” appoint one or more vice presidents, “having heard the opinion of the Central Committee of the party and the People’s Assembly.”

14. Somali law did not authorize torture or other human rights abuses. Article 27.1 of the Somali Constitution prohibited torture (“A detained person shall not be subject to physical or mental torture.”). Article 26 prohibited arbitrary detention. Specifically, Article 26.2 provided, “No person shall be liable to any form of detention or other restrictions of personal liberty, except when apprehended *in flagrante delicto* or pursuant to an act of the competent judicial authority in the cases and in the manner prescribed by the law.” Article 26.3 provided “Any

person who shall be detained on grounds of security shall without delay be brought before the judicial authority which has competence over the offence for which he is detained within the time limit prescribed by law.” In light of these provisions, it is my opinion the Somali Constitution specifically prohibited torture and arbitrary detention and by implication, since it required judicial intervention with respect to persons accused of offenses, prohibited extrajudicial killings as well.

15. The Somali Constitution also set forth the principles of Somali justice. Article 96.1 required the courts and the office of the attorney general to “protect the socialist system of the State and its social structure.” Article 96.3 described one of the Judiciary's objectives as ensuring observance of the law, and guaranteeing the protection of the “freedom, rights, and life of the citizen, interests and dignity of the human being.” According to Article 98, the Judges and the Attorneys-General were to perform their duties independently and be “guided by the rule of law.” According to Article 104.2, the office of the State Attorney General was to ensure that the “decisions, orders and directions of state institutions” were “in accordance with the Constitution and laws of the country.”

16. While many of the constitutional provisions set forth above appear to provide Somali citizens with due process and protection of their civil liberties, the fact is that under the dictatorship of Mohamed Siad Barre, there was no due process or such protection. Following the coup in the fall of 1969, many people were simply arrested and imprisoned without charges and held without trial for years. I personally know two senior Somali National Police Officers who were held without charges or trial in Labataan Jiro, an East German built prison, for several years, many of them in solitary confinement in underground cells. They were released only by the intervention of the U.S. Government, prior to an official visit to the U.S. by President Mohamed

Siad Barre as Head of State, in 1982. They were never charged with any crime, brought before any court, civilian or military, or tried for any offense. Following their release, they were both held under house arrest and subsequently, although permitted to leave their homes, were not allowed outside of Mogadishu. A former Prime Minister was similarly imprisoned without charges or trial and released in 1982.

17. The 1979 Constitution empowered President Mohamed Siad Barre to declare "emergency rule . . . and take all appropriate measures when faced with grave matters endangering the sovereignty, internal or external security of the country, or in circumstances of absolute necessity." (Article 83.1). On October 21, 1980, President Mohamed Siad Barre declared a State of Emergency. On October 23rd, President Mohamed Siad Barre reinstated the powers and functions of the Supreme Revolutionary Council. To my knowledge the State of Emergency existed from 1980 until the overthrow of the regime in 1991. Under the State of Emergency any person accused of any crime involving national security was brought before a military court or a court operated by the National Security Service. To my knowledge, no alleged act of illegality, violation of the Somali Constitution or violation of human rights was ever brought before any court, civilian or military at any time before or after the declaration of the State of Emergency.

18. In June 1990, in an effort to end the continuing armed conflict between Somalis seeking to overthrow the dictatorship and the use of military force against large segments of the civilian population, more than one hundred prominent Somali politicians issued a Manifesto to the regime calling for the return of a democratic government. Among the signers of the Manifesto were the first President of Somalia, the former President of the Parliament, several former Somali Ambassadors and senior Police Officials. The response of President Barre was to

have the leaders of the Manifesto movement arrested and charged with subversion, which carried the death penalty. The trial never took place and the Manifesto leaders were released, due to popular support in Mogadishu for the accused, and pressure from the U.S. Department of State.

19. Based upon my knowledge of people subject to arbitrary arrest and lengthy imprisonment without charges or trial, the arbitrary imposition of house arrest and restriction on freedom of travel, the arrest of prominent individuals for exercising their right of freedom of speech calling for the restoration of democracy, and the imposition of a state of emergency for more than a decade, resulting in the suspension of the normal judicial process, it is my opinion there was no due process or civil rights in Somalia from the beginning of the dictatorship of Mohamed Siad Barre until his last day in power when he fled Mogadishu in 1991.

The Post-Barre Somalia

20. In 1991 the dictatorship of Mohamed Siad Barre was overthrown by armed force. Following the downfall of the regime, Somalia effectively ceased to exist as a nation. It disintegrated into regions or districts, controlled by warlords using clan based militias to practice extortion, murder, rape, and robbery. Between 1991 and the arrival of U.S. troops as part of Operation Restore Hope, an orgy of ethnic cleansing on a clan basis ensued. I personally know of instances of members of the Mijertain, a subclan of the Darood, who barely escaped from Mogadishu with their lives and either fled the country or to Puntland where the Mijertain are in the majority.

21. In 1991, the northern part of the country, formerly British Somaliland, declared its independence from Somalia. Since then, the Somaliland Republic has been a self-declared autonomous country although it has not been recognized by the United States, the African Union or the United Nations. The majority tribe in the Somaliland Republic is the Issaq.

22. In 1993 when I was in Mogadishu, the city was divided between two warring subclans of the Hawiye, one faction led by Mohamed Farah Aideed, and the other by Ali Mahdi, both men claiming to be President. The purpose of my April 1993 assignment as Special Assistant to Ambassador Gosende and Admiral Howe was to assess the state of the Somali judiciary and police and make recommendations for the restoration and rebuilding of the Somali justice system after the Barre regime was overthrown. As part of my mission in Somalia in 1993, I visited police stations and courts in Mogadishu (on both sides of the “Green Line” that separated areas controlled by two warring factions), the towns of Baidoa and Bardera in the south, the town of Borama in the Somaliland Republic, and the town of Bosasso in the northeast, in what is now known as Puntland.

23. My recommendations from my assignment and 1993 visit were contained in a report to the United States Agency for International Development and in an article I wrote for a symposium conducted by the Woodrow Wilson School at Princeton University. This article was later published by Westview Press. As explained in that report, it was clear at that time there was no functioning court system in Somalia, with the exception of a very few local courts in small areas of homogeneous populations where local judges could administer a rudimentary form of justice acceptable to the local community. Generally speaking, however, Somalia was in a state of chaos, with an inadequate police force and judicial system.

24. In 2004, a new Somali Transitional Federal Government (“TFG”) was elected by delegates to one of many lengthy, internationally sponsored conferences that were convened outside of Somalia due to security reasons. At the November 2004 United Nations Security Council meeting held in Nairobi, Kenya, TFG’s then-President, Abdullahi Yusuf, himself a

warlord from Puntland, requested that the United Nations provide a protective force for the TFG so it could sit in Mogadishu. No such forces were provided at that time.

25. Today the TFG controls only a small part of Mogadishu. The rest of the capital is under the authority of the militia of Al Shabaab, an armed group seeking to control Somalia. The TFG survives solely under the protection of troops from Uganda and Burundi. While the TFG has a parliament, the lack of security in Mogadishu makes it impossible for that body to convene there. They generally meet in Nairobi, Kenya. The full cabinet is not in session in Mogadishu, again because of security concerns. There are constant daily battles between the forces supporting the TFG and Al-Shabaab. The TFG exercises no control over the Somaliland Republic, which has its own elected government and claims to have seceded from Somalia, nor over Puntland which is run by an elected regional government based in Bosasso. It has not yet taken the formal step of declaring independence. In no realistic sense can the TFG be deemed to be a central government or even a government presiding over a federal system. The Somaliland Republic does not acknowledge the TFG as having any authority over it. Puntland continues to function independently of the TFG.

26. In my opinion, the plaintiffs in this case cannot obtain a meaningful legal remedy from the TFG for three reasons. First, the lack of security in Mogadishu has made it impossible for the TFG to function, let alone establish a judicial system that could provide such a meaningful legal remedy to the plaintiffs. Second, even if the TFG is able to establish a functioning judicial system, such system could not provide plaintiffs with a meaningful legal remedy as evidenced by the statement made by the Prime Minister of the TFG. I have read Exhibit 3 to the Motion to Dismiss, which is a letter dated November 28, 2010 to Secretary of State Hillary Clinton (“TFG Letter”), from the TFG’s Prime Minister, Mohamed Abdullahi

Mohamed. The TFG letter requests the United States intervene on Mr. Samantar's behalf by filing a suggestion of immunity. Presumably, the TFG would reiterate this claim in Somali courts within the TFG's jurisdiction. Third, the U.S. Government does not now and has never recognized the TFG as the government of Somalia. On September 24, 2010, in remarks to the press, at a special briefing, Assistant Secretary for African Affairs, Johnnie Carson described the United States' policy in Somalia as a "two-track policy." This was a marked change from the prior policy of dealing exclusively and solely with the TFG. Assistant Secretary Carson explained in one track, the United States would work to make the TFG "more effective." In the other track, the United States will "work to engage more actively with the governments of Puntland and Somaliland." According to Ambassador Carson, the United States continues to believe that it should follow the African Union position and recognize only a single Somali state and consequently does not plan to bestow diplomatic recognition on any of the aforementioned regions. A copy of Secretary Carson's remarks is attached to this declaration as Exhibit B.

27. The TFG Letter asserts that proceeding with this case "will exacerbate the inter-clan tensions" within Somalia. In my opinion, this statement is not based on the realities of the current situation in Somalia. The tribal homeland of the Isaaq is generally in the north, in the Somaliland Republic, where they live peacefully apart from other clans. It is therefore unlikely that proceeding with this lawsuit will "exacerbate inter-clan tensions."

28. Despite persistent efforts, the Somaliland Republic has not been recognized as an independent country by the United States. While it insists it is an independent nation, Assistant Secretary Carson indicated, in his September 24, 2010 statement, the U.S. has no intention of recognizing the Somaliland Republic.

29. Absent any recognition of the Somaliland Republic by the United States, there is a serious question as to whether any legal judgment rendered by the courts of Somaliland would be enforceable in the United States. If not recognized, such a judgment, by a Somaliland court, would be worthless against a former official of the regime of Mohamed Siad Barre living in the United States. It is my opinion that plaintiffs cannot obtain a meaningful remedy from the courts of the Somaliland Republic.

30. In addition, it is not clear that Somaliland's judiciary is adequate to the task of fairly deciding cases involving human rights violations. In 1999, an international conference on Human Rights in Somaliland was held in Hargeisa, Somaliland. A report on the conference was issued by Amnesty International and International Cooperation for Development. The conference was attended by representatives of those two organizations as well as Somaliland Government Officials and local non-governmental organizations (NGOs). With respect to justice and prison conditions, the report concluded in part:

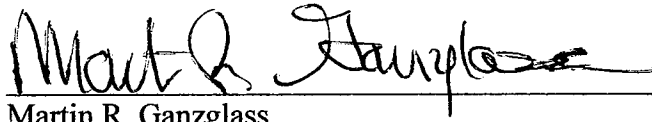
The legal system in Somaliland is most staffed by unqualified people . . . Corruption is common and it is alleged that a legal case can be won or lost on the basis of financial leverage. There are numerous violations of human rights due to the underdeveloped legal system.”

31. There are no functioning courts in the small area of territory controlled by the TFG. The court system in Puntland is also undeveloped, lacking competent judges, court staff and resources. In the rest of Somalia, that is the area south of Mogadishu, the territory is either dominated by Al Shabaab which imposes a strict Sharia legal system on those civilians living under its rule, or by local warlords or clan elders. It is my opinion that given the lack of functioning courts and trained judges in the former Somali Republic plaintiffs would not be able to bring a human rights case in the other parts of Somalia.

32. I have read the Affidavit of Alessandro Campo, referenced on page 19 of Defendant's Memorandum in Support of his Motion to Dismiss. In my opinion, a member of the Isaaq clan who pursues a human rights claim outside of the Somaliland Republic against a member or members of the former Mohamed Siad Barre regime would reasonably fear reprisals by the Marehan clan, the subclan to which Barre belonged. Many Marehan are former members of the Red Berets and the National Security Service and were responsible for much of the human rights abuses suffered by members of the Isaaq and other clans. It is not a question of whether or not there are any remnants left of the Mohamed Siad Barre regime. There are not. The danger of reprisals would come from any Marehan tribal member against any Isaaq plaintiff. That danger was especially present in the years immediately following the collapse of the Barre regime in 1991 due to the widespread lawlessness and chaos which prevailed in much of Somalia.

33. As stated in Paragraph 27 above, the Isaaq live peacefully apart from other clans in Somaliland. However, if a member of the Isaaq clan pursued a human rights claim in Somaliland, the plaintiff could not travel to other parts of Somalia to gather evidence or question witnesses because of the fear of being attacked by members of other clans. While the Mohamed Siad Barre government no longer holds power in Somalia, many positions in that regime were based on clan affiliation. As mentioned above, most members of the Red Berets and NSS were members of the Marehan, Mohamed Siad Barre's subclan and were responsible for many of the human rights abuses suffered by the Isaacs. In Somalia today, clan affiliation has become even more significant. Presently, in the absence of any strong central or regional government, security for any Somali depends on being in an area where his or her clan is in the majority.

I declare under penalty of perjury under the laws of the United States of America
that the foregoing is true and correct. Executed on December 14, 2010.

A handwritten signature in cursive script, appearing to read "Martin R. Ganzglass", written over a horizontal line.

Martin R. Ganzglass

EXHIBIT A

THE SOMALI DEMOCRATIC REPUBLIC

Preamble to the Constitution

The Somali People collectively and individually struggling for a life of dignity and equality, and engaged in a fight to establish lasting peace and stability internally and externally, to realize the general interests of the working masses, and accomplish the major objectives of the revolution, unity of the nation, socialist construction in order to create a society founded on social justice, equality and democracy in which the individual attains higher levels of political and social consciousness and strengthens the pillars of the revolution and national sovereignty, in order to achieve rapid political and socio-economic development, have resolved to adopt this constitution which shall constitute the basis of the struggle for the development of the Somali society, peaceful co-existence and mutual cooperation among nations of the world, especially those whose interests shall coincide.

The Constitution of the Somali Democratic Republic

Chapter I

General Principles

Section 1

The Republic

Article 1

The Somali State.

1. The Somali Democratic Republic is a socialist state led by the working class, and is an integral part of the Arab and African entities.
2. All sovereignty belongs to the people who shall exercise it through their representative institutions.

Article 2

Flag, Emblem and the Capital

1. The national flag shall be azure in color, rectangular, and shall have a white star with five equal points emblazoned in its center.
2. The emblem of the Somali Democratic Republic shall be composed of an azure escutcheon with a gold border and shall bear a silver five pointed star. The escutcheon surmounted by an embattlement with five points in moorish style, the two lateral points halved, shall be borne by two leopards rampant in natural form facing each other, resting on two lances crossing under the point of the

escutcheon, with two palm-leaves in natural form interlaced with a white ribbon.

3. Mogadisho (Hamar) shall be the capital of the Somali Democratic Republic.

Article 3

Religion and Language

1. Islam shall be the state religion.
2. Somali is the language which all Somalis speak and through which they recognize each other; Arabic is the language which links the Somali people with the Arab nation, of whom they are an integral part, and the two languages shall constitute the official languages of the Somali Democratic Republic.

Article 4

The Unity of the Somali People

1. The Somali nation is one and Somali nationality is indivisible.
2. The law shall determine the modes of acquiring and losing Somali Citizenship.

Article 5

State Territory

1. The state territory shall be sacred and inviolable.
2. The territorial sovereignty shall extent over land, the sea, the water column sea-bed and subsoil continental shelf, and island and airspace.

Article 6

Equality of Citizens

All citizens regardless of sex, religion, origin and language shall be entitled to equal rights and duties before the law.

Section Two

The Party

Article 7

Authority and Leadership of the Party

1. The Somali Revolutionary Socialist Party shall be the only legal party in the Somali Democratic Republic; no other party or political organization may be established.
2. The Somali Revolutionary Socialist party shall have supreme authority of political and socio-economic leadership in the Somali Democratic Republic.

Article 8

Unitary Nature of the Leadership

The leadership of the country shall be founded on the unitary system of political leadership of the party and state.

Article 9

Deliberations, Decisions and Executions

1. Political institutions elected at all levels shall function in accordance with the principle of collective deliberations, majority decisions and collective responsibility in execution.
2. Within the party institutions the afore-stated principles shall dictate the unity of view points, sensitivity, purpose and collective work.

Article 10

Complementarity of Party and State Duties

1. Party and state institutions shall discharge their respective duties as prescribed by the law, each pursuing its own methods in order to accomplish the common objectives.
2. The political mobilization of the country shall be based on the complement of the duties of party and state institutions as prescribed by the laws establishing them.

Article 11

Party Statute

The structure and functions of the party institutions shall be determined by the statute of the Somali Revolutionary Socialist Party.

Article 12

Social Organizations

1. The state shall allow the establishment of social organizations of the workers, cooperatives, youth and women.
2. Social organizations shall be established on national, local production levels and in educational centers.
3. The specific structure, laws and programs of the social organizations shall be in consonance with the general interests of the masses, the Constitution, the statute and the program of the Somali Revolutionary Socialist Party.

Article 13

Powers and Duties of Social Organizations

Social organizations shall participate in the leadership of State and social affairs and resolution of political, economic, social and cultural matters in accordance with the duties prescribed in their respective laws.

Article 14

Democratic Centralism

The principle of Democratic centralism shall be the basis of mobilization, and functions of party and state.

Section Three

Foreign Policy

Article 15

The Principle of Self-Determination

1. The Somali Democratic Republic shall firmly uphold the principle of self-determination of peoples and fully supports the national liberation movements, and all the peoples fighting for their freedom and independence.
2. It shall resolutely oppose colonialism, neo-colonialism, international imperialism and racial discrimination.

Article 16

Somali Territories Under Colonial Occupation

The Somali Democratic Republic adopting peaceful and legal means shall support the liberation of Somali territories under colonial occupation and shall encourage the unity of the Somali people through their free will.

Article 17

Policy of Neutrality and Peaceful Co-Existence

1. The Somali Democratic Republic shall pursue a policy of positive neutrality.
2. It shall fully recognize the principle of peaceful coexistence of the peoples of the world.

Article 18

Policy of Cooperation

The Somali Democratic Republic shall promote a policy of cooperation among all peoples and states based on mutual benefit, equality, and respect for the independence and political system peculiar to each state.

Article 19

International Legal Norms

The Somali Democratic Republic shall recognize the Universal declaration of human rights and generally accepted rules of international law.

Chapter 2

Fundamental Rights, Freedoms and Duties of the Citizen and Individual

Article 20

Political, Economic, and Social Rights

Every citizen shall be entitled to participate fully in the political, economic, social and cultural activities in accordance with the constitution and laws.

Article 21

Right to Work

1. Every citizen shall be entitled to work. Work is a duty, honor and the foundation of a socialist society.
2. The state shall promote the creation of employment in order to realize the citizen's fundamental right to work.

Article 22

Right to Election

Every citizen who fulfills the conditions prescribed by the law shall be entitled to elect and be elected.

Article 23

Right to Education

Every citizen shall have the right to free education.

Article 24

Freedom of Processions, Publications and Opinion

1. Every citizen shall be free to participate in an assembly, demonstration, or in their organization.
2. The citizen shall further be entitled to express his opinion in any manner, freedoms of publication and speech.
3. The exercise of the freedoms mentioned in paragraph 1 and 2 of this article shall not contravene the Constitution, the laws of the land, general morality and public order, or the freedoms of other citizens.

Article 25

Right to Life and Personal Security

1. Every individual shall have the right to life and personal security
2. The law shall determine the conditions in which the death sentence may be passed.

Article 26

Personal Liberty

1. Every person shall have the right to personal integrity.
2. No person shall be liable to any form of detention or other restrictions of personal liberty, except when apprehended in flagrante delicto or pursuant to an act of the competent judicial authority in the cases and in the manner prescribed by the law.
3. Any person who shall be detained on grounds of security shall without delay be brought before the Judicial authority which has competence over the offence for which he is detained within the time limit prescribed by law.
4. Every person who shall be deprived of his personal liberty shall forthwith be informed of the offence of which he is accused.
5. No person shall be searched except in the conditions mentioned in paragraph 2 of this article, or under laws relating to judicial, sanitary, fiscal and security matters, and in the manner prescribed by the law, giving due respect to the honor and integrity of the person.

Article 27

Security of the person under detention

1. A detained person shall not be subjected to physical or mental torture.
2. Corporal punishment shall be prohibited.

Article 28

Private Ownership

1. Private ownership shall be guaranteed by law, which shall define the modes of acquisition and forfeiture, and the contents and limits of its enjoyment for the purpose of safeguarding its social functions.

2. The use of private property shall in no case be contrary to the public interest, and the objectives of the revolution.
3. Private property may be expropriated or requisitioned for reasons of public interest, in exchange for equitable compensation.

Article 29

Privacy of the Home

Every person shall be entitled to the inviolability of his home or any other place reserved for personal use except in the cases referred to in paragraphs 2 and 5 of article 26.

Article 30

Freedom of Communication

The right of secrecy of correspondence and other means of communication shall not be tempered with, except in the cases determined by the law.

Article 31

Freedom of Religion

Every person shall be entitled to profess any religion or creed.

Article 32

Right to Institute Legal Proceedings and Right of Defence

1. Every person shall have the right to institute legal proceedings before a competent court.
2. Every person shall have the right of defense before a court.
3. The state shall guarantee free legal aid in the conditions and in the manner prescribed by law.

Article 33

Penal Liability

1. Penal Liability shall be personal.
2. The accused shall be presumed innocent until the conviction becomes final.

Article 34

Non-retroactivity of Penal Laws

No person may be punished for an act which was not an offence under the law at the time when it was committed, nor may a punishment be imposed other than the one prescribed by the law enforced at the time such offence was committed.

Article 35

Extradition and Political Asylum

1. The Somali Democratic Republic may extradite a person who has committed a crime in his country or another, and has taken refuge in the Somali Democratic republic, provided that there is an extradition treaty between the Somali Democratic Republic and the state requesting the extradition of the accused or offender.
2. The Somali Democratic Republic may grant political asylum to a person who has fled his country or another for political reasons while struggling for the interests of the masses, human rights or peace.

Article 36

Protection of Public Property

Every citizen shall have the duty to protect and consolidate public property.

Article 37

Participation in Economic Growth

Every person shall have the duty to participate in the economic growth of the country, payment of taxes, contributions to state expenditure according to his capacity and the laws of the country.

Article 38

Defence of the Motherland

The defence of the motherland and the consolidation of the unity of the Somali people shall be a sacred duty of every citizen.

Article 39

Observance of the Constitution and Laws

Every person shall have the duty to faithfully observe the constitution and laws of the state.

Chapter 3

Socio-Economic Foundation

Section I

The Economy

Article 40

Economic Development

1. The State shall develop the economy of the country, and raise

production, while assuring an equitable distribution.

2. The state shall encourage the principle of self help for the rapid development of the country.

Article 41

The economy of the Somali Democratic Republic shall comprise the following sectors.

The state sector which shall constitute the vanguard in the economic development of the country and shall be given special priority;

The cooperative section which shall be instrumental in promoting the living standards of cooperative members, while promoting the rapid growth of the national economy, and the state shall participate in its planning and encouragement;

The Private sector which shall be based on non-exploiting private ownership;

The mixed sector which shall be based on the joint ownership between the Somali state and others.

Article 42

Land and Marine Resources

1. The land, natural marine and land based resources shall be state property.
2. The state shall promulgate a law prescribing the best methods for exploiting such resources.

Article 43

Economic Planning

1. The economy of the country shall be founded on socialist state planning.
2. The plan shall have a judicial authority superior to other laws.
3. There shall be a supreme state planning institution, and the law shall establish its structure, duties and powers.

Article 44

External and Internal Trade

In promoting the economic development of the country the state shall guide external and internal trade.

Article 45

Protection of Currency

The state shall organize the fiscal and monetary system of the country, and shall be law fix taxes.

Section 2

Promotion of Education & Science

Article 46

Education

1. The state shall give special priority to the promotion, expansion and dissemination of education and science, and shall consider education as the ideal investment which shall play the leading part in the Somali political and socio-economic development.
2. Education in the Somali Democratic Republic shall favor the working class, and shall conform to the special conditions and environment of the Somali Society.

Article 47

Compulsory Education

Education, in the Somali Democratic Republic shall be free. It shall be compulsory up to the intermediate school level.

Article 48

Eradication of Illiteracy

Eradication of illiteracy and adult education shall be a national duty towards which the people and state shall pool their resources in its fulfillment.

Article 49

Promotion of Science and Arts

1. The state shall promote science and arts, and shall encourage scientific and artistic creativity.
2. Copy rights and patent rights shall be regulated by law.

Article 50

Youth and Sports

In order to ensure healthy physical and mental growth of the youth, and to raise their level of education and political consciousness the state shall give special importance to the promotion and encouragement of gymnastics and sports.

Section 3

Cultural and Social Welfare

Article 51

Promotion of Culture

1. The state shall promote the progressive culture of the Somali people, while benefiting from the international culture of human society.
2. It shall promote art, literature and the national folklore.
3. It shall protect and preserve nations, historic objects and sites.

Article 52

Social Customs

The state shall preserve the good customs, and shall liberate society from outdated customs and those inherited from colonialism specially tribalism, nepotism, and regionalism.

Article 53

Child Care

The state shall promote child care homes and revolutionary youth centers.

Article 54

Rural Development

The state shall promote the program of permanent rural development campaign in order to eradicate ignorance and to narrow the gap between rural and urban life.

Article 55

Health

The state in fulfilling the policy of general health care shall promote the prevention of contagious diseases, and encourage general hygiene, and free medical treatment.

Article 56

Family Welfare

1. The state recognising the family as the basis of society shall protect the family and shall assist the mother and child.

2. The state shall be responsible for the care of the handicapped, children of unknown parents and the aged, provided they shall not have anybody to care for them.
3. The state shall guarantee the care of children whose parents die while defending the country.

Article 57

Work and the Workers

1. The state shall safeguard and promote work and its various types.
2. The minimum age for work in the Somali Democratic Republic shall be fifteen years.
3. The workers shall be entitled to receive without discrimination a remuneration equal to the amount and value of work done.
4. The workers shall be entitled to weekly rest and annual leave.
5. The law shall determine the working hours, conditions of service and persons suitable for certain jobs.

Article 58

Evaluation of Work

In evaluating work the state shall apply the principle; "from each according to his ability, to each according to his work."

Article 59

Social Insurance and Assistance

The state shall promote the system of social insurance and assistance and shall strengthen general insurance institutions of the country.

Chapter 4

State Structure

Capital One

Functions and Rules of the People's Republic

Article 60

Legislative Power

Legislative power in the Somali Democratic Republic shall exclusively be vested in the People's Assembly.

Article 61

Election to the People's Assembly

1. The People's Assembly shall consist of deputies elected by the people through free direct and secret ballot.
2. Every Somali has attained the age of twenty one years shall be eligible for election as a deputy. The law shall determine the grounds for ineligibility for election to the People's Assembly.
3. The number of deputies, conditions and procedure for election shall be established by a special law.
4. The President of the Somali Democratic Republic may nominate to the People's Assembly up to six persons from among people dedicated to science, Arts, and culture or highly esteemed patriots.

Article 62

Term of Office

1. The term of office of each People's Assembly shall be five years beginning from the declaration of election results.
2. In the event of circumstances which shall render the holding of elections impossible, the President of the Somali Democratic Republic shall, after consultations with the Central Committee of the Somali Revolutionary Party, have the power to extend the term of the Assembly for a period not exceeding one year.

Article 63

Dissolution of the People's Assembly

1. The People's Assembly may be dissolved before the expiry of its term of office on the proposal of one-third of the deputies and the approval of two-thirds of the membership.
2. The People's Assembly may also be dissolved by the President of the Republic after consultations with the Central Committee of the Somali Revolutionary Socialist Party and the Standing Committee of the People's Assembly.
3. The election to the new People's Assembly shall take place within three months beginning from the date of dissolution.

Article 64

Sessions

1. The People's Assembly shall hold two sessions annually.

2. The People's Assembly may be convened in an extraordinary session by a resolution of the Standing Committee, or on the request of one-third of the membership.
3. The President of the Somali Democratic Republic shall have the power to convene an extraordinary session of the People's Assembly.

Article 65

Meetings and Decisions

1. The People's Assembly at its initial meeting shall elect from among its members: Chairman, vice-chairman and a standing committee.
2. The meetings of the People's Assembly shall be public. However closed meetings may be held on the motion of the President of the Republic, the Standing Committee, Government or not less than one fourth of the deputies, and on the approval of the Assembly.
3. The majority of the deputies of the Assembly shall form a quorum.
4. The Assembly shall reach its decisions by a majority vote except when a special majority is required by the constitution or by law.

Article 66

Rules of procedure

1. The conduct of business in the Assembly shall be governed by rules of procedure adopted by the Assembly.

Article 67

Powers of the Assembly

1. Amendment of constitution;
2. Legislation and approval of decisions on national development;
3. Election and dismissal of the President of the Somali Democratic Republic as expressly stated in article 80 of this constitution;
4. Election and dismissal of the Standing Committee of the Assembly;
5. Ratification of international treaties relating to political, economic and commercial matters or agreements entailing financial obligation for the state;
6. Ensuring observance of the constitution and the laws of the country;
7. Approval of the national economic development plan;
8. Approval of the annual budget and accounts;

9. Enforcing accountability within the Government and its members;
10. Any other powers granted to the Assembly by the constitution;

Article 68

Delegation of Legislative Power

1. The People's Assembly may for a limited period delegate to the Government the power to legislate on specified matters. The enabling legislation may establish the principles or directives which the government shall follow.
2. Legislative power delegated to the government shall be exercised through Presidential Decrees.

Article 69

Emergency Decree - Laws

1. In the event of special emergency circumstances, the government may pass Decree laws which shall have temporary effect, and shall be issued by Presidential Decrees. Such Decrees shall within a month be submitted before the People's Assembly or the Standing Committee for conversion into laws.
2. The People's Assembly when in session, or the Standing Committee when the Assembly is in recess, shall reach a decision within fifteen days beginning from the date of the presentation of the decree.

Article 70

Draft Laws

The President of the Somali Democratic Republic, the Standing Committee, or the government may present a draft law to the People's Assembly. A draft law may also be proposed by a member of the people's Assembly provided one third of the membership agreed to such a proposal.

Article 71

Laws Relating to Party Strategy

Every draft law concerning Party strategy for the realization of revolutionary objectives and the system of the national leadership shall initially be approved by the central Committee, before the People's Assembly shall reach a final decision.

Article 72

Promulgation and Publication of Laws

1. Every law approved by the People's Assembly or the Standing Committee shall be promulgated by the President within forty-five days.

2. The President of the Somali Democratic Republic shall, within the period mentioned in paragraph 1 of this article, have the power to resubmit such a law to the Assembly stating the grounds thereof with a request to reconsider the law and reach a decision.
3. Where the Assembly shall approve such a law for the second time by a two-third majority, the President shall promulgate it within forty-five days.
4. Every law approved by the Assembly and promulgated by the President shall be published in the official bulletin and shall come into force after the fifteenth day of its publication, unless the law shall prescribe a different time limit.

Article 73

The Deputy

1. Every deputy shall represent the general interests of the Somali people.
2. Before assuming functions in the Assembly a Deputy shall take the following oath:

In the name of God and country I swear that I shall faithfully, selflessly and with full confidence serve the Somali people, implement the principles of the Revolution of 21st October, 1969, abide by the Constitution and laws of the country, carry out the socialist principles, protect the general interests of the people and the Somali state, defend with all my ability the freedom, sovereignty and unity of the country, place the general interest before private interest, and practice equality and justice among the Somali people.

3. A Deputy shall not be prosecuted for views and opinions expressed before the assembly and its various committees in the exercise of his responsibilities.
4. No criminal proceedings shall be instituted against a deputy, nor shall he be arrested, or his person or domicile be subjected to search, except in cases of flagrante delicto or with the authorization of the Assembly or the Standing Committee, when the Assembly is not in session provided that such an act shall be subsequently validated by the Assembly.
5. A Deputy shall discharge his responsibilities in the Assembly while pursuing his ordinary duties. While the Assembly is in session, or when entrusted with tasks relating to his Assembly responsibility, a Deputy shall be entitled to an honorarium which shall be fixed by a special law.

Article 74

Removal and Recall of a Deputy

1. Every deputy who shall fail to fulfill the conditions of his membership or shall fail to discharge the duties relating to his responsibility shall be relieved of such responsibility.
2. The electors may recall any deputy in whom they have lost confidence on the proposal of one-fourth of the electors.
3. The decision to relieve the deputy from responsibility shall be by a simple majority of the People's Assembly.

Article 75

Investigations by the Assembly

1. Every Deputy shall have the right to propose motions and put questions to the Government or its members, which the Government shall be obliged to answer within twenty days.
2. The Assembly may order investigations through committees comprising its members.

Section Two

The Standing Committee

Article 76

Functions and Powers of the Standing Committee

The Standing Committee shall be the organ which shall direct the business of the Assembly and shall discharge the functions of the Assembly between recesses and shall have with the exclusion of its powers those mentioned in article 67, paragraphs 1, 3, 7 and 8 and article 82 paragraphs 3 and 12 of the Constitution.

Article 77

Membership of the Standing Committee

1. The Standing Committee shall comprise the following members: chairman, vice-chairman, secretary, and ten members.
2. The chairman and vice-chairman of the Assembly shall become the chairman and vice-chairman of the Standing Committee.

Article 78

The Powers of the Standing Committee

The Standing Committee shall have the following powers:

1. Legislation and amendment of laws during recesses, subject to subsequent approval by the Assembly.
2. Interpretation of laws and resolutions of the Assembly.
3. The convening of ordinary and extraordinary sessions of the Assembly.
4. Supervision of election of deputies to the Assembly.
5. Any other powers granted by the Constitution or the People's Assembly.

Capital II

President of the Somali Democratic Republic

Article 79

Head of State

The President of the Somali Democratic Republic shall be the Head of State and shall represent state power and the unity of the Somali people.

Article 80

Election and Term of Office

1. The candidate for the President of the Republic shall be proposed by the central committee of the Somali Revolutionary Socialist Party and shall be elected by the People's Assembly.
2. The election of the President shall be by a majority of two-thirds of the deputies on the first and second ballots. A simple majority shall suffice on the third ballot.
3. The Assembly may relieve the President of his responsibility in accordance with the procedure laid down in paragraphs 1 and 2 of this article.
4. The President of the Republic shall hold office for six years beginning from the date of taking the Oath of Office and shall be eligible for re-election.
5. Before assuming office, the President shall take the Oath of Office set out in article 73 of this Constitution.

Article 81

Conditions for Election

Every Somali whose parents are of Somali origin, shall not have married a person not of Somali origin, has fulfilled the conditions for election to the Assembly, and has attained the age of forty may be eligible for election to the Presidency of the Somali Democratic Republic. The President of the Republic while in office shall not marry a person not of Somali origin.

Article 82

Duties and Powers of the President

In addition to the powers and duties granted by the Constitution and the laws, the President of the Somali Democratic Republic shall have the following powers and duties:

1. Representation of the state in relations with foreign states.
2. Representation of the unitary nature of the political leadership of party and state.
3. Ratification of international treaties relating to defense and security, sovereignty and independence of the Republic, on the approval of the Central Committee of the Party and People's Assembly.
4. Ratification of other international agreements.
5. Reception and accreditation of ambassadors and heads of foreign missions.
6. Chairmanship of joint meetings of party and state institutions.
7. Appointment and dismissal of ministers and deputy-ministers.
8. Appointment and dismissal of the President of the Supreme Court, Attorney-General of the state, having heard the opinion of the Central Committee of the Somali Revolutionary Socialist Party.
9. Appointment and dismissal of senior state officials having heard the opinion of the Council of Ministers.
10. Grant pardon and commute sentences.
11. To be Commander-in-Chief of the armed forces and chairman of the National Defence Council.
12. Declare states of war and peace after authorization by the Central Committee of the Party and the People's Assembly.
13. Initiate a referendum when the country is faced with important issues.

14. To issue Presidential decrees.
15. Confer medals and other state honors.

Article 83

Extraordinary Powers of the President

1. The President of the Somali Democratic Republic, shall have the power, after consultations with the National Defence Council, to proclaim emergency rule throughout the country or a part of it, and take all appropriate measures when faced with grave matters endangering the sovereignty, internal or external security of the country, or in circumstances of absolute necessity.
2. In the event of a state of war the President shall assume power over the entire country, and those articles of the Constitution which shall be incompatible with such a situation shall be suspe

Article 84

Vice Presidents

1. The President of the Somali Democratic Republic having heard the opinion of the Central Committee of the party and People's Assembly may appoint one or more vice-presidents.
2. Before assuming functions the vice-president or vice-presidents shall take the oath of office set out in article 73 of the Constitution.

Article 85

Incapacity to Discharge Responsibility

1. In case of death, resignation, or permanent disability of the President of the Somali Democratic Republic, a new President shall be elected within sixty days in accordance with the procedure laid down in article 80 of the Constitution.
2. Until the election of a new President, or in case of a temporary disability of the President the first vice-president shall temporarily assume the presidency.

Capital III

The Government

Section I

Central Government

Article 86

Council of Ministers

1. The Council of Ministers shall be the supreme executive organ of the Central Government.
2. The Council of Ministers shall consist of the chairman of the council and ministers.
3. The President of the Somali Democratic Republic shall be the chairman of the Council of Ministers.
4. The President may appoint a Prime Minister if he shall deem it appropriate.

Article 87

Powers of the Council of Ministers

In addition to the powers granted by the Constitution and laws the Council of Ministers shall have the following powers:

1. To present draft laws to the People's Assembly.
2. To direct, coordinate and supervise Government activities.
3. To issue decrees.
4. To direct activities relating to the defence and security of the state.
5. To prepare the annual budget and accounts.
6. To lay down the plan for the economic development of the country.
7. To conclude agreements with foreign countries and international institutions.
8. To take every step to safe guard the interest of the state and public order within the powers granted by the Constitution.

Article 88

Organization of the Government

1. A Special law shall establish the powers and functions of the Council of Ministers not specified by the Constitution.
2. The organization of the Council of Ministers, ministeries and related offices shall be determined by presidential decrees.

Article 89

Penal Liability of Ministers

1. Ministers shall be liable for crime resulting from the execution of their functions.
2. The law shall determine the procedure for prosecuting ministers for crimes mentioned in subsection 1 of this article and any other crimes.

Article 90

Oath of Office

Before assuming their functions government members shall take the Oath of Office set out in article 73 of the Constitution, before the President of the Republic.

Article 91

Government Program

Subsequent to its appointment, the Government shall present its program to the central committee of the Party and the People's Assembly.

Article 92

Deputy Ministers

Ministers in their functions may be assisted by deputy ministers appointed by the President of the Republic, having heard the opinion of the Council of Ministers.

Section 2

Decentralization of Power and Administration

Article 93

Administrative Decentralization

As far as possible administrative functions shall be decentralized to local administration and public bodies.

Article 94

Local Administration

1. Local administrative powers shall be an integral part of the central government powers of the Somali Democratic Republic.
2. The law shall determine local administrative powers in accordance with the principle of democratic centralism.

Article 95

People's Local Councils

1. The people shall directly elect members of the People's local councils.
2. The law shall determine the structure, powers, sources of revenue and the relationship between the People's local councils, the Party, People's Assembly and the State.

Capital IV

The Judiciary

Section I

Principles of Justice

Article 96

Objectives of Justice

1. The courts and the office of the Attorney-General shall protect the socialist system of the State and its social structure.
2. The courts and the office of the Attorney-General, in the fulfillment of their responsibility shall inculcate in the Somali citizen a spirit of participation in the construction of the country, defence of the socialist system, observance of the laws, social cooperation and the faithful discharge of state and social duties.

3. The Judiciary shall ensure observance of the laws, and shall guarantee the protection of the freedom, rights, and life of the citizen, interests and dignity of the human being.

Article 97

Unity of the Judiciary

The Judiciary of the Somali Democratic Republic shall be unified.

Article 98

Independence of the Judiciary

Judges and Attorney-Generals shall be independent in the performance of their functions and shall be guided by the rule of law; they shall not be relieved of their responsibilities except in conditions provided by the law.

Article 99

Court Proceedings

1. The court proceedings shall in principle be oral and shall be open to the public. The law shall determine the conditions in which the proceedings shall be in Camera.
2. Judgments of courts shall be pronounced in the name of the Somali people.

Section 2

The Courts

Article 100

Courts of the Republic

1. The courts of the Somali Democratic Republic shall comprise the following: The Supreme Court, Courts of Appeal, Regional courts, District courts, Judicial committees, Military courts.
2. Special courts whose jurisdiction and structure shall be determined by law, may be established.
3. People's judges shall participate in the courts as determined by special law.

Article 101

The Supreme Court

The Supreme Court shall be the highest judicial organ in the Somali Democratic Republic. It shall regulate , and supervise the activities of all the courts.

Article 102

Organization of the Judiciary

The organization of the Judiciary in the Somali Democratic Republic and the mode of appointment of judges shall be determined by a special law.

Section 3

Article 103

The Attorney-General of the State

1. The office of the state Attorney-General shall comprise: the attorney-general and his deputies.
2. The establishment of the office of the Attorney-General and its functions shall be determined by a special law.

Article 104

Responsibilities of the State Attorney-General

1. The office of the state Attorney-General shall ensure the strict observance of the laws of the country.
2. It shall ensure that the decisions, orders and directions of state institutions are in accordance with the Constitution and the laws of the country.
3. It shall initiate proceedings against anyone who shall commit a crime.
4. It shall supervise the prisons and reformatories.
5. It shall protect the rights of the weaker section of society.
6. It shall fulfill any other functions prescribed by the law.

Section 4

The Higher Judiciary Council

Article 105

Responsibility of the Higher Judiciary Council

1. The Higher Judiciary Council shall be the organ which shall direct the general policy and administration of the Judiciary.

2. The Higher Judiciary Council shall advise the President of the Republic on amnesty, appointment, transfer, promotion, and dismissal of judges and members of the office of the Attorney-General.
3. It shall supervise the functions and conduct of judges and members of the office of the Attorney-General.
4. The structure of the Higher Judiciary Council and its functions shall be determined by a special law.

Article 106

Chairmanship of the Higher Judiciary Council

The President of the Somali Democratic Republic shall be the chairman of the Higher Judiciary Council.

Article 107

Constitutionality of laws

1. There shall be a constitutional court which shall have the power to decide on the constitutionality of laws.
2. The constitutional court shall be composed of the supreme court along with members from the people's Assembly nominated by the President of the Republic having heard, the opinion of the standing committee.
3. The Procedure composition and the term of the constitutional court shall be determined by a special law.

Chapter V

Defense and Security of the Country

Article 108

Responsibilities of the Armed Forces

1. The armed forces shall protect the sovereignty and independence of the Somali Democratic Republic, the achievements and fruits of the Revolution against internal and external enemies, ensure internal security and peace and shall participate in the construction of the country.
2. The state shall develop the capability and technical expertise of the armed forces, raise their political consciousness, and inculcate in them the spirit of nationalism and self-sacrifice for the motherland.

Article 109

Structure of the Armed Forces

The structure and the organization of the armed forces shall be determined by a special law.

Article 110

National Defense Council

1. The responsibilities of the National Defense Council shall be to evaluate conditions relating to the defense and the security of the country and mobilize all resources necessary for meeting the defense needs of the country.
2. The President of the Somali Democratic Republic shall be the Chairman of the National Defense Council and shall appoint other members.
3. The law shall determine the powers of the National Defense Council both in time of peace and war.

Chapter VI

Miscellaneous Provisions

Article 111

The Basic Law

1. The Constitution shall have supreme legislative authority.
2. The Constitution of the Somali Democratic Republic shall be the basis for all laws, decrees and order of state institutions.

Article 112

Amendments to the Constitution

1. Amendments to the Constitution may be proposed by the President of the Somali Democratic Republic, the Central Committee of the Party or one-third of the membership of the People's Assembly.
2. The People's Assembly shall approve Amendments to the Constitution by a two-thirds majority.
3. Amendments to the Constitution shall not affect the following:
 - a) the Republican system of the country
 - b) the adoption of the principle of socialism
 - c) territorial unity
 - d) the fundamental rights and freedoms of the citizen and individual.

Article 113

Transitional Provisions

1. The laws at present in force shall continue to apply and those sections which are found incompatible with the Constitution shall be amended within one year.

2. Until such time that the institutions prescribed by the Constitution are established, their powers shall be exercised by existing institutions.

Article 114

Entry into Force

The Constitution shall come into force with effect from the date of the declaration of results of the referendum.

EXHIBIT B



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Remarks to the Press from UNGA

Johnnie Carson

Assistant Secretary, Bureau of African Affairs

Philip J. Crowley

Assistant Secretary, Bureau of Public Affairs

New York City

September 24, 2010

MR. CROWLEY: (In progress) one of our regional assistant secretaries here at least once. There's been many things that you've seen in terms of the work this week on Africa. Certainly the high-level meeting that's happening on Sudan is an example of that, and also the Secretary's bilateral today with President Museveni. But there are a lot of things that you haven't seen in terms of engagement by others, including Deputy Secretary Steinberg yesterday on Somalia, Assistant Secretary Carson on a wide range of issues from Zimbabwe to the Congo to others, so we thought we'd try to have Johnnie for about 20 minutes just to kind of give you a broad sweep and then answer your specific questions.



ASSISTANT SECRETARY CARSON: P.J., thank you very much, and thank you all for coming this afternoon. It's a pleasure to see a number of the Washington faces also migrating up to New York with us at the UNGA.

As P.J. says, this has been an important UN session for us because of the Administration's focus on Africa. Two things that are happening this week that are critically important: One is our engagement on Somalia, which occurred yesterday; and the engagement on Sudan, which will happen this afternoon.

But over the course of the last several days, Secretary Clinton has, in fact, had a number of important bilateral meetings, including a very long and productive meeting yesterday with the South African Foreign Minister Mashabane, who is one of the most impressive foreign ministers on the continent. She also had a brief meeting with the president of Nigeria, President Goodluck Jonathan. And this morning she had a very productive hour-long meeting with President Museveni. Let me say a little bit about that meeting, if I could.

President Museveni is probably one of the most important leaders in East Africa, and certainly in the continent. And he has, through his military, provided the backbone of the AMISOM peacekeeping forces in Somalia. He has probably in excess of 5,000 of the nearly 8,000 troops on the ground helping to defend the TFG government and carrying out both a UN and a AU mandate. The Secretary expressed her deep appreciation to President Museveni for what he is doing in Somalia on behalf of the AU and also on behalf of the international community.

The Secretary also took the opportunity to indicate to President Museveni that the U.S. will continue to work with him and his government as he seeks to end the repressive activities of Joseph Kony and the LRA. As you know, the LRA has been one of the most ruthless rebel groups in all of Africa, having started its rampage of terror in Uganda, taking it to Uganda, and taking it from Uganda to Congo and into the Central Africa Republic. We will continue to work with the Ugandans as they try to eliminate the scourge of the LRA, and we will certainly continue to provide them support and assistance.

One of the other big things that we've been working on here is on Somalia and our Somalia policy. Yesterday afternoon, there was a major meeting on Somalia chaired by the Secretary General Ban Ki-moon. There were approximately four or five heads of state there, including the prime minister of Ethiopia, the president of Uganda – President Museveni, and a number of the foreign ministers, including the foreign minister of France Kouchner, the foreign minister of Italy Frattini, the foreign minister of Great Britain, Mr. Hague, and we were represented at that meeting by our Deputy Secretary of State Jim Steinberg.

Mr. Steinberg pointed out to those there that we see the problem in Somalia as a national problem, a regional problem, and also a global problem. It is a problem that has metastasized over the last two decades, which has led to a situation where we now have international piracy, foreign fighters going into Somalia, and some groups in Somalia supporting remnants of the al-Qaida East Africa cell that was responsible for the destruction of our embassies in Dar es Salaam and Nairobi in August of 1998.

It's a regional problem because of the large number of refugees that flow out of Somalia into neighboring Kenya, an estimated 5,000 to 6,000 move out every year^[1] from that country into Kenya, but refugees going into Ethiopia, Eritrea, Yemen, and Djibouti as well; large amounts of illegal arms flowing, large amounts of illegal commerce. Somalia is a collapsed state with a weak government unable to project either power or stability or to provide services to its people.

The African Union has stepped up and has put troops on the ground, but it does need additional support in terms of more troop contributing – troop contributors, more material support, and more monetary support. The U.S. Government has been working very hard alongside of African governments to gain more men, more materiel, and more money for this force. At the last African Union meeting approximately six weeks ago in Kampala, I met with some 13 states and organizations to try to marshal greater support for our initiatives in Somalia, and we have followed up in Washington with a meeting of the same groups to try to increase support for any AMISOM effort.

We also outlined yesterday in a statement made by Deputy Steinberg what, in fact, is a two-track policy. We will pursue one track, which is the familiar track of supporting the Djibouti peace process, the TFG, and the government of Sheik Sharif, trying to help it become more effective, to make it more inclusive, and to give it the ability to provide services to its people. And we will also continue to work to strengthen AMISOM. That is the first track. That's the track that most people are familiar with.

But we will also be pursuing a second track, which we think is also increasingly important, and that is we will work to engage more actively with the governments of Puntland and Somaliland. We hope to be able to have more American diplomats and aid workers going into those countries on an ad hoc basis to meet with government officials to see how we can help them improve their capacity to provide services to their people, seeing whether there are development assistance

projects that we can work with them on. We think that both of these parts of Somalia have been zones of relative political and civil stability, and we think they will, in fact, be a bulwark against extremism and radicalism that might emerge from the south.

Equally as a part of the second-track strategy, we are going to reach out to groups in south central Somalia, groups in local governments, clans, and sub-clans that are opposed to Al-Shabaab, the radical extremist group in the south, but are not allied formally or directly with the TFG. And we will look for opportunities to work with these groups to see if we can identify them, find ways of supporting their development initiatives and activities.

Let me stop right there and probably take your questions, which are probably more central to your thinking than what I'm saying to you.

QUESTION: Well, actually, what you said about Somaliland and Puntland, at one point you referred to them as countries. Are you contemplating some kind of a diplomatic recognition?

ASSISTANT SECRETARY CARSON: No, we are not. We believe that we should follow the African Union position on this. We still recognized only a single Somali state. This is the position of the Africa Union, which is the most important and largest continental regional body. We do not contemplate and we are not about to recognize either of these entities or areas as independent states.

QUESTION: So what does the greater engagement –

ASSISTANT SECRETARY CARSON: The greater engagement can be defined as meeting on a periodic basis with government officials from these two political entities, talking to them about development issues, including a range of health, education, agriculture, water projects that they might want to develop, looking for ways to strengthen their capacity both to govern and to deliver services to their people. In the past, we have not engaged these areas and political entities aggressively. We will now start to do so.

Yes, sir.

QUESTION: Is that decision – I mean, how does that decision reflect on your assessment of the TFG's ability to have them get up and running? It sounds like you're getting sort of a couple of backups ready because you don't think the TFG is really going to pull it together.

ASSISTANT SECRETARY CARSON: We will continue to pursue the first track because it is an important track. The TFG is the recognized political government of Somalia. It is recognized by IGAD, which is the subregional organization. It's recognized by the AU and it's recognized by the UN. Sheik Sharif and the TFG government senior representatives are here participating in the UNGA.

The TFG faces enormous challenges because governing Somalia has been an enormous challenge over the last two decades. It faces a security challenge from a radical extremist group called Al-Shabaab. It faces the challenges of living in a very harsh climate in which rainfall is frequently unpredictable. It is a challenge because of its location, its history, and its environment.

We will continue to work with the TFG and its leadership, and we will work with other moderate forces and elements in the south who share many of the same values and principles of the TFG even though they may not be directly allied with it.

QUESTION: I mean, do you anticipate setting up some kind of permanent offices in Somaliland, Puntland, or Hargeisa, or wherever?

ASSISTANT SECRETARY CARSON: No, we do not anticipate setting up any new diplomatic facilities in all of those – in any of those areas. But I must say that we were very pleased with the announcement yesterday at the meeting on Somalia that the UN is going to begin to staff on a regular basis its offices in Mogadishu. We think that's a positive development to have UN staff there (inaudible).

QUESTION: (Inaudible) Somaliland or Puntland in terms of specific projects, money that --

ASSISTANT SECRETARY CARSON: No, but we did have both embassy and AID officers in Hargeisa approximately four weeks ago. They had some very useful and exploratory meetings with the government there. We hope that we will be able to have, on a regular basis, opportunities to exchange views with government officials and to look for areas where we can provide development assistance and to help them stabilize and improve the economic and social conditions in their country.

QUESTION: Okay. Just to – this is run out of Nairobi?

ASSISTANT SECRETARY CARSON: This is run out of Nairobi. Our operations for Somalia, all of Somalia, are based in Nairobi.

QUESTION: One more about AMISOM. The Ugandans were quoted again and the military chief of staff was quoted recently as saying that they're ready to send up to 10,000 additional troops but they're awaiting U.S. funding to get that going. Given the troop deficit you've frequently mentioned, is the U.S. to fund this? Is that a plan, and when is that money going to happen?

And secondly, on AMISOM, there's a discussion about whether or not they should – the forces there should be going on a more – taking a more aggressive stance and actually going after the rebels. What's the U.S. position on that?

ASSISTANT SECRETARY CARSON: First of all, the U.S. Government has been one of the largest supporters of the AMISOM peacekeeping effort. We support the AMISOM peacekeeping effort because it grows out of an African desire to support the Djibouti process, the TFG, and the current TFG leadership. We also endorse and support the efforts of the IGAD and the AU to expand the number of AMISOM peacekeepers. The United States will continue to make contributions to the AMISOM force based on our ability to win the appropriate congressional support for funding of that operation. We will not take responsibility for paying for all of the additional troops that go in there. We think that obligation should be shared broadly by the international community. As I said earlier, we believe that the problem in Somalia is both a regional and a global problem and, in fact, should be shared globally.

Let me just point out again the fact that over the last three years, we have seen an enormous upsurge in the hijacking of ships passing through the Red Sea and the upper northwestern corner of the Indian Ocean. When that happens, it has an impact not just on the states in the region, but it has an impact on the global community as a whole.

Yesterday afternoon, I had a conversation with my counterpart in the Japanese Government, and we talked about how the situation in Somalia directly impacts Japan. Any products that are moving from Japan or from Asia to Europe, or vice versa, from Europe, Germany or England and the Netherlands around to Asia, comes out and around through the Mediterranean and through the Suez Canal, down to the Red Sea, and around.

When ships are subject to hijacking, it has three or four negative global impacts. First, it raises substantially the cost of international insurance. Second, it can, if the countries believe it too dangerous to go through the Suez Canal and down to the Red Sea, extend the journey, the movement of products from Europe to Asia, or Asia to Europe, by as much as a week after they go around the Cape of Good Hope. And thirdly, it increases the cost of not only insurance and potentially

time, but it also costs those countries that are contributing naval forces to prevent piracy – it costs them enormous amounts to fund the naval operations out here. So the impact is global.

We are encouraging countries not only in Europe and Africa, but the Middle East and Asia, to recognize the negative impact that Somalia has on the global community as much as it has on Africa. African countries take a disproportionate burden for handling of the Somali pirates.

I also would point out that the – still the second largest source of income for a country like Egypt is the use of the Suez Canal. When traffic is diverted because of problems in the Red Sea, it costs them money as well. So it's a major problem, not just a problem for Africa.

MODERATOR: This has to be the last one, because I'm getting the staff scared that Johnnie is paying for our lunch.

QUESTION: In the context of your meeting with your Japanese counterpart, did you discuss any possible joint projects or new solutions to this problem?

ASSISTANT SECRETARY CARSON: I certainly encouraged the Japanese Government to think about financial contributions to help defer the cost of countries in the region to handling pirates. States like Kenya, Tanzania, Mauritius, the Seychelles incur an enormous amount when they take pirates, have to prosecute them and jail them. Assisting them financially in doing that was one of the issues I discussed.

I also encouraged them to think about making monetary contributions that can be used and directed towards AMISOM and directed towards supporting the TFG in its ability to deliver services. I also asked them to think about and consider providing the military equipment that could be used by AMISOM. This is something that we are encouraging a number of states in Europe, the Middle East, and in Asia to look at. It's important that countries in – who are part of the Arab League participate in this as well. We've seen the hijacking of some supertankers from Saudi Arabia. Saudi Arabia could be of great assistance in this. It is a close neighbor to Somalia and it is impacted by what happens in Somalia. They too could make substantial financial and material contributions to this.

So when President Museveni says Africa and Uganda are prepared to put in troops, that's their part of this international contribution. It is important that European, Middle Eastern, and Asian states find a way to make a contribution as well through material support or through monetary support. That's what I think President Museveni was saying, and it's a point that we believe is important to stress as well. Africans are prepared to play their role; it's important for others to do so as well.

MR. CROWLEY: Thank you.

QUESTION: P.J., what's the latest on the settlements?

MR. CROWLEY: I have nothing to add to what I said last night. (Laughter.)

QUESTION: Thank you.

ASSISTANT SECRETARY CARSON: Okay, take care.

MR. CROWLEY: Thanks, Johnnie.

QUESTION: P.J., EAP in Washington is telling us to ask you for any statement on the release of the Chinese captain by the Japanese. They keep deferring us back up here to you. They say, "P.J. will have something to say on it."

MR. CROWLEY: Well, as we had stated yesterday, we were concerned that this was an issue that had the potential to escalate. I think Jeff Bader yesterday talked about the strong nationalist fervor that had been generated both on the Chinese side and the Japanese side, so we are gratified that the situation has been resolved. It was something that the Japanese Government assured us that would be done within accordance of their legal process and international law. This was a Japanese decision to make, and we're just hopeful that with the release of the ship captain, tensions will recede and the countries in the region will get back to normal business.

QUESTION: Thank you.

QUESTION: Just one Japanese question. Is this – I mean, maybe that Prime Minister Kan's – his new cabinet is criticized by the other side, opposite side of the party – I mean the – this compromise means that Japan lost diplomatic – diplomatically with the Chinese – I mean this kind of chicken game, people (inaudible) chicken game. Don't you think that this kind of criticizing (inaudible)?

MR. CROWLEY: I mean, as we – we think this is a proper outcome. And we had discussed this with the Japanese. It came up, as we said, in the meeting that the Secretary had with Foreign Minister Maehara yesterday. We had some low-level – lower-level conversations with the Chinese as well, and we sensed that there was a desire on both sides to resolve this soon. We think this is the right decision. It's how mature states resolve these things through diplomacy. And we think this is in the interest of the two countries and the interest of the region. Obviously, there are some underlying issues that have been triggered by this episode. The United States continues to support freedom of navigation in the region, and we will continue to emphasize that. Obviously, we have an important meeting that'll be going on today involving the ASEAN countries and you'll be seeing a communiqué that comes out of that meeting.

QUESTION: Regarding to the Clinton and Maehara discussion, was there any indication from the Japanese side of this possibility to release him?

MR. CROWLEY: This is a decision for – that Japan has made, and I'll defer to the Japanese Government to explain its reasoning. But obviously, we believe that this will significantly reduce the existing tension. We think it was a proper decision for Japan to make.

QUESTION: Thank you.

MR. CROWLEY: Thank you.

[1] an estimated 5,000 to 6,000 move out every month from that country into Kenya

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IN THE UNITED STATES DISTRICT COURT
THE EASTERN DISCRICT OF VIRGINIA
(Alexandria Division)

BASHI ABDI YOUSUF, et al. : Civil Action No. 1-04W1360
Plaintiffs, :
 :
v. :
MOHAMED ALI SAMANTAR :
Defendant :

DECLARATION OF PAOLA GAETA

I, Paola Gaeta, declare as follows:

1. I am over the age of eighteen years and am otherwise qualified to testify as to the facts and opinions set forth below. All the facts and opinions rendered herein are based upon my personal knowledge.

BACKGROUND

2. I am a Professor of International Criminal Law at the Law Faculty of the University of Geneva and Adjunct Professor of International Criminal Law at the Graduate Institute for International and Development Studies. Since 2007, I have been also the Director of the LL.M. Program in International Humanitarian Law of the Geneva Academy of International Humanitarian Law and Human Rights.

3. Until 2010 I served as Full Professor of International Law at the University of Florence, where I was also an Assistant Professor from 1998 to 2001 and an Associate Professor from 2001 to 2004.
4. I was also a *Visiting Fellow* at the Research Centre for International Law, Cambridge (1996), a legal assistant at the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (1997), and Researcher at the TMC Asser Institute, The Hague (1998) and the Centre Mahler de droit pénal comparé, Paris (2000). I obtained my Ph.D. on Interim Measures taken by International Courts and Tribunals at the European University Institute in 1997.
5. I am currently a Member of the Editorial Board of the *Journal of International Criminal Justice* and of the Editorial Board of the *European Journal of International Law*.
6. I have authored numerous articles in leading international journals and volumes on public international law, international criminal law, international human rights law, and I have edited "The UN Genocide Convention: A Commentary" published by Oxford University Press in 2009 and "The Statute of the International Criminal Court: A Commentary" (co-editor with A. Cassese and J. R. W. D. Jones) published by the Oxford University Press in 2001.

ITALIAN JUDICIAL SYSTEM

7. The Italian legal system did not provide an adequate and available for remedy for victims of international crimes during the time that Defendant Samantar was domiciled in Italy. Under Italian law, persons who have suffered damage for a tort can bring a civil action before the civil courts or, when the tort also constitutes a crime and is prosecuted, can seek compensation in the criminal courts (the so-called system of *costituzione di parte civile nel processo penale*).

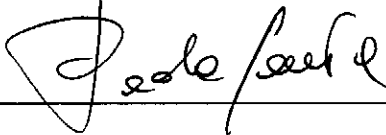
8. The plaintiffs could not have brought a civil claim in the Italian civil courts to obtain damages for the claims alleged in the instant complaint because Italian law does not contain a specific cause of action for torture; extrajudicial killing; attempted extrajudicial killing; cruel, inhuman, degrading treatment or punishment; arbitrary detention; crimes against humanity; or war crimes in non-international armed conflicts. In addition, the plaintiffs could not have sought civil compensation in a criminal case against the defendant because the aforementioned international crimes were not criminalized by a statutory provision at the national level as the Italian constitution requires (principle of strict legality in criminal law).
9. Regarding torture, although Italy adopted the U.N. Convention against Torture of 10 December 1984 (Law no. 498 of 3 November 1988), Italy has not yet enacted implementing legislation that defines torture and imposes criminal and civil penalties for torture. (See Conclusions and Recommendations of the Committee Against Torture, Italy, U.N. Doc. A/54/44, para. 163-169). Because torture is not recognized as a distinct offense under Italian law, it would have been impossible for plaintiffs to bring a civil claim for compensation based on torture to the Italian courts..
10. Similarly, regarding the crimes of extrajudicial killing; attempted extrajudicial killing; and cruel, inhuman, degrading treatment or punishment, and arbitrary detention, although Italy ratified the International Covenant on Civil and Political Rights (Law n. 881 of 1977), Italy has failed to enact any provisions defining these crimes or establishing criminal and civil penalties for these crimes. Because these crimes have not been established as offenses under Italian law, it would have been impossible for plaintiffs to bring a civil claim for compensation based on these crimes in Italy.

11. Regarding crimes against humanity, during the time that Samantar was domiciled in Italy, there were no provisions defining crimes against humanity (and still there are not) and no provisions establishing criminal penalties for crimes against humanity. Therefore, it would have been impossible for plaintiffs to bring a civil claim for compensation based on crimes against humanity during the time Samantar was domiciled in Italy. The same holds true for war crimes committed in non international armed conflicts.
12. The only possibility for the plaintiffs was therefore to seek civil compensation for the common offenses of manslaughter and murder (art. 575 *et. seq.* of the Italian criminal code) or assault and battery (art. 581 and 582 of the Italian criminal code), either by suing the defendant in the competent Italian civil court or by siding with the state prosecution in a criminal case eventually brought against him. In this regard two remarks are necessary.
13. With respect to bringing a civil complaint in the competent civil court, one must observe that this possibility was theoretically available to the plaintiffs by virtue of art. 4 of the Italian code of civil procedure (subsequently incorporated into art. 3 of Law no. 218 of 1995), which recognizes a general principle of civil jurisdiction, and would permit a foreign national domiciled in Italy to be sued in an Italian civil court by nationals of other countries. This possibility was, however, in fact illusory. It is well known that the length of the Italian civil proceedings is (and a certainly was at the time when the defendant resided in Italy) abnormal, ranging from ten to fifteen years. It is for that reason that Italy has been frequently condemned by the European Court of Human Rights for breaching art 6 of the European Convention of Human Rights. This article, defining the right to a "fair trial," states that a trial will be fair if it is completed within a "reasonable time." The abnormally long litigation duration in Italy casts doubts on the effectiveness and adequacy of the judicial civil remedies provided by the Italian system.

14. As for seeking compensation in the criminal courts, this possibility was of course available only to the extent that a criminal case had been brought against the defendant. No such case against Samantar was ever instituted. Moreover, Italian courts could have exercised criminal jurisdiction over common offences committed abroad by a foreigner against foreigners only upon a number of conditions, including the specific request by the Minister of Justice (art. 10.2 of the Italian Criminal Code). In this case, no such a request was issued, nor was it likely to be issued in light of the self-restraint in the application of this provision granting Italian criminal courts universal jurisdiction. In fact, to the best of my knowledge, this provision has been applied only very recently, in case concerning the death of 300 hundred people who shipwrecked in the high seas while attempting to illegally enter the Italian coasts: decision of the Italian Court of Cassation, sez. I, (ud. 07-12-2005) 25-01-2006, n. 2955).

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed on December 14, 2010.

A handwritten signature in black ink, appearing to read "Paola Gaeta", is written over a solid horizontal line.

PAOLA GAETA