Record No. 07-1893

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BASHE ABDI YOUSUF, AZIZ MOHAMED DERIA (IN HIS CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATES OF MOHAMED DERIA ALI, MUSTAFA MOHAMED DERIA, JAMES DOE I AND JAMES DOE II), JOHN DOE I, JANE DOE, AND JOHN DOE II,

Appellants,

versus

MOHAMED ALI SAMANTAR,

Appellee.

On Appeal From the United States District Court
for the Eastern District of Virginia, Alexandria Division
The Honorable Leonie M. Brinkema
District Court Case No. 1:04 CV 1360

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

During the Siad Barre regime, the civilian citizens of the northwestern region of Somalia suffered unspeakable atrocities at the hands of the Somali military. Many were brutally tortured with electric shocks. Many were gathered from their homes at gunpoint, lined up in groups of twenty or more and shot by firing squads. Others were systematically raped and arbitrarily detained for years. The Plaintiffs in the underlying lawsuit were victims of those very atrocities. They have sued Defendant Samantar, the former head of the Somali military who is now a Virginia resident, whom they seek to hold individually accountable for these violent abuses.

It is undisputed that Defendant Samantar was not an agency or instrumentality of any government at the time of the suit. It is also undisputed that since 1991 Somalia has been without any central government. Despite these facts the lower court dismissed this case on Foreign Sovereign Immunity Act ("FSIA") grounds in a flawed extension of two cases concerning allegedly indiscriminate bombing decisions by the Israeli government. For the reasons set forth below, the district court's grant of foreign sovereign immunity to Defendant Samantar should be overturned.

ARGUMENT

I. SAMANTAR IS NOT ENTITLED TO FSIA IMMUNITY

A. FSIA Does Not Apply to Persons Who Are Not Agents or Instrumentalities of the State at the Time of the Suit

Samantar claims immunity under the FSIA as an alleged "agency or instrumentality" of Somalia. 28 U.S.C. § 1603(b). In construing this section, the United States Supreme Court has held, unanimously and unambiguously, that agency or "instrumentality status [is] determined at the time the suit is filed." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003). Because Samantar had not been affiliated with the Somalia government for years before this suit was filed, he cannot claim "agency or instrumentality" status and is therefore not protected by the FSIA.

The Court in *Patrickson* set forth several bases for its conclusion that agency or instrumentality status is determined at the time the complaint is filed. First, the Court looked to the language of the statute. Section 1603 is "expressed in the present tense," which "requires that instrumentality status be determined at the time suit is filed." *Id*. Second, the Court relied on the "longstanding principle that the jurisdiction of the Court depends on the state of things at the time of the action brought." *Id.*, quoting *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993). As a jurisdictional issue, sovereign immunity also depends on the state of things at the time of suit. *Patrickson*, 538 U.S. at 478. The Court also distinguished sovereign

immunity from common-law immunities available to state or federal government officials, such as executive officers or judges. The reason for immunities for government officials is to immunize their *conduct* so as to avoid "crippl[ing] the proper and effective administration of public affairs." *Id.* at 479, quoting *Spalding v. Vilas*, 161 U.S. 483, 498 (1896). Thus, those officials retain their conduct-based common law immunity even after they have left office. Unlike those immunities, foreign sovereign immunity is not meant to affect the conduct of the foreign actor, "but to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns."[1] *Id*., quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Thus, unless a defendant is currently affiliated with the government at the time of suit, it has no sovereign immunity. For all of these reasons the Court held that "instrumentality status is determined at the time of the filing of the complaint." *Id.* at 480.

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[1] This holding of *Patrickson* was echoed by *Republic of Austria v. Altmann*, 541 U.S. 677, 708 (2004), where Justice Breyer, concurring in the Court's opinion, clarified that "the legal concept of sovereign immunity, as traditionally applied, is about a defendant's *status* at the time of suit, not about a defendant's *conduct* before the suit." (Emphasis added). *See also Abrams v. Société Nationale des Chemins de Fer Français*, 389 F.3d 61 (2d Cir. 2004) (applying *Patrickson* and *Altmann* to hold that a railroad is protected by the FSIA because it was owned by the French government at the time of suit, even though it had been privately owned at the time of the allegedly wrongful conduct).

Samantar argues that *Patrickson* is limited to corporations and does not apply to individuals. He is mistaken. Every aspect of the Court's rationale in *Patrickson* applies to individual defendants with as much force as it applies to corporations.

First, section 1603(b), in all respects, is expressed in the present tense. The statutory language does not permit any distinction between corporations and individuals. Second, the principle that "the jurisdiction of the Court depends upon the state of things at the time of the action brought," applies equally to individual and corporate defendants. *Id., quoting Keene*, 508 U.S. at 207. Third, the Court's comparison of sovereign immunity to immunities available to individual government officers belies any notion that its sovereign immunity holding is limited to corporations. Each of the reasons relied upon by the Court in *Patrickson* applies to individuals as well as to corporations; there is no way to read this holding of *Patrickson* as being limited to corporate defendants.[2]

Samantar can cite only one post-*Patrickson* case holding that the FSIA applies to former officials of foreign governments. *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 789 (S.D.N.Y. 2005). However, the court in *Terrorist Attacks* did not conduct an analysis of the Supreme Court's

[2] Plaintiffs acknowledge that the language of the FSIA applies more rationally to corporations than it does to individuals, but this merely suggests that the FSIA does not apply to individuals in the first instance. (Opening Brief at 30-32).

rationale in *Patrickson*. Furthermore, the authorities relied upon in *Terrorist Attacks* offer no support for its conclusion. Two of the cases cited in *Terrorist Attacks* were decided before the Supreme Court's decision in *Patrickson*, and neither one attached any significance to the fact that the defendants no longer held office in a foreign state. *See Byrd v. Corporacion Forestal y Indus. de Olancho S.A.*, 182 F.3d 380 (5th Cir. 1999); *Bryks v. Canadian Broadcasting Corp.*, 906 F. Supp. 204 (S.D.N.Y. 1995).[3] The *Terrorist Attacks* court also relied on this Court's opinion in *Velasco* which, although decided after *Patrickson*, did not discuss whether the termination of the individual defendants' affiliation with Indonesia was relevant to the sovereign immunity analysis. *See Velasco v. Gov't of Indonesia*, 370 F.3d 392 (4th Cir. 2004).[4] Indeed, a review of the briefs on file at this Court make clear that neither party in *Velasco* raised the *Patrickson* issue in

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[3] Indeed, the opinion in *Bryks* does not inform the reader whether the individual defendants were employed by the state-owned Canadian Broadcasting Corporation at the time of the opinion. The opinion in *Byrd* reveals that at some point before the appellate decision the individual defendants had left their positions with the state-owned defendant, but does not disclose whether they were employed at the time the suit was filed in the district court. *See* 182 F.3d at 382, n.3.

[4] The individual defendants in *Velasco* were former Ambassador Mawardi, former National Defense Security Council ("NDSC") official Hartomo, and other unnamed Indonesian government officials. *Velasco*, 370 F.3d at 395. The *Velasco* decision notes only that Hartomo was removed from his NDSC position before Velasco's suit was filed. *Id.* at 397. The *Velasco* opinion does not disclose whether defendant Hartomo was an official of the Indonesian government in some other capacity at the time of the suit and makes no mention of the status of the other individual defendants at the time of suit.

the appeal, and this Court's opinion in *Velasco* did not consider the argument nor even cite the *Patrickson* decision. This Court did not hold that former officials are protected by the FSIA, because neither the parties nor the Court addressed that issue in *Velasco*.

Samantar also offers a policy reason why a former governmental official should retain sovereign immunity, even though a corporation formerly owned by a foreign government lacks such immunity. (Brief of Appellee at 15). According to Samantar, when a foreign government sells its interest in a corporation, the buyer may negotiate for indemnification from the selling government. Samantar posits that a former official leaving government service lacks such an opportunity, and therefore should retain sovereign immunity even after leaving office. Samantar's reasoning is deeply flawed.

First, this theory lacks any support in law, and Samantar relies on no authority adopting it. Second, a government may choose to indemnify a former official just as it may elect to indemnify a purchaser of its former corporation.[5] Because governmental indemnification may be available for corporate and individual defendants, there is no basis for differential treatment. And third, Samantar's rationale turns the doctrine of immunity on its head. It assumes that it

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[5] *See e.g. Good v. Aramco Servs. Co.*, 971 F.Supp. 254, 261 (S.D.Tex. 1997) (Saudi Arabia allowed for representation of officers and directors in lawsuits brought against them in their official capacity and for indemnification of expenses incurred by them by reason of such lawsuits).

is better policy to permit a suit against a now-private corporate defendant which is indemnified by a foreign state (thereby placing the foreign sovereign's treasury at risk), than to permit a suit against a non-indemnified former official (which poses no threat to the foreign state's assets). If only one of these hypothetical defendants should be entitled to sovereign immunity – and neither one is – it should be the indemnified corporation, not the former official. Samantar's policy argument has no support in law or logic.

Finally, Samantar relies on one snippet of legislative history of the Torture Victim Protection Act to argue that Congress understood the FSIA to apply to claims against former officials under that statute. (Brief of Appellee at 16). This lone comment is far outweighed by the bulk of legislative history which strongly suggests that Congress did not intend the FSIA to apply to TVPA claims at all. (Opening Brief at 43-47).

It is undisputed that Samantar was not an official of the Somali government at the time of the Complaint, so the district court erred in its holding that Samantar is protected by the FSIA.

B. There Is No "Government of Somalia" That Can Satisfy the Threshold Statehood Question of a FSIA Analysis

1. There is no "Foreign State" of Somalia

The first question of a FSIA analysis is to identify the "foreign state." *See, e.g.*, *Velasco*, 370 F.3d at 398 (holding "the Government of Indonesia and the

NDSC are "foreign states" within the meaning of the FSIA"). Because "foreign state" is not defined under the FSIA, courts apply the Restatement definition of that term. *See, e.g., Estate of Klieman v. Palestinian Auth.*, 424 F.Supp.2d 153, 158 (D.D.C. 2006); *Ungar v. PLO*, 402 F.3d 274, 283 (1st Cir. 2005). According to the Restatement, a "state" is an entity with a defined territory and a permanent population, under the control of its government, which engages in foreign relations. *Estate of Klieman*, 424 F.Supp.2d at 158, *citing* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1986).

Defendant Samantar does not even attempt to argue that there is a "state" of Somalia that can satisfy any of the Restatement factors.[6] It cannot be disputed that Somalia does not pass the Restatement test for "statehood."

Alternatively, some courts have reasoned that only foreign sovereigns that have received official United States recognition qualify as "states" entitled to foreign sovereign immunity in United States courts. (Opening Brief at 21). Responding, Samantar contends that the Transitional Federal Government ("TFG") is, in fact, a government of Somalia that has received de facto Executive Branch recognition[7] and is therefore entitled to sovereign immunity. (Brief of Appellee at

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[6] *See* Opening Brief at 19-22 for discussion of these factors.

[7] To support his de facto recognition theory, Defendant Samantar cites *Murarka v. Bachrak Bros.*, 215 F.2d 547, 552 (2d Cir. 1954). In *Murarka*, however, the manifestation of intent to recognize was unambiguous. India and the United States had formally appointed, accredited, and exchanged ambassadors.

8-9). Second, Samantar contends that, even if the TFG is not recognized by the Executive Branch, Somalia still qualifies as a "foreign state" entitled to sovereign immunity. *Id.* He is wrong on both counts.

Samantar's contention that the United States recognizes the TFG as the official government of Somalia is simply incorrect. Numerous courts have held or noted that since the fall of the Barre regime in 1991, Somalia has been without an internationally recognized government. *See, e.g., Abebe v. Ashcroft,* 379 F.3d 755, 764 n.1 (9th Cir. 2004) ("Somalia . . . does not have an internationally recognized government."); *Ali v. Ashcroft,* 346 F.3d 873, 877 (9th Cir. 2003) ("Petitioners filed a petition for writ of habeas corpus . . . seeking to enjoin the INS from removing them to Somalia because *Somalia does not have a government recognized by the United States* and thus could not accept them.") (emphasis added); *Jama v. I.C.E.*, 329 F.3d 630, 634 (8th Cir. 2003)("Somalia lacks a functioning central government. . . ."), *aff'd by Jama v. I.C.E.*, 534 U.S. 335 (2005).

Murarka merely holds that such formal exchange of ambassadors amounts to de facto recognition. *Id.* In stark contrast, the TFG's relations with the United States amount to no more than occasional negotiations with representatives of the TFG. The Restatement explicitly identifies "negotiations with representatives of unrecognized regimes" as an example of the types of association that do *not* support an implication of an intention to recognize. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 104 COMMENT (C) (1965) (emphasis added).

Additionally, numerous available published statements of the State Department suggest that the United States has not recognized the TFG or any other entity to be the "Government of Somalia" since the Barre regime fell in 1991. (J.N. 1-3, 5) (explaining anarchic conditions in Somalia from 1991 to date, and noting lack of a centralized government). In fact, both parties agreed in the district court that Somalia lacked any central government and that conditions in the country were chaotic. (J.A. 50, 51, 120, 124, 170, 201).

Samantar's alternative argument – that even if the United States does not recognize the TFG, Somalia still qualifies as a "foreign state" under the FSIA – also lacks merit. First and foremost, Samantar admits (at least in one portion of his brief) that a government that is not recognized by the Executive Branch does not qualify as a "foreign state" under the FSIA: "if the acts are perpetrated by an official of an entity unrecognized by the United States, the entity is not a 'foreign state" under the FSIA, and the FSIA affords no immunity to an action under the TVPA." (Brief of Appellee at 24). In light of this admission Samantar should not be heard to contend that Somalia qualifies as a "foreign state" even if the TFG is not a recognized government.[8]

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[8] Numerous cases have held that lack of recognition specifically signifies this country's unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control. *See*, *e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964). In light of this reasoning, the district court's heavy reliance on the TFG is particularly misplaced.

Moreover, Samantar's argument cannot be reconciled with the prevailing Restatement test for statehood. Among other requirements, a foreign "state" must have "a defined territory and a permanent population under the control of its own government. . . ." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 201 (1987). Indeed, governmental control is the most important of the factors that determine statehood. (Opening Brief at 20). Modern day Somalia lacks a controlling government and a defined territory, and it therefore does not qualify as a "foreign state" under the FSIA.

Samantar emphasizes that international law distinguishes the succession of a state from the succession of a government. (Brief of Appellee at 9-10). This principle, and the cases upon which Samantar relies,[9] do not apply here. It is undisputed that Somalia disintegrated into a chaotic situation without a centralized government. Post-Barre Somalia has, undisputedly, been *without* a successor

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An unrecognized government cannot be allowed to speak as the sovereign authority, least of all on a question of sovereign immunity.

[9] *Iran Handicraft & Carpet Exp. Ctr. v. Marjan Int'l Corp.*, 655 F. Supp. 1275, 1281 (S.D.N.Y. 1987); *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 731 F. Supp. 619 (S.D.N.Y. 1990), *aff'd on other grounds*, 925 F.2d 566 (2d Cir. 1991); *Kalasho v. Republic of Iraq*, 2007 WL 2683553 (E.D. Mich. 2007); *Yucyco, Ltd. v. Republic of Slovenia*, 984 F. Supp. 209 (S.D.N.Y. 1997).

government. There is not even a government that *claims* to control the same territory as the Barre regime. (Opening Brief at 20-21).[10]

In sum, because there is neither a state as defined by the Restatement, nor a recognized government for FSIA comity purposes, there is no "Government of Somalia" that can be identified as a "foreign state" in the threshold holding of this Court's FSIA analysis.

2. This Court Should Consider the Statehood Issue on Appeal

Samantar argues that the question of Somalia's "foreign state" status should not be decided here because it was not adequately raised below. In fact, Plaintiffs did challenge Somalia's status as a state at the district court level. If, however, the Court finds that Plaintiffs did not raise the issue below with the requisite details and specificity, it should still consider the issue to avoid a miscarriage of justice.

a. Plaintiffs Properly Challenged Somalia's Status as a Qualifying State Before the Trial Judge

In this case, Plaintiffs alleged the following in their pleadings:

> In 1991 the government of Siad Barre was ousted from power. Following the overthrow of the Siad Barre regime, *Somalia ceased to exist as a nation. It disintegrated into regions or*

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[10] Among other things, it is significant that the FSIA is based on principles of comity. *Patrickson*, 538 U.S. at 479. International comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience. . . ." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Courts have long held that "[i]n the absence of recognition no comity exists." *Russian Socialist Federated Soviet Republic v. Cibrario,* 139 N.E. 259, 262 (N.Y. 1923).

> *districts*, controlled by war lords using clan based militias to practice extortion, murder, rape, and robbery. *Today, there is no central government in Somalia, no seat of government* in the Capital, Mogadishu, and no Constitution providing for *or recognizing a federal system of government.*

(J.A. 170) (emphasis added).[11] Moreover, the Complaint describes how, during the 1990s, Somalia fell into increasing chaos and the central government collapsed. (J.A. 50). Plaintiffs further noted that Somalia remains unstable and ungoverned until today. (J.A. 51). In addition to describing the disintegration of the country into multiple clan-controlled regions, Plaintiffs specifically noted that the northwestern portion of the former Somalia has completely seceded and declared its independence. (J.A. 51, 172). The Plaintiffs repeatedly made it clear that Somalia does not have a defined territory or permanent population. (J.A. 170, 50).

Plaintiffs also disputed the validity and legitimacy of the TFG and explicitly pointed out its lack of recognition by the United States. (J.A. 181). Plaintiffs also mentioned the TFG's failure to control virtually any of the territory of the former country, including the capital city, Mogadishu. (J.A. 171-172). Finally, Plaintiffs' submission of letters from the controlling government of Somaliland (the region in which the abuses of the Complaint took place) reflects the Plaintiffs' assertion that

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[11] Even the district court agreed that, after 1991, "Somalia descended into turmoil. It has been *without a central government since this time* and much of the territory has been subject to serious civil strife." (J.A. 201) (emphasis added).

the region formerly known as Somalia is not now a qualifying "foreign state" that is governed and controlled by one recognized government. (J.A. 187-197).

These allegations are more than enough to preserve this important issue. Plaintiffs specifically injected all of the elements of this issue into the district court proceedings. *See Maynard v. Gen. Elec. Co.*, 486 F.2d 538, 539 (4th Cir. 1973) (considering the issue of lack of privity on appeal, despite the appellant's failure to argue it specifically before the district judge, because the elements of the theory appeared in the record); *Semaan v. Mumford*, 335 F.2d 704, 706, n.7 (D.C. Cir. 1964) ("Although the estoppel theory was not explicitly argued below, it was plainly encompassed by the pleadings and was clearly a 'discernible circumstance' from the record before the court."); *see also Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 604 (4th Cir. 2004) (holding that the court of appeals is required to consider any theory encompassed by the submissions in the underlying litigation).

In sum, Plaintiffs challenged Somalia's status as a "foreign state" for FSIA purposes with detail and specificity. Plaintiffs pointed to Somalia's discontinuation as a nation, disintegration into multiple regions, lack of stability, lack of a constitution, and lack of a legitimate, functioning, recognized government that controls its former territory. As such, all of the elements of the theory appear

in the submissions to the lower court and the Court should consider the argument. *See Maynard*, 486 F.2d at 539, and *Volvo Constr. Equip.,* 386 F.3d at 604.

b. A Failure to Address the "Foreign State" Issue on Appeal Will Result in a Miscarriage of Justice

If the Court somehow finds that the Plaintiffs did not raise the elements of the "foreign state" argument below, the Court should nonetheless consider the "foreign state" issue because a failure to do so would be a miscarriage of justice. *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) (the Court of Appeals may address an issue not raised before the trial court on appeal if failure to do so would result in a miscarriage of justice).

Injustice will result here if this issue is not considered because the Court will set a precedent that empowers warlords, feudal lords and armed militias in failed states around the world to deprive United States courts of jurisdiction over claims for human rights abuses brought under the ATS and TVPA. A rule of law that grants foreign sovereign immunity despite the absence of a qualifying "foreign state" would, to the detriment of justice, shield the actions of future non-state-actor foreign criminals in United States courts. For this reason, even if Somalia's status as a qualifying "foreign state" was not adequately raised below, it should still be addressed by this Court.

C. Samantar Is Not Entitled to Foreign Sovereign Immunity Because FSIA Immunity Cannot Attach to Acts That Are Outside the Scope of Authority of Foreign Officials

Samantar's alleged acts were violations of Somali and customary international law. (*See* Opening Brief at 32-37.) As such, they were beyond the scope of his authority and cannot be ratified as official acts. Defendant Samantar cites *no* cases holding that human rights abuses such as torture and mass killings of civilians by firing squads may be ratified. Both the *Belhas* and *Matar* cases cited by Defendant Samantar and relied upon by the district court can be properly characterized as cases involving single-incident allegations of allegedly indiscriminate bombing. *Belhas v. Ya'Alon*, 466 F. Supp. 2d 127 (D.D.C. 2006); *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007).[12]

Though Plaintiffs contend that *Belhas* and *Matar* are wrongly decided to the extent that they improperly equate "color of law" with "official capacity" (Opening Brief at 41), if this Court is not inclined to reject their "color of law" analysis entirely, those opinions must be limited to their narrow holdings: that battlefield target selection decisions are the type of acts that can be, in some circumstances, ratified as "official acts" falling within a foreign officer's scope of authority for FSIA purposes. Under no circumstances should that very limited holding be extended into a rule that allows acts clearly falling outside a military leader's scope

[12] Neither *Belhas* nor *Matar* is controlling authority in this Circuit.

of authority (such as torture, mass killings by firing squad, rape, and arbitrary detention) to be ratified as "official acts." And the limited holdings of those two cases certainly should not now be extended into a rule that defers automatically to any putative stamp of "ratification," no matter who applied it, and without inquiry into the nature of the act itself.

Samantar wrongly urges this Court to adopt just such a blind rule. This Court should instead analyze the nature of each act set forth as a claim under the ATS and TVPA to determine if it is within the official's scope of authority. When that analysis is conducted, the Court will conclude that, even if the *Belhas* and *Matar* decisions currently adjudicated their very narrow fact scenarios, they have not supplanted the weight of authority recognizing that a state cannot lawfully empower its agents and instrumentalities to violate its own laws or international laws concerning torture, firing squad mass killings and other war crimes and human rights abuses. (*See* Opening Brief at 32-38).

II. THE TVPA WILL BE ESSENTIALLY NULLIFIED IF THE BELHAS-MATAR-SAMANTAR LINE OF CASES IS UPHELD

Defendant Samantar argues, remarkably, that this Court should interpret FSIA in a way that will limit the application of the TVPA, a later-decided statute, to the extraordinarily narrow group of defendants including only officials of nonrecognized entities or "nongovernmental officials who act under color of law." (Brief of Appellee at 25). Defendant Samantar's proposed class of potential

defendants apparently only includes factual scenarios akin to that in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). Clearly, the TVPA is not restricted to extraordinary cases such as *Kadic*.

The defendant in *Kadic* was "the President of a three-man presidency of the self-proclaimed Bosnian-Serb republic within Bosnia – Herzegovina, sometimes referred to as "Srpska," which claims to exercise lawful authority, and does in fact exercise lawful control, over large parts of the territory of Bosnia-Herzegovina." *Kadic*, 70 F.3d at 237. Congress surely did not intend to limit the reach of the TVPA to leaders of "states" such as Srpska.

Indeed, adopting Defendant Samantar's suggested new, very limited class of TVPA defendants would directly contravene Congress's intent for that statute. The TVPA was unquestionably intended by Congress to reach foreign government officials. (Opening Brief at 43-50). Congress, in enacting the TVPA, noted that torture and extrajudicial killing cannot be within the scope of a "foreign official's" authority and that FSIA should normally provide no defense to an action under the TVPA against a "former official." S. REP. NO. 102-249, at 18 (1991). To now limit the TVPA's reach to the miniscule class of defendants recommended by Defendant Samantar would be to reject both Congress's intent and the "clear mandate" previously recognized by the United States Supreme Court. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004).

III. ARGUMENTS NOT ADDRESSED BY THE DISTRICT COURT

The district court did not address Samantar's arguments regarding head of state immunity, the statute of limitations and the doctrine of exhaustion of remedies. As set forth in Plaintiffs' Opening Brief, these arguments lack merit and should be rejected by this Court. To the extent that the Court does not reject these arguments, it should remand them to the district court for consideration in the first instance or for discovery to resolve factual disputes.

A. Samantar Is Not Entitled to Head of State Immunity

Samantar is not protected by head of state immunity because he never served as head of state of Somalia. Article 79 of the Somali Constitution in force during the Barre regime states plainly that "the President of Somali Democratic Republic shall be the Head of State and shall represent state power and the unity of the Somali people." (J.A. 157). Samantar never served as President of Somalia because that position was held at all relevant times by President Siad Barre. (J.A. 170). Furthermore, Samantar's positions as Prime Minister and Minister of Defense do not entitle him to head of state immunity. *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988) (finding the United States government's recommendation that Margaret Thatcher be granted immunity conclusive on the

issue of head of state immunity);[13] *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1121 (D.D.C. 1996) (denying head of state immunity to Minister of Defense and any other officer of United Arab Emirates).

Moreover, even if Samantar at one time served as head of state (he did not), he would still not be protected by head of state immunity because he is not a sitting head of state. *First Am. Corp.*, 948 F. Supp. at 1121; *El-Haddam v. Embassy of United Arab Emirates*, 69 F. Supp. 2d 69, 82 n. 10; *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988).[14]

B. The Statute of Limitations Does Not Bar Plaintiffs' Claims

A ten-year statute of limitations applies to claims under the TVPA and ATS.[15] Pursuant to the doctrine of equitable tolling, courts toll the statute of limitations until the defendant has entered the jurisdiction of United States courts. *See Arce v. Garcia*, 434 F.3d 1254, 1264 (11th Cir. 2006). (Opening Brief at 52-53). Samantar entered and assumed residence in the United States in 1997 and, at the time Plaintiffs filed this suit, had been in the United States for less than ten

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[13] The United States government has not intervened with a similar recommendation in this case. Moreover, the United Kingdom does not have a President position analogous to that of Siad Barre of Somalia.

[14] Although argued in the district court, Samantar does not now assert that he is subject to a common law "official acts" immunity.

[15] *See, e.g., Papa v. United States*, 281 F.3d 1004, 1012 (9th Cir. 2002).

years. Based on the bare facts relative to the timing of Samantar's entry into the United States, Plaintiffs' claims are not barred by the statute of limitations.

Samantar continues to argue that Plaintiffs could have brought this case in Italy during the period between 1991 and 1997, when he lived in Italy. Despite the persistence of his claim, he is still unable to cite support for this proposition. Instead he presents as "fact" his contention that Plaintiffs could have filed suit in Italy or Somaliland. At the district court, Plaintiffs contested those assertions (made by a purported but disputed expert retained by Defendant Samantar) arguing that ratification of the United Nations Convention Against Torture, a non-self-executing treaty, is not enough. There is no implementing legislation in Italy that would have allowed Plaintiffs to bring a case for torture, nor does Italy have statutes that allow for a private cause of action to be brought for any of the other claims alleged by the Plaintiffs such as extrajudicial killings, crimes against humanity, or war crimes. (Opposition to Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint at 19-20). The arguments of both sides related to the statute of limitations invoke factual issues that are in dispute between the Parties. Should the Court decide that the applicable statutes should not be tolled, Plaintiffs request discovery to address the unresolved factual issues.

C. The Doctrine of Exhaustion of Remedies Does Not Bar Plaintiffs' Claims

The ATS does not require Plaintiffs to exhaust their local remedies. *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005). Under the TVPA, Plaintiffs only have to exhaust "adequate and available" remedies in the countries where the abuses occurred. 28 U.S.C. § 1350. Plaintiffs are not required to exhaust remedies in a foreign forum if such remedies are "unobtainable, ineffective, inadequate, or obviously futile." *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995). Somalia, which does not possess an appropriate judicial forum for victims of human rights abuses, does not have a court system that qualifies as an adequate and available remedy for victims such as the Plaintiffs in this case.

Samantar proffers affidavits disputing Plaintiffs factual allegations. (J.A. 109-125). Should the Court reject Plaintiffs' argument that the ATS does not require local exhaustion, Plaintiffs should be granted discovery regarding available remedies.

IV. JURISDICTIONAL DISCOVERY IS NECESSARY

A. The District Court Did Not Lift Its Stay of Discovery

Samantar improperly suggests that the district court reopened discovery when it reinstated this case. (Brief of Appellee at 13). He is wrong.

On January 7, 2005, the district court stayed the case to allow the Department of State to provide a Statement of Interest regarding Samantar's

immunity claim. (J.A. 209). The district court ordered specifically that all discovery, with the exception of requests for information from government agencies, was stayed *until further Order of the Court*. (J.A. 5). Later the district court placed the case on administrative suspension. (J.A. 8), August 30, 2005 Order ("The Clerk is directed to remove this civil action from the active docket of the court"). After two years of silence from the State Department, the district court reactivated the case on January 22, 2007. (J.A. 9). Despite Samantar's suggestion to the contrary, the district court did not then also lift the stay of discovery. (J.A. 10). Instead, the district court ordered counsel for both Parties to meet and confer regarding scheduling a status conference and ordered that the Clerk merely "reinstate the case to the Court's active docket." (J.A. 9).

To the extent that Samantar has suggested that Plaintiffs simply neglected to take advantage of discovery options available to them, Samantar has mischaracterized the disposition of the proceedings below.

B. Discovery Is Necessary to Resolve Disputed Jurisdictional Fact Issues

If the Court does not overturn the district court's FSIA ruling, at a minimum the case should be remanded for jurisdictional discovery to resolve the contested factual issues surrounding Somalia's status as a qualifying "foreign state" and the authenticity of the TFG letters.

When a defendant challenges the factual basis of the court's subject matter jurisdiction under the FSIA, the court does not rely solely on facts alleged by the plaintiff, and disputed by the defendant, in ruling on a motion to dismiss. *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40-41 (D.C. Cir. 2000). Instead, it is "essential for the district court to afford the parties the opportunity to present evidentiary material at a hearing on the question of FSIA jurisdiction. The district court should afford broad latitude to both sides in this regard and resolve disputed factual matters by issuing findings of fact." *Reiss v. Société Centrale Du Groupe Des Assurances Nationales*, 235 F.3d 738, 748 (2d Cir. 2000). Here, jurisdictional discovery is appropriate to resolve factual issues bearing on the Court's jurisdiction.

1. Plaintiffs Are Entitled to Jurisdictional Discovery Regarding the Statehood Status of Somalia

Plaintiffs should be afforded the opportunity to engage in limited jurisdictional discovery regarding Somalia's status as a qualifying "foreign state" for FSIA purposes. Plaintiffs and Defendant Samantar dispute whether Somalia is a "foreign state" within the meaning of the FSIA. (Opening Brief at 19-22; Brief of Appellee at 8-10). Defendant Samantar's only support for his argument that Somalia is a "foreign state" within the meaning of the FSIA, is a single page on the United States Department of State's website. (Brief of Appellee at 9). The cited page merely includes Somalia in a list of independent states with diplomatic

relations with the United States. *Id.* Based on this web page, Defendant Samantar asserts that that the United States Government "recognizes" Somalia as a "foreign state." *Id.*

Plaintiffs contend that numerous other statements published by the U.S. Department of State more strongly and clearly support the opposite conclusion—that the United States Government does *not* officially recognize Somalia and has no official United States representation in the region. (J.N. ¶ 5). Multiple references on the State Department's website confirm the TFG's persistent inability to operate as an organized, functioning government with control over any territory and support the conclusion that the United States does not officially recognize Somalia. (Opening Brief at 19-22). Plaintiffs concede that neither party can point to a sole declarative sentence saying expressly that Somalia is or is not "recognized" by the United States.

Because the FSIA grants immunity from suit to "foreign states" only, the issue of Somalia's statehood status is thus a disputed factual question that is "inextricably intertwined" with the issue of FSIA jurisdiction. 28 U.S.C. § 1604; *see Reiss*, 235 F.3d at 748 (allowing plaintiff to proceed with discovery where the authority of an agent to act on behalf of the foreign sovereign is "inextricably intertwined" with the issue of jurisdiction under the FSIA). Because the parties have a factual dispute concerning Somalia's status as a qualifying "foreign state,"

the Parties should be afforded the opportunity to conduct discovery regarding this question.

Specifically, in the absence of input from the State Department and in the absence of definitive United States policy declaration regarding recognition of Somalia or the TFG, the case should be remanded for discovery into, at a minimum:

> (1) whether there is a manifestation of intention by United States to treat Somalia as a state, or to treat the TFG as the government of Somalia. (Such manifestation may be made by an express indication that recognition is extended or by implication from certain relations or associations between the United States and the TFG, unless such an implication is prevented by disclaimer of intention to recognize.)
>
> (2) whether there is any bilateral international agreement between the United States and the TFG that implies recognition of Somalia as a state and recognition, as its government, of the TFG.

See RESTATEMENT (SECOND) ON FOREIGN RELATIONS LAW § 104 (1965). These are some factors on which the district court should have permitted jurisdictional discovery before ruling that the TFG is the recognized government of Somalia.

If the Court decides not to overturn the district court's FSIA ruling, it should nonetheless remand this case to the district court so that the parties may engage in appropriate jurisdictional discovery regarding the factors listed above, and regarding the Restatement "statehood" criteria discussed in Section I.B., *infra*.

2. Plaintiffs Are Also Entitled to Jurisdictional Discovery Regarding the TFG and the Authenticity of the TFG Letters

Plaintiffs should also be given the opportunity to conduct limited jurisdictional discovery regarding the legitimacy and status of the TFG in general and the authenticity of the letters issued by the TFG in this case.[16] It is undisputed that since the inception of the TFG in November of 2004, that organization has been sharply divided. (J.A. 201). As set forth in Plaintiffs' Opening Brief and Plaintiffs' Motion for Judicial Notice, the TFG is involved in ongoing violent conflict with clan-based warlords and armed opposition factions, and has never established effective control of the former Somalia. (J.A. 201-02, J.N. ¶ 3).

In view of the TFG's turbulent status, (J.N. 1, 2), and given the representations made by Mr. Abdillahi M. Duale of Somaliland regarding the political biases tainting the statements made in the TFG letters (J.A. 189), Plaintiffs have several bases on which to question the legitimacy of the purported TFG letters. It is not at all automatically verifiable that the signatories of those letters are who they claim to be or have the authority to speak for Somalia, or even for the

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[16] The district court improperly gave credence to letters from individuals claiming to represent the TFG, despite the State Department's unwillingness to do so. (Opening Brief at 8-10, 22-25). Because Plaintiffs were not afforded an opportunity to conduct discovery related to the letters, and because the district court afforded them "great weight" in extending immunity under the FSIA to Samantar (J.A. 218-19), Plaintiffs are entitled to a reasonable opportunity to conduct discovery related to the letters. *Prakash v. American Univ.*, 727 F.2d 1174, 1180 (D.C. Cir. 1984).

entire TFG. In addition to discovery related to statehood and recognition, if the district court intended to rely so heavily on the statements in the TFG letters, Plaintiffs should have been allowed to conduct jurisdictional discovery related to the authenticity.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court reverse the district court's decision and remand the case to the district court.

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I certify that on January 16, 2008, copies of the foregoing Reply Brief was served by overnight delivery on:

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