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

FARHAN MOHAMOUD TANI WARFAA,	**:**	
Plaintiff,	**:**	
versus	**:**	**Civil Action No. 1:05-cv-00701 (LMB/JFA)**
YUSUF ABDI ALI,	**:**	
Defendant.	**:**	

BRIEF IN SUPPORT OF DEFENDANT'S RENEWED MOTION TO DISMISS

COMES NOW the Defendant, Yusuf Abdi Ali, and herewith directs the attention of this Honorable Court to the following Memorandum of Points and Authorities in Support of his Renewed Motion to Dismiss the Amd. Comp. [Document 90], *viz*.:

SALIENT FACTS AND PROCEDURAL HISTORY

Defendant Yusuf Abdi Ali ("Ali" or "Defendant") served as the Commander of the Fifth Brigade of the Somali National Army, in Gebiley, Somalia, from May of 1987, until October of 1988. Declaration of Yusuf Abdi Ali [Document 23 (Motion to Dismiss), Exhibit 7, at ¶ 13][1] Upon the imminent collapse of the Siad Barre regime in Somalia, in December of 1990, Ali, by then detailed to Keesler Air Force Base, in Biloxi, Mississippi, where he had been receiving training in management studies, by the United States Air Force, which had been aborted by the build up for the Gulf War, traveled to Canada, where he sought refugee status. *Id*. at ¶¶ 14, 15.

[1] Because the said Ali Declaration was filed herein before the advent of CM/ECF in this Honorable Court, a copy of the said Declaration is submitted herewith for ready reference *qua* "Exhibit '1'".
[2] *See, e.g.*: Mohamed Sheikh Nor, "At least 10 dead in attack on Somalia's parliament building", *CNN World*, 24 May 2014, URL: http://www.cnn.com/2014/05/24/world/africa/somalia-attack/ (Last visited on 30 May 2014)
[3] For an interesting observer's view of the denial of *certiorari* from the interlocutory Samantar

Upon his arrival in Canada, Ali lived openly, in Toronto, Ontario, from December of 1990 until October of 1992, all the while living openly in Canada, whereupon Ali was deported from Canada to the United States. *Id.* at ¶¶ 15-18. Ali then lived, openly, in the United States, in Arlington, Virginia, from October of 1992 until July of 1994, whereupon he moved to Addis Abba, Ethiopia, where he lived, openly, until December of 1996, at which point Ali returned to the United States, where he has resided, continuously and openly, in Alexandria, Virginia, to the present. *Id*. at, *inter loci*, ¶¶ 16, 22.

Plaintiff ("PLT") claims to be a Somali farmer, living in Fifo Uray, Somalia, a small village located near the city of Gebiley, Somalia, and that he and the other supposed victims of the alleged abuses set out in the Amd. Comp. are all members of the Somali Issaq clan, a clan which predominates in the northwestern region of Somalia, where he lives. Amd. Comp. at ¶16. PLT claims that "[t]he Issaq were among the best educated and most prosperous Somalis and were perceived from the outset (of the 1980s) as potential opponents to the Barre regime" *Id*. at ¶12. PLT further claims, *inter alia*, that ". . . the (Somali) government's extreme oppression led members of the Issaq clan to establish an opposition force called the Somali National Movement ('SNM') in 1981." *Id*. PLT goes on to claim that the Somali National Army committed widespread human rights abuses in its campaign to eliminate the SNM and any perceived supporters [,]" *Id*. at ¶13, and further claims that ". . . (Ali), as commander of the Fifth Battalion, . . . directed, and participated in, a brutal counterinsurgency campaign that refused to distinguish between civilians and combatants." *Id.* at ¶15. alleges that members of the Issaq clan were repressed by the Somali Government in the 1980s, of which Ali was a part undertook a "violent campaign to eliminate Isaaq clan opposition to the Government" and that this campaign "intentionally disregarded the distinction between civilians and [] fighters" within the Somali

National Movement, an insurgency group established by members of the Isaaq clan. Second Amd. Comp. ("Complaint") (DE #76, Ex. 1) at ¶¶ 19-21. Ali allegedly should be liable for the abuses committed during this campaign because he intended to "further this system of repression and ill-treatment" and was "reckless or indifferent to the risk" that the abuses alleged would occur during this campaign. *Id*. at ¶¶ 80, 83.

PLT contends, *inter alia*, that Ali bears responsibility for PLT's alleged arbitrary detention, and torture and that Ali, personally, attempted to kill PLT extrajudicially. *Id*. at *passim*.

PLT first brought his subject claims in an antecedent action, filed with this Honorable Court on 10 November 2004, and docketed qua Civil Action No. 04-1361. However, the PLTs in that action, then proceeding anonymously, were allowed to nonsuit their case, without prejudice, per this Honorable Court's Order of 29 April 2005 [Document 83], and to recommence the action within 45 days upon compliance with certain conditions. PLTs subsequently recommenced their cause on 13 June 2005, with the filing of their Complaint in the instant action [Document 1]. As adverted to *supra*, Ali filed a Motion to Dismiss the Complaint on 20 July 2005 [Document 23]. PLTs opposed the motion [Document 25, filed 3 August 2005], and, on 5 August 2005, this Honorable Court entered an Order [Document 26] continuing the Motion to Dismiss and staying the action ". . . until either party provides the Court with a declaration from the Department of State that it has no objection to this action going forward and that taking discovery in Ethiopia will not interfere with United States foreign policy."

Thereafter, the action remained stayed for over five years, that is, until this Honorable Court lifted the stay, per its Order of 21 October 2010 [Document 47], upon the motion of PLTs [Document 40, filed 14 October 2010]. However, upon Defendant's consent motion to reimpose

the stay, prompted by the 5 March 2011 Order of the Supreme Court in the then pending case of *Kiobel v. Royal Dutch Petroleum*, Record No. 10-1491, which directed the parties in said case to file supplemental briefs addressing the following question: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C., § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States", this Honorable Court again stayed the cause per its Order of 6 April 2012, reimposed a stay of proceedings [Document 57].

In the aftermath of the Supreme Court's holding in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), this Honorable Court initially elected to continue the stay for 120 days upon a status conference held on 17 May 2013 [Documents 65 & 66], whilst the Court solicited a statement of interest from the United States Department of State [Document 71, sent to State Department on 21 June 2013]. The said query from the Court to the State Department yielded initially the filing on 19 September 2013, by the United States a Statement of Interest in which, essentially, the United States declined to respond to this Honorable Court's query [Document 75]. Then, on 20 September 2013, this Honorable Court continued the stay for another 120 days [Document 77].

The next noteworthy development as regards the instant case was the dispatch on or about 30 November 2013 of an official diplomatic letter from Abdi Farah Shirdon, the Prime Minister of the Government of the Federal Republic of Somalia to Secretary of State John Forbes Kerry, requesting immunity from suit for Ali. [Defendant Abdi Ali, as commander of the Fifth Battalion,directed, and participated in, a brutal counterinsurgency campaign that refused to distinguishbetween civilians and combatants., filed herein on 4 December 2013]. Such request states, in pertinent part, that,

". . . the Federal Republic of Somalia hereby affirms and ratifies Mr. Ali's plea of common law immunity from suit, and, furthermore, finds that all of his actions undertaken in Somalia, as commander of the Fifth Brigade, were undertaken in his official capacity with the Government of Somalia . . . (and that) the Federal Republic of Somalia rejects the notion that Colonel Ali's actions were contrary to the law of Somalia or the law of nations, much less that he may be fairly said to be liable under any of the theories propounded in the Complaint filed in the district court."

Following the submission by the Government of Somalia of its within-referenced request for immunity for Ali, this Honorable Court held a status hearing on 24 January 2014, and, again, continued the stay of proceedings for 120 days [Documents 81], with the Court specifying in its Order continuing the stay, *inter alia*, that the purpose of the continuance is to give the State Department an opportunity to respond to the aforesaid request from the Somali Government for immunity for Ali [Document 82].

On 24 April 2014, the United States filed another Statement of Interest with this Honorable Court [Document 85], in which, *inter alia*, the United States indicated that ". . . [t]he Government of Somalia has been occupied with questions of security, which has [*sic*.] proven an obstacle to discussions regarding immunity[,]" Statement of Interest at ¶3, and went on to state that "[i]n April 2014, the Department of State has continued to engage with the Government of Somalia concerning this matter, and seeks to begin substantive discussions concerning the immunity of the defendant as soon as possible[,]" *Id*. at ¶5, concluding that ". . . the United States has not formed views as to the defendant's claim of immunity at this time." *Id.*

On 25 April 2014, this Honorable Court again lifted the stay of proceedings and, concomitantly, granted leave to PLTs to file an Amd. Comp. whereby PLTs would drop "Jane Doe" from the instant action and supply the alleged true name of the remaining PLT, but not otherwise alter or change the allegations contained in the original Complaint [Documents 86 & 87]. PLT then filed his Amd. Comp. on 9 May 2014 [Document 89].

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION.

A. PLTs' claims are nonjudiciable as political questions and acts of state.

The Amd. Comp. in this case, accepting its factual allegations to be true, questions the legality of actions taken by the Somali Government, a government then recognized by the United States, and by the Somali National Army, to quell an insurgency movement by members of the Isaaq clan, operating through the SNM, aimed at undermining the policies of that Government.

The armed conflict represented an extension of a purported military policy that favored certain clans and that ". . . the Issaq clan . . . was a special target of the government." Amd. Comp. at ¶12. PLT and every alleged victim identified in the Amd. Comp. is a member of the Isaaq clan, complaining of abuses allegedly carried out by Defendant and the Somali National Army " . . . in a brutal counterinsurgency campaign that refused to distinguish between civilians and combatants." *Id*. at ¶ 15.

The Amd. Comp. also acknowledges, as it must, that Somalia remains a dangerous place, stating, *inter alia*, that "[s]table conditions still do not exist in most parts of the country." However, if anything, PLT appears to minimize the presents danger of travel within Somalia. In its Statement of Interest filed with this Honorable Court on 24 April 2014 [Document 85], cited *supra*, the State Department acknowledges as much, citing security concerns as an impediment to engaging the Somali Government on its pending request for immunity for Defendant. In addition, recent headlines in the news media yield the observation that security issues persist to the present, even in Mogadishu, the capital city of Somalia.[2]

[2] *See, e.g.*: Mohamed Sheikh Nor, "At least 10 dead in attack on Somalia's parliament building", *CNN World*, 24 May 2014, URL: http://www.cnn.com/2014/05/24/world/africa/somalia-attack/

In its last Statement of Interest filed with this Honorable Court, the Executive Branch substantially avers that it has taken the Somali Government's diplomatic request for immunity for Defendant in this action under advisement and suggests that the ultimate determination of the United States on such question will flow from substantive negotiations with the Government which will ensue as soon as the security situation within Somalia improves to a sufficient extent to allow such discussions to take place. Thus, given the primacy of the Executive Branch in formulating foreign policy and conducting foreign relations, Defendant respectfully submits that this Honorable Court should at least defer action in respect of this matter pending the State Department's determination as regards the subject pending request for immunity for Ali from the Somali government. To do otherwise, encroaches on the constitutional prerogatives of the Executive Branch and thrusts the Court into an area beyond its jurisdiction and ken. Thus, any substantive determination by this Court will necessarily express, in the language of *Baker v. Carr*, 369 U.S. 186 (1962),"a lack of respect due the coordinate branches of government" and carries "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217.

The Supreme Court held, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), that "[q]uestions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." In *Baker v. Carr*, 369 U.S. at 217, the Court articulated the six factors that courts are to consider in determining whether to dismiss a case because of its "non-judiciability on the grounds of a political questions's presence." Of these six factors, the two principally implicated by this case are "[4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate

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branches of government; or . . . [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id*. Dismissal of this case is mandated if any "one of these formulations is inextricable from the case at bar." *Id*.

This case poses a question similar to that which the U.S. District Court for the District of Columbia found to raise a nonjudiciable political question in *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005), *appeal dismissed*, 473 F.3d 345 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 2931 (2008). A claim in that case questioned whether an oil company with majority Indonesian government ownership aided and abetted the Indonesian army in seeking to eliminate a segment of the Indonesian population. In dismissing the claim, the court that a resolution of the claim would "create a significant risk of interfering in Indonesian affairs and thus U.S. foreign policy concerns." 393 F. Supp. 2d at 28; *see also Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1032 (W.D. Wash. 2005) (finding that any decision to restrict trade with Israel posed a nonjudiciable political question); *In re Refined Petroleum Products Antitrust Litigation*, 649 F. Supp. 2d 572, 596-98 (S.D. Tex. 2009) (declining to consider as a nonjudiciable political question the legality of an alleged conspiracy between oil producers and OPEC states to fix the price of oil products).

The court in *Doe v. Exxon Mobil* had the benefit, in its determination, of a cautionary letter from the U.S. State Department. 393 F. Supp. 2d at 22. Whether or not the Department intervenes in this matter, the ultimate decision as to the existence of a nonjusticiable political question resides with this Court. *See id*. at 23.

Adjudication of PLT's claims also is barred by the act of state doctrine. This prudential principle precludes federal courts from passing on the validity of a foreign government's official acts. "In the Eastern District of Virginia, the act of state doctrine applies when: (1) the act

undertaken by the foreign state is public, and (2) the foreign state completes the act within the its territory." *Dominican Republic v. AES Corp.*, 466 F. Supp. 2d 680, 694-95 (E.D. Va. 2006) (declining to apply the doctrine because the outcome of the case did not turn upon the foreign governmental act in question).

As described *supra*, the Amd. Comp. acknowledges that the particular acts of which Ali is accused were taken as part of an official government campaign to target members of the Issaq clan as part of a counterinsurgency campaign by the Somali National Army to eliminate the SNM "opposition force". Amd. Comp. at ¶ 12 In setting out an attempt to target a civilian population in order to further a military objective during civil unrest , the instant facts resemble, in kind if not degree, those in the case in which the U.S. Supreme Court first articulated the dimensions of the act of state doctrine. The PLT in *Underhill v. Hernandez*, 168 U.S. 250 (1897), an American citizen, complained that, though a noncombatant, he was the victim of "assaults and affronts" by order of a civil war military commander. *Id*. at 251. In language apt here (and determinative as well of the right of Ali to common law immunity set out in Section I.B. *infra)*, the Court held, "The immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as a matter of fact." 168 U.S. at 251; *see also Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d at 1032; *In re Refined Petroleum Products*, 649 F. Supp. 2d at 588.

It is no challenge to the application of the act of state doctrine that the particular acts that are immune from challenge might have violated the law of the state or international law. In *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004), the conduct of local government officials of the People's Republic of China in repressing the Falun Gong movement was found to be protected

by the act of state doctrine despite the claim that the repressive conduct transgressed the official laws of the state and were authorized only by covert unofficial policy. *Id*. at 1288-1307. Similarly, the conduct was found to be exempt from scrutiny despite arguments that the repressive actions violated substantially the same international norms alleged here to have been violated by Ali. *Id.*

Because consideration of the claims against Ali will cause this Honorable Court to pass upon the legality of what PLT tacitly acknowledges to be the conduct of a military campaign incident to a civil war, and because the clan rivalries at issue in that civil war still inform U.S. efforts to achieve peace in Somalia, the claims are not subject to adjudication and must be dismissed as political questions and internal acts of the Somali state.

B. Ali Enjoys Immunity under Common Law Principles of Foreign Official Act Immunity.

Ali is entitled to immunity from this suit under the common law doctrines of foreign official act and head of state immunity. These immunity doctrines extend deep into American jurisprudence and apply to immunize one who, like Ali, is accused of actions taken in his official capacity.

1. Ali cannot be sued for actions taken in his official capacity.

In the earliest days of the Republic, the "absolute" immunity of a foreign sovereign was understood to encompass not only the state and the head of state, but also other individual officials insofar as they acted on the sovereign's behalf. In concluding that a French governor was immune from civil suit in connection with the seizure of a ship, the Attorney General stated:

> I am inclined to think, if the seizure of the vessel is admitted to have been an official act, done by the defendant by virtue, or under color, of the powers vested in him as governor, that it will of itself be a sufficient answer to the PLT's action; that the defendant ought not to answer in our courts for any mere irregularity in the exercise of his powers; and

> that the extent of his authority can, with propriety or convenience, be determined only by the constituted authorities of his own nation.

1 Op. Att'y Gen. 45, 46 (1794); *see also* 1 Op. Att'y Gen. 81 (1797) ("it is as well settled in the United States as in Great Britain, that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States").

Subsequent expressions of official act immunity appear in the case law. *Underhill v. Hernandez*, 168 U.S. at 252, presents facts remarkably similar to those here except as to the severity of the injuries alleged. A civilian PLT sued, in federal court, a Venezuelan general for an assault upon him that took place during the quelling of a civil insurrection by troops under the General's command. In finding the general immune from suit, the Supreme Court held that "[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agent of governments ruling by paramount force as matter of fact." 168 U.S. at 252; *see Jones v. Le Tombe*, 3 U.S. (3 Dall.) 384, 385 (1798); *Lyders v. Lund*, 32 F.2d 308, 309 (N.D. Cal. 1929) ("in actions against the officials of a foreign state not clothed with diplomatic immunity, it can be said that suits based upon official, authorized acts, performed within the scope of their duties on behalf of the foreign state, and for which the foreign state will have to respond directly or indirectly in the event of a judgment, are actions against the foreign state"); *Heaney v. Spain*, 445 F.2d 501, 504 (2d Cir. 1971) (noting in *dicta* that the immunity of a foreign state extends to any official or agent of the state with respect to their official acts); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990); *accord*, *e.g.*, *Velasco v. Indonesia*, 370 F.3d 392, 399 (4th Cir. 2004); *In re Terrorist Attacks*,

392 F. Supp. 2d 539, 551 (S.D.N.Y. 2005); *Doe I v. Israel*, 400 F. Supp. 2d 86, 104 (D.D.C. 2005); *Herbage v. Meese*, 747 F. Supp. 60, 66 (D.D.C. 1990), *aff'd*, 946 F.2d 1564 (D.C. Cir. 1991) (per curium) ("a government does not act but through its agents").

PLT acknowledges that Ali's actions were taken in the course of his official duties. "Defendant . . ., as commander of the Fifth Battalion, directed, and participated in, a brutal counterinsurgency campaign that refused to distinguish between civilians and combatants[,]" Amd. Comp. at ¶ 15, and, as referenced *supra*, the Government of Somalia, per its 30 November 2013 diplomatic letter to the State Department, which remains pending, has placed its imprimatur on all of Ali's subject actions.

PLT suggests that human rights abuses, as violations of law, cannot be deemed to be official acts. This argument is logically flawed, runs counter to the principle underlying official act immunity, and gains no force from the assertion that Ali's actions might have violated customary international norms.

A civil lawsuit against a government official will almost always challenge the lawfulness of the official's acts. Hence, the official's immunity would be rendered meaningless if it could be overcome by allegations of lawfulness alone. *See Waltier v. Thomson*, 189 F. Supp. 319, 321 n.6 (S.D.N.Y. 1960) (applying Judge Learned Hand's ruling as to the immunity of U.S. officials for alleged lawlessness in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) to hold immune a Canadian official accused of fraud; *Herbage v. Meese*, 747 F. Supp. at 67 (rejecting argument that officials lost immunity by virtue of "acting illegally," finding that conduct was within the scope of their official capacities); *Kline v. Kaneko*, 685 F. Supp. 386, 390 (S.D.N.Y. 1988) (holding that PLT's claim that Mexican immigration official expelled her without due process "is in no way inconsistent with [the official] having acted in his official capacity").

The availability of official act immunity for serious violations of law flows directly from the principle underlying such immunity. An official acting in an official capacity is a manifestation of the state, and the official's acts are attributable to the state rather than to the official personally. As the Supreme Court held in finding that alleged police torture was "sovereign" rather than commercial activity, and thus protected by sovereign immunity:

> [H]owever monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature. . . . Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce. "[S]uch acts as legislation, or the expulsion of an alien, or a denial of justice, cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such."

Saudi Arabia v. Nelson, 507 U.S. 349, 361-62 (1993) (citations omitted); *see also El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996) (defendant's activities were immune in that they "were neither personal nor private, but were undertaken only on behalf of the Central Bank [of Jordan]"); *Doe I v. Israel*, 400 F. Supp. 2d at 104 (D.D.C. 2005); *Belhas v. Ya'alon*, 466 F. Supp. 2d 127, 130 (D.D.C. 2006); *cf. Park v. Shin*, 313 F.3d 1138 (9th Cir. 2002) (Korean official being sued by a personal family employee was not immune because he was not acting within the scope of his official duties).

Any contrary rule would invite an end-run around the immunity of the state. The immunity of a foreign state is not subject to any vague "unlawfulness" exception. It is subject only to those immunity exceptions specifically set forth in the FSIA; *see Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433-35 (1989).

In *Amerada Hess*, the Supreme Court held that a foreign state's immunity was not subject to any general exception for alleged violations of international law brought under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. 488 U.S. at 435-43. By PLT's thinking, the litigants in

Amerada Hess, which involved the bombing of a neutral ship by the Argentine military, could have avoided dismissal simply by naming the defense minister as defendant rather than the Argentine government itself. *See also Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242-45 (2d Cir. 1997); *Princz v. Germany*, 26 F.3d 1166, 1173-75 (D.C. Cir. 1994); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d at 1102; *Park v. Shin*, 313 F.3d at 1144 (in determining whether acts at issue were performed in an official capacity, courts should "consider whether [the] action against the foreign official is merely a disguised action against the nation that he or she represents").

Nothing in the foregoing analysis is changed by the fact that PLT alleges that Ali's conduct violated customary international norms. Individuals "acting in their official capacities as agents of" a foreign government are entitled to immunity "no matter how heinous the alleged illegalities." *Herbage*, 747 F. Supp. at 67; *see Waltier*, 189 F. Supp. at 321 n.6.; *Doe I v. Israel*, 400 F. Supp. 2d at 105 ("even assuming that the . . . defendants have engaged in *jus cogens* violations, . . . *[j]us cogens* violations, without more, do not constitute an implied waiver of FSIA immunity").

Ali retained his official act immunity despite his departure from the Somali National Army. *See*, *e.g.*, *Underhill v. Hernandez*, 65 F. 577, 579- 580 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897). *Hatch v. Baez*, 14 N.Y. Sup. Ct. 596, 600 (1876) ("The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity."). The immunity of foreign officials arises from the official character of their acts and not from their status at time of suit. *Id*. (Immunity "springs from the capacity in which the acts were done, and protects the individual who did them."). "The Executive Branch has . . . recognized that the immunity enjoyed by a foreign official generally survives his departure from office." Brief for the United

States as Amicus Curiae Supporting Affirmance, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555) at 11.

Customary international law recognizes the residual immunity enjoyed by former government officials. *See*, *e.g.*, 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 of its Forty-Third Session at 25, U.N. Doc. A/46/10 (Supp.) (Sept. 1, 1991) (Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property).

Affording immunity to former officials also promotes the United States' interests in comity with other nations. *See Schooner Exchange*, 11 U.S. at 137; *Hatch*, 14 N.Y. Sup. Ct. at 600; *see also Boos v. Barry*, 485 U.S. 312, 323-24 (1988). Finally, it encourages an international regime of law under which former U.S. officials can travel abroad with less fear of being haled before a foreign tribunal to answer for their official acts.

2. The Fourth Circuit's 2013 holding that former government officials do not enjoy common law immunity from suit is wrongly decided and is awaiting judicial review by the Supreme Court.

In the Fourth Circuit's holding in respect of the interlocutory appeal in *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012), *certiorari* denied (January 13, 2014), that court held that alleged acts that violate *jus cogens* norms can *never* be sovereign acts attributable to the foreign state. Concededly, if said holding were to stand, it could, conceivably, abnegate Ali's immunity from suit claim here if the wrongs alleged against Ali were to be deemed to be violative of *jus cogens* norms. However, Defendant respectfully urges that said holding is wrong, is contrary to precedent, has created a conflict in the circuits and is, thus, susceptible to reversal in the near term by the Supreme Court of the United States. As for the notion that the Supreme Court's denial on 13 January 2014 of Samantar's initial application for a writ of

certiorari (*Samantar v. Yousuf*, No. 12-1078, 2013 U.S. S. Ct. Briefs LEXIS 1319 (March 4, 2013)), it bears mention that the interlocutory nature of the underlying appeal, coupled with a proverbial eleventh hour canard concerning the Somali Government's views on immunity for Samantar may well have caused the Court view said appeal as a poor vehicle with which to resolve the palpable circuit conflict on the immunity question and clarify the law in this area[3].

In the course of its consideration of the Samantar's said *certiorari* petition from the interlocutory decision of the Fourth Circuit denying his immunity claim, the Supreme Court called for the views of the Solicitor General on 24 June 2013, and, on 10 December 2013, the Solicitor General filed a brief recommending that the Court grant certiorari, vacate and remand. As the Solicitor General noted in his brief, U.S. Brief, 11, 19-22, the Fourth Circuit fashioned a "per se" rule—a "categorical judicial exception to conduct-based immunity to cases involving alleged violations of *jus cogens* norms." The Second, Seventh, and D.C. Circuits have reached the opposite conclusion. *See Matar*, 563 F.3d at 15 (rejecting the argument that a foreign official "should be deemed to have forfeited [his] sovereign immunity whenever [he] engages in conduct that violates fundamental humanitarian standards" (emphasis and citation omitted)); *Belhas*, 515 F.3d at 1287, *abrogated on other grounds by Samantar*, 130 S. Ct. at 2282; *Ye v. Zemin*, 383 F.3d 620, 625 (7th Cir. 2004).

Since both the district court and the Fourth Circuit declined to stay proceedings in the district court during the pendency of Samantar's interlocutory appeal, proceedings continued in

[3] For an interesting observer's view of the denial of *certiorari* from the interlocutory Samantar Fourth Circuit appeal, *see generally*: John Bellinger, "Supreme Court Denies Samantar Cert Petition (but this may not be the end of the story)", *Lawfare*, 13 January 2014, at URL: http://www.lawfareblog.com/2014/01/supreme-court-denies-samantar-cert-petition-but-this-may-not-be-the-end-of-the-story/ (Last visited on 30 May 2014).

the district court even after Samantar had taken an appeal of the district court's immunity determination, and, while Samantar's interlocutory appeal was pending in the Fourth Circuit, the district court issued its final default judgment in favor of the PLTs in that case on 28 August 2012. Said final judgment was also appealed timely by Samantar, and, on 3 February 2014, the Fourth Circuit entered a brief order disposing of Samantar's appeal of the district court's final judgment.

Then, on 5 May 2014, Samantar filed a petition for a writ of *certiorari* from the Fourth Circuit's order dismissing his appeal from the final judgment. (*Samantar v. Yousuf*, No. 13-1361, 2014 U.S. S. Ct. Briefs LEXIS 1806 (May 5, 2014)). For ready reference, a copy of said pending *certiorari* petition is submitted herewith *qua* "Exhibit '2'". Like his former Prime Minister, Samantar, Ali respectfully submits that the common law entitles him to immunity from suit.

II. PLTS' CLAIMS ARE TIME BARRED.

The facts alleged by PLT in his Amd. Comp. establish that the statute of limitations on PLT's claims had run prior to the commencement of this action, and the action accordingly is time barred.[4]

A. In the absence of tolling, the limitations period had run at the time of commencement of this suit.

PLT alleges that the victims suffered injuries and death at the hands of the Somali Armed Forces and others between 1981 and 1989. Ali entered Canada in December of 1990, lived there

[4] Ordinarily, the defense of the running of the statute of limitations might first be considered in connection with a ruling on a motion for summary judgment. However, the Fourth Circuit has held that, "[w]here facts sufficient to rule on an affirmative defense– including the defense that the PLT's claim is time-barred–are alleged in the complaint, the defense may be reached by a motion to dismiss filed under Rule 12(b)(6)." *Pressley v. Tupperware Long Term Disability*

openly for . PLT filed his suit on November 10, 2004, more than 23 years after the allegation of first injury and 15 years after the occurrence of the final alleged event.

The statute limitations for claims under the Torture Victims Protection Act ("TVPA") is ten years. 28 U.S.C. § 1350 note, § 2(c). The ATS contains no statute of limitations, but, since the enactment of the TVPA, it has been generally found, under borrowing principles, to be identical to that under TVPA. *See*, *e.g.*, *Van Tu v. Koster*, 364 F.3d 1196, 1199 (10th Cir. 2004); *Deutsch v. Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003); *Hilao v. Marcos*, 103 F.3d 767, 773 (9th Cir. 1996). Regardless whether the limitations period is ten years or a shorter period of two years if a more general preference for borrowing the most closely analogous state limitations period is followed,[5] the limitations period has run on the instant claims, and, absent the tolling of the limitations period, the claims should be dismissed.

B. Equitable tolling is not available for claims under the TVPA or ATS.

In reliance on language in the Senate committee report that accompanied the TVPA, several courts have held that the running of the statute of limitations under the TVPA and ATS

Plan, 553 F.3d 334, 336 (4th Cir. 2009) (quoting *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (en banc)) (interior quotations omitted).

[5] When a federal statute contains no express limitations period, the courts generally borrow the limitations period from the most analogous state statute unless a "rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when federal policies at stake and practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking," *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 35 (1995) (citation and internal quotation marks omitted). The only court to determine the limitations period for a claim under the ATS begun prior to the enactment of the TVPA in 1992 looked to the state law limitations period for personal injury actions applicable to the claim. The limitations period under Virginia law for personal injury claims is two years. Va. Code Ann. § 8.01-243(A). Following the enactment of the TVPA, courts have applied the TVPA limitations period of ten years to ATS claims, including claims other than those to which the TVPA might also pertain. *See*, *e.g.*, *Deutsch v. Turner*, 324 F.3d at 717. This has made particular sense when substantive provisions of the TVPA have been given retroactive effect. Since retroactive effect is not

can be tolled in appropriate circumstances. *See*, *e.g.*, *Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir. 2009). Equitable tolling is permissible, however, only where it is "[not] inconsistent with the text of the relevant statute." *See United States v. Beggerly,* 524 U.S. 38, 48 (1998). In *Beggerly*, the Supreme Court held that the 12-year statute of limitations under the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a(g), could not be tolled in large part because, as a consequence of "the unusually generous nature of the QTA's limitations time period, extension of the statutory period by additional equitable tolling would be unwarranted." 524 U.S. at 48-49. The ten-year limitations period in the TVPA and the identical period courts have found for claims made under the ATS thus suggest that equitable tolling is inconsistent with the provisions of the TVPA.

That equitable tolling should not be available under the TVPA and ATS also finds compelling support in the legislative history of the TVPA. The law as enacted was the text as it passed the House of Representatives. *See* Pub. L. No. 102-256, H.R. 2092, 106 Stat. 73 (Mar. 12, 1992). In adopting the House bill, which contained no reference to equitable tolling, the Congress rejected a provision of the Senate bill which recited, "All principles of equitable tolling, however, shall apply in calculating this limitation period." *See* S. Rep. No. 102-249, 102nd Cong., 1st Sess., 1991 WL 258662, at *2 (text of S. 313, § 2(c). The excision of this language not only strongly suggest that Congress did not intend for the TVPA, or by extension the ATS, to allow for equitable tolling, it also arguably made nugatory the language in the Senate report supporting broad availability for equitable tolling, language on which courts have relied in finding that the running of the statute had tolled. *See*, *e.g.*, *Chavez*, 559 F.3d at 492.

C. PLTs have not established a basis for equitable tolling.

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appropriate here (see section IV.A. *infra*), an argument may be made that the traditional preference for borrowing a state limitations norm should prevail.

Even if equitable tolling were potentially available to claimants under the TVPA and ATS, the PLTs have not presented circumstances sufficient to satisfy the strict standards for tolling set out in the legislative history and court decisions. As the Supreme Court has noted, "Federal courts have typically extended equitable relief only sparingly." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). The Fourth Circuit determines whether to permit equitable tolling according to the "extraordinary circumstances" test, which requires a PLT to present (1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time. *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (citing *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000)). As otherwise stated by the Fourth Circuit, equitable tolling "must be reserved for those rare instances where – due to circumstances external to the party's own conduct – it would be unconscionable to enforce the limitations period against the party and gross injustice would result." *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000). PLTs bear the burden of adducing facts to demonstrate the existence of such extraordinary circumstances. *Hall v. Johnson*, 332 F. Supp. 2d 904, 908 (E.D. Va. 2004).

PLT alleges two putative bases for equitable tolling: (a) that the first filing of the subject antecedent action on 10 November 2004 occurred at a point where Ali had resided in the United States in the United States "for less than ten years since he first arrived in the United States after the fall of the Barre regime", Amd. Comp. at ¶35; and (b) an *ipse dixit* assertion that, "because prior to 1997, Issaq victims of human rights abuses committed in the 1980s by the Somali Armed Forces, or persons or groups acting in coordination with the Somali Armed Forces, could not have been expected to pursue a cause of action in the United States." Id. at ¶36. Neither circumstance warrants equitable tolling.

1. The running of the statute of limitations could not be tolled after Ali entered Canada.

For his claim that tolling is available whenever a defendant is outside the United States, PLT's Amd. Comp. curiously ignores altogether that aspect of Ali's Motion to Dismiss the Complaint filed on 20 July 2005 [Document 23, "Exhibit '1'"], where Ali's expert in Canadian jurisprudence, *viz*., Gerald D. Chipeur, Esquire, of Calgary, Alberta, Canada, opined, in his 30 March 2005 expert report that there would have been no reasonable impediment in (Canadian) law to bringing an action against Mr. Ali in Ontario while he was resident in that province from December of 1990 to October 1992 and that an Ontario court would have accepted for disposition an action commenced by the PLTs against Ali with respect to the allegations set forth in the action." Chipeur Report at Page 4. For ready reference, an unexpurgated copy of the Chipeur Report is submitted herewith *qua* "Exhibit '3". To the extent that PLT defending his putative equitable tolling argument in his Opposition to the First Motion to Dismiss [Document 25, filed on 3 August 2005], he relied on a deficient divination of legislative intent as regards the TVPA. *Id*. at pp. 13 – 23, *passim*.

However, the Senate report cannot be used as authority for equitable tolling since it comments upon a provision of the Senate bill that was stricken from the legislation before final adoption. The House committee report contains no reference to tolling during times when a prospective defendant may have resided outside the United States. *See* H.R. Rep. No. 102-367(I), 102nd Cong., 1st Sess., 1991 WL 255964, at *5.

Even if the expansive language of the Senate report did provide guidance as to equitable tolling, this action still would not be timely against Ali. The Senate report recites that the statute "should be tolled during the time the defendant was absent from the United States *or from any*

jurisdiction in which the same or a similar action arising from the same facts may be maintained by the PLT, provided that the remedy in that jurisdiction is adequate and available." S. Rep. No. 102-249, 1991 WL 258662, at *11 (emphasis added). The statute of limitations thus would have begun to run in 1990 when Ali took up residence in Canada prior to entering the United States, since Canada offered PLT an adequate and available remedy according to the report of Ali's Canadian law expert, Mr. Chipeur. The contention made by PLT's countervailing expert, University of Toronto Law School Professor Ed Morgan, that Chipeur is wrong because Canada did not pass the statute dealing explicitly with war crimes until 1999, PLTs' Opp. to Mot. to Dismiss, at 19-20, is a specious point inasmuch as it does rebut Chipeur's point that a common law tort action could have been brought on the discrete facts alleged in the Complaint. As a second basis for tolling, PLT asserts that, "[u]ntil approximately 1997, [PLT's] reasonable fear of reprisals against themselves or members of their families still residing in Somalia served as an insurmountable deterrent" to bringing this action. Amd. Comp. at ¶ 36. This argument is also unavailing since, even if the assertion were properly supported and accurate, a fear of reprisal, when the abusive regime no longer is in authority, cannot warrant equitable tolling.

First, even the expansive language of the Senate report does not contemplate tolling based upon a PLT's personal circumstances except where the PLT is himself "imprisoned or otherwise incapacitated." S. Rep. No. 102-249, 1991 WL 258662, *11. PLT does not allege in the Amd. Comp. or any other pleadings that, as a consequence of the conditions in Somalia, he suffered imprisonment or other incapacity through November 1994 such that the filing of this action in November 2004 would have been timely.

Second, the domestic circumstances under which courts have found a fear of reprisal to be a basis for equitable tolling have been limited, in the language of a recent case reviewing such

circumstances, to "civil unrest at the hands of authoritarian governments that directly prohibited the PLTs from bringing their claims to light." *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 694 (S.D. Tex. 2009); *see also Hilao v. Marcos*, 103 F.3d at 773 ("[a]ny action against Marcos [for torture, summary execution, and disappearances] . . . was tolled during the time Marcos was president" but no longer). By contrast, the PLT asserts in his Amd. Comp. that the alleged "human rights abuses were the hallmark of the military government that came to power in 1969 and brutally ruled Somalia until it was toppled in 1991." Amd. Comp. at ¶ 10. PLT provides no evidence that Ali or any other members of the toppled government could have taken or directed retaliation against him or any of the victims or else the members of his/their respective families after 1991.

Third, PLT has adduced no facts to support his bare assertion that a fear of reprisal deterred him from bringing of this action. Tellingly, the Amd. Comp. makes no mention of any threats made against any of the PLT or his family.

III. PLT HAS FAILED TO STATE A CLAIM FOR RELIEF UNDER THE ATS.

Each of PLT's six claims asserts a violation of the ATS. For the reasons set forth below, none of the claims states a cognizable claim because, to be actionable, a claim has to have been accepted as a basis for jurisdiction under the ATS at the time the events alleged in the complaint occurred. *See Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 123 (2d Cir.), *cert. denied*, 129 S. Ct. 1524 (2008). However, none of the instant claims is grounded in a norm that was universally accepted, and hence actionable, in 1984 or 1988/1989, when the relevant events took place. In addition, even if the respective cause of action existed, the particular facts adduced in many instances do not support liability.

A. The PLT does not make out their first claim for relief, for attempted extrajudicial killing.

The ATS did not recognize any such cause of action at the time Ali is alleged to have engaged in wrongdoing, and, even if the ATS did recognize such a cause of action, the facts do make out liability.

The ATS provides that: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004), the Supreme Court held that, "the ATS is a jurisdictional statute creating no new cause of action." The Court concludes: "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." *Id.* at 720. This set of actions was limited to "offenses against ambassadors, . . . violations of safe conduct . . ., and individual actions arising out of prize captures and piracy." *Id*. Any new norm that is the basis for the ATS claim must have "attained the status of binding customary international law" at the time of the actions alleged to make out a violation of that norm. *Id.* at 735. Courts must exercise "great caution in adapting the law of nations to private rights." *Id.* at 728.

A prohibition against extrajudicial killing or attempted extrajudicial killing did not represent an established norm in 1984 or again in 1989. As the *Sosa* court noted, a "clear mandate" to entertain such action based on extrajudicial killings or torture emerged with the enactment of the TVPA in 1992. The Supreme Court found that the international pronouncements on which courts *(see*, *e.g.*, *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1153-1154 (11th Cir. 2005) (decided after, but omitting any reference to, *Sosa*)) have relied in finding an international norm against torture and extrajudicial killing – the Universal Declaration of

Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) (the "Universal Declaration") and the International Covenant on Civil and Political Rights, Dec. 16, 1966, (U.N.T.S. 171 (the "International Covenant")) – did not establish a "relevant and applicable rule of international law." *Sosa v. Alvarez-Machain*, 542 U.S. at 28.

Moreover, in enacting the TVPA to proscribe international torture and extrajudicial killing, the Congress thought it was creating new causes of action. As the Senate report recited, "[t]he purpose of this legislation is to *provide a Federal cause of action* against any individual who, under actual or apparent authority or under color of law of any foreign nation, subjects any individual to torture or extrajudicial killing." S. Rep. No. 102-249, WL 258662, at *3 (emphasis added). The House report recited that the law carries out international obligations of the U.S. by "*establishing* a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing". H.R. Rep. No. 102-367(I), 1991 WL 255944, at *1 (emphasis added). [6]

Even if a prohibition against extrajudicial killing was actionable under the ATS during the 1980's, the facts set out in the complaint do not describe a violation of this proscription. As defined in the TVPA:

> "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

[6] Further militating against a finding that a norm against torture or extrajudicial killing existed prior to enactment of the TVPA is the statement in the Senate report that, "[w]hile nearly every nation now condemns torture and extrajudicial killing in principle, in practice more than one-third of the world's governments engage in, tolerate, or condone such acts." S. Rep. No. 102-249, WL 258662, at *3. The resistance of one-third of the world's governments to forgoing torture and extrajudicial killing in 1991 when the Senate report was written hardly describes norms that must be found, in the language of *Sosa,* to be "specific, universal, and obligatory." *Sosa v. Alvarez-Machain*, 542 U.S. at 732 (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

28 U.S.C. § 1350 note, § 3(a).

Even the facts alleged in connection with the alleged shooting of PLT would not, if true, make out a prima facie case of attempted extrajudicial killing even if such a cause of action were to exist. The threadbare description of the supposed shooting supplied in the Amd. Comp. does not establish that it was "deliberated" and thus manifested the "requisite extrajudicial intent." H.R. Rep. No. 102-367(I), 1991 WL 255964, at *4.

B. PLT does not make out their second claim for relief, for attempted extrajudicial killing.

The PLT has failed to establish any basis for relief for attempted extrajudicial killing. If no universal norm proscribed extrajudicial killing, an attempt to accomplish what was not proscribed could not be proscribed It would further appear that a cause of action for attempted extrajudicial killing under the ATS has yet to be recognized, or even entertained, by any American court. This claim should be dismissed.

C. PLT does not make out their third claim for relief, for torture.

Much as with extrajudicial killing as discussed above, torture was not actionable under the ATS prior to the enactment of the TVPA. *See* section III.A *supra*. *But see Filartiga v. Pena-Irala*, 630 F.2d 876, 890 ("for purposes of civil liberty, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind"). This claim should be dismissed.

C. **PLT does not make out their fourth claim, for cruel, inhuman, or degrading treatment or punishment**.

If no action existed for extrajudicial killing or torture prior to enactment of the TVPA, then it should not be possible to find one for the lesser and less definable injuries resulting from cruel, inhuman or degrading treatment or punishment. In *Aldana v. DelMonte Fresh Produce,*

N.A., Inc, 416 F.3d 1242, 1247 (11th Cir. 2005), the court indicated that, for actions that took place in 1999, "[w]e see no basis in law to recognize PLT's claims [under the ATS] for cruel, inhuman, degrading treatment or punishment." To identical effect, see *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D.Cal. 1987), *affirmed in part and modified in part on other grounds on reconsideration*, 694 F. Supp. 707 (N.D.Cal. 1988) (the boundaries of any norm proscribing cruel, inhuman, and degrading treatment were insufficiently defined as of 1988 to preclude its recognition as a tort actionable under the ATS); *see also Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1162 n. 190 (C.D.Cal 2004). This claim must accordingly be dismissed.

E. PLT does not make out their fifth claim, for arbitrary detention.

Arbitrary detention is not actionable in that it did not, in 1984 or 1989, represent a specific, universal, and obligatory norm of customary international law. In *Sosa*, the PLT argued that the ATS provided jurisdiction for a general prohibition against arbitrary detention. 542 U.S. at 736. The Supreme Court disagreed, finding that the PLT's view "expresses an aspiration that exceeds any binding customary rule having the specificity we require." *Id*. at 738.

F. PLT does not make out their sixth and seventh claims, for crimes against humanity and for war crimes.

PLT's claims for crimes against humanity and war crimes, their sixth and seventh claims, simply restate the allegations of the first five claims but attach them to differently named causes of action. Since PLT has not stated causes of action cognizable under the ATS in their first five claims, he have not established the predicate for these claims here, and these claims must also fail.

G. PLT fails to state a claim for secondary liability.

To the extent that PLT claims that Ali was liable in that he exercised "command" responsibility over alleged perpetrators of the wrongdoing, Amd. Comp. at ¶¶ 2, 6, 15, 30, 31, 32, 33, 34, 46, 54, 64, 72, 80, & 88, or that he "conspired" with alleged perpetrators to commit wrongdoing, *Id*. at ¶¶ 2, 29, 54, 64, 72, 80 & 88, he is pleading for secondary liability. To establish such secondary liability, PLT must demonstrate that customary international law recognized secondary liability in 1984 and 1989. "[A]n allegation of aiding and abetting a violation of international law or conspiring to violate international law asserts a distinct claim." *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 256 (S.D.N.Y. 2009).

PLT cannot show that customary international law recognized secondary liability in 1988. The court in *In re South African Apartheid Litigation* conducted a lengthy review of the possible basis for an international norm imposing secondary liability. *Id.* at 255-62. Based upon this review, the court "decline[d] to recognize conspiracy as a distinct tort to be applied pursuant to ATCA jurisdiction." *Id.* at 262. As to aider and abettor liability, the court found some support in customary international law but relied for this finding principally on pronouncements in the Rome Statute of the International Criminal Court which first came into force on 17 July 1998. Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90.

Even then, the standard identified by the court in *In re South African Apartheid Litigation* would not support a cause of action for aider and abettor liability against Ali in that such standard "requires that an aider and abettor know that its actions will substantially assist the perpetrator in the commission of a crime or tort in violation of the law of nations." 617 F. Supp. 2d at 261. The requirement of knowing aid also finds support in *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996), a case which, like the instant one, considered the secondary liability of

a senior military official for events committed by armed forces during the 1980s. The court there approved an instruction that a finding of liability required a determination either that the military commander was complicit in the specific acts of wrongdoing, a charge not made here, or that the commander "knew of such conduct by the military and failed to use his power to prevent it." 103 F.3d 767 at 776.

The PLT does not meet this standard. A requirement of knowledge cannot be met through allegations of recklessness or indifference. *See United States v. Carr*, 303 F.3d 539, 540 (4th Cir. 2002).

IV. PLT HAS FAILED TO STATE CLAIMS FOR RELIEF UNDER THE TVPA.

A. The TVPA does not apply to conduct that occurred before its enactment.

In addition to his claims for relief for torts arising under the ATS, the PLT asserts, in Claims First and Second, violations by Ali of the TVPA. Amd. Comp. at ¶¶ 44, 51. The TVPA was enacted in 1992. All of the events alleged in the complaint as bases for liability against Ali took place at least four years prior to enactment. Since the TVPA cannot be applied retroactively and the causes of action alleged under the TVPA were not available prior to enactment of the TVPA, the PLT's TVPA claims must be dismissed.

In *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994), the Supreme Court confirmed the basic tenet of Constitutional jurisprudence that if a "statute would operate retroactively, out traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." The Court there held that "a new damages remedy . . . is the kind of provision that does not apply to events antedating its enactment in the absence of clear congressional intent." *Id.* at 283. Nothing in the language of the TVPA or its legislative

history evinces "clear congressional intent" that the TVPA be applied retroactively so as to overcome the Constitutional presumption against its retroactive application. As found in one of the few cases considering the retroactive application of the statute, "[t]he TVPA . . . does not have retroactive effect." *Gonzalez-Vera v. Kissinger*, 2004 WL 5584378, *8 (D.D.C. 2004).

The only basis for sustaining the TVPA claims in the Complaint would, accordingly, be a determination that the PLTs are not seeking to apply the TVPA retroactively, *i.e.*, that subjecting the Ali to the strictures of the TVPA would not, in the language of *Landgraf*, "impair rights [Ali] possessed when he acted, increase [Ali's] liability for past conduct, or impose new duties with respect to transactions already completed." *Id*. at 280.

B. PLT has failed to allege a basis for secondary liability against Ali.

For the reasons set forth in section III.G *supra*, discussing the unavailabilty of a claim of secondary liability under the ATS, PLT has also failed to allege a basis for secondary liability against Ali under the TVPA.

CONCLUSION

PLT has failed to establish subject matter jurisdiction for their claims, their claims are time barred, and the PLTs have not set out cognizable causes of action under the ATS or the TVPA. For these reasons, his claims must be dismissed.

Respectfully submitted,

/s/ Joseph Peter Drennan

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CERTIFICATE OF SERVICE

I, Joseph Peter Drennan, hereby certify that, on this 31st day of May 2014, I caused to be served a true and correct copy of the foregoing Defendant's Renewed Motion to Dismiss PLT's Amd. Comp., electronically, via this Honorable Court's CM/ECF System, unto:

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