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

***In re*:**	**:**	
JANE DOE, *et alii*,	**:**	
Plaintiffs,	**:**	
versus		**Civil Action No. 04–1361**
	:	
YUSUF ABDI ALI,	**:**	
Defendant.		

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS
WITH PREJUDICE THE COMPLAINT

COMES NOW, before this Honorable Court, your defendant in respect of the above–encaptioned cause, *viz.*, YUSUF ABDI ALI, by and through his undersigned attorney and counsellor, *viz.*, Joseph Peter Drennan, and herewith sets forth his Memorandum of Points and Authorities in Support of his accompanying Motion to Dismiss With Prejudice the Complaint filed herein by your anonymous plaintiffs, *viz*

INTRODUCTION

As a threshold consideration, your defendant asserts that your plaintiffs cannot maintain the instant action, *inter alia,* as they have failed to identify themselves properly, as they were required to do by the express provisions of F. R. Civ. P. 10 (a). In any event, your defendant, *viz.,* Yusuf Abdi Ali, is immune from suit in an American court in respect

of the alleged wrongs claimed by your plaintiffs, as, at all times relevant herein, your defendant was serving the then lawful and recognized Government of Somalia, in various, official capacities, as a high ranking officer in the Somali National Army. Accordingly, your defendant respectfully asserts that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602–1611 (2004), bars the courts of the United States from exercising personal jurisdiction over the leaders and high–ranking officials of foreign countries, such as your defendant, and thus require dismissal pursuant to Federal Rule of Civil Procedure 12 (b)(1).

In addition, your plaintiffs have failed to state a claim upon which relief can be granted this action, and, accordingly, the Complaint should be dismissed pursuant to the provisions of F. R. Civ. P. 12 (b)(6) as well. Foremost in such regard is the fact that your plaintiffs' claims are time–barred, as the no events of alleged wrongdoing took place later than 1990, whereas the two statutes alleged by your plaintiffs to constitute the basis for federal question jurisdiction, *viz.,* the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350, as well as the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, each require that suit be brought within ten (10) years of the alleged perpetration of wrongful conduct, thus meaning that that all of the claims contained in the Complaint are time–barred, as the instant suit was not brought by 2000. As detailed further, *infra,* there are no provable facts or compelling circumstances that would

warrant any “equitable tolling” of the limitations period, let alone those putative grounds pleaded in the Complaint.

In further regard to the matter of the subject's Complaint being time–barred, since there is no evident reason why your plaintiffs, either and or both of them, could have brought an action or actions in the functioning court system of Northern Somalia (“Somaliland”), this Honorable Court should dismiss the Complaint for failure to exhaust judicial remedies, as required by the TVPA, 28 U.S.C. § 1350 note, § 2 (b), and on the basis of forum *non conveniens.* Your defendant would further observe, in passing that your plaintiffs' anticipatory “equitable tolling” plea, *ingravidated* in the Complaint, is self–serving, conclusory, internally inconsistent, and premised upon reasoning by *non sequitur.*

Finally, your plaintiffs' putative cause of action must be dismissed as the specific allegations of misconduct by your defendant vis–a–vis your plaintiffs, awful through such alleged actions are, do not, individually, or else collectively, rise to the level of a violation of international law norm that would give rise to actionability under the ATCA, in light of the Supreme Court's recent decision in *Sosa v. Alvarez–Machain,* 124 S. Ct. 2739 (2004). *Sosa* represents, *inter alia,* a definitive interpretation of the language contained in the ATCA, which, fundamentally, represents a curtailment of earlier, expansive interpretations rendered by lower courts, over the last couple of decades or so, such that *Sosa* requires that

"federal courts should not recognize claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the 18th–century paradigms familiar when [the ATCA] was enacted." *Id.,* 24 S. Ct. at 2761. *Sosa,* in a sense, delimits the scope of claims cognizable under the ATCA to those claims as "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 2756. As detailed further, *infra*, the Complaint, as framed, does not specifically allege acts which fit within such sphere. Accordingly, the Complaint must be dismissed under F. R. Civ. P. 12 (b) (6) for such latter reason as well.

BACKGROUND

The politics and twentieth century history of the Horn of Africa, where the alleged occurrences pleaded in the Complaint are said to have occurred, is quite complex, and subject to varying interpretations; however, there are a few significant details that your plaintiff respectfully suggests are important in respect of providing a sense of context to the intensive clan and tribal enmity which appears to animate the allegations set forth in the Complaint.[1] Though we are now some twenty years

[1] Although the Complaint purports to constitute private causes of action brought by two *individual* plaintiffs, whomever they are, public statements made by a certain legal representative of your plaintiffs suggest that the filing of the instant action was primarily motivated by a desire to advance the grievances of the *Issaq clan* against those clans associated with the former regime of Siad Barre, as evinced, *inter alia,* in the following excerpt from a press release issued by the San Francisco based Center for Justice and Accountability, in an 11 November 2004, press release heralding the 10 November 2004, filing of the instant action, as well as the companion case brought on that same day, in this Honorable Court, against the former Somali head of state Mohamed Ali Samatar (*see: Bashe Abdi Yousef, et alii, v. Mohamed Ali Samatar,* Civil

removed from the events at issue, it should not be forgotten that the tragedy of today that is Somalia was forged in the crucible of Cold War politics and rivalries, coupled with Somalia's traditional tensions with neighboring Ethiopia, with which it shares a long border with no geographical definition, in the area of the border region between the former Italian Somaliland, in Northwest Somalia, and Ethiopia, where the national border, on maps after 1950 or so was labeled as an "Administrative Line," *a la* the current "Line of Control" between Indian and Pakistani forces in Disputed Kashmir. The border region between Somalia and Ethiopia is inhabited by nomadic clans, such as the Issaq, whose population distribution lies athwart the presumed political border between the two states. Similar cross–border clan distribution exists in the South, between Somalia and Kenya. Since Somalia's hostile neighbor Ethiopia lay firmly within the American sphere of alignment throughout the 1960s, Somalia was courted by the former Soviet Union, which supplied it with vast amounts of military equipment and ordinance, and significant military training and cooperation. When the military regime of Siad Barre assumed power in Somalia, in the late 1960s, Ethiopia was

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Action No. 04–1360), *viz.*:

> "Sandra Coliver, Executive Director of the Center for Justice & Accountability, which launched the lawsuit *(sic.)* , stated, 'It is outrageous that war criminals like these two men can live in the United States, just a few miles from the nation's capitol. Although the plaintiffs in these actions are from the Isaaq clan, ***we are not simply seeking justice for this clan, but for all people who have suffered severe repression under the military regime of Siad Barré. We hope that survivors from other clans will come forward***.'" (http://www.cja.org/cases/Somalia%20Press/Somali%20PR%2011.04.htm) (emphasis added).

ruled by the avowedly pro–American Emperor Haile Selassie, and the two states had only recently fought a war, on the early 1960s, over title to Ethiopia's Ogaden Provence, in Eastern Ethiopia, astride the border with Somalia, as the Ethiopian Ogaden contained a significant population of ethnic Somalis.

However, after brief period of stasis, in 1974, the Ethiopian military embraced Communism, through a Bolshevik type revolutionary movement called the *Derg*, which thereupon deposed Haile Selassie and imposed a military dictatorship. Mengistu Haile Merriam emerged from the Ethiopian military elite's revolutionary cabal as the strongman, and quickly aligned himself and his regime with the former Soviet Union, which obliged, by supplying lavish levels of military aid and inserting some 11,000 Cuban soldiers, accompanied by some 1,500 Soviet advisers, to assist Ethiopia in its fight against Somalia during a late 1970s flare up of the conflict over the Ogaden, after the Somali military, pursuing an irredentist policy, had established a significant salient in the Ogaden region. This embrace by Ethiopia of the Soviet Union, eventually, precipitated a movement of the Siad Barre regime away from the Soviet Union, and towards a *de facto* alliance with the United States, as a United States–Somali rapprochement, begun, in 1977, by the Carter Administration, culminated in the conclusion of a military access agreement between the two countries in 1980, whereby, *inter alia,* the

United States was permitted to use naval ports and airfields at Berbera, Chisimayu, and Mogadishu. *See, generally:* the background information at the respected website *www.globalsecurity.org,* especially at: http://www.globalsecurity.org/military/ops/ogaden.htm . Emblematic of the fact that Somalia lay at the precipice of the shifting fault lines of the Cold War, was the poignant observation by President Carter's National Security Adviser Zbigniew Brzezinski that "SALT (the Strategic Arms Limitation Talks between the United States and the Soviet Union) lies buried in the sands of the Ogaden", signifying the death of détente between the two superpowers. *Id.* America's interest in Somalia in the mid–1970s and through the 1980s, was driven, perforce, by its strategic position on the Horn of Africa, close to Middle East oil fields and oil shipping lanes. The Islamic Revolution in Iran, in 1979, was a significant concomitant factor *in the* American imperative of forging a military cooperative arrangement with the Barre regime, notwithstanding the poor human rights record of the Somali Government.

The Barre regime received significant American military training, *materiel* and other aid, over the ensuing decade, during which period, your defendant served Somalia in an official capacity, for much of the time, as a representative of Somalia's military forces, throughout the years during which your plaintiffs allegedly were victimized. It is particularly worthy of mention that, during such period, your defendant

also received significant military training from the Armed Forces of the United States. Significantly, Somalia has never been designated a state–sponsor of terrorism under 50 U.S.C. App. § 2405 (j) or 22 U.S.C. § 2371 or otherwise been placed on any sort of U.S. enemies list.

During the decade of military cooperation between Somalia and the United States, *inter alia,* Somalia was embroiled in military conflict with Ethiopia on two fronts, *viz.*, the Ogaden region, for the reasons stated above, and, in the Northwest sector of the country, where the Barre regime was beleaguered by a Communist inspired insurgency movement known as the Somali National Movement ("SNM"), based in sanctuaries in Ethiopia, that would launch attacks, over the ill–defined border between the two states, against Somali military and civilian targets inside Somalia. Meanwhile, Ethiopia was becoming increasingly consumed by an ultimately successful secessionist movement in its northern region known as Eritrea . As detailed in the *DECLARATION OF YUSUF ABDI ALI,* a true copy of which may be found annexed hereunto, and incorporated herewith by reference thereto, as if set out in full, *qua* "Exhibit 'A'" ("Ali Declaration"), *inter alia,* from May of 1987, through July of 1988, your defendant served as the Fifth Brigade of the Somali National Army, based in Gebiley, Somalia. It can be summarized here that the Fifth Brigade's security responsibility consisted of maintaining a presence along the Ethiopian–Somali border and tasked with preventing cross–border

incursions by the SNM and/or Ethiopian regular military forces.

At the time at which the Barre regime in Somalia collapsed, your defendant was receiving American military training, *in situ,* in Mississippi. Fearing persecution and his personal safety were he to return "home" to a disintegrating Somalia, then becoming rapidly engulfed by chaos, your defendant first sought refuge in Canada.

As stated in greater detail in the attached Ali Declaration, your defendant lived in Canada until 1992, at which point he was deported to the United States; *inter alia,* your defendant has resided openly in Northern Virginia since then, excepting from July of 1994 through December of 1996, where he lived openly in Ethiopia, endeavoring, in vain, to work with other Somalis in the Somali *diaspora,* to form a proto–government of Somalia, in exile. It bears mention that, by the time at which your defendant took temporary residence in Ethiopia, that nation had, as it were, thrown off the yolk of Communism, as of 1991, when the dictator Mengistu fled the country for Zimbabwe, never to return.

ARGUMENT

I. Plaintiffs Have Improperly Proceeded Anonymously:

Without having sought, let alone obtained, prior leave from this Honorable Court, your two putative plaintiffs have failed to identify themselves by their actual names. This inexcusable failure to satisfy a basic requirement of pleading represents a palpable violation of Rule 10

(a) of the Federal Rules of Civil Procedure, which provides, in pertinent part, that "every pleading shall contain a caption setting forth. . . the names of all the parties." F. R. Civ. P. 10 (a). Thus, this Honorable Court lacks subject matter jurisdiction with respect to the claims of your plaintiffs, which, accordingly, must be dismissed. *See: Nat'l Commodity & Barker Ass'n v. Gibbs*, 886 F.2d 1240, 1245 (10th Cir. 1989).

Even if your plaintiffs had sought prior permission to proceed through fictitious names, your defendant respectfully asserts that no such leave would have been granted, since the circumstances presented herein do not satisfy the necessary requirements for a party or parties to proceed anonymously.

Judge Ellis of this Honorable Court recently highlighted the limited conditions under which a plaintiff may be allowed the "rare dispensation" of anonymity. *Jane Doe I v. Merten*, 219 F.R.D. 387, 391 (E.D. Va. 2004) ("*Doe I*") (quoting *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993) ("*James*")). As a preamble to its decision in *Doe I,* Judge Ellis noted, *inter alia,* that Rule 10 (a) embodies the presumption, firmly rooted in American law, of openness in judicial proceedings [,]" Id., and went on to note that ". . . this presumption harks back to the English common law, where there existed a rule of openness in both criminal trials ***and civil proceedings."*** *Id., citing: Gannett Co. v. DePasqualle,* 443 U.S. 368, 384–9, 386, nt. 15 (1979) (emphasis added). The primary considerations

identified by this Honorable Court in *Doe I,* in ascertaining whether, *vel non,* such "stringent standards" had been met, include the following factors, as well as others to be considered, where appropriate, in judging the appropriateness of a party's proceeding anonymously, *viz.*:

> (1) whether the justification asserted by the requesting party to proceed anonymously is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature;
>
> (2) whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non–parties;
>
> (3) the ages of the persons whose privacy interests are sought to be protected;
>
> (4) whether the action is against a governmental or private party; and relatedly;
>
> (5) the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.

Doe 1, 219 F.R.D. at 391–92 (quoting *James*, 6 F.3d at 238). This Honorable Court in *Doe I* applied these factors to determine that alien students challenging a policy of considering immigration status in college admissions were not entitled to proceed anonymously even though the avowed consequence would be to cause them to withdraw their Complaint.

We respectfully submit that an application of the *Doe I* factors, set forth in ramified fashion above, to the circumstances presented in

respect of the instant case, should lead to the same outcome. Four of the five enumerated *Doe I* factors either have no application here or weigh unequivocally against anonymity. Only the second factor, risk of retaliation, could, theoretically, at least, have any arguable relevance to the instant case; however, as the Complaint contains no factually compelling basis for your plaintiffs', *ipse dixit,* contention that exposure of their respective identities would reasonably cause either of them to apprehend reprisal, the Complaint must be dismissed.

Federal courts allow plaintiffs to remain nameless on the basis of fear of reprisal only when there is a genuine, demonstrated need , as ascertained by the following factors: (1) the severity of the threatened harm; (2) the reasonableness of the anonymous party's fears; and (3) the anonymous party's vulnerability to retaliation. *Does I through XXIII*, 214 F.3d 1058 (9th Cir. 2000). The court also must also consider the "prejudice at each stage of the proceeding to the opposing party." *Id.* at 1068.

Your plaintiffs have utterly failed to offer any specific description of the type and severity of the alleged potential harm that they each maintain justifies shielding their respective identities. Moreover, neither plaintiff has alleged *any* discrete facts averred to be supportive of their collective and respective, conclusory assertions that identification could pose a risk of retaliatory physical or mental harm either to them or to non–parties. The Complaint only states generally, "Plaintiff . . . seeks to

proceed under a pseudonym because (s)he fears reprisals against himself or his family as a result of participation in this lawsuit." Complaint, ¶¶ 9, 10. Nowhere in the Complaint do either of your plaintiffs deign to supply any facts which could possibly be supportive of the reasonableness of their fears or of their specific degree or measure of vulnerability. *Au contraire,* the Complaint implicitly suggests that, since 1997, your plaintiffs have felt reasonably safe from reprisal by your defendant, as exemplified by the following passage, *viz.*:

> Until approximately 1997, victims' reasonable fear of reprisals against themselves or members of their families still residing in Somalia served as an insurmountable deterrent to such action. Also, until approximately 1997, it would not have been possible to conduct safely investigation and discovery in Somalia in support of such a case.

Complaint at ¶ 47. With the filing of the instant action, any perceived danger, reasonable or unreasonable, presumably, has passed.. Beyond that, a perusal of the Complaint yields, *inter alia*, a curious reference, in the herald to the putative "***SECOND CLAIM FOR RELIEF"*** to what appears to be a family and given name for "Jane Doe."[2] Complaint at 15 (emphasis in original, with such emphasis extending to the evidently inadvertent disclosure of Jane Doe's identity). Could it be that your plaintiffs initially planned on proceeding *in proper persona,* and had their

[2] Even though said herald in the Complaint, a public document, clearly contains what appears to be a proper Somali sounding name, consistent with concerns annunciated by this Honorable Court, at a hearing, on 7 January 2005, in a companion ATCA case arising out of Somalia, viz*, Bashe Abdi Yousef, et alii, v. Mohamed Ali Samatar,* Civil Action No. 1:04–1360, your defendant forbears from gratuitously repeating such name in other pleading, pending a ruling from this Honorable Court on such issue.

lawyers originally draft the Complaint with their respective family and given names, only to purge their names from the Complaint before filing same, as some sort of tactical ploy? Necessarily, such an inference is, to an extent, conjectural, but the telltale association of the putatively anonymous female plaintiff with what appears to be a real name, albeit only in a herald to a putative count, is strongly suggestive that cloaking the plaintiffs in pseudonyms was an afterthought, all of which tends to belie any *bona fide* notion of fear of retribution.

Your plaintiffs simply cannot establish any credible risk that your defendant could take revenge upon any of them or close family members, even if he were inclined to do so, as both plaintiffs, each a member of the *Issaq* clan, and, presumably, their respective families as well, reside in the redoubt of *Issaq* ruled and dominated Somaliland, where, according to the most recent United States Department of State Report on Somalia, Somaliland is a region of historic Somalia where conditions of calm prevail. Department of State 2003 Country Report on Human Rights Practices in Somalia (Feb. 25, 2004).

Hearkening back to the first factor articulated by this Honorable Court in *Doe 1* – a need to preserve privacy in a highly personal matter – being an alleged victim or having a close relative who is an alleged victim of torture or other heinous act does not represent the kind of "'personal information of the utmost intimacy' that warrants abandoning the

presumption of openness in judicial proceedings." *Doe 1*, 219 F.R.D. at 392 (quoting *S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979)). "[T]he types of personal intimate information justifying anonymity for litigating parties have typically involved such intimate personal matters as birth control, abortion, homosexuality, or the welfare rights of illegitimate children or abandoned families." *Id.* (citations omitted). Being a victim of a crime, especially an alleged "war crime", or "crime against humanity," is more likely to engender sympathy rather than the potential for salacious attention, opprobrium or revilement that has been held to warrant anonymity.

As for the third factor, which protects the privacy of minors, the Complaint neither hints nor suggests that either plaintiff has not achieved majority. Similarly irrelevant is the fourth factor, which considers whether the action is against a governmental party, for your defendant is a private party. Thus, there should be no concern that disclosure might lead to official retaliation.

Finally, the fifth factor, the risk of unfairness to your defendant, militates mightily against anonymity for at least two reasons. First, given the many years that have passed since the events alleged in the Complaint, it would appear likely that much of the evidence against your defendant would come from the oral testimony of your plaintiffs. Accordingly, in order to prevail against the infamous and loathsome

charges lodged against him in the Complaint, your defendant may well be required to impeach the credibility of your plaintiffs' *solivagant* accusations against him. Your defendant would invariably be prejudiced in this effort if he could not be free to examine every relevant detail of your plaintiffs' lives, an effort that would likely be stymied if your plaintiffs were permitted to proceed anonymously. *See generally: James*, 6 F.3d at 240–41**.** For instance, query as to how your defendant and his undersigned counsel could vet the *bona fides* of your plaintiffs absent knowledge of their respective true names, as individuals in the Somalia diaspora who may be following the subject case may, unwittingly, possess relevant information that would become known to them if only they knew the names of the parties.

Respectfully, your defendant asserts that, If this Honorable Court were to allow your to avoid naming themselves on account of their claimed fear of "reprisal" against themselves or their families[3] (Complaint, ¶¶ 9–10), it would confer unfair and unsupported judicial credence to the suggestion in the Complaint that your defendant, somehow, retains a

[3] The Complaint fails to identify, generically, or otherwise, any members of either plaintiff's respective family, excepting a vague reference, at ¶ 17 of the Complaint, that "[a]t the time of the events at issue, Plaintiff Jane Doe *was married* and living with her husband in Gogol Wanaag, a small village in the Huluq Valley, an agricultural area east of Gebiley. Like others in the area, *they were nomads* and tended herds of cattle, sheep, goats and camels for a living."" (emphasis added). *Inter alia,* the use of the past tense in the foregoing excerpted passage suggests that she may no longer be married or living a nomadic existence. We are told absolutely nothing about John Doe's family, past or present.. At ¶¶ 9 & 10 of the Complaint, respectively, we are told, *inter alia,* that Jane Doe and John Doe each is ". . .a native, citizen and resident of Somalia." However, where in Somalia either plaintiff is currently living we are not told. Given the allegation that both plaintiffs are of the Issaq clan, we can only infer that each lives in Issaq dominated Somaliland.

mysterious power to wreak vengeance on your plaintiffs for mounting a civil challenge against him in a United States court. It is unsupported and illogical for your plaintiffs to insinuate that your defendant, who has been living in the United States for many years, could possibly visit vengeance upon your plaintiffs, in Somaliland, or, for that matter, anywhere else.

These two categories of prejudice – impeding a defendant's ability to cross–examine the plaintiffs effectively and lending *de facto* judicial support to a central feature of your plaintiffs' case – are precisely the kinds of prejudice that the appellate court in *James, supra,* found to weigh against allowing a plaintiff to proceed anonymously. *James*, *supra,* 6 F.3d at 240–41. Unlike the circumstances in the *James* case (where the court ultimately permitted the anonymous plaintiffs to proceed), here, the second kind of prejudice cannot be cured by giving your defendant and his counsel confidential access to the plaintiffs' true identities, or else through any of the other ameliorating devices suggested by the *James* court, as the imposition of such confidentiality would preclude the specter of your plaintiff's being offered potential information to discredit or impeach the plaintiffs by members of the Somali diaspora.[4]

[4] As this Honorable Court no doubt observed at the 7 January 2005 hearing in the companion case brought against the Former Prime Minister of Somalia, *Samatar, supra,* where the courtroom was filled with members of the local Somali community, which will, upon information and belief, likely be the case at the upcoming hearing on this motion as well, each of these cases before this Honorable Court has attracted considerable interest among Somalis worldwide. Indeed, due to publicity that, upon

In addition to the factors set forth above, another factor that your plaintiff respectfully submits tends to abnegate any notion that either of your plaintiffs harbors genuine concern about retribution from your defendant is that your plaintiffs' counsel have been courting the attention of the public by prominently featuring details of the instant *pending l*itigation on their respective websites. *See:* *http://cja.org/cases/Tokeh.shtml* ; & *http://cooley.com/news/pressreleases.aspx?ID=000038754020* . Given the ubiquity of the World Wide Web overlay to the Internet, and the wonderments of search engines, such as *Google* ©, such crowing on the Internet over an unproven case, suffused with all sorts of gratuitous calumnies concerning your plaintiff, coupled with an open solicitation for putative witnesses (*See, e.g.:* the excerpt from the web–posting from Sandra Toliver, Executive Director of the Center for Justice and Responsibility set forth at Footnote No. 1, *supra,* which reads as if it were a clarion call from the counsel for the Issaqs for the recruitment of imagined witnesses against your defendant: "We hope that survivors from other clans will come forward."), make your plaintiffs' maintainment of anonymity, manifestly, prejudicial and untenable. As Tim Berners–Lee, the British physicist who is generally recognized as the father of the

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information and belief, was fomented by the aforementioned press release by the Center for Justice and Accountability, the instant case has received considerable publicity even inside of Somaliland. *See, e.g.:* the following posting on the Internet by a website sponsored by the "Somaliland International Recognition Group," *viz.:* http://www.sirag.org.uk/formersomaliapmfacelawsuit.htm .

World Wide Web observed: “You affect the world by what you browse.” Your plaintiffs, having unleashed publicity engendered by the Internet against your defendant ought not to escape a like measure of reciprocal scrutiny by remaining in the shadows under an unsupportable claim imagined “fear” or “retribution.”

II. Plaintiffs' Claims Are Barred by the Applicable Statutes of Limitations and by their Failure to Exhaust Judicial Remedies, for Which There Exist No Basis For Equitable Tolling:

Your plaintiffs also have failed to state a claim upon which relief can be granted this action, and should be dismissed pursuant to Federal Rule of Civil Procedure 12 (b)(6). Your plaintiffs’ claims are time–barred, as the events alleged took place no later than 1989, and the Torture Victims Protection Act (“TVPA”), 28 U.S.C. § 1350 note, requires that actions be brought within a ten–year limitations period, 28 U.S.C. § 1350 note, § 2 (c), a deadline which passed over five years ago. The same limitations period applies to Alien Tort Claims Act (“ATCA”), 28 U.S.C. § 1350.

Also, because Plaintiffs could have brought an action in the functioning court system of Northern Somalia (Somaliland), this Court should dismiss the Complaint for failure to exhaust judicial remedies, as required by the TVPA, 28 U.S.C. § 1350 note, § 2 (b), and on the basis of forum *non conveniens* ––more about that *infra.*

As referenced above, your plaintiffs have advanced two statutory

bases for bringing the instant action, *viz.,* the TVPA, 28 U.S.C. § 1350, and the ATCA, 28 U.S.C. § 1350. For suits brought upon either basis, the federal courts have uniformly held the TVPA's ten–year statute of limitations governs questions of timeliness. *See*, *Hoang Van Tu v. Koster*, 364 F.3d 1196, 1199 (10th Cir. 2004); *Deutsch v. Turner*, 317 F.3d 1005 (9th Cir. 2003); *Hilao v. Marcos*, 103 F.3d 767, 773 (9th Cir. 1996).

Your plaintiffs allege that they suffered injuries at the hands of your defendant and other members of the Somali Armed Forces and others, at various points between 1984 and 1990. According to the TVPA and cases interpreting the ATCA, any contemplated legal action in respect of such alleged wrongs should have been brought no later than 2000. Your plaintiffs maintain that equitable tolling should extend the limitations period so as to allow the instant, otherwise untimely, action. However, the facts pleaded do not satisfy the requirements for equitable tolling.

The Fourth Circuit has determined that whether, *vel non,* to apply equitable tolling according to the "extraordinary circumstances" test, requires the petitioner 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 (4th Cir. 2003), *citing Harris v. Hutchinson,* 209 F.3d 325, 330 (4th Cir. 2000).

It has been held that where, as here, a plaintiff asserts fear of reprisal and inadequacy of the available court system as justification a delay in filing, equitable tolling may be permitted only when:

> extraordinary circumstances outside of a person's control prevent him from timely asserting a claim. *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996). Intimidation and fear of reprisal are extraordinary circumstances that warrant equitable tolling. Id. The effective unavailability of the courts system also constitute the type of extraordinary circumstances that would toll the statute of limitations.

Alexander v. Oklahoma, 2004 U.S. Dist. LEXIS 5131 (N.D. Okla., March 19, 2004) , *aff'd*, 382 F.3d 1206, 2004 U.S. App. LEXIS 25755 (10th Cir. Okla. Dec. 13, 2004). Further, as a general matter, the factual standard under the TVPA for application of equitable tolling is quite high. *See, e.g.*, *Hoang Van Tu v. Koster*, 364 F.3d 1196, 1199–1200, 2004 U.S. App. LEXIS 7401 (10th Cir. Utah, Apr. 16, 2004), *cert. den.,* by related case of *Tu v. Terry,* 2004 U.S. LEXIS 6623 (U.S. , Oct. 4, 2004) (In case brought by alleged victims of the *My Lai Massacre,* the court noted that, in spite of "plaintiffs' poverty, their status as subjects of a Communist government, the Vietnam War, and their inability to travel, plaintiffs have made no showing sufficient to justify tolling . . ."). Moreover, the Eastern District of Virginia very recently underscored that plaintiffs bear the burden of adducing facts that warrant application of equitable tolling, in the context of an untimely *habeas corpus* action. *See: Hall v. Johnson*, 332 F. Supp. 2d 904, U.S. Dist. LEXIS 17175 (E.D. Va. August 24, 2004). In the instant

action, your plaintiffs offer nary a scintilla of evidence in support of their conclusory, anticipatory claim for equitable tolling, just dollops of disparagement and demonization of your defendant. Nonetheless, let us now consider your plaintiffs' averred grounds for equitable tolling.

First, your plaintiffs contend that the limitations period should not begin to run until 1997, because they feared that, although the Barre government ceased to exist in 1991, bringing suit, nonetheless ,would trigger reprisals. Complaint at ¶¶ 47–49. The case cited by the *Alexander, supra,* court, *viz., Hilao v. Marcos*, *supra,* illustrates why your plaintiffs' circumstances could, arguably, only have tolled the statute of limitations until 1991, when the Somali Government of Siad Barre administration ended. In *Hilao*, *supra,* the plaintiffs brought an action for torture, disappearances, and summary execution against the Estate of Former Philippine President Ferdinand Marcos. The court, in *Hilao,* ruled that "[a]ny action against Marcos . . . was tolled during the time Marcos was president" because of fear of intimidation and reprisals, but no longer. *Hilao, supra,* at 773. *See also*, *Deutsch v. Turner Corp.*, 317 F.3d 1005, 1028–29 (9th Cir. 2003) (affirming use of TVPA's ten–year statute of limitations for actions involving abuses committed by German and Japanese corporate interests during World War II and denying application of equitable tolling). Thus, to trigger equitable tolling, fear of reprisal by a political leader or government official is limited to the period of the

leader's or regime's power. Your plaintiff has been just an ordinary, private person who just happened to have served under a long gone, if not forgotten, Somali regime, for over fourteen years now.

The Complaint alleges that both of your plaintiffs hail from Somalia, near Gebiley, and that each has resided in Somalia for all relevant periods, up to the present. Although not alleged with clarity in the Complaint, your plaintiffs, both of whom are said to be members of the Issaq clan, have, all the while, upon information and belief, been resident in that part of Somalia which, since 1991, has been ruled, *de facto,* by the Issaq clan, *viz.,* the State of Somaliland. Your plaintiffs' presumed, presence in Somaliland appears to suggest, *inter alia,* that, in post–Barre Somalia, if nothing else, your plaintiffs' evident selection of Somaliland as a domicile is indicative of their respective perceptions of security there. Lenin once poignantly observed that people vote with their feet. Your plaintiffs have, evidently, remained in the Somaliland area of Historic Somalia, continuously, since the fall of the Barre regime[5], and, presumably, were each competent all the while. Ergo, by their continued presence there, they must each be reasonably secure there. That being the case, query as to why they have waited until now to bring the instant case. The Complaint fails to enlighten in such regard.

[5] In ¶26 of the Complaint, your plaintiffs allege that, at some, unspecified point following Jane Doe's alleged release from confinement, in September of 1990, ". . . [s]he fled Somalia and joined her family in a refugee camp in Harta-Shekh, Ethiopia [,]" and goes on to state that ". . . [s]he currently resides in Gebiley, Somalia." *Id. As the Barre regime collapsed in early 1991, we can only presume that Jame Doe's alleged exile in Ethiopia lasted no more than a few months.*

Incongruously, your plaintiffs tacitly concede that they could have brought the action in Somaliland as early as 1993 ("a rudimentary civil administration was established there in 1993" Complaint at ¶ 51). Your plaintiffs, in any event, also could have filed suit in a jurisdiction outside of Somalia, where your defendant would, irrefragably, have had no power, whatsoever, to exact revenge, at any point over the last fourteen plus years since the fall of the Barre regime, but, inexplicably, did not bring suit until initiating the instant action, before this Honorable Court. Indisputably, were a suit to have been initiated in another country, at any point during the last decade and a half, the potential for adverse impact in Somalia would have been minimal. From August of 1990, until December of 1990, your defendant resided, openly, here in the United States, in Biloxi, Mississippi, at Keesler Air Force Base (Ali Declaration at ¶¶ 14–15). Thereafter, your defendant resided, openly and continuously, first, in Toronto, Canada, from December of 1990, until October of 1992 (Ali Declaration at ¶¶15–18), and then, from, October of 1992, until July of 1994, your defendant, likewise, resided openly and continuously, in Arlington, Virginia (Ali Declaration at ¶¶19–21), Then, from July of 1994, until December of 1996, your defendant lived, openly and continuously, in Addis Abba, Ethiopia (Ali Declaration at ¶¶21–22) and, from December of 1996, until the present, your defendant has resided, openly and continuously, right here, in Alexandria, Virginia (Ali Declaration at ¶22).

Notwithstanding the foregoing, your plaintiffs, at ¶46 of an unverified Complaint brought by two, anonymous plaintiffs incorrectly state, *inter alia,* that " [your defendant] has resided in the United States for less than ten years since he first arrived in the United States [,]" whereas the above–referenced periods of residence by your defendant in the United States, actually aggregate to considerably more than ten years.[6]

Your plaintiffs have each had ample opportunity to bring a timely action against your defendant, without fear of reprisal, yet, inexcusably, both failed to do so. Moreover, your plaintiffs also have failed to satisfy the second requirement for application of the doctrine – effective unavailability of a court system. For over ten years, Canada, Ethiopia, the United States, and, yes, your plaintiffs' native Somaliland, all have been available to serve as a forum for this action, yet, evidently, your plaintiffs allowed the applicable limitations period to lapse, with no legal action

[6] By your defendant's reckoning, even though, at the time of the filing of the Complaint, he had resided in the United States for some 9 years and 8 months, *since the fall of the Barre regime* (*id est,* from October of 1992, to July of 1994 (1 year and 9 months), and, from December of 1996, to November of 2004 (7 years and 11 months), such tally is of no moment, as your plaintiffs are simply mistaken in supposing that the period of your defendant's residence in the United States is, anywise, a yardstick for computing equitable tolling. In any event, as mentioned above, your defendant has resided in the United States for somewhat more than a decade, *in toto,* ". . .since he first arrived in the United States [,]" Complaint at ¶46.. For one thing, adding the period of time in which your defendant was in Biloxi, Mississippi, brings your defendant's period of time resident in the United States up to exactly ten years; however, adding the year and six months that your defendant was stationed at Fort Benning, Georgia, from late December of 1984, until June of 1985, and, thence, at Fort Leavenworth, Kansas, from June of 1986, before returning to Mogadishu, in July of 1986 (Declaration of Ali at ¶10), brings the total period of time that your defendant has lived in the United States *since he first arrived in the United States,* to over eleven and a half years. But, as suggested above, and detailed further below, your plaintiffs have incorrectly framed their putative equitable tolling analysis, as constituting some sort of metered calculus, computed by a defendant's presence in the United States..

having been initiated anywhere.

Your defendant respectfully urges this Honorable Court to take judicial notice of your plaintiffs' potential for access to the courts of both common law countries, *viz.,* Canada and the United States, throughout the relevant period, and, for the reasons set forth herein, that access to the courts was also available in Somaliland, where, presumably each of your plaintiffs has long resided and, upon information and belief, continues to reside, for well over a decade now. Although the undersigned is still gathering evidence on the issue of your plaintiffs' potential access to justice in the Ethiopia, due to the limited, remote period in which your defendant was resident there (1994–1996), upon information and belief, the undersigned believes, preliminarily, that the case for the availability of access to the courts of Ethiopia, during such period, is at least as compelling as the case made herein for the availability of justice in the courts of Somaliland, especially, as the undersigned is aware that the government formed in Ethiopia, in 1991, upon the collapse of the Communist Mengistu regime, was, by the 1994–1996 time frame, upon information and belief, well along the road to relative peace and a multi–party democracy, however imperfectly formed.

Your plaintiffs maintain, *ipse dixit,* that, until 1997, it would have been impossible to collect information to mount an action without fear of reprisal. Complaint at ¶¶ 47–53, *passim.* This argument is unsupported.

As an aside, since your plaintiffs' specious and inaccurate contentions as regards the state of the Somaliland judicial system, and conditions political and security wise, in Historic Somalia writ large, as pleaded in the Complaint, are virtually coextensive, word for word, with corresponding allegations made by the plaintiffs in the above–referenced case brought in this Honorable Court against Former Prime Minister Mohamed Ali Samatar (*Bashe Abdi Yousef, et alii, v. Mohamed Ali Samatar,* Civil Action No. 04–1360), which case has, likewise, been assigned by the Clerk to Your Honor's docket, your defendant would respectfully request that this Honorable Court take judicial notice of the flock of expert witness affidavits filed by the defendant in *Samatar, supra,* in respect of evaluating the virtually identical, if equally problematical, claims for equitable tolling by the plaintiffs in *Samatar, supra.*

For one thing, any chaos and tribal warring that characterized Somalia in 1991 continues to describe current conditions. Affidavit of Alessandro Campo ("Campo Affidavit"), filed in *Samatar, supra, qua* "Exhibit 2" to defendant's Memorandum in Support of his Motion to Dismiss, at ¶13; Affidavit of Mohammed Haji Nur ("Nur Affidavit"), filed *qua* "Exhibit 3," thereto, at ¶¶12–13; and the Affidavit of Mohamed Abdirizak ("Abdirizak Affidavit"), filed *qua* "Exhibit 4" thereto, at ¶¶ 9–11. Why your plaintiffs point to 1997 as the first possible date after

which they could bring suit and, presumably, conduct discovery , is, to say the least, not readily apparent, as the situation in Somalia did not change dramatically between 1991 and 1997. *See:* Campo Affidavit at ¶¶12–13; *see also:* Nur Affidavit at ¶¶ 12–13; and Abdirizak Affidavit at ¶¶ 9,11. At a minimum, 1997 did not constitute any particular turning point after which discovery would have been more feasible. Your plaintiffs' delay in bringing this action, *inter alia,* only serves to make discovery more difficult, presumptively, to the prejudice of your defendant; inarguably, with the passage of time, paperwork is lost or destroyed, witnesses become more difficult to locate, and, invariably, those witnesses who can be located two decades on from the events alleged in the Complaint have faded memories.

The Congress has made no express provision for invoking equitable tolling as regards either the TVPA or the ATCA. *Compare, e.g.: Peterson, et alii, v. Islamic Republic of Iran,* 264 F. Supp. 2d 46 (D.D.C. 2003)[7]where the applicable 10–year limitations of action in the statutory framework that created a cause of action for suit for U.S. servicemen who were victims of the 1983 bombing of the U.S. Marine Barracks, in Beirut, Lebanon, under the Foreign Sovereign Immunity Act of 1996 ("FSIA"), was deemed equitably tolled until 1996, *id est,* during the period in which the foreign state sponsor of state–sponsored terrorism (Iran) enjoyed traditional immunity from suit, that is, until the passage by the Congress

[7] The undersigned is co–counsel for the plaintiffs in *Peterson, supra.*

of Pub. Law 104–132, which was made effective on April 24, 1996, effectively stripping Iran of its immunity for its perpetration of acts of state–sponsored terrorism against American nationals, as per the express provisions of 28 U.S.C., Sec. 1605 (f), which, in pertinent part, provide for "equitable tolling" during "the period in which the foreign state was immune from suit." *Peterson, supra.*[8]

In sum, the Plaintiffs' alleged victimization allegedly took place between 1984 and 1990. The ten–year statute of limitations thus expired in 2000, or, at the latest, assuming the availability of equitable tolling, in 2001, ten years after the Barre administration collapsed, and your plaintiffs could not reasonably have feared reprisal from your defendant thereafter, let alone to the present. Accordingly, your plaintiffs' claims now are time–barred and must be dismissed pursuant to Federal Rule of Civil Procedure 12 (b)(6).

[8]One of the few exceptions to FSIA immunity was created when Congress promulgated 28 U.S.C. § 1605 (a)(7)(A) (2004) (permitting jurisdiction over states and officials from states that sponsor terrorism) and the 1996 Flatow Amendment, P.L. 104–208, Div A, Title I, § 101(c) [Title V], 110 Stat. 3009–172 (creating a cause of action for victims of torture, extrajudicial killing, and terrorism). In enacting these Congress intended to "expand the scope of monetary damage awards available to American victims of international terrorism." H.R. Conf. Rep. No. 104–863, 987 (1996). In other words, by allowing victims of state–sponsored terrorism to bring actions against the responsible states or officials, Congress sought to increase the breadth of available remedies for acts such as torture and extrajudicial killing. Conversely, it follows that by specifically delimiting the reach of these provisions to state sponsors of terrorism, states not deemed by the Executive Branch to be sponsoring terrorism (and their officials) should be accorded FSIA immunity. As referenced above, the former Government of Somalia was never implicated in state–sponsored terrorism, whatever its other failings.

III. Defendant Ali Is Immune From Suit:

Any action brought against a foreign state, or else, *inter alia,* its agents and officials acting in their official capacity, must be brought under the FSIA. 28 U.S.C., Sec. 1602–1611, *et seq.* This Honorable Court thus lacks jurisdiction to entertain the instant cause, unless your plaintiffs have properly alleged that the case falls within one of the specifically enumerated exceptions to immunity under the FSIA. *See: Kingdom of Saudi Arabia v. Nelson,* 507 U.S. 349, 123 L. Ed. 2d 47, 113 S. Ct. 1471 (1993). Significantly, the FSIA has been construed to be applicable to individuals for acts performed in their official capacity or on behalf of either a foreign state or its agency or instrumentality. *El–Fadi v. Central Bank of Jordan,* 316 U.S. App. D.C., 86, 75 F. 3d 668, 671 (D.C. Cir. 1996), *citing Chuidian v. Philippine National Bank,* 912 F. 2d 1095, 1101–1103 (9th Cir. 1990).

The head–of–state doctrine has long been recognized at common law as providing foreign leaders absolute immunity from actions in the United States courts. *See, In re Grand Jury Proceedings*, 817 F.2d 1108 (4th Cir. 1987), *cert. denied*, 484 U.S. 890 (1987); *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988); *We Ye v. Jiang Zemin*, 383 F.3d 620 (7th Cir. 2004); *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994); *Abiola v. Abubakar*, 267 F. Supp. 2d 907 (N.D. Ill. 2003). Such immunity extends not only to sitting

heads of state but also to past heads of state. *We Ye* at 881–83; *Lafontante* at 133–34; *cf. In re Grand Jury Proceedings* at 1111 (denying head–of–state immunity to former Philippine President Marcos because new government waived his immunity).

There can be no gainsaying that, at all relevant periods, your defendant was an official of the Somali Government (Declaration of Ali, *passim),* as, *inter alia,* by granting him an "A–2" diplomatic visa on all of his sojourns to the United States whilst the Government of Somalia remained extant (Declaration of Ali at ¶24), the Executive Branch has, by its classification thus of your defendant as a diplomat, thereby implicated the FSIA.

Significantly, it bears mention that the Government of Somalia could not supply a waiver your defendant's presumed immunity, *a la In re Grand Jury Proceedings, supra,* as there is, presently, no Government of Somalia.

Legal scholars considering the scope of head–of–state immunity for high–ranking officials similarly consider cabinet–level positions within the doctrine's penumbra. For example, at the Eighty–Fifth Annual Meeting of the American Society of International Law, Foreign Governments in United States Courts Proceedings, April 19, 1991 ("Foreign Governments") (reported in 85 *Am. Soc'y Int'l L.* 251, 276 (1991)), the following remarks were made:

> The foreign minister – someone who is a *cabinet* member, perhaps, and enjoys top status in the government – generally seems to be accorded the same status as the head of state. Problems arise when you get down to the next level of government officials, though, because they are not really heads of state in any traditional sense.

Foreign Governments, note 71, at 275 (remarks of David A. Jones, Jr. (emphasis in original)). Since your plaintiffs deign to imbue your defendant with, virtually, total control over the north–west region of Somalia during all relevant periods, your plaintiffs have accorded your plaintiff the equivalence of cabinet status (query as to whether, *vel non,* the construct of your plaintiff painted in the Complaint, however false, accords him the functional equivalence of a territorial governor for the central Somali Government.).

Thus, this Honorable Court must dismiss the claims contained in the Complaint, all of which accrued at a time when your plaintiffs, essentially, assert that your defendant was an official of the Somali Government.

Notably, head–of–state immunity is separate from,, but also consistent with, the strictures of the FSIA. *See, Abiola,* 267 F. Supp. 2d at 913–14 (FSIA does not alter head–of–state immunity, noting that "[t]he FSIA's definition of 'foreign state' noticeably omits heads of state"); *Lafontant*, 844 F. Supp. at 137 ("that the FSIA is inapplicable to a head–of–state comports with both the history of the FSIA and the underlying

policy of comity"); *see also*, *In re Grand Jury Proceedings*, *supra*, 817 F.2d at 1111 (holding the former Philippine President and his wife liable for failing to comply with grand jury subpoenas, but also that their head–of state–immunity had been waived by the new Philippine government). [9]

IV. Your Plaintiffs Have Failed to Comply With the TVPA's Requirement That They Exhaust Their Legal Remedies and on the Basis of Forum Non–Conveniens

The TVPA requires, *inter alia,* that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to acclaim occurred." 28 U.S.C. § 1350 note, § 2(c). Although "not intended to create a prohibitively stringent condition precedent to recovery under the statute," *Xuncax v. Granajo*, 886 F. Supp. 162, 178 (D. Mass. 1995), before bringing suit in the United States, your plaintiffs first must have exhausted their legal remedies in either Somalia or Somaliland. [10]

[9] Even if the Court were to restrict the Defendant's head–of–state immunity in some way (e.g., to the period during which the Defendant served as the Commander of the Fifth Battalion of the Somali National Army), the FSIA nevertheless prohibits this Honorable Court from exercising personal jurisdiction over him during the entire period of his official service to Somalia. Although the FSIA does not address directly its relationship to individuals holding official posts, the majority of federal courts have held that the FSIA applies not only to countries, but also to their officials, so long as the individuals involved are acting within the scope of their positions. *Cabiri v. Assasie–Gyimah*, 921 F. Supp. 1189, 1197–98 (S.D.N.Y. 1996) ("It is well–established that the FSIA provides immunity to individuals who are officials of a foreign government"); *el–Fadi, supra*; *Chuidian, supra.*

[10] While the exhaustion requirement is, by its terms, applicable to the allegations under he TVPA, claims based on a violation of international norms under the ATCA also may be subject to the same exhaustion requirement. *Sosa v. Alvarez–Machain*, 124 S. Ct. 2739, 2766 (2004).

Once a defendant raises failure to exhaust local remedies as an affirmative defense and "makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile." *Sinaltrainal v. Coca–Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003); *Barrueto v. Larios*, 291 F. Supp. 2d 1360 (S.D. Fla. 2003) (failure to exhaust remedies is an affirmative defense under TVPA).

In the case at bar, your plaintiffs have tacitly admitted in their Complaint that Somaliland has a functioning government with a court system, where each of your plaintiffs resides and where you plaintiffs' claims should have been brought. The Somaliland judicial system is adequate and functions well free of political influence for claims of this nature. Campo Affidavit at ¶¶ 6–7. Nur Affidavit at ¶¶ 8–10. According to the U.S. State Department, a functioning judicial system has existed since at least 1988: "Somaliland's Government included . . . a functioning civil court system." Department of State 2003 Country Report on Human Rights Practices in Somalia (February 25, 2004); Department of State 2002 Country Report on Human Rights Practices in Somalia (March 31, 2003); Department of State 2001 Country Report on Human Rights Practices in Somalia (March 4, 2002); Department of State 2000 Country Report on Human Rights Practices in Somalia (February 23, 2001); Department of

State 1999 Country Report on Human Rights Practices in Somalia (February 23, 2000); Department of State 1998 Country Report on Human Rights Practices in Somalia (February 26, 1999). Furthermore, Somaliland would permit a lawsuit to be brought there for events that took place in part in Mogadishu, which remains part of Historic Somalia. The laws of Somaliland provide a cause of action for victims of attempted extra–judicial killing, torture and the whole panoply of civil wrongs of the sort alleged in the Complaint. Campo Affidavit at ¶¶ 6–9.

In determining whether a plaintiff has exhausted his remedies for purposes of the TVPA, the inquiry is whether a remedy is available and adequate. 28 U.S.C. § 1350 note, § 2(c). Given the availability of an adequate remedy in Somaliland, your plaintiffs' claims must be dismissed.

In addition to having failed to comply with the TVPA's exhaustion requirement, your plaintiffs' action also should be adjudicated in Somaliland because of the inconvenience of this forum to the witnesses, and the difficulty associated with conducting discovery from the United States. Dismissal on the basis of forum *non conveniens* is appropriate if a defendant can demonstrate: "(1) that there exists an adequate alternative forum . . . and (2) that the ordinarily strong presumption favoring a plaintiff's chosen forum is overcome by a balance of the relevant factors of private and public interest weighing heavily in favor of the alternative

forum." *Aguida v. Texaco, Inc.*, 142 F. Supp. 2d 534, 538–39 (S.D.N.Y. 2001). As discussed extensively above, Somaliland provides an adequate, alternative forum and, as detailed further below, the private interests of the parties and witnesses, as well as the public interest of Somaliland, favor dismissal of this action.

As alluded to in the Complaint, there are several reasons why Somaliland's courts would be more appropriate to hear the instant action than this Honorable Court. First, the events complained of allegedly *all* took place in Somalia. Second, both plaintiffs currently reside in Somalia, presumably in the region called Somaliland. Presumably, the same is also true for most, if not all, of your your plaintiffs' putative witnesses. Fourth, most if not all of the documents relevant to Plaintiffs' allegations and Defendant's defense are in Somaliland or elsewhere in Somali (Ali Declaration at the last ¶[11] thereof, at page 5). The warp and woof of your plaintiffs' First Array of Interrogatories and Requests for the Productions of Documents, true xerographic facsimiles of which are annexed hereunto, and incorporated herewith, as if set out in full, *qua* Exhibit 'B'" and "Exhibit 'C'", respectively, clearly suggest that even your plaintiffs are, apparently, of the view that witnesses and documents respecting the subject matter lie in Somalia. Finally, as the country that evolved in the aftermath of the Barre government, Somaliland and its citizens have a

[11] In a belatedly discovered, incidental *erratum* in the Ali Declaration, what should have been denoted *qua* ¶ "25" was mislabeled as ¶ "4," which *erratum is quite evident and immaterial to the content of the Ali Declaration.*

stronger interest in adjudicating Plaintiffs' claims than does the United States, which, for well over a decade now has not recognized any government in Historic Somalia. Accordingly, your plaintiffs' action should be dismissed on the basis of forum *non conveniens.*

For the reasons stated above, Plaintiffs have failed to state a claim upon which relief can be granted and their action should be dismissed pursuant to Federal Rule of Civil Procedure Rule 12 (b)(6).

V. The Alleged Misconduct Pleaded in the Complaint Fails to Meet the Requisite Standards for Actionability Under the ATCA, in Light of the Supreme Court's Recent Holding in Sosa v. Alvarez–Machain, 124 S. Ct. 2739 (2004).

Customary notions of "international law" do not appear to be implicated in the discrete alleged wrongs sustained by your plaintiffs. To be sure, the Complaint is laden with a number of allegations and insinuations of serious wrongdoing by your plaintiff, all of which are emphatically and vehemently denied by your plaintiff, who disclaims *any* wrongdoing, whatsoever, of whatever degree or magnitude. To be sure, the Complaint contains serious charges, such as a conclusory charge that ". . .the Somali National Army committed . . .widespread and systematic use of torture, rape, arbitrary and prolonged detention, and mass executions" Complaint at ¶11; that ". . .[t]he Somali National Army committed widespread human rights abuses in its violent campaign to

eliminate the SNM and any perceived supporters" Complaint at ¶ 14; that " (the Somali National Army) killed and looted livestock, blew up water reservoirs *(sic.)*, burned homes, and tortured and detained alleged SNM supporters" *Id.*; that, "[p]articularly after 1984, (the Somali National Army) also carried out a systematic policy of indiscriminately killing civilians as collective punishment for SNM activities" , and that "[s]uch acts were intended to, and did, spread terror among Issaq civilians in order to deter them from assisting the SNM." *Id.* Notwithstanding such broad–brushed disparagements of the Somali National Army, the Complaint does not directly implicate your defendant in extra–judicial killing of non–combatants, rape, summary executions, killing livestock, looting livestock, destroying water reservoirs or cisterns, or burning homes . Although the Complaint goes on to assert, with reference to the above–referenced nefarious activities, that ". . .[s]uch acts were intended to, and in fact did, spread terror among Issaq civilians in order to deter them from assisting the SNM [,]" *Id.*, nowhere does the Complaint specifically allege that your either of the parties plaintiff were murdered, raped, had livestock rustled or killed, homes or other property destroyed, or, tellingly, even that either party plaintiff was a civilian at all. To be sure, the Complaint states that Jane Doe was, with her husband, a nomad, who ". . . tended herds of cattle, sheep, goats, and camels for a living." Complaint at ¶ 17, and your plaintiff called John Doe is described as

having been a “farmer” Complaint at ¶ 27. However, for all of the obliquely sympathetic treatment contained in the Complaint to describe the Communist inspired SNM, nowhere in the Complaint is there a clear, unequivocal statement that either of your defendants was a civilian at all times complained of, or, for that matter, even any of the time complained of. Based upon the facts as pleaded, how are we not to infer that your plaintiffs were unlawful combatants , in the sense that they were aiders, abettors or supporters of the SNM. When we consider the historical context in which, at all times relevant herein, *inter alia,* the Government of Somalia was fully recognized as the sole, legitimate Government of Somalia, fighting a Communist inspired insurgency that may well have enjoyed support within Somalia proper among Issaq elements, is hardly violative of traditional norms of “international law.” As for the notion that the alleged wrongful acts were, somehow, part and parcel of some sort of systematic campaign, as it were, to terrorize Issaqs, there is no allegation of genocide, or even of attempted genocide. Although no doubt worthy of criticism, *a la* the excesses of the Russian Army in this decade in its withering harsh crackdown on secessionist insurgents in Chechnya, the use of harsh tactics by any nation fighting a fierce insurgency should be seen in the appropriate context of a defensive action then being waged by a *de facto* ally of the United States against a rebel movement receiving, in the case of Somalia and the SNM, succor

from the Soviet Union, whether directly or indirectly, at a time when the Soviet Union was the implacable foe of the United States and of freedom everywhere in the world of the 1980s, which faced a quantitatively different threat than that posed today by terrorism. As an aside, as adverted to above, your defendant explicitly denies *any* allegations of wrongdoing directed against him, much less that he harmed either of your plaintiffs in *any* way.

When one considers that *Sosa, supra,* is so recent, and so complex, that, at this writing, the undersigned's latest *Lexis* ® search of law review articles yields that a full commentary on the Supreme Court's decision has yet to appear in publication, a careful consideration ought to be given herein to emergent interpretative academic commentary. Having said that, the undersigned respectfully urges that *Sosa, supra,* will ultimately be viewed as visiting, *inter alia,* a significant curtailment of the range of conduct considered, in any event, actionable under the ATCA, such that the specific wrongs alleged against your defendant would ultimately prove not to be actionable under the ATCA. The *Sosa, supra,* Court set forth the test of ATCA actionability for a specific wrong on a historical matrix, as may be observed in the following formulation of the test to be applied, *viz.*:

> "Accordingly, we think courts should require any claim based on the present day law of nations to rest on a norm of international character accepted by the civilized world and

> defined with a specificity comparable to the features of the 18th century paradigms we have recognized. This requirement is fatal to Alvarez's claim."
>
> 124 S.Ct. at 2759.

Sosa, supra, provides even further admonitory language regarding the process by which courts determine contemporary notions of the law of nations, as may be readily observed in the following passage, *viz.*:

> "Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

Id. at 2766–2767, *quoting The Paquete Habana,* 175 U. S. 677, 700, 44 L. Ed.320, 20 S. Ct. 290 (1899).

It is exceedingly difficult to imagine how the alleged wrongs pleaded by your plaintiffs could conceivably fit within an atavistic, recrudescence of the original 19th century concepts embodied in the ATCA, and, hence, it is more reasonable to interpret *Sosa, supra,* as operating so as to preclude ATCA actionability here.

VI. Conclusion:

WHEREFORE, for the foregoing reasons, your defendant ever prays that his *Motion to Dismiss* be granted, and that he he afforded such other and further relief as may be deemed by this Honorable Court to be just and fitting.

Respectfully submitted,

/s/Joseph Peter Drennan
JOSEPH PETER DRENNAN
218 North Lee Street
Third Floor
Alexandria, Virginia 22314
Telephone: (703) 519–3773
Telecopier: (703) 548–4399

Virginia State Bar No. 023894

ATTORNEY AND
COUNSELLOR
FOR YUSUF ABDI ALI

CERTIFICATE OF SERVICE

I, Joseph Peter Drennan, undersigned, hereby and herewith certify that, on this 10th of January, 2005, a true xerographic facsimile of the foregoing was despatched by hand carriage, enshrouded in a suitable wrapper, unto:

Robert R. Vieth, Esquire
Daniel J. Wadley, Esquire
Tara M. Lee, Esquire
Cooley Godward, L.L.P.
One Freedom Square
11951 Freedom Drive
Reston, Virginia 20190–5656; & that, on even date, another true xerographic facsimile of the foregoing was despatched by carriage of First Class Post, through the United States Postal Service, with adequate postage affixed thereto, enshrouded in a suitable wrapper, unto:

Matthew Eisenbrandt, Esquire
Helene Silverberg, Esquire
Center for Justice & Accountability
870 Market Street
Suite 684
San Francisco, California 94102.; and that, on even date, Robert R. Vieth, Esquire, and Helene Silverberg, Esquire, were also served, electronically, with a true copy of the foregoing at the respective *e–mail* address of each, *viz.*: rvieth@cooley.com &hsilverberg@cja.org .

Respectfully submitted,

/s/Joseph Peter Drennan
Joseph Peter Drennan