

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

JANE DOE and)
JOHN DOE,)
)
 Plaintiffs,)
) Civil Action No. 1:05CV701 (LMB/BRP)
 v.)
)
 YUSUF ABDI ALI,)
)
 Defendant.)

**PLAINTIFFS' OPPOSITION TO MOTION OF DEFENDANT YUSUF ABDI ALI
TO DISMISS WITH PREJUDICE THE COMPLAINT**

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INTRODUCTION

The Plaintiffs instituted this action under the Alien Tort Claims Act (“ATCA”), 28 U.S.C. § 1350, and the Torture Victim Protection Act (“TVPA”), 28 U.S.C. § 1350 note, against Defendant Yusuf Adbi Ali (“Ali”), who served as a commander in the Somali National Army in the 1980s. Plaintiffs allege that Ali is liable to Plaintiffs for acts of attempted extrajudicial killing; torture; crimes against humanity; war crimes; cruel, inhuman or degrading treatment or punishment; and arbitrary detention.

Ali’s motion to dismiss should be denied. First, this Court has already ruled that Plaintiffs may proceed anonymously – defendant’s efforts to reargue the issue should be precluded. Second, the statute of limitations must be equitably tolled as a result of Ali’s absence from the jurisdictional reach of U.S. Courts, and because the chaotic conditions in Somalia precluded investigation of Plaintiffs’ claims and raised fear of reprisals. Finally, contrary to Ali’s contentions, this case does not raise a political question and Executive Branch input is unwarranted and unnecessary. For the reasons stated herein, Ali’s arguments are without merit and his motion should be denied.

STATEMENT OF FACTS

The Plaintiffs’ Suffering at the Hands of Ali and his Subordinates

Plaintiffs are victims of the acts of Ali and his military subordinates. Defendant Ali commanded the army unit stationed in Gebiley, Somalia. Complaint (“Compl.”) ¶ 16. Between approximately 1984 through 1989, Ali, as commander of the Fifth Battalion, directed and participated in a brutal counterinsurgency campaign that refused to distinguish between civilians and combatants. *Id.*

Members of the Fifth Battalion under Ali's command abducted Jane Doe and her husband, imprisoned her, brutally beat her during interrogations and caused her to miscarry. Compl. ¶¶ 18-25. Ali personally beat her on at least one occasion. Compl. ¶ 23. After a sham trial on charges of aiding enemies of the state, Jane Doe was convicted and sentenced to death. Compl. ¶ 24. Her sentence was commuted to life in prison, and she was released from prison five years later. Compl. ¶¶ 24-26.

Plaintiff John Doe also was abducted by members of the Fifth Battalion, who imprisoned him, interrogated him and repeatedly tortured him. Compl. ¶¶ 29-37. Ali participated in and directed many of these torture sessions, and, during one torture session, Ali personally shot John Doe with his pistol and left him for dead. Compl. ¶¶ 32-37. John Doe survived the shooting and paid soldiers to obtain his release. Compl. ¶ 38.

Human Rights Abuses in Somalia

Somalia became an independent nation in 1960. Ex. A, Preliminary Expert Report of Richard B. Ford, ("Ford Report"), at p. 2. On June 26, 1960, the British Protectorate of Somaliland, which comprised the northwest region of Somalia, received its independence; five days later, the Italian Trust Territory of Somalia also attained its independence. *Id.* The two regions then united on July 1, 1960 to form the Somali Republic. *Id.* In October 1969, a coup led by Major General Mohamed Siad Barre ("Barre") toppled the first and only democratic government of the new nation of Somalia. Compl. ¶ 12. The new government suspended the existing Constitution, closed the National Assembly, abolished the Supreme Court and declared all political parties illegal. *Id.*

Throughout the 1980s, members of the Somali National Army committed gross human rights abuses against the civilian population of Somalia, including the widespread and systematic use of torture, rape, arbitrary and prolonged detention, and mass executions. Compl. ¶ 11.

The Violence In Northern Somalia

The Isaaq clan, located primarily in the northwestern region of Somalia, was a special target of the Barre government, as Isaacs were perceived from the outset as potential opponents to the Barre regime. Compl. ¶ 13. In response to growing opposition the government placed the northern region under military control, increasing the potential for abuse of power by individual military commanders. *Id.*

Members of the Somali National Army committed widespread human rights abuses in a violent campaign to eliminate opposition elements and their perceived supporters. Compl. ¶ 14. They killed and looted livestock, blew up water reservoirs, burned homes, and tortured and detained alleged opposition supporters. *Id.* Particularly after 1984, Army units engaged in the indiscriminate killing of civilians as collective punishment for opposition activities. *Id.*

The area around the northern town of Gebiley (where Defendant commanded an Army unit) was a center of human rights abuses by the Somali National Army. Compl. ¶ 15. This region was a strategic focus because of its close proximity to the Ethiopian border, where opposition bases were believed to be located. *Id.*

Post-Barre Somalia

Following the violent defeat of the military government of Siad Barre in 1991, Somalia's central government collapsed, and Somalia fell into increasing chaos. Compl. ¶ 48. Fighting among rival clan leaders resulted in the killing, displacement, and mass starvation of tens of thousands of Somali citizens. *Id.* Somalia's clan-based civil war and anarchic violence proved to be so brutal that it drove the United Nations from the country in 1994. *Id.* Rival clan militias continued to commit gross and systematic human rights abuses in the years after the United

Nations' departure, including the deliberate killing and kidnapping of civilians because of their clan membership. *Id.*

In 1991, the former British protectorate of Somaliland declared its independence, reclaimed its previous name, and seceded from Somalia. Compl. ¶ 51. A rudimentary civil administration was established there in 1993, but major armed conflicts in 1994 and 1996 plunged the region back into turmoil. *Id.* No country in the world recognizes Somaliland as an independent state.¹

Although human rights violations of former army officers were generally known to have occurred, as described more fully in the Ford Report, attached as Ex. A, the conditions in Somalia in the 1990s did not permit detailed factual investigation of human rights claims. The open civil war of the final years of the Barre regime prevented westerners from visiting Somalia and devastated its infrastructure. *See Ex. A, Ford Report.* at p. 3-4. Travel into Somalia in the early and mid-1990s was nearly impossible. *Id.* International air service into the country was virtually non-existent. *Id.* There is no railway system in Somalia, no bus service was then available, and the civil war had destroyed the country's road system. *Id.* at 4. Communication into Somalia was equally difficult. The civil war and subsequent clan-based armed conflict virtually destroyed the country's already limited telephone and mail systems. *Id.* Nor were email or cell phones available in Somalia in the 1990s. *Id.* Most significant, however, was the extreme danger outsiders who may have wanted to investigate human rights claims would have faced. *Id.* at 4-7. Simply put, Somalia was considered one of the most dangerous countries in

¹ Counsel for defendant has tried mightily to make a case-preclusive defense out of this immaterial fact. His repeated exclamations regarding the unrecognized status of Somaliland are particularly ironic in light of his present eagerness to convince the Court to rely upon declarations and correspondence from the equally status-less Transitional Federal Government of the Republic of Somalia (the "TFG"). No country in the world recognizes the TFG either.

the world during those years. *Id.* at 3-6.

It was only in 1997 that even one region of Somalia became stable enough to permit investigation into human rights claims in the country, when the warring clans of the self-described “Republic of Somaliland” agreed to end armed conflict in the region. *Id.* at 7. The Somaliland election of 1997 further consolidated the peace process. *Id.* As a result, since 1997 it has been possible to look into claims of human rights abuses among people residing in this area. International commercial air service was restored in 1997. *Id.* at 7. Though fixed-line phone service is still not available in most of Somalia, cell phone and email service only became available to many people in this region around 2000. *Id.* at 4. Finally, and most important, with the peace agreement still holding, it is now reasonably safe for Americans to travel there to personally speak with victims of human rights abuses and witnesses to those events. *Id.* at 7.

Ali’s Movement After The Collapse Of The Barre Government

According to Ali, he came to the United States for military training during 1990, and his training ended in December 1990. Ali Decl. ¶ 15.² Because of the chaos in Somalia and the imminent fall of the Somali government, at the end of his training Ali declined to return to his home and sought refugee status in Canada. In 1992 Ali entered the United States after being deported from Canada on the grounds that he “was associated with the Barre regime,” Ali Decl. ¶ 18. In 1994, facing deportation proceedings here, Ali left for Ethiopia. Ali Decl.

² Plaintiffs do not necessarily accept the truth of all points of the Ali Declaration at this stage of this case. Moreover, Ali’s attachment of his declaration in support of his brief should not be construed as converting the motion to dismiss briefing into summary judgment briefing. Any doubts the Court has regarding factual disputes must be resolved in favor of the allegations recited in the Complaint. *Adams v. Bain*, 697 F.2d 1213, 1216 (4th Cir. 1982).

¶ 22. In December 1996 he returned to the United States and now lives in Alexandria, Virginia. Ali Decl. ¶ 22.³

STANDARD OF REVIEW

Ali's motion is filed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. In considering a motion under Fed. R. Civ. P. 12(b)(6), the court must accept as true all the allegations of the complaint, and the complaint may not be dismissed "unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." *Adams v. Bain*, 697 F.2d 1213, 1216 (4th Cir. 1982) (citations omitted). Moreover, the court must draw all reasonable inferences from the facts of the complaint in the light most favorable to the plaintiff. *Krane v. Capital One Servs., Inc.*, 314 F. Supp. 2d 589, 596 (E.D. Va. 2004).

ARGUMENT

I. THE COURT HAS ALREADY RULED THAT THESE PLAINTIFFS SHOULD BE PERMITTED TO PROCEED ON THESE CLAIMS ANONYMOUSLY, AND PLAINTIFFS SHOULD BE PERMITTED TO CONTINUE TO DO SO.

On January 28, 2005, after full briefing from both sides and oral argument on the issue, this Court ruled that these same two plaintiffs should be permitted to proceed anonymously on these same eleven claims. Court Order dated January 28, 2005, attached as Ex. B. The parties,

³ Ali's contention that Plaintiffs "remain oblivious" to the state of affairs in Somalia, Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss with Prejudice the Complaint ("Mot. to Dismiss") at 13, n.16, is outrageous and beyond the pale. Plaintiffs reside in Somalia, while Ali enjoys a life of ease here in the U.S., as do the experts upon whom he relies. It is difficult to see how Plaintiffs' efforts to seek justice for the wrongs perpetrated against them by Ali could be deemed "counter-productive" to anyone other than Ali.

facts, and claims are the same now as they were then. There is no reason to relitigate this issue. If the Court is nonetheless inclined to entertain Ali's renewed attack on Plaintiffs' anonymous status, analysis of the applicable facts and law still supports the Court's grant of permission to proceed anonymously. The use of pseudonyms is permitted upon consideration of the factors set forth in *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993).

None of the facts involved in weighing the *James* factors have changed since January.⁴ Plaintiffs' Memorandum in support of their January 14, 2005 Motion for Leave to Proceed Anonymously set forth in detail, and with support from eleven exhibits, the strong factual basis for Plaintiffs' request. Plaintiffs attach and incorporate that Memorandum hereto as Exhibit C in support of this opposition to Defendant's pending motion.

One point regarding the reasonableness of Plaintiffs' fear of reprisals does warrant amplification. As Plaintiffs noted in their prior briefing, many former Barre regime leaders and perpetrators of human rights abuses still live openly in Somalia. One notorious example is General Muhammad Said Hirsi (Morgan), the one-time northern commander of the Somali Armed Forces. Morgan has been referred to as one of the "Butchers of Hargeisa." Fiona Lortan, *Africa Watch: Rebuilding the Somali State* at 6, at <http://www.iss.co.za/pubs/ASR/9No5And6/Lortan.html>, attached as Ex. 3. to Ex. C. He continues to live openly in Somalia and has served as a member of Somalia's Transitional National Assembly. *Id.* In connection with this motion, Ali relies on a letter from the Minister of State of the unrecognized Transitional

⁴ Ali now claims there are seven new "important matters" which the Court should consider. Mot. to Dismiss at p. 2-6. The only matter which could conceivably relate to the Plaintiffs' anonymous status is Ali's contention that Plaintiffs have forfeited "any excuse" for proceeding anonymously because their June 24, 2005 Memorandum allegedly demonstrates that they are working "hand-in-glove with the so-called 'government of Somaliland.'" *Id.* This argument is based solely on his opinion that Plaintiffs are trying to use their lawsuit as a "vehicle" to secure recognition for Somaliland and thus have the "cooperation" of the government of that region. Mot. to Dismiss, at p. 5. This is nonsense. Plaintiffs further address this argument at Section III below. It does not bear at all upon the legitimacy of Plaintiffs' Doe status.

Federal Government of the Republic of Somalia, which letter refers to hearsay statements by this same General Morgan. Mot. to Dismiss, Ex. 2. Thus, at least one infamously violent former military officer appears to be actively providing assistance to Ali in connection with this case. Under these circumstances, Ali cannot credibly argue that Plaintiffs lack any reasonable basis for their fear of retribution.⁵

Thus, an analysis weighing the *James* factors discussed above strongly militates in favor of permitting the Plaintiffs to proceed anonymously.

II. THE STATUTE OF LIMITATIONS DOES NOT BAR PLAINTIFFS' CLAIMS.

A complaint will not be dismissed on statute of limitations grounds unless the defendant can establish that “the plaintiff cannot prove any set of facts that will support his or her claim and entitle him or her to relief.” *Krane*, 314 F. Supp. 2d at 596. Ali cannot meet this standard and his argument that the Court should dismiss this case because the ten-year limitations period has expired therefore must fail.⁶

Pursuant to the doctrine of equitable tolling, this suit is timely. First, the statute of limitations must be tolled for the period of time Ali was outside of the U.S. At the time this suit

⁵ Indeed, the evidence and opinions offered by Ambassador Crigler actually *bolster* Plaintiffs’ previous arguments regarding their reasonable fear of retaliatory harm. *See, e.g.*, Trusten Frank Crigler Declaration, Mot. to Dismiss, Ex. 4, at p. 3 (referencing “the very real security dangers within Somalia, and the absence of any peacekeeping authority”).

⁶ Defendant’s so-called “important matter” allegedly relating to the statute of limitations involving Jane Doe’s release date is much ado about nothing. Defendant’s brief harshly criticizes an alleged inexactitude regarding the times and dates of Jane Doe’s arrest and release, going so far as to characterize the current Complaint as a “disturbingly pattern of fishy fuzzing of significant...key alleged dates and times.” Mot. to Dismiss, at p.3, fn. 5. Federal Rule of Civil Procedure 8 requires no more than a short and plain statement of the facts. The 27 page Complaint in this case includes over 12 full pages of specific factual allegations and far exceeds the notice pleading requirements of Rule 8. Counsel for Defendant seeks to discredit Plaintiffs by imposing his notion of dates and times on nomadic Somalis who have adopted a much different understanding of the concept of time. The proper place and time for counsel to address those concerns and issues is during deposition. Plaintiffs are prepared to testify that each of the events described in the Complaint actually happened and that Defendant is responsible for the injuries they sustained. We are confident that the Court and the jury will find Plaintiffs’ testimony credible and compelling once Plaintiffs are finally able to offer it.

was filed, Ali had been in the United States for less than ten years since the fall of the Barre regime.⁷ Second, the extraordinary and chaotic circumstances in Somalia, including the inability to conduct the investigation necessary to bring this case and fears of reprisal, mandates equitable tolling.

A. Principles Governing the Tolling of the Statute of Limitations.

Federal statutes of limitations are subject to equitable tolling unless tolling is inconsistent with the intent of the legislature. The “basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances,” *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 427 (1965), *i.e.*, whether tolling is “consonant with the legislative scheme.” *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 558 (1974). Because the touchstone is legislative intent, there is no strict formula to determine whether tolling may be applied in a given case. Nonetheless, the United States Supreme Court has indicated that tolling applies in various situations, including circumstances where the plaintiff has been blocked from filing suit through no fault of his own. *See, e.g., Young v. United States*, 535 U.S. 43 (2002).

Young provides a good illustration of the principles governing equitable tolling. *Young* involved a claim by the Internal Revenue Service (“IRS”) for taxes that originally were due in 1993. In May 1996, less than three years after the taxes were due, the taxpayers filed a Chapter 13 petition in bankruptcy. In March 1997, while the Chapter 13 proceeding was pending, the taxpayers filed a Chapter 7 petition in bankruptcy, which case was closed in September 1997. During the entire time the taxpayers were in bankruptcy, the IRS was precluded from pursuing its claim due to the automatic stay of the Bankruptcy Code, 11 U.S.C. § 362(a). After conclusion

⁷ Plaintiffs filed their initial complaint on November 10, 2004. At Plaintiffs’ request, the Court dismissed the initial complaint without prejudice and tolled the statute pending filing of the present Complaint, per Court Order dated April 29, 2005.

of the second bankruptcy case, the IRS sought collection of the taxes originally due in 1993. The taxpayers resisted on the grounds that the taxes had become due more than three years before they filed their Chapter 7 petition in March 1997, and therefore the case was barred by the applicable three-year statute of limitations. The IRS contended that the three-year period was subject to equitable tolling for the period during which the taxpayers were protected by the automatic stay. The United States Supreme Court agreed with the IRS.

In a unanimous opinion authored by Justice Scalia, the Court began its analysis with the statement, “[i]t is hornbook law that limitations periods are customarily subject to equitable tolling . . . unless tolling would be inconsistent with the text of the relevant statute.” 535 U.S. at 49 (internal citations and quotation marks omitted). Indeed, “Congress must be presumed to draft limitations periods in light of this background principle.” *Id.* at 49-50.

Under the Court’s rationale tolling was required because the automatic stay “prevented the IRS from taking steps to protect its claim.” *Id.* at 50. Because the IRS was legally disabled from pursuing the claim, there was no need to examine whether the taxpayers had engaged in any misconduct. *Id.* at 50. The Court held that tolling was “appropriate regardless of petitioners’ intentions when filing back-to-back Chapter 13 and Chapter 7 petitions.” *Id.*⁸

Thus, *Young* allowed tolling without any evidence of misconduct by the defendant, and may therefore be considered an example of the type of “extraordinary circumstances” – there, a bankruptcy filing – that prevent a plaintiff from pursuing his claim and therefore require equitable tolling. *See, e.g., Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (tolling allowed if extraordinary circumstances beyond plaintiff’s control prevented a suit within the limitations

⁸ In *Young*, the taxpayers also cited a separate tolling provision that, by its terms, did not apply to the IRS’s claims. The taxpayers argued that this express tolling provision signified congressional intent *not* to allow tolling in the circumstances presented by *Young*. The Court rejected that argument, holding that the express tolling provision “*supplements* rather than displaces principles of equitable tolling.” 535 U.S. at 53 (emphasis in original).

period). And, it is clear from *Young* and other cases that the issue of tolling is determined by Congressional intent. To decide whether and how equitable tolling applies, courts “examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act.” *Burnett*, 380 U.S. at 427.

In enacting the TVPA, Congress chose a long statute of limitations and expressly stated that all equitable tolling principles should apply to TVPA claims. The TVPA incorporated a ten-year limitations period, 28 U.S.C. § 1350 note, § 2(c), and Congress stated unequivocally that equitable tolling should apply — and such principles should be applied liberally. S. Rep. No. 249, 102d Cong., 1st Sess., at 10-11 (1991) (attached as Ex. D). The Senate Report on the TVPA instructs that the limitations period should be calculated “with a view toward giving justice to Plaintiffs rights.” *Id.* Committee Reports such as these represent “the authoritative source” for determining legislative intent. *Garcia v. United States*, 469 U.S. 70, 76 (1984), citing *Zuber v. Allen*, 396 U.S. 168, 186 (1969).⁹

Ali mistakenly finds significance in that the statutory language of the TVPA and ACTA do not expressly invoke equitable tolling. Mot. to Dismiss, at p. 12. As noted above, the Supreme Court in *Young* expressly found that limitations periods are “customarily subject to ‘equitable tolling’” and went on to apply equitable tolling when the plaintiff could not bring suit, despite the absence of any express statutory tolling principle. As discussed below, courts on numerous occasions have applied equitable tolling in the TVPA and ACTA context.

⁹ These equitable tolling principles also extend to the ATCA. The TVPA establishes “an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act).” *Abebe-Jira v. Negewo*, 72 F. 3d 844, 848 (11th Cir.), *cert. denied*, 519 U.S. 830 (1996) (emphasis omitted) (quoting TVPA legislative history). Cases have further identified a “close relationship” between the ATCA and TVPA for limitations purposes. *Papa v. United States*, 281 F. 3d 1004, 1012 (9th Cir. 2002). Further, the legislative history of the TVPA “casts light on the scope of the Alien Tort Claims Act.” *Xuncax v. Gramajo*, 886 F. Supp. 162, 172 n.2 (D. Mass. 1995).

B. The Suit Is Timely Because At The Time Plaintiffs Filed This Suit, Ali Had Been In The United States For Less Than Ten Years Since the Fall Of The Barre Regime.

The statute of limitations was tolled because two extraordinary circumstances prevented Plaintiffs from asserting their claims earlier: first, the Barre regime – in whose military Ali was an officer – continued to rule Somalia through oppression, torture, and violence until 1991. Thus the statute of limitations must be tolled until that time. Second, between 1991 and the filing of this suit, Ali was outside the jurisdictional reach of the U.S. courts such that he was in the U.S. for less than ten years. Taken together, these extraordinary circumstances – both beyond Plaintiffs’ control – tolled the statute of limitation for a sufficient period so that this suit was timely filed. *See, e.g., Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1547-51 (N.D. Cal. 1987) (tolling ACTA claim from 1977-1984 – the period between the conduct forming the basis of the suit and the fall of the regime under which the conduct occurred – and from 1984-1987 – the period during which defendant concealed himself).

1. The Statute Of Limitations Was Tolled Until The Fall of the Barre Regime.

The statute of limitations for Ali’s acts, committed while he was an officer in the Somali National Army, was tolled through the 1991 overthrow of the military government headed by Major General Siad Barre.¹⁰ The case law calls for tolling under these circumstances. *See Hilao v. Marcos*, 103 F.2d 767, 773 (9th Cir. 1996) (tolling the statute of limitations in a TVPA case until the end of the Marcos presidency, which also happened to be the beginning of the period Marcos entered into this jurisdiction); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1368 (S.D. Fla. 2001) (tolling the statute of limitations in a TVPA case through period in

¹⁰ Ali concedes this very point in his initial Memorandum of Points and Authorities in Support of Defendant’s Motion to Dismiss with Prejudice the Complaint filed on January 5, 2005, at pp. 22-23 (tolling based on fear of reprisal “is limited to the period of the leader’s or regime’s power”).

which General Pinochet's military regime was replaced by a civilian government); *Doe v. Rafael-Saravia*, 348 F. Supp. 2d 1112, 1146-48 (E.D. Cal. 2004) (tolling statute in TVPA/ATCA case arising from 1980 assassination through 2003 filing due to unavailability of fair and impartial judiciary in El Salvador, as democratically elected government did not take office until 1994, and due to fear of reprisals, among other things); *Forti*, 672 F. Supp. at 1550 (denying motion to dismiss ATCA claims on statute of limitations grounds because plaintiffs' allegations raised issue of fact regarding their access to courts prior to democratically elected government taking power); *see also Hanger v. Abbott*, 73 U.S. 532 (1867) (tolling statute of limitations, absent any express tolling provision in statute, during period which courts in Confederate states were closed to citizens of United States because of Civil War); *Osbourne v. U.S.*, 164 F.2d 767, 769 (2d Cir. 1947) (tolling statute during period plaintiff was prisoner of war).

Tolling through the fall of the Barre regime is wholly appropriate under the circumstances at hand. The Plaintiffs simply cannot have been expected to bring a case against the perpetrator of human rights abuses while the brutal military government for which he worked remained in power nor while Ali himself maintained military authority over the area where Plaintiffs and their families lived. Indeed, in the later years of the Barre regime the country was in a state of civil war, and Ali himself refused to return because of the conditions there.

Ali Dec. ¶ 15. Thus, the statute of limitations is tolled through the fall of the Barre government in 1991.

2. The Statute Of Limitations Is Tolled During All Periods When No U.S. Court Would Have Had Jurisdiction Over Ali

The courts of the United States could not assert jurisdiction over Ali except for the time he was actually present in this country. Because the acts that are the subject of this Complaint were neither committed in the United States nor targeted at U.S. citizens, this Court would not

have been able to assert jurisdiction over Ali unless he was present in the U.S. and subject to service of process. See *International Shoe Co. v. Wash.*, 326 U.S. 310 (1954); *Burnham v. Superior Court of California*, 495 U.S. 604 (1990) (requisite minimum contacts were satisfied by petitioner's physical presence in the forum). As such, Plaintiffs could not have brought a case against Ali while he was outside the U.S. Ali's absence from the U.S. was indisputably beyond the Plaintiffs' control. Because the statute of limitations is tolled for all periods of time when Ali was outside the country, this suit has been brought within the ten-year limitations period.

Indeed, the rationale of *Young* compels the conclusion that Plaintiffs' claims were tolled while Ali was beyond the jurisdictional reach of United States courts. Just as the IRS in *Young* was prevented from asserting its claims due to the automatic stay of bankruptcy, the Plaintiffs here were prevented from pursuing their claims against Ali due to lack of jurisdiction. And, as shown below, Congress clearly intended, in the context of the TVPA and ATCA, that the statute of limitations would be tolled during periods that the plaintiffs were precluded from filing suit, specifically noting periods while the defendant was immune or absent from the United States. Thus, tolling is necessary to effectuate Congressional purpose and intent.

The TVPA was enacted to ensure that both U.S. citizens and aliens can bring claims for torture and extrajudicial killing carried out under color of law of a foreign nation. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2763 (2004) (TVPA "establishes an unambiguous and modern basis for federal claims of torture and extrajudicial killing."). In enacting the TVPA, Congress intended to (1) provide an avenue for torture victims to pursue claims against their torturers here in the United States because "[j]udicial protection against flagrant human rights violation is often least effective in those countries where such abuses are most prevalent," S.

Rep. No. 102-249, at 3 (1991);¹¹ and (2) denounce and deter foreign torturers from seeking haven in this country.¹² Such Congressional intent is given effect by tolling the limitations period when a defendant is outside of the reach of United States courts. Of course, it is impossible to pursue these remedies unless the defendant is present in the United States.

Tolling during a defendant's absence from the jurisdiction comports with Congressional intent (and the practical reality) that such claims may only be brought against defendants who are subject to jurisdiction. In response to concerns regarding possible difficulties the TVPA might raise regarding the management of foreign policy,¹³ the Senate Report stated:

First and foremost, only defendants over which a court in the United States has personal jurisdiction may be sued. In order for a Federal court to obtain personal jurisdiction over a defendant, the individual must have "minimum contacts" with the forum state, for example, through residency here or current travel. Thus, this legislation will not turn the U.S. courts into tribunals for torts having no connection to the United States whatsoever.

S. Rep. 102-249, at 7 (footnote omitted) (emphasis added). As noted by the TVPA's sponsor in the floor debates, "The act is intended to deny torturers a safe haven in this country. *If a torturer does not come to the United States and establish sufficient contacts, then he or she cannot be sued under this act.*" 138 Cong. Rec. S2667, at 2667-68 (daily ed. Mar. 3, 1992) (statement of Sen. Arlen Specter) (emphasis added) (attached as Ex. E). In its Report on the TVPA, the Senate, observing that "all equitable tolling principles" should apply under this law, provided a list of "illustrative, but not exhaustive" situations in which courts were expected to toll the

¹¹ For the Court's convenience, the Senate Report on the TVPA is attached as Ex. D.

¹² See, e.g., 138 Cong. Rec. S2667, at 2668 (daily ed. Mar. 3, 1992) (statement of Sen. Arlen Specter) ("[o]ne reason for enacting [the TVPA] is to discourage torturers from ever entering this country.") (attached as Ex. E). Where, as here, statements of individual legislators are consistent with statutory language and other legislative history, "they provide evidence of Congress' intent." *Brock v. Pierce County*, 476 U.S. 253, 263 (1986).

¹³ Some senators had raised concerns that the TVPA "inappropriately establishes U.S. courts as the forum [for] suits that have no substantial connection with the United States," and that the TVPA "might create serious difficulties with the management of foreign policy." S. Rep. 102-249, at 13 (1991).

limitations period. S. Rep. No. 249, 102d Cong., 1st Sess., at 10-11 (1991). This list expressly covers the facts at issue here:

The statute of limitation 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 plaintiff, provided that the remedy in that jurisdiction is adequate and available. Excluded also from calculation of the statute of limitations would be the period when a defendant has immunity from suit. The statute of limitations should also be tolled for the period of time in which the plaintiff is imprisoned and otherwise incapacitated. It should also be tolled where the defendant has concealed his or her whereabouts or the plaintiff has been unable to discover the identity of the offender.

Id. at 11 (emphasis added, citations omitted).

Indeed, several courts have relied on this express congressional intent in tolling the statute of limitations for TVPA claims. For example, in *Hilao v. Marcos*, 103 F.3d 767, 773 (9th Cir. 1996), the Ninth Circuit cited the Senate Report on the TVPA as authority that equitable tolling under the statute included “periods in which the defendant was absent for the jurisdiction” and tolled the statute during the period the defendant was absent for the jurisdiction. *See also Collett v. Socialist Peoples’ Libyan Arab Jamahiriya*, 362 F. Supp. 2d 230, 242 (D.D.C. 2005) (relying on Senate Report’s direction that defendant’s period of immunity from suit should be excluded from calculation of statute of limitations and finding that statute began to run once defendant was stripped of immunity).

The principle that limitations periods do not apply during a defendant’s absence from the jurisdiction is not unique to the TVPA. To the contrary, almost every state in the United States to consider the question holds that a statute of limitations is tolled while the defendant is beyond the jurisdiction of the court. *See, e.g.*, Kan. Stat. Ann. § 60-517 (tolling statute of limitations for periods defendant is absent from state); N.Y. Civ. Prac. L. & R. 207 (tolling statute until defendant enters state and for periods of absence from the state greater than four months); 42 Pa.

Const. Stat. § 5532(a) (same); S.C. Code Ann. § 15-3-30 (tolling statute until defendant enters state and for periods of absence over one year). For example, in *Bergman v. Turpin*, 145 S.E. 2d 135, 137 (Va. 1965), the Virginia Supreme Court quoted with approval the following passage from 34 Am. Jur., Limitation of Actions, § 221:

Where there is no disability or other circumstance precluding the operation of the statute, it is said to be the intent of the statute of limitations to ban all actions *except those against persons or corporations upon whom notice of action cannot be served because they are out of the state.*

This rule is generally accepted throughout the United States. *See, e.g.*, 4 Am. Jur. Trials 441 § 31 (recognizing that almost every state allows tolling while the defendant is outside the jurisdiction); 51 Am. Jur. 2d, Limitations of Actions § 191 (tolling protects plaintiffs from possibility that they may not be able to serve process on or obtain personal jurisdiction over defendants).

Moreover, tolling principles apply with special force to TVPA and ATCA cases because exclusion of human rights violators from the United States was of paramount concern. This separate goal of Congress also calls for tolling while the defendant remains beyond our borders.

As noted by several members of Congress during the debate over the TVPA's enactment:

- “There is no question that torture is one of the most heinous acts imaginable, and its practitioners should be punished and deterred from entering the United States.” 138 Cong. Rec. S2667, at S2668 (daily ed. Mar. 3, 1992) (statement of Sen. Arlen Specter) (Ex. E);
- “[The TVPA] puts torturers on notice that they will find no safe haven in the United States.” 137 Cong. Rec. H11244, at H11244 (daily ed. Nov. 25, 1991) (statement of Rep. Mazzoli) (Ex. F);
- “[The TVPA] sends a distinct and forceful message that the U.S. will not host torturers within its borders.” 137 Cong. Rec. H11244, at H11245 (daily ed. Nov. 25, 1991) (statement of Rep. Yatron) (Ex. F).

The deterrent purpose of the TVPA can be given effect only if the statute's ten-year limitations period is tolled during defendant's absence from the United States. Congress acknowledged the need to apply tolling in this manner. As noted in the Senate Report: "The statute of limitations *should be tolled* during the time the defendant was absent from the United States." S. Rep. No. 102-249, at 11 (1991) (emphasis added).

Were the limitations period permitted to run while a defendant remained outside the United States, foreign perpetrators could easily "game" the statute's remedial system: they would simply let the limitations period expire before coming to the United States. The effect of such a rule would turn Congressional intent on its head: having intentionally waited to enter the U.S. until after the limitations period expired, perpetrators could remain here forever beyond the reach of our laws. The U.S. would quickly become precisely the safe haven for torturers and others who have committed human rights abuses that Congress expressly sought to prevent by enacting the TVPA.¹⁴

Because the "basic inquiry" in an equitable tolling analysis is "whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances," *Burnett*, 380 U.S. at 427, it is clear that the statute of limitations for Plaintiffs' claims under the TVPA and the ATCA must be tolled while the defendant is outside the United States.

According to his own Declaration, at the time the Complaint was filed Ali had been present in the United States for less than ten years since the fall of the Barre regime. He was deported to the United States from Canada in October 1992. Ali Decl. at ¶ 18. He remained here

¹⁴ The possibility that the statute of limitations might be tolled indefinitely comports with Congressional intent to preclude human rights violators from using the U.S. as a safe haven, and is not unique to human rights issues. For example, in *U.S. v. All Funds in Account Nos. 747.034/278, 747.009/278, 747.714/278 Banco de Credito*, 295 F.3d 23 (D.C. Cir. 2002), the court determined that the statute of limitations had not run on an action to seize several bank accounts because the accounts were outside of the U.S., even though the statute would be tolled indefinitely under such a reading.

