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

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

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

Robert R. Vieth (VSB #24304)
Scott A. Johnson (VSB #40722)
Tara M. Lee
Cooley Godward LLP
One Freedom Square
11951 Freedom Drive
Reston, Virginia 20190-5656
(703) 456-8000

Welly Tantono
Deval Zaveri
Cooley Godward LLP
4401 Eastgate Mall
San Diego, California 92121
(858) 550-6000

Matthew Eisenbrandt
Helene Silverberg
Center for Justice & Accountability
870 Market Street, Suite 684
San Francisco, California 94102
(415) 544-0444

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

RULES

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 commanded 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 it 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 Isaaqs 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 Sers., 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 plaint 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 tortures 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 Spector) (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.

from October 1992 until July 1994, when he voluntarily departed for Ethiopia in lieu of deportation. Ali Decl. at ¶ 21. Ali returned to the United States in December 1996. Ali Decl. at ¶ 22. The Complaint in this case was filed in November 2004. Between the fall of the Barre regime and the filing of the Complaint, Ali thus admits he had been present in the United States for less than ten years. Accordingly, the statute of limitations has not run and this action is timely.

3. Ali's Time In Canada is Excluded From the Statute of Limitations Calculation.

Ali argues that Plaintiffs could have brought this case in Canada during the period Ali was located there, and therefore the statute of limitations should not be tolled for the period he was in Canada. This argument fails. First, as noted above, Congressional intent mandates tolling for periods a defendant is outside of the U.S., regardless of where the defendant may otherwise be located. Second, Plaintiffs could not have brought this case in Canada as suggested.

Clearly, a TVPA or ACTA case could not be brought anywhere other than the U.S. Moreover, Plaintiffs could not have brought this case in Canada against Ali, as set forth more fully in Exhibit G attached hereto, the Preliminary Expert Report of Ed Morgan, Law Professor at the University of Toronto and Faculty Chair of the International Human Rights Program, ("Morgan Report"). First, Plaintiffs would not have met the jurisdictional requirements to bring suit. Morgan Report ¶¶ 10, 12-18, 24, 26, 27. Defendant's own expert even concedes that "[t]he [Canadian] Court could decline jurisdiction if the Defendant's residence in Ontario was the only connection the case had with Ontario." Mot. to Dismiss, Ex. 1, Expert Report of Gerald D. Chipeur, at p. 3. Second, Plaintiffs would not have had an appropriate remedy under Canadian law. Ex. G, Morgan Report ¶¶ 19-22, 24, 26-27. Canada does not have a statute recognizing the

tort of torture, and Ontario law has never recognized a cause of action for torture or extrajudicial killing equivalent to the TVPA. Morgan Report ¶19. Indeed, Canada's War Crimes and Crimes Against Humanity Amendment Act was not passed until 1999, Morgan Report ¶ 22, which was seven years after Canada deported Ali. Plaintiffs simply could not have successfully brought this case against Ali in Canada when he resided there.

Ali's failure to make any argument about any possible recourse available to Plaintiffs in Ethiopia is understandable. As described in the Expert Report of Kumlachew D. Chekol, attached as Ex. H, Plaintiffs could not have brought a claim against Ali in Ethiopia during his stay there.

C. Defendant's Reliance on *Romagoza-Arce* is Misplaced.

In his Motion to Dismiss, Ali urges this Court to consider the Eleventh Circuit's decision in *Romagoza-Arce v. Garcia*, 400 F.3d 1340 (11th Cir. 2005). In *Romagoza-Arce*, the Eleventh Circuit panel concluded that, on the facts of that case, equitable tolling was not warranted. This Court should not follow *Romagoza-Arce*, as it is wrongly-decided and non-binding on this Court.[15] Indeed, *Romagoza-Arce* is contrary to other circuit court precedent. For example, the Ninth Circuit, in addressing equitable tolling of TVPA claims, has held that the limitations period under the TVPA is tolled until a defendant enters the United States. *Hilao v. Marcos*, 103 F. 3d 767, 773 (9th Cir. 1996).

Moreover, the Eleventh Circuit panel violated Congress's clear legislative mandate that the statute of limitations should be tolled until a defendant enters the United States. The panel also ignored Congressional intent that the TVPA provide a remedy to victims of torture and deny

---

15 Plaintiffs note that the Eleventh Circuit recently reopened the judgment in *Romagoza-Arce* and has requested additional briefing, having discovered that the panel had made at least two factual errors with possible implications for its holding.

safe haven to human rights abusers. By refusing to toll the statute of limitations while the defendants in that case were outside the United States, the Opinion frustrates legitimate claims under the TVPA and ATCA and offers safe haven to the very human rights abusers that Congress sought to bar from our country. The decision fails to implement – in fact, repudiates – the will of Congress.

The Panel Opinion in *Romagoza-Arce* concedes that Congress intended equitable tolling to be available for claims brought under the TVPA. 400 F.3d at 1346. The Opinion unduly relies, however, on defendant misconduct to trigger tolling, a rationale that conflicts with Eleventh Circuit and other circuit precedent. *See, e.g., Browning v. AT&T Paradyne*, 120 F. 3d 222, 226 (11th Cir. 1997) ("tolling does not require any misconduct on the part of the defendant"); *see also EEOC v. Kentucky State Police Dep't.*, 80 F.3d 1086, 1095 (6th Cir.), *cert. denied*, 519 U.S. 963 (1996), *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1990).[16] Indeed, just two weeks after *Romagoza-Arce* was issued, another Eleventh Circuit panel held that the statute of limitations in an ATCA and TVPA case was tolled due to circumstances that involved no misconduct at all on the part of the defendant. *See Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005).

More importantly, *Romagoza-Arce*'s implied requirement of wrongful misconduct conflicts with Supreme Court and Fourth Circuit precedent. *See, e.g., Young v. U.S.*, 535 U.S. 43, 50-51 (2002) (expressly allowing tolling regardless of debtor's intentions in filing back-to-back bankruptcy petitions, whether "filed in good faith or solely to run down the look back

---

[16] It appears that the *Romagoza-Arce* court, in considering tolling, may have confused equitable estoppel, which precludes a defendant from taking advantage of his own wrongful conduct, and equitable tolling, which does not require defendant misconduct. *See Browning v. AT&T Paradyne*, 120 F.3d 222, 226 (11th Cir. 1997).

provision"); *Rouse v. Lee*, 339 F. 3d 238, 246 (4th Cir. 2003), *cert. denied*, 541 U.S. 905 (2004) (recognizing tolling based on extraordinary circumstances).

Indeed, one relevant aspect of the opinion in *Romagoza-Arce* is particularly questionable. The panel seemed to recognize that the defendant was not subject to suit while he was outside the United States. Yet the court stated that the plaintiffs should have filed suit against him in the U.S. anyway:

> Moreover, the Plaintiffs do not argue that a court would not have equitably tolled the statute if their claims had been timely filed (even if the defendants could not have been served), an option that Plaintiffs should have pursued.

Romagoza-Arce, 400 F.3d at 1351.

This reasoning is deeply flawed and should not be followed. To follow the panel's suggestion, prior to the running of the limitations period a plaintiff must file a case somewhere in the United States – without any knowledge of whether, when, or where the defendant would arrive in the United States. Such a case would not long survive, as the randomly-chosen federal court would have no jurisdiction over the defendant and the case would soon be dismissed. *See also* Fed. R. Civ. P. 4(m) (requiring dismissal if service of process not effected within 120 days of filing). Indeed, it is highly questionable whether such a filing, where jurisdiction clearly is lacking, would toll the statute of limitations. *See, e.g., Shofer v. Hack Co.,* 970 F. 2d 1316, 1319 (4th Cir. 1992) ("The commencement of an action in a clearly inappropriate forum, a court that clearly lacks jurisdiction, will not toll the statute of limitations"); *Holland v. Washington Metropolitan Area Transit Authority*, Civ. A. No. 85-2117, 1987 WL 16840, at * 1 (D.D.C. Sept. 1, 1987). Moreover, this reasoning is directly contrary to the emphasis placed by Congress on ensuring that suits be brought only against defendants over whom the court may exercise jurisdiction.

The panel's reasoning is also directly at odds with its own concern that tolling the statute in that case would have set a "dangerous precedent" by opening the floodgates to human rights cases. *Romagoza-Arce*, 400 F.3d at 1351. The panel's reasoning requires every victim of human rights abuses to randomly file a TVPA/ATCA case simply to preserve their right to bring their claims. Potential plaintiffs would have no choice but to file cases – even in the absence of information about whether a perpetrator was in the U.S. or ever intended to come here – to avoid the statute of limitations. This rule would inundate the federal courts with cases which would then merely fail for lack of jurisdiction.

In light of these very serious substantive and procedural issues, it would be especially unwise for this Court to follow the panel's reasoning in *Romagoza-Arce*.

D. Alternatively, The Statute Of Limitations Is Tolled Until At Least 1997 Because of the Extraordinary Circumstances in Somalia Until That Time.

Regardless of Ali's comings and goings in the United States, the chaotic conditions in Somalia, where Plaintiffs reside, also require that the statute of limitations be tolled until at least 1997. The extraordinary circumstances mandating tolling include fear of reprisals and inability to conduct investigations and acquire evidence, all of which derive from the conditions of violence and chaos that have prevailed in Somalia since the departure of the Barre government in 1991. Only since 1997 has there been sufficient stability in even one region of Somalia that would permit the filing of a lawsuit such as this. In human rights cases, courts have tolled the running of the statute of limitations when circumstances have prevented the plaintiffs from gaining access to evidence or interfered with their ability to file suit. Courts hold that fear of reprisals against both plaintiffs and potential witnesses justifies tolling the limitations period in ATCA and TVPA cases. *Hilao*, 103 F. 3d 767, 773 (9th Cir. 1996) (citing "intimidation and fear of reprisals" as factors supporting equitable tolling). Indeed, fear of reprisal, both in the

jurisdiction where the wrongful acts occurred and here in the United States, may serve as a basis for equitable tolling. *See Doe v. Saravia*, 348 F. Supp. 2d 1112, 1147-48 (E.D. Cal. 2004) (tolling the statute from 1980 assassination that served as basis for complaint through filing of suit in 2003, based in part upon fear of reprisal, which fear lasted well beyond time El Salvadoran security forces were disbanded).

These conditions are precisely the type of extraordinary circumstances that exist in the present case. The allegations of the Complaint – which must be taken as true at this stage of the litigation – make it clear that the extraordinary circumstances in the former country of Somalia prevented Plaintiffs from filing these human rights claims until, at the earliest, 1997.

The Complaint, as supplemented by the preliminary expert report of Richard B. Ford, contains a description of the well-documented chaos and clan-based warfare that has existed in much or all of Somalia -- where Plaintiffs and their families live -- since the defeat of the military government in 1991 and collapse of Somalia's central government. Compl. ¶ 48; Ford Report. Since 1991, no national government has existed in Somalia to protect its citizens from the continuing clan-based violence. Gross and systematic human rights violations openly committed by rival clans had a further chilling effect. Pursuit of human rights claims, even in the United States, would have exposed victims and their families to acts of retribution that served as an insurmountable deterrent to bringing a cause of action in the United States. Compl. ¶ 47. Witnesses also reasonably feared acts of reprisal for assisting in such cases. Compl. ¶ 49. It is only since 1997, when the northwestern region of Somalia (the area known as "Somaliland") obtained a modest level of stability, that pursuit of a case such as the present one – even in the United States – became possible. Compl. ¶¶ 50-51. Only since 1997 has Somaliland's government exercised a modicum of authority over its territory. Compl. ¶ 51. Lack of basic

infrastructure likewise restricted counsel's ability to pursue this case. Somalia's communication and transportation systems were virtually destroyed in the civil war. Ford Report, at p. 4. Fixed line phone service is still not available in most of Somalia. *Id.* at p. 4. Cell phone service and email were not restored until 2000. *Id.* Travel into Somalia was nearly impossible in the 1990s. *Id.* at p. 3-4. Commercial air service was not restored until 1997. There still is not railway and there was no bus service at the time. *Id.* Moreover, U.S. lawyers visiting Somalia would have literally put their lives at risk. *Id.* at p.4. Accordingly, the statute of limitations was tolled until at least 1997.

In sum, prior to 1997, given the circumstances described above, victims of human rights abuses perpetuated by the Somali military could not have been expected to pursue a cause of action in the United States because of the reasonable fear of reprisals against themselves or members of their families still residing in Somalia, and because of their inability to investigate and prepare their case. The statute of limitations must be tolled at least until 1997, which renders this suit timely.

III. THIS CASE DOES NOT PRESENT A NONJUSTICIABLE POLITICAL QUESTION

Finally, Ali relies upon *Baker v. Carr*, 369 U.S. 186 (1962), to argue that because this case relates to events that occurred abroad, it presents a nonjusticiable political question. *Baker*, however, addressed this very argument and rejected it: "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. Thus, Ali fundamentally misconstrues the political question doctrine, and his motion to dismiss on this ground should be denied.

The issue at the heart of the political question doctrine is whether a case directly implicates a power constitutionally committed to the political branches. The political question

doctrine "excludes from judicial review those controversies and cases which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacean Soc.,* 478 U.S. 221, 230 (1986). Where a case is brought pursuant to statute, under the Constitution the court "cannot shirk the responsibility to decide the matter merely because the decision may have significant political overtones." *Id.*

Application of the political question doctrine is especially inappropriate where, as here, Congress expressly created causes of action that, by their nature, may have an effect upon foreign affairs. Virtually all cases filed under the ATCA and the TVPA deal with traumatic moments in foreign countries' recent pasts, and have the potential to rekindle old antagonisms. *See, e.g., Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980) (for human rights abuses committed by the military during the military dictatorship in Argentina); *Cabello v. Fernandez-Larios,* 402 F.3d 1148 (11th Cir. 2005) (for human rights abuses committed by the military during the military dictatorship in Chile); *Hilao v. Marcos,* 103 F.3d 767 (9th Cir. 1994) (for claims during the military dictatorship in the Philippines); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (for human rights abuses committed by Bosnian Serb paramilitary during Bosnian civil war). Yet in enacting the TVPA, Congress – with the acknowledgement of the Executive Branch – endorsed the rationale of *Filartiga* and expressly permitted private suits for human rights abuses to proceed in U.S. federal court.[17]

Plaintiffs' case against Ali therefore does not present a nonjusticiable political question for at least three reasons. First, no power constitutionally committed to the Executive Branch is

---

[17] The ATCA created causes of action for violations of international customary law and established federal court jurisdiction over them. 28 U.S. C. § 1350. The TVPA, signed into law by President George H. W. Bush in March 1992, extended these rights to U.S. citizens. 28 U.S. C. § 1350 note.

implicated by this case.[18] The sole question presented here is whether Col. Ali committed acts that violate the ATCA and the TVPA. Tort suits based on alleged gross human rights violations are constitutionally committed to the Judiciary. *See Kadic*, 70 F.3d at 249.

Second, the ongoing and largely unsuccessful efforts at Somali reconstruction do not render this case nonjusticiable. In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), a case concerning human rights abuses in Sudan, defendant Talisman sought to have the case dismissed as nonjusticiable on the grounds that adjudication would hinder the Sudanese peace efforts then underway.[19] *Id.* at 343. The court noted, however, that "the civil war in Sudan had been raging on and off for decades," *id.*, and that "[l]asting peace appears unlikely in the near future regardless of the actions of this Court." *Id.* at 343 n.46. The court therefore declined to defer to the peace negotiations and held that the action was not barred by the political question doctrine. *Id.* at 349. Other cases have proceeded during peace negotiations or other politically charged moments. *See, e.g., Ungar v. Palestine Liberation Organization*, 402 F.3d 274, 281 (1st Cir. 2005) ("The reality is that, in these tempestuous times,

---

[18] Ali's self-serving allegation that Plaintiffs are using this case to obtain recognition of the self-declared "Republic of Somaliland"— a power admittedly committed to the Executive Branch—is entirely false and should be ignored by this Court. Ali has no evidence to support this farfetched and unfounded claim, which is intended simply to divert the Court's attention from the real issues of this case. Plaintiffs bring this case against Col. Ali to enforce legal rights, created by the U.S. Congress, that permit them to seek legal redress in U.S. federal court for human rights abuses committed against them by the defendant. Nothing more. Plaintiffs are not seeking recognition of the Somaliland government. Plaintiffs' use of the term "Somaliland," and references to the "Republic of Somaliland," in their pleadings, proves nothing – it is preposterous for Ali to suggest that the use of the descriptive place name "Somaliland" equate to promotion of a political objective. Plaintiffs note that U.S. State Department itself uses these terms. State Department documents concerning Somalia, and postings about Somalia on its website, ranging from travel warnings to its Human Rights report, refer to the northwest region of Somalia as "Somaliland" and to the civil administration in control of this region as "the government of Somaliland." *See, e.g.*, U.S. Department of State, Bureau of African Affairs, Background Note: Somalia (2005), http://www.state.gov/r/pa/ei/bgn/2863.htm (attached as Ex. I). Indeed, Ali's own exhibits are replete with references to "Somaliland" and "Somaliland's leaders." Mot. to Dismiss, Ex. 4, at p. 4. Finally, Plaintiffs' pleading include representations from Somaliland government officials because this Court required Plaintiffs' counsel to certify that the taking of depositions in Hargeisa did not offend local law. See Order dated June 14, 2005.

[19] The court was also in receipt of a letter from the Government of Sudan claiming that adjudication of the case would interfere with its efforts to "guarantee the safety of millions of civilians." *Id.* at 343 n. 45.

any decision of a United States court on matters relating to the Israeli-Palestinian conflict will engender strong feelings. Be that as it may, the capacity to stir emotions is not enough to render an issue non-justiciable. For jurisdictional purposes, courts much be careful to distinguish between political questions and cases having political overtones.")

The case against Col. Ali is unlikely to have any effect on the long-running Somali peace process. Efforts to reconstruct Somalia having been going on for more than a decade and those efforts have proved impervious to far more direct events than this case. The governments of most of Somalia's neighboring countries, as well as the U.N. and the African Union, tried more than a dozen times in the last fourteen years to mediate this conflict, and all of them have failed.[20] The Transitional Federal Government (TFG), the current body claiming to be the government of Somalia, has not been recognized by any country.[21] In short, Ali's claim that this case will interfere with the peace process is simply not persuasive.

Third, the United States has had virtually no involvement in Somalia for the last decade. Since 1995, when the United States withdrew its troops from Somalia, the Executive Branch has kept its distance from all developments related to the country. It has played no role in peace efforts beyond urging the parties to reach a peace agreement, and has not recognized any of the bodies claiming to be the government of Somalia, including the present one. *See, e.g.,* Hussein

---

20 In the mid-1990s, Ethiopia played host to several Somali peace conferences and initiated talks at the Ethiopian city of Sodere. The Governments of Egypt, Yemen, Kenya, and Italy also have attempted to bring the Somali factions together. In 1997, the Organization of African Unity and the Intergovernmental Authority on Development (IGAD) gave Ethiopia the mandate to pursue Somali reconciliation. In 2000, Djibouti hosted a major reconciliation conference, which resulted in the creation of the failed Transitional National Government (TNG). In early 2002, Kenya organized a further reconciliation effort under IGAD auspices known as the Somalia National Reconciliation Conference, which concluded in October 2004. Shortly before the expiration of its mandate, the participants in this conference created the so-called Transitional Federal Government, the current body claiming to be the government of Somalia. *See* U.S. Department of State, Background Note: Somalia (2005), http://www.state.gov/r/pa/ei/bgn/2863.htm (attached as Ex. I).

21 Thus the letters Ali has obtained purporting to express the TFG's objections to the case against him should be treated with considerable skepticism.

Adam and Richard Ford, *Removing Barricades in Somalia: Options for Peace and Rehabilitation*, United States Institute of Peace (1998), pp. 23-24, available at http://www.usip.org/pubs/peaceworks/pwks24/chaps_24.html; U.S. Department of State Background Note: Somalia (2005), http://www.state.gov/r/pa/ei/bgn/2863.htm. Thus judicial resolution of Plaintiffs' claims would not imply any lack of respect for the Executive Branch, nor place the court at odds with any Executive Branch policy determination.

In sum, the political question doctrine does not bar Plaintiffs' claims against Ali because the resolution of these claims are within the exclusive province of the judiciary. Ali's motion to dismiss on this ground must therefore be denied.

CONCLUSION

For the foregoing reasons Plaintiffs request that the Court deny the motion to dismiss.

Dated: August 3, 2005

JOHN DOE I
JANE DOE I

By Counsel

By: _____

Robert R. Vieth (VSB #24304)
Scott A. Johnson (VSB #40722)
Tara M. Lee
Cooley Godward LLP
One Freedom Square
11951 Freedom Drive
Reston, Virginia 20190-5656
(703) 456-8000

Matthew Eisenbrandt
Helene Silverberg
Center for Justice & Accountability
870 Market Street, Suite 684
San Francisco, California 94102
(415) 544-0444

Welly Tantono
Deval Zaveri
Cooley Godward LLP
4401 Eastgate Mall
San Diego, California 92121
(858) 550-6000

CERTIFICATE OF SERVICE

I hereby certify, this 3rd day of August, 2005, that a true copy of the foregoing was sent electronically and by first-class mail, postage prepaid, to the following counsel of record:

Joseph Peter Drennan, Esq.
218 North Lee Street, Third Floor
Alexandria, Virginia 22314-2631

_____