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. 1:04 CV 1361 (LMB/BRP)

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

This is a civil action for compensatory and punitive damages for torts in violation of international and domestic law. Plaintiffs, citizens of Somalia, 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 now seeks to have Plaintiffs' Complaint dismissed. He argues that (1) Plaintiffs improperly have proceeded anonymously; (2) Plaintiffs' claims are time-barred; (3) Plaintiffs have failed to exhaust remedies in Somalia and the case should be dismissed on forum non conveniens grounds; (4) he is immune from suit; and (5) Plaintiffs have failed to state a claim under the ATCA. For the reasons stated herein, Ali's arguments are without merit and his motion should be denied.

STATEMENT OF FACTS

The Barre Reign

Throughout the 1980s, 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. Complaint ("Compl.") ¶ 11. These human rights abuses were the hallmark of the military government that had come to power in 1969 and brutally ruled Somalia until it was toppled in 1991. *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. Power was assumed by the Supreme Revolutionary Council ("SRC"), which consisted primarily of the

army officers who had supported and participated in the coup. *Id.* The SRC suspended the existing Constitution, closed the National Assembly, abolished the Supreme Court and declared all political parties illegal. *Id.* To further strengthen its grip on power, the military leadership systematically oppressed all other clans who opposed the military government. *Id.*

In 1979, Somalia adopted a new Constitution designed largely to legitimize the military dictatorship. The 1979 Constitution established a government headed by a president and recognized the president as Somalia's Head of State. *See* Constitution of the Somali Democratic Republic ("Somali Constitution"), Article 82.[1] Barre held this position until the collapse of the regime in 1991. The Somali Constitution also required Somalia to follow "generally accepted rules of international law," including those proclaimed in the Universal Declaration of Human Rights. *Id.* at Article 19. For example, the Somali Constitution expressly prohibited torture, extrajudicial killings and arbitrary detention. *Id.* at Articles 25.2, 26.2, 26.3, and 27.1. The military government that ruled Somalia throughout the 1980s, however, consistently and flagrantly violated these prohibitions.

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. The government's extreme oppression led some members of the Isaaq clan to establish an opposition force called the Somali National Movement ("SNM") in 1981. *Id.* The government responded by placing the northern region under military control. *Id.* Throughout the 1980s, Somali National Army units were stationed in or near virtually every village and town throughout the region. *Id.*

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[1] The Somali Constitution is attached to the Declaration of Martin R. Ganzglass ("Ganzglass Decl.") submitted with this Opposition as Exhibit 1.

The Somali National Army committed widespread human rights abuses in its violent campaign to eliminate the SNM and any perceived supporters. Compl. ¶ 14. It killed and looted livestock, blew up water reservoirs, burned homes, and tortured and detained alleged SNM supporters. *Id.* Particularly after 1984, it also carried out a systematic policy of indiscriminately killing civilians as collective punishment for SNM activities. *Id.* Such acts were intended to, and did, spread terror among Isaaq civilians to deter them from assisting the SNM. *Id.*

The area around the northern town of Gebiley was a center of human rights abuses by the Somali National Army. Compl. ¶ 15. This region was a strategic focus of the military campaign because of its close proximity to the Ethiopian border, where SNM bases were located. *Id.*

Ali's Role As Commander Of The Fifth Battalion

Defendant Ali commanded the army unit stationed in Gebiley. Compl. ¶ 16. From 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.*

The Plaintiffs

Plaintiffs are but two of many victims of Ali and his military subordinates. 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. Ali personally beat her on at least one occasion. After a sham trial on charges of aiding enemies of the state, Jane Doe was convicted and sentenced to death. Her sentence was commuted to life in prison, but she was released from prison six years later, near the end of the Barre reign. Compl. ¶¶ 17-26.

Plaintiff John Doe also was abducted by members of the Fifth Battalion, who imprisoned him, interrogated him and tortured him. Ali was present for some of these torture sessions, and

Ali personally shot John Doe with his pistol and left him for dead. John Doe survived the shooting and paid soldiers to obtain his release. Compl. ¶¶ 27-38.

Post-Barre Somalia

Throughout the 1990s, Somalia fell into increasing chaos. Compl. ¶ 48. Following the violent defeat of the military government in 1991, Somalia's central government collapsed. *Id.*

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.*

Somalia remains without a functioning national government and national judicial system in which victims of Barre-era human rights abuses could bring their claims. Compl. ¶ 52. Shari'a courts operate in some regions of the country, but such courts impose religious and local customary law often in conflict with universal human rights conventions. *Id.* Despite the very recent selection of a former warlord as president, Somalia still does not have a functioning national government with a court system capable of reviewing human rights abuses committed by the military government in the 1980s. *Id.* The country remains under the de facto control of competing clan leaders, warlords and criminal gangs, many of whom commit or countenance the commission of serious human rights abuses. *Id.*

Ali's Movement After The Collapse Of The Barre Government

During his service in the Somali military Ali traveled to the United States for military training. According to Ali, one of these training programs ended in December 1990. Ali Decl.

¶ 15.[2] Because of the imminent fall of the Somali government, at the end of that program 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, which admittedly had a "poor human rights record." Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss With Prejudice the Complaint ("Mot. to Dismiss") at 7. In 1994 Ali, facing deportation proceedings here, left for Ethiopia. Ali Decl. ¶ 22. In December 1996 he returned to the United States and lives in Alexandria, Virginia. Ali Decl. ¶ 22.

The Unrecognized Region of Somaliland

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.* Since about 1997, Somaliland's government has exercised only a modicum of authority over its territory. *Id.* No other country in the world recognizes Somaliland as an independent state.

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[2] Plaintiffs do not necessarily accept the truth of the Ali Declaration at this stage of this case, since they have not had the opportunity to conduct discovery into Ali's whereabouts since the fall of the Barre regime. Moreover, neither Ali's attachment of his declaration in support of his brief, nor his reference to affidavits or declarations filed in this Court in the matter of *Yousef v. Samantar*, Civil Action No. 04-1360, should be construed as converting the motion to dismiss briefing into summary judgment briefing. Should the Court be inclined to convert the pending motion to dismiss into a summary judgment motion, Plaintiffs respectfully request that the Court give notice under Federal Rule of Civil Procedure 12(b) and allow Plaintiffs to conduct discovery and submit additional information. *Harrods Ltd. v. Sixty Internet Domain Names*, 110 F. Supp. 2d 420, 427 (E.D. Va. 2000) (converting the motion to dismiss into a motion for summary judgment would be premature because discovery had not begun and the evidentiary record had not been established). In any case, 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).

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 Services, Inc.*, 314 F. Supp. 2d 589, 596 (E.D. Va. 2004).

Ali's immunity arguments arguably implicate the subject matter jurisdiction of this court. On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), unlike a motion pursuant to Rule 12(b)(6), the Court may consider evidence outside the complaint to resolve factual disputes. *Carter v. Arlington Public School System*, 82 F. Supp. 2d 561, 564 (E.D. Va. 2000).

ARGUMENT

I. PLAINTIFFS SHOULD BE PERMITTED TO PROCEED ANONYMOUSLY, AND THE CASE IS NOT SUBJECT TO DISMISSAL BECAUSE THE PLAINTIFFS HAVE PROCEEDED UNDER PSEUDONYMS.

Ali first argues that the Complaint must be dismissed because, according to Ali, Plaintiffs have improperly proceeded anonymously. Mot. to Dismiss at 9-19. To the contrary, Plaintiffs legitimately fear for their own personal safety, as fully explained in Plaintiffs' previously-filed Motion For Leave To Proceed Anonymously and supporting memorandum. Plaintiffs incorporate by reference the arguments presented in that memorandum in opposition to Ali's motion to dismiss.

II. ALI IS NOT ENTITLED TO IMMUNITY.

Ali argues that this case is barred because he is entitled to immunity from suit. Mot. to Dismiss at 30-33. Ali's immunity argument is preposterous and must fail. Ali is not entitled to head of state immunity because such immunity is reserved for heads of state, a position he concedes he never held. Moreover, Ali is not entitled to immunity under the FSIA because, to the extent that the FSIA applies to individuals, it does not immunize officials for human rights violations in derogation of norms of customary international law.

A. Ali Never Served As Somalia's Head Of State And Is Not Entitled To Head Of State Immunity.

Common law head of state immunity is strictly limited to foreign leaders who embody the conceptual identity of ruler and state. It is based on, and limited by, the principle that sovereign states are immune from suit by other states. "Head of state immunity is primarily an attribute of state sovereignty, not an individual right." *In re Grand Jury Proceedings*, 817 F.2d 1108, 1111 (4th Cir. 1987). It is "founded on the need for comity among nations and respect for the sovereignty of other nations; it should apply only when it serves those goals." *Id.* It is therefore generally reserved for sitting presidents recognized by the United States government. *See, e.g., Lafontant v. Aristide*, 844 F. Supp. 128, 133-34 (E.D.N.Y. 1994) (according head of state immunity to President Aristide, the head of state recognized by the U.S. Government); *U.S. v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990) (denying head of state immunity to General Noriega because head of state recognized by the U.S. Government was President Delvalle).

Ali never served as Head of State of Somalia; he was a battalion commander in the Army. Ali Decl. at 13. Throughout the entire relevant time period, the position of Head of State of the Somali Democratic Republic was held by President Major General Siad Barre. Ganzglass Decl. at 10. Article 79 of the Somali Constitution expressly states:

> The President of the Somali Democratic Republic shall be the Head of State and shall represent state power and the unity of the Somali people.

It is simply beyond dispute that Ali never served as Somalia's Head of State.

Recognizing that he was not the Head of State of Somalia, Ali offers a confusing argument that his position as an official of the Somali military somehow entitles him to head of state immunity. This barely understandable argument relies on his allegation that he was granted an "A-2" diplomatic visa during his visits to the United States, which he couples with an allegation that he maintained a degree of control over the northwest region of Somalia – all in an effort to try to elevate his military position to a "cabinet-level" status. Mot. to Dismiss at 31-32. Factually, this argument is unsupported. Moreover, Ali's self-aggrandizing attempt to claim head of state immunity fails under the applicable law.

Even cabinet members and other high-ranking officials are not considered heads of state and are therefore denied the protections of head of state immunity. *See, e.g., First American Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1121 (D.D.C. 1996) (denying head of state immunity to defendants Minister of Defense and the former Prime Minister, Vice President, and member of Supreme Counsel of Rulers of the United Arab Emirates because none was head of state); *Republic of Philippines v. Marcos*, 665 F. Supp. 793 (N.D. Cal. 1987) (denying head of state immunity to Solicitor General of the Philippines); *see also El-Hadad v. Embassy of the United Arab Emirates*, 69 F. Supp. 2d 69, 82, n. 10 (D.D.C. 1999) (without reaching issue, but stating that head of state immunity would not have afforded protection to a minister and other executive officials because they were not head of state) *rev'd in part on other grounds*, 216 F. 3d 29 (D.C. Cir. 2000); *cf., Tachiona v. U.S.*, 386 F. 3d 205, 220-21 (2d Cir. 2004) (affirming grant of immunity to foreign minister but on grounds of diplomatic immunity, not head of state immunity as granted by lower court); *Kilroy v. Windsor*, Civ. No. C-78-291 (N.D. Ohio 1978), excerpted in

1978 Dig. U.S. Prac. Int'l L. 641-43 (1978) (same); *Chong Book Kim v. Kim Yong Shik* (Hawaii Cir. Ct. 1963), excerpted in 58 Am. J. Int'l L. 186-87 (1964) (same).[3]

Ali is not, and never was, the head of state of Somalia. Accordingly, this Court should deny Ali head of state immunity.

B. The Foreign Sovereign Immunities Act Does Not Protect Officials For Acts Outside Their Official Capacities.

As Ali concedes, the FSIA only provides immunity for acts carried out within the scope of an individual defendant's legal authority. Mot. to Dismiss at 30; *see Velasco v. Indonesia*, 370 F. 3d 392, 399 (4th Cir. 2004). In *Velasco*, a recent Fourth Circuit decision ignored by Ali, the court determined that the FSIA does not provide immunity to individuals who have been sued for acts which were not within their official capacity or were outside the scope of their authority. *Velasco*, 370 F. 3d at 399. Employing the same reasoning, courts hold that human rights abuses are, *ipso facto*, beyond the scope of an official's authority and that the official therefore is not entitled to immunity under the FSIA. *Hilao v. Marcos*, 25 F. 3d 1467, 1471 (9th Cir. 1994) (FSIA inapplicable because alleged acts of torture, execution, and disappearances were "clearly outside of [former Philippine President Ferdinand Marcos's] authority as President"); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) (FSIA inapplicable because acts of torture "fall outside the scope" of defendant's official authority); *Xuncax v. Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995) (FSIA inapplicable because acts of torture, summary execution, arbitrary detention, disappearance and cruel, inhuman or

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[3] Ali's reliance on *Ye v. Zemin*, is misplaced, as the defendant in question was a sitting – not former – head of state when the case was filed. *Ye v. Zemin*, 383 F. 3d 620, 622 (7th Cir. 2004). Moreover, in *Ye*, the court did not consider whether a former head of state was entitled to immunity, but rather found the Executive Branch's determination of immunity dispositive. *Ye*, 383 F. 3d at 625-26. *In re Grand Jury Proceedings*, also relied on by Ali, likewise did not address whether a former head of state had immunity, as the court's determination that former president Marcos had no immunity turned on the current government's waiver of any immunity. *In re Grand Jury Proceedings*, 817 F. 2d at 1110-11.

degrading treatment "exceed anything that might be considered to have been lawfully within the scope of Gramajo's official authority").[4]

Plaintiffs here allege that Ali is legally responsible for the acts of torture, attempted extrajudicial killing, arbitrary detention, war crimes and crimes against humanity committed against them. Compl. ¶¶ 1-2. The acts alleged by Plaintiffs were expressly prohibited by the Somali Constitution and violate customary international law.[5] *Flores v. Southern Peru Copper Corp.*, 343 F. 3d 140 (2d Cir. 2003) ("official torture, extrajudicial killings, and genocide, do violate customary international law"). Plaintiffs sufficiently have alleged that Ali's actions were committed outside the scope of his legal authority, and the FSIA does not apply.[6]

III. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.

Dismissal of a complaint because it is barred by the applicable statute of limitations is proper only if "the defendant . . . establish[es] 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 argues that the Court should dismiss this case because the ten-year limitations period has expired. The doctrine of equitable tolling, however, which applies with particular force in claims filed pursuant to the ATCA and TVPA, makes clear that this suit is timely, for two alternative

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[4] Ali's reference to the expansion of the FSIA's exception for state immunity for state-sponsored terrorism, Mot. to Dismiss at 29 n. 8, is irrelevant, as the exception relates to states – not individuals – and more basically, there is no allegation against the Government of Somalia or that it engaged in state-sponsored terrorism.

[5] For example, Article 27.1 of the Somali Constitution prohibited the use of torture. Article 25.2 prohibited extrajudicial killings. Articles 26.2 and 26.3 prohibited arbitrary detention. Article 19 required Somalia to follow customary international law.

[6] Any ruling to the contrary effectively would nullify the TVPA, which only applies to defendants who act "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350 note. Ali contends that one who acts under such authority or color of law is entitled to immunity, a theory that would completely negate the TVPA. This argument cannot be accepted.

reasons.[7] First, the filing was timely because at the time this suit was filed, Ali had been in the United States for less than ten years since the fall of the Barre regime. Second, in the alternative, the extraordinary and chaotic circumstances in Somalia, including the Plaintiffs' fear of reprisal and the inability of their counsel to conduct the investigation necessary to bring this case, mandates equitable tolling until at least 1997.

A. The Law Of Equitable Tolling.

"'Equitable tolling' is the doctrine under which plaintiffs may sue after the statutory time period has expired if they have been prevented from doing so due to inequitable circumstances." *Ellis v. Gen. Motors Acceptance Corp.*, 160 F. 3d 703, 706 (11th Cir. 1998). Limitations periods are "customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal citations and quotation marks omitted); *accord, Rouse v. Lee*, 339 F. 3d 238, 246 (4th Cir. 2003).

The scope of any tolling to be accorded to a relevant statute is determined by congressional intent. "[T]he basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 427 (1965). 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." *Id.*

Furthermore, as a matter of equity, courts permit tolling in certain situations where a plaintiff is prevented from asserting his claims earlier. *Rouse*, 339 F. 3d at 246. Thus, a plaintiff

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[7] Ali acknowledges that the applicable ten-year statute of limitations is subject to equitable tolling, but he suggests that the tolling period ended when the Barre government was overthrown. Mot. to Dismiss at 22-23. For the reasons stated herein, Ali's admission that tolling applies is correct, but his choice of the date of termination of the tolling period is wrong.

is entitled to equitable tolling "if he presents (1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time." *Id.*

B. The Suit Is Timely Because At The Time This Suit Was Filed 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 Somali military--in which Ali was an officer--continued to rule Somalia until 1991. Thus the statute of limitations must be tolled until that time. Second, since 1991, Ali was beyond the jurisdictional reach of the U.S. courts for approximately four years, thus, 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.

1. It Is Beyond Dispute That The Statute Of Limitations Was Tolled Until The Fall of the Barre Regime.

There is no dispute that the statute of limitations for Ali's acts, committed while he was an officer in the Somali National Army, was tolled at least until the 1991 overthrow of the military government headed by Major General Siad Barre. Ali concedes this very point. *See* Mot. to Dismiss at 22-23 (tolling based on fear of reprisal "is limited to the period of the leader's or regime's power"). This application of tolling principles is also uniformly supported by the relevant case law. *See Hilao v. Marcos*, 103 F.2d 767, 773 (9th Cir. 1996) (tolling the statute of limitations 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 (tolling the statute of limitations through period in which General Pinochet's military regime was replaced by a civilian government); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1550 (N.D. Cal. 1987) (declining to dismiss complaint on statute of limitations

grounds because plaintiffs' allegations raised issue of fact regarding tolling of statute of limitations).

Such tolling 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 remained in power and while Ali, himself, maintained military authority over the area where Plaintiffs and their families lived. Even during Ali's absence for military training in the United States, Plaintiffs clearly could not have brought an action against Ali, considering his anticipated return to military command and the continued military control exercised by the Barre regime over the area in which they resided. Indeed, Jane Doe was imprisoned by Ali through September 1990. Compl. 26. Thus, although the statute of limitations is tolled for a longer period, as discussed below, the earliest the statute of limitations begins to run coincides with the fall of the Barre government in 1991.

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

After the fall of the Barre regime, the courts of the United States could not assert jurisdiction over Ali except for the time he was present in this country.[8] As discussed below, Congress clearly intended that, in the context of the TVPA and ATCA, the statute of limitations be tolled for the duration of a defendant's absence from the United States. The case law confirms this conclusion. 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.

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[8] 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. *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).

In enacting the TVPA, Congress intended to (1) provide an avenue for torture victims to pursue claims against their torturers 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);[9] and (2) denounce and deter foreign torturers from seeking haven in this country.[10] Such Congressional intent is given effect by tolling the limitations period when a defendant is outside of the reach of United States courts. Indeed, if the statute of limitations were permitted to run on ATCA and TVPA claims while human rights defendants remained outside the United States, the goals of Congress would be stymied. Under such a legal system, foreign torturers would merely have to wait until the statute of limitations expired before entering the United States, safe in the knowledge that they could no longer be sued for their human rights violations. This is the polar opposite of Congress' intent.

Indeed, Congress expressly contemplated this exact factual scenario. Initial drafts of the TVPA went so far as to reject any limitations period whatsoever for the statute. S. 1629, 101st Cong. § 2(b) (1989) ("The court shall not infer the application of any statute of limitations or similar period of limitations in an action under this section."). While the TVPA ultimately did incorporate a ten-year limitations period, 28 U.S.C. § 1350 note, § 2(c), both houses of Congress stated unequivocally that equitable tolling should apply. Both the Senate and House Reports on the TVPA declare without ambiguity that "all equitable tolling principles" should apply under this law. S. Rep. No. 249, 102d Cong., 1st Sess., at 10-11 (1991); H.R. Rep. No. 367, 102d

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9 For the Court's convenience, the Senate Report on the TVPA is attached as Exh. 2.

10 *See, e.g.,* 138 Cong. Rec. S4176, at 4176 (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."); 137 Cong. Rec. H34785, at 34785 (daily ed. Nov. 25, 1991) (statement of Rep. Mazzoli) ("[The TVPA] puts torturers on notice that they will find no safe haven in the United States."); *Id.* (statement of Rep. Yatron) (TVPA "sends a distinct and forceful message that the U.S. will not host torturers within its borders."). 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).

Cong. 1st Sess., at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 88.[11] 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).[12]

This legislative history makes clear that tolling should apply during periods when a plaintiff is unable to prosecute a case against the defendant. The Senate Report contains a list of "illustrative, but not exhaustive" situations in which courts were expected to toll the limitations period. S. Rep. No. 249, 102d Cong. 1st Sess., at 10-11 (1991). The Report expressly refers to periods where a defendant is absent from the United States or immune from suit. *Id.* Of course, this Congressional intent is backed by common sense. If a plaintiff cannot assert claims against a defendant because the court cannot obtain jurisdiction over him (due to absence or immunity), then the limitations period should be tolled.[13]

The courts that have applied these principles in ATCA and TVPA cases have concluded that the statute of limitations is tolled while the defendant is beyond the jurisdictional reach of

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[11] For the Court's convenience, the House Report on the TVPA is attached as Exh. 3.

[12] 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. 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).

[13] The expression of this principle in federal law is by no means limited to the ATCA and TVPA. For example, the statute governing contract actions brought by the United States or any officer or agency thereof provides that the period during which "the defendant or the res is outside the United States" shall be excluded from computation of the limitations period. 28 U.S.C. § 2416(a). The same rule applies in criminal actions relating to tax offenses. *See* 26 U.S.C. § 6531; *see also United States v. Myerson*, 368 F.2d 393, 395 (2d Cir. 1966) ("There is nothing unreasonable or arbitrary about the tolling of the statute of limitations during an offender's absence from the country"). Because all tolling principles should apply to claims under the ATCA and TVPA, the tolling concepts embedded in these statutes, and others like them, apply to ATCA and TVPA claims as well. Many states likewise provide for tolling of the statute of limitations when a defendant is outside of the state. *See, e.g.*, Kan. Stat. Ann. § 60-517 (tolling statute of limitations for periods defendant absent from state); N.Y. Civ. Prac. L. & R. 207 (tolling statute until defendant enters state and for periods of absence from the state for periods 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).

the federal courts. In *Hilao v. Marcos*, 103 F. 3d at 773, the court cited the Senate Report on the TVPA as authority that equitable tolling under the statute included "periods in which the defendant was absent from the jurisdiction."[14] Similarly, in *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1368 (S.D. Fla. 2001), the court held that the defendant's participation in the federal witness protection program tolled the statute of limitations, reasoning that during his participation "the Defendant was ostensibly absent from this jurisdiction, in that he could not be served."[15]

Tolling the statute of limitations for TVPA claims during the defendant's absence from the United States effectuates the Congressional intent that the United States not become a "haven for torturers." Congress intended to keep torturers from entering the country, and the only way to effectuate that intent is to toll the statute of limitations for all periods that the defendant is absent from the jurisdiction. Otherwise, a torturer like Ali could wait until the ten year statute expires, then freely enter this country in derogation of Congress' clear intent.

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

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[14] Ali contends that *Hilao* only tolled the limitations period "during the time Marcos was president," but no longer. Mot. to Dismiss at 22. However, as the lower court's findings of fact show, the duration when Marcos was President coincides with the period during which he was outside of the jurisdiction of the United States. *In re Estate of Marcos Human Rights Litigation*, 910 F. Supp. 1460, 1463 (D. Haw. 1995) (finding that Marcos, his family and others loyal to him fled to the United States when the Marcos government was overthrown). The court in *Cabello* properly interpreted *Hilao* to require tolling when the defendant is absent from the jurisdiction. 157 F. Supp. 2d at 1367-68.

[15] Although the court, responding to new information contained in the Second Amended Complaint, later found that the defendant may not have participated in the witness protection program, it nevertheless upheld its decision to toll the limitations period on alternative grounds. *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d 1325, 1330 (S.D. Fla. 2002).

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 admits he had been present in the United States for a total time of only nine (9) years and eight (8) months. Mot. to Dismiss at 25 n. 6. Accordingly, the statute of limitations has not run and this action is timely.

C. Alternatively, The Statute Of Limitations Is Tolled Until At Least 1997 Because of Plaintiffs' Fear of Reprisal and the Inability To Conduct Investigations Into Past Human Rights Abuses.

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 include fear of reprisals and inability to acquire evidence, all of which derive from the incredible 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. Accordingly, the statute of limitations was tolled until at least 1997.

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. Specifically, 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*, ___ F. Supp. 2d _____, No. Civ-F-03-6249, 2004 WL 2913256 (E.D. Cal. Nov. 24, 2004) (tolling the statute from the 1980 assassination that served as the basis for the complaint

through the filing of suit in 2003, based in part upon fear of reprisal, which fear lasted well beyond the time the security forces were disbanded); *John Doe I v. Unocal*, 963 F. Supp. 880, 897 (C.D. Cal. 1997) ("For those plaintiffs who remain in Burma, attempts to access courts in this country may present a threat of reprisal [to them]"), *reversed on other grounds*, *John Doe I v. Unocal Corp.*, No. 00-56603, 00-57197, 00-56628, 00-57195, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *rehearing en banc granted, opinion vacated by*, *Doe v. Unocal Corp.*, Nos. CV-96-0659-RSWL, CV-96-06112-RSWL, 2003 WL 359787 (9th Cir. 2003).

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 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. 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.

Ali makes much of the asserted stability of the region of Somaliland. Mot. to Dismiss at 14, 34. This is rebutted by the allegations of the Complaint. While Somaliland declared its independence in 1991 and established a rudimentary civil administration there in 1993, major armed conflicts in 1994 and 1996 plunged the region back into turmoil. Only since 1997 has Somaliland's government exercised a modicum of authority over its territory. Compl. ¶ 51.

In sum, prior to 1997, given the circumstances described above, victims of human rights abuses perpetuated by the Somali Armed Forces or associated security services could not have been expected to pursue a cause of action in the United States against a former military commander 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.

D. The Equitable Tolling Cases Relied Upon By Ali Are Distinguishable.

Ali relies on three cases to support his argument that equitable tolling is not warranted in this case. *See Alexander v. Oklahoma*, 382 F. 3d 1206 (10th Cir. 2004) (seeking 80-year tolling), *Deutsch v. Turner Corp.*, 317 F. 3d 1005 (9th Cir. 2003) (seeking 60-year tolling), and *Hoang Van Tu v. Koster*, 364 F. 3d 1196 (10th Cir. 2004) (seeking 22-year tolling). Unlike this case, however, defendants in those cases were United States citizens or otherwise subject to United States jurisdiction throughout the periods for which the plaintiffs sought equitable tolling. Furthermore, in each of these cases, none of the plaintiffs alleged exceptional facts. The *Alexander* plaintiffs did not plead factors to show they were being kept out of the court system, and the *Deutsch* and *Koster* plaintiffs similarly could not show how they were prevented from filing similar suits in the United States at an earlier time. *Alexander*, 382 F. 3d at 1220 (plaintiffs failed to allege "they were prohibited from accessing the courts in the 1970s, 1980s, or 1990s"); *Alexander v. Oklahoma*, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131, at *32 (finding that the

era of intimidation ended in the 1960's); *Koster*, 364 F. 3d at 1199-1200 ("even if some degree of equitable tolling were appropriate . . . plaintiffs have made no showing to justify" the tolling sought in that case).

In summary, unlike the cases relied upon by Ali, Plaintiffs' claims here are not barred by the statute of limitations. Ali's motion based on the statute of limitations must be denied.

IV. ALI'S ARGUMENT THAT PLAINTIFFS HAVE FAILED TO EXHAUST THEIR REMEDIES IN SOMALIA IS WITHOUT MERIT.

Ali argues that all of Plaintiffs' claims should be dismissed because Plaintiffs have not exhausted their remedies in Somalia or Somaliland, as required by Section 2(b) of the TVPA:

> A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

28 U.S.C. § 1350 note, § 2(b).

Ali's exhaustion argument fails. First, the exhaustion requirement only applies to the TVPA claims, not to Plaintiffs' claims pursuant to the ATCA. Second, even as to Plaintiffs' TVPA claims, the exhaustion requirement is an affirmative defense and Ali has not met, and cannot meet, his heavy burden of establishing that adequate domestic remedies exist in Somalia.

A. Plaintiffs' Claims Under The Alien Tort Claims Act Are Not Subject To The Exhaustion Requirement.

Plaintiffs asserting claims under ATCA are not required to exhaust their remedies in the country in which the alleged violations of customary international law occurred. *See Kadic v. Karadzic*, 70 F. 3d 232, 241 (2d Cir. 1995); *Doe v. Saravia*, __ F. Supp. 2d at ___, 2004 WL 2913256 at *44; *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1133 (C.D. Cal. 2002) ("The court is not persuaded that Congress' decision to include an exhaustion of remedies provision in the TVPA indicates that a parallel requirement must be read into the ATCA."); *see also Jama v.*

I.N.S., 22 F. Supp. 2d 353, 364 (D.N.J. 1998) (noting that "nothing in the ATCA which limits its application to situations where there is no relief available under domestic law").

B. It Is Sufficient At This Stage Of The Case That Plaintiffs' Complaint Alleges They Have No Adequate Or Available Remedies In Somalia

To the extent Plaintiffs seek relief under the TVPA, they are only required to exhaust "adequate and available" remedies in Somalia. 28 U.S.C. § 1350 note, § 2(b). The exhaustion requirement under the TVPA "was not intended to create a prohibitively stringent precedent to recovery under the statute." *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995). Accordingly, exhaustion of remedies in a foreign forum is generally not required if the foreign remedies are "unobtainable, ineffective, inadequate or obviously futile." *Id.* (internal quotes omitted). Congress' intended operation of the exhaustion requirement is set forth in the TVPA's legislative history:

> [T]orture victims bring suits in the United States against their alleged torturers only as a last resort. . . . Therefore, as a general matter, the committee recognizes that in most instances the initiation of litigation under this legislation will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred. The committee believes that courts should approach cases brought under the proposed legislation with this assumption.
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> . . . [T]he respondent has the burden of raising the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that claimant did not use. . . . The ultimate burden of proof and persuasion on [this] issue . . . lies with the defendant.

S. Rep. No. 249, 102d Cong., 1st Sess., at 9-10 (1991). Plaintiffs are entitled to a presumption that local remedies have been exhausted. *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1357 (S.D. Fla. 2003). Ali "must demonstrate not only that the foreign forum is amenable, but also that it . . . [offers] certain rights, such as the right to a speedy and fair trial." *Sinaltrainal*, 256 F. Supp. 2d at 1358.

Because exhaustion of remedies is an affirmative defense on which the defendant has the burden of proof and persuasion, it is not the proper subject of a motion to dismiss, particularly when Plaintiffs' Complaint alleges they have no adequate or available remedies. The Complaint alleges that Somalia remains without a functioning national judicial system in which victims of Barre-era human rights abuses could bring their claims. Although Shari'a courts operate in some regions of the country, such courts impose religious and local customary law often in conflict with universal human rights conventions. Compl. ¶ 52.

Plaintiffs further allege that the Somaliland courts do not offer an adequate or available remedy. It remains impossible to seek judicial remedies in its courts for human rights claims. Compl. ¶ 53. The Somaliland government's human rights record is weak, and human rights activists are frequently arrested and detained. *Id.* The judicial system remains very tied to religious and political elites and lacks the properly trained judges and other legal personnel necessary to litigate complex human rights cases. Compl. ¶¶ 52-53.

In light of these allegations, which must be accepted, it is clear that Ali has not met his burden. Ali refers to the affidavit of Alessandro Campo, filed in another case. Nowhere does Campo identify what types of legal claims or remedies are actually available to Plaintiffs in Somalia or Somaliland. He also makes no mention of whether Plaintiffs would be entitled to a speedy or fair trial, or any other benefit of due process (probably because all indications point to otherwise). *See Sinaltrainal*, 256 F. Supp. at 1358 (recognizing burden on defendant to demonstrate that the foreign forum is not only amenable, but that it would provide an adequate remedy by providing certain rights such as the right to a speedy and fair trial). Campo can point to no reported decision that suggests that adequate remedies exist in Somaliland.

Even the authorities cited by Ali conclude that the Somaliland and Somalia justice system is an inadequate alternative to the United States' judicial system. *See* Department of State ("DOS") 2003 Country Report on Human Rights Practices in Somalia ("Country Rep."), p. 5 (Feb. 25, 2004) (noting that while the Somaliland Constitution calls for an independent judiciary, "the judiciary is not independent in practice"); DOS 2002 Country Rep., p. 7 (Mar. 31, 2003) (concluding that there is a "serious lack of trained judges and of legal documentation in Somaliland.")

Furthermore, Ali does not advise the Court as to how he could be served with process for a case in Somaliland. Also, Somaliland is not recognized as a country by the United States. Therefore, there is, at a minimum, a very serious question whether any "judgment" obtained in Somaliland "courts" will be enforceable against Ali in the country of his residence (the United States). Va. Code Ann. § 8.01-465.10. Plaintiffs are aware of no case that stands for the proposition that a United States court is legally obligated to recognize a decision rendered by the "courts" of an unrecognized territory, or that a plaintiff must exhaust remedies in such a court system. Thus, any remedies in Somaliland are inadequate.

V. ALI'S RELIANCE ON THE DOCTRINE OF FORUM NON CONVENIENS IS WITHOUT MERIT.

A. The Law Of Forum Non Conveniens.

As the party moving to dismiss based on the doctrine of *forum non conveniens*, Ali bears the burden of showing (a) that there is an adequate alternative forum, and (b) that the balance of private and public interest factors favor dismissal. *See Bhatnagar v. Surrendra Overseas Ltd.*, 52 F. 3d 1220, 1226 (3d Cir. 1995). *See also Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F. 3d 1383, 1390 (8th Cir. 1995) (finding that because the defendant made only conclusory allegations regarding his *forum non conveniens* allegation, the

district court did not abuse its discretion in declining to dismiss); *Hodson v. A. H. Robins, Co., Inc.*, 528 F. Supp. 809, 817 (E.D. Va. 1981) (defendant has a "heavy burden" on this issue), *abrogated on other grounds, Broadcasting Co. of the Carolinas v. Flair Broad.*, 892 F.2d 372 (4th Cir. 1989). Plaintiff's choice of forum rarely should be disturbed. *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 918 (N.D. Ill. 2003). The *forum non conveniens* doctrine offers Ali no relief.[16]

B. Ali Has Failed To Meet His Burden On The Threshold Issue Of An Adequate Alternative Forum.

As discussed in Part IV above, Somaliland does not offer an adequate alternative forum. *See Abiola*, 267 F. Supp. 2d at 918 ("the defendant's threshold burden is to demonstrate that an adequate alternative forum exists"). Thus, Ali has not met his burden on the first prong of the *forum non conveniens* test.

C. Private And Public Interest Factors Do Not Support Dismissal Of This Case.

1. Private Interests Favor The Retention Of This Case In This Court.

Consideration of the "private interest" factors[17] is dominated by the fact that any judgment from a court in Somaliland likely would not be enforceable in Virginia (factor 5). *See ESI, Inc. v. Coastal Power Prod. Co.*, 995 F. Supp. 419, 427-28 (S.D.N.Y. 1998) (denying

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[16] As the Court considers this issue, it should note the concerns identified in other human rights cases:

> [a] motion for dismissal on *forum non conveniens* grounds raises special concerns when the claims . . . are brought . . . [for] human rights abuses. Dismissal "can represent a huge setback in a plaintiff's efforts to seek reparations for acts of torture" due to "the enormous difficulty of bringing suits to vindicate such abuses." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F. 3d 88, 105, 106 (2d Cir. 2000).. . . *Cf.* H.R. Rep. No. 102-367, pt. 1, at 3 (1991) ("Judicial protections against flagrant human rights violations are often least effective in those countries where such abuses are most prevalent. . . . The general collapse of democratic institutions characteristic of countries scourged by massive violations of fundamental rights rarely leaves the judiciary intact.").

Abiola v. Abubakar, 267 F. Supp. 2d 907, 918 (N.D. Ill. 2003) (citations omitted).

forum non conveniens argument in part because it was not shown that a foreign judgment would be enforceable in the U.S.). *See* section IV(B) *supra*.

Ali's arguments relating to the availability of witnesses and documents in Somalia (factors 1 – 4) fall short because he has not identified a single witness in Somalia, even though such a list of witnesses has been held to be a prerequisite for *forum non conveniens* dismissal. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 341 (S.D.N.Y. 2003). Nor has Ali made a showing that Somaliland has compulsory process for the attendance of witnesses. Finally, while some witnesses and plaintiffs may live in Somalia, many live in the United States, including Ali and others. *See Calava Growers of Calif. v. Generali Belgium*, 632 F.2d 963, 969 (2d Cir. 1980) (Newman, J., concurring) (noting that it is "often quicker and less expensive to transfer a witness or a document than to transfer a lawsuit").[18]

2. The Public Interest Favors The Retention Of This Case In This Court.

The public interest factors do not support dismissal of this case.[19] Ali does not cite to a single court proceeding in Somaliland demonstrating that Somaliland has an interest in adjudicating claims remotely similar to those at issue here. Furthermore, the United States has an interest in deciding this case because it has an interest in not being a haven to human rights abusers, and it has an interest in vindicating Ali's violations of international human rights law. *See Wiwa*, 226 F. 3d at 106 ("The new formulations of the Torture Victim Protection Act convey

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17 The private interest factors are: (1) relative ease of access to sources of proof; (2) availability of compulsory process for attendance of witnesses; (3) costs of bringing willing witnesses and parties to the place of trial; (4) access to physical evidence and other sources of proof; (5) enforceability of judgments; and (6) "all other practical problems that make trial of a case easy, expeditious and inexpensive." *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981) (*citing Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

18 Ali has made no showing on the sixth private interest factor relating to other practical considerations.

19 The public interest factors are: (1) burden on local courts and juries; (2) local interest in having the matter decided locally; and (3) familiarity with governing law and avoidance of unnecessary problems in conflicts of law or application of foreign law. *Gulf Oil Corp.*, 330 U.S. at 508-09. Ali has offered no evidence on the first or third factor.

the message that torture committed under color of law of a foreign nation in violation of international law is 'our business,' as such conduct not only violates the standards of international law but also as a consequence violates our domestic law."); *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 339-40 (similar).[20] Thus, Ali's argument for dismissal based on the doctrine of *forum non conveniens* should be denied.

VI. THE SUPREME COURT'S ANALYSIS IN SOSA PERMITS PLAINTIFFS' CLAIMS TO GO FORWARD.

Ali appears also to argue that Plaintiffs' claims do not meet the standard for ATCA cases recently set forth in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). Mot. to Dismiss at 40-41. ("[i]t is exceedingly difficult to imagine how the alleged wrongs pleaded by your plaintiffs could conceivably fit within an atavistic, recrudescence of the original 19th century concepts embodies in the ATCA"). Ali's reading of *Sosa* could not be more mistaken. Each of Plaintiffs' claims has been recognized as an offense against customary international law and therefore, under *Sosa*, each is actionable under the ATCA. Ali's motion to dismiss on this ground must be denied.

In *Sosa,* the United States Supreme Court held that the ATCA gives federal courts jurisdiction to hear claims by an alien for torts in violation of the law of nations. 124 S. Ct. at 2761. As the Court explained, when the ATCA was enacted in 1789, only three torts were recognized under the common law as being violations of the law of nations "with a potential for personal liability": violation of safe conduct, infringement of the rights of ambassadors, and piracy. *Id.* at 2761. A majority of the Court found, however, that the "international law violations" recognized by federal common law did not remain frozen in 1789. *Id.* Rather,

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[20] Notably, the *Wiwa* court reversed a *forum non conveniens* dismissal to the United Kingdom in part because the trial court had "failed to give weight" to "the interests of the United States in furnishing a forum to litigate claims of violations of international standards of the law of human rights." *Wiwa*, 226 F. 3d at 106. *Wiwa* is instructive because it refused to send a case to the U.K. where the courts are regarded as "exemplary in their fairness and commitment to the rule of law." *Id.* at 101.

claims are invalid only if they are based on international law norms with "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Id.* at 2765. The Supreme Court then approvingly cited pre-*Sosa* ATCA cases which concerned exactly the types of human rights abuses at issue in this case. Those cases hold that international law norms which are "specific, universal and obligatory," that is, norms that have achieved the status of binding customary law, are actionable under the ATCA. *Id.* Plaintiffs' claims, which are virtually identical to those in the cases cited by the Supreme Court, indisputably meet this long-accepted standard and remain actionable under the ATCA.

Congress' enactment of the TVPA confirms that torture and extrajudicial killing are actionable under federal law. *See Sosa*, 124 S. Ct. at 2763 ("[A] clear mandate appears in the Torture Victim Protection Act of 1991, 106 Stat. 73, providing authority that 'establish[es] an unambiguous and modern basis for' federal claims of torture and extrajudicial killing."); *see also, e.g., Flores v. Southern Peru Copper Corp.*, 343 F. 3d 140, 156 (2d Cir. 2003) ("[O]fficial torture, extrajudicial killings, . . . violate customary international law . . ."); *Filartiga v. Pena-Ivala*, 630 F.2d 876 (2d Cir. 1980) ("[O]fficial torture is now prohibited by the law of nations."); *Hilao v. Estate of Marcos,* 25 F. 3d 1467, 1475 (9th Cir. 1994) ("The right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of *jus cogens*."); *Doe v. Saravia*, __ F. Supp. 2d __, 2004 WL 2913256 at *31, 40-41 (E.D.Cal. 2004) (extrajudicial killing meets the "specific, universal and obligatory standard" set forth in *Sosa*); *Forti*, 672 F. Supp. at 1542 ("[t]he prohibition against summary execution . . . is . . . universal, obligatory and definable") *amended,* 694 F. Supp. at 710-11.

The prohibitions against crimes against humanity and war crimes also have attained the status of customary international law. These prohibitions were recognized by the Charter of the

International Military Tribunal at Nuremberg ("Nuremberg Charter"). *See* Restatement (Third) of the Foreign Relations Law of the United States § 702, rpt. note 1 (1987). Since Nuremberg, these prohibitions have been expressly recognized in several international instruments to which the United States is a party. *See, e.g.,* Convention Relative to the Protection of Civilian Persons in Time of War, entered into force Oct. 21, 1950, for the United States Feb. 2, 1956, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287; Statute of the International Criminal Tribunal for the former Yugoslavia, U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1192 (1993); Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1602 (1994). Several federal U.S. courts have found crimes against humanity and war crimes to be actionable under the ATCA. *See, e.g., Kadic*, 70 F. 3d at 242 ("The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II, . . . and remains today an important aspect of international law"); *Flores*, 343 F. 3d at 151 ("Customary international law rules proscribing crimes against humanity, including genocide, and war crimes, have been enforceable against individuals since World War II"); *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1299 (S.D. Fla. 2003) ("Crimes against humanity have been recognized as violations of customary international law since the Nuremberg Trials in 1944"); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1344 and 1352-54 (N.D. Ga. 2002) (applying the "specific, universal and obligatory" test to hold that crimes against humanity are actionable under the ATCA); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) at *5, 9 and 27, (analyzing several ATCA claims under the "specific, universal and obligatory" standard and holding the prohibition of crimes against humanity to be "a norm that is customary, obligatory, and well-defined in international jurisprudence"); *Saravia*, __ F. Supp. 2d

at __, 2004 WL 2913256 at *44 (crimes against humanity constitute a specific, universal, and obligatory norm and . . . this norm is actionable under the ATCA.")

Plaintiffs' claims for cruel, inhuman or degrading treatment or punishment also meet the standard set forth in *Sosa*. Federal courts in the United States have recognized the prohibitions against this conduct to be binding customary international law. *See, e.g., Mehinovic*, 198 F. Supp. 2d 1322, 1347, 1349 ("Cruel, inhuman, or degrading treatment is a discrete and well-recognized violation of customary international law . . . . Arbitrary detention is a violation of customary international law"); *Cabello*, 157 F. Supp 2d. at 1362 ("the right to remedy cruel, inhuman, or degrading treatment or punishment is customary international law"); *Jama v. INS*, 22 F. Supp. 2d 353, 363 (D.N.J. 1998) ("American Courts have recognized that the right to be free from cruel, unhuman or degrading treatment is a universally accepted customary human rights norm"); *Wiwa*, 2002 WL 319887 at *7 ("The international prohibition against 'cruel, inhuman, or degrading treatment' is as universal as the proscriptions of torture, summary execution, and arbitrary arrest").

Finally, Plaintiffs' claims for arbitrary detention also meet the standard set forth in *Sosa*. Notwithstanding its determination regarding plaintiff Alvarez-Machain's own claim,[21] *Sosa* acknowledges that arbitrary detention, under some circumstances, violates customary international law clearly enough to be actionable under the ACTA. *See Sosa*, 124 S. Ct. at 2768-9 ("Any credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority."). Here, Plaintiffs allege prolonged detention,

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[21] The *Sosa* court held only that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities, and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." *Sosa*, 124 S. Ct. at 2769.

under abject conditions, with no resort to established criminal proceedings. Compl. ¶¶ 19, 21, 24, 25, 29-37. Under these circumstances, federal courts have found that the norm against arbitrary detention has attained the status of customary international law. *See Martinez v. City of Los Angeles*, 141 F. 3d 1373, 1384 (9th Cir. 1998) ("there is a clear international prohibition against arbitrary arrest and detention"); *Hilao*, 103 F. 3d at 795 n.9 ("Customary international human-rights law prohibits prolonged arbitrary detention."); *Mehinovic*, 198 F. Supp. 2d at 1349 ("Arbitrary detention is a violation of customary international law"); *Forti I*, 672 F. Supp. at 1541 ("There is case law finding sufficient consensus to evince a customary international human rights norm against arbitrary detention"); *Xuncax*, 886 F. Supp. at 185 ("As with official torture, the practices of summary execution, 'disappearance,' and arbitrary detention also have been met with universal condemnation and opprobrium"); Restatement (Third) of Foreign Relations Law § 702(e) ("Arbitrary detention is cited as a violation of international law in all comprehensive international human rights instruments.").

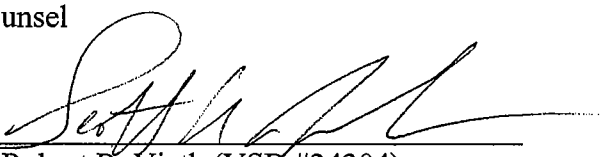
CONCLUSION

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

Dated: January 21, 2005

JOHN DOE I
JANE DOE I

By Counsel

By: 

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CERTIFICATE OF SERVICE

I hereby certify, this 21st day of January, 2005, that a true copy of the foregoing was sent electronically and by first-class mail, postage prepaid, to the following counsel of record:

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