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

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| JANE DOE and JOHN DOE<br><br>Plaintiffs,<br><br>v.<br><br>YUSUF ABDI ALI,<br><br>Defendant. | ) | Civil Action No. 1:05 CV 701 (LMB/BRP) |

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**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO LIFT STAY**

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Jane Doe and John Doe ("Plaintiffs"), through undersigned counsel, respectfully request that the Court lift the stay put in place by its order of August 5, 2005 (No. 1:05cv701, Dkt No. 26.)[1] Plaintiffs also request that the Court order a scheduling conference to take place within 30 days of the Court's order reactivating this case.

## I. INTRODUCTION

The circumstances that prompted the Court to stay this action in August 2005 have changed drastically and in such a way that the stay is no longer necessary or appropriate. Accordingly, this lawsuit should proceed apace to its final resolution.

Plaintiffs brought this case in November 2004, seeking to hold the Defendant, Yusuf Abdi Ali ("Colonel Ali"), accountable for brutal acts of violence against the Plaintiffs during the time that Colonel Ali commanded troops in the Somali National Army. Plaintiffs allege that Colonel

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[1] Plaintiffs are proceeding under pseudonyms in accordance with the Court's January 31, 2005 Order in Case No. 1:04 CV 1361.

Ali is responsible for, among other things, the attempted killing of Plaintiff John Doe and the illegal torture, cruel or inhuman treatment, and arbitrary detention of both Plaintiffs. Colonel Ali's depraved acts, which were part of a systematic and widespread targeting of civilian members of the Isaaq clan, also constitute war crimes and crimes against humanity.

In 2005, Colonel Ali alleged that, as a former Somali official, he enjoys immunity from this lawsuit. Colonel Ali also objected to fact witness depositions occurring in Ethiopia. (No. 1:05cv701, Dkt. Nos. 18, 23.) In August 2005, the Court stayed this action in order to give the U.S. State Department ("State") an opportunity to advise the Court: (i) whether State objects to this action going forward on the grounds that former Somali officials should have immunity; and (ii) whether fact discovery in Ethiopia would interfere with U.S. foreign policy. (No. 1:05cv701, Dkt. No. 26.) Recently, State has made its position on immunity for former Somali officials clear -- it does not exist in the circumstances presented here. Similarly, deposition discovery in Ethiopia is no longer an issue that warrants a stay of this matter.

**A. Immunity for Former Somali Officials**

On the question of immunity, in the *Samantar* case (also before this Court), State took the position that Mohamed Ali Samantar ("Samantar"), the former Prime Minister and Defense Minister of Somalia, is not immune from claims like the claims Plaintiffs assert in this action. *See Yousuf v. Samantar*, No. 1:04cv1360, Dkt. No. 147, p. 7 (attached as Ex. A). In particular, the Executive Branch made clear that (i) it does not recognize any government of Somalia that could waive or assert immunity for a former Somali official (like Colonel Ali); and (ii) U.S. residents (like Colonel Ali) who enjoy the protections of U.S. law should be subject to the

jurisdiction of U.S. courts. (*Id.*) The Executive Branch's analysis in *Samantar* applies with equal force in this lawsuit due to the similarities between the two cases.[2]

Prior to filing this motion, counsel for Plaintiffs contacted State to discuss whether the Executive Branch intends to file a position statement in this lawsuit. State is aware of this case; however, State is of the opinion that the Court has not requested a statement of interest from the Executive Branch in this case. State also believes that such a request is unnecessary, and Plaintiffs agree, especially in light of the clear positions State has taken in the *Samantar* case before this Court. State obviously will file a statement in this case if it later chooses, but the Court need not and should await such a filing before allowing this case to proceed.

**B. Potential Discovery in Ethiopia**

On the question of discovery in Ethiopia -- and unlike the situation that existed in August 2005 -- the *Ali* plaintiffs are not proposing to conduct any party depositions in Ethiopia. Plaintiffs' attorneys in this case are working to arrange for Plaintiffs to travel to the United States for their depositions when that time arrives (and assuming they are well enough to travel to the U.S.). Plaintiffs also have other alternatives for the site of both non-party and party depositions, including (but not limited to) Djibouti. And, this Court recently ruled that non-party depositions may occur in Ethiopia, rejecting all of Samantar's arguments opposing such discovery there. (No. 1:04cv1360, Dkt. No. 196.) As a result, the mere possibility of depositions occurring in Ethiopia cannot justify the continued stay of this case.

In short, the original concerns underpinning the stay of this case in 2005 have been satisfied and there are no impediments to this case proceeding. Far from objecting, State has

[2] State has taken the identical position in another human rights case brought against a former Somali National Army colonel. *See Ahmed v. Magan*, No. 2:10-cv-342, Dkt. No. 45, p. 7 (S.D. Ohio, Dec. 6, 2010) (attached as Ex. B).

endorsed actions such as this one, brought under U.S. law in a U.S. court against perpetrators of unspeakable atrocities who now live in the U.S. under the protection of U.S. laws. Accordingly, the Court should lift the stay of this case.

## II. BACKGROUND

### A. Plaintiffs' Claims Against Colonel Ali

Plaintiffs were born, raised, and live in the northern portion of the former Somalia, an area that is now the Republic of Somaliland. During the 1980s, Colonel Ali commanded a brigade of the Somali National Army stationed near the town of Gebiley, which is located in the area where Plaintiffs reside. Plaintiffs are the victims of human rights abuses committed by Colonel Ali or by those under his direct command. As detailed in Plaintiffs' Complaint, Colonel Ali participated in, ordered, or has command responsibility for acts that are remarkable for their cruelty and inhumanity.

Briefly summarized, Colonel Ali's troops snatched Plaintiff Jane Doe from her farm in the middle of the night, without cause, and then detained and viciously beat and tortured her for days. (No. 1:05cv701, Dkt. No. 1, ¶¶ 17-23.) She was then subjected to a sham "trial" and sentenced to death, but spared the firing squad only because she was pregnant at the time. (*Id.*, ¶ 24.) She eventually endured several years of illegal imprisonment under appalling conditions. (*Id.*, ¶ 25.) Her physical injuries as a result of these heinous acts include the loss of the child she was carrying at the time and other permanent injuries that now severely limit her ability to move around and perform certain basic daily tasks. (*Id.*, ¶ 22.)

Colonel Ali also personally committed the attempted murder of Plaintiff John Doe. (*Id.*, ¶ 37.) John Doe was a peaceful agrarian detained without justification by Colonel Ali's troops. (*Id.*, ¶¶ 27-29.) For several days, John Doe was ruthlessly beaten and tortured by Colonel Ali's

soldiers and then interrogated by Colonel Ali. (*Id.*, ¶¶ 30-37.) On the final day of these torture sessions, Colonel Ali became enraged, pulled his sidearm, and fired several shots at John Doe, striking him three times. (*Id.*, ¶ 37.) Colonel Ali, thinking him dead, ordered the soldiers to bury John Doe. (*Id.*) Miraculously, John Doe survived the attack.

Plaintiffs assert claims against Colonel Ali for compensatory and punitive damages under the Torture Victim Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350), and the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350 (2010). The suffering that Colonel Ali inflicted on the Plaintiffs also was part of a systematic or widespread targeting of Isaaq clan members, both civilian and military. (No. 1:05cv701, Dkt. No. 1, ¶¶ 11-16.) As aptly described by one Somali general, the Somali National Army engaged a "campaign of obliteration" against the Isaaq clan.[3]

In legal terms, Colonel Ali's personal resumé includes attempted extrajudicial killing; torture; cruel, inhuman or degrading treatment or punishment; arbitrary detention; crimes against humanity; and war crimes. (No. 1:05cv701, Dkt. No. 1, ¶¶ 54-142.) Indeed, Colonel Ali is particularly infamous for his zeal in carrying out the policy of "obliterating" Isaaq civilians. Put simply, Colonel Ali was one of the most sadistic and notorious Somali war criminals.

**B. Procedural History Of This Case**

This matter originally was filed on November 10, 2004, but Plaintiffs encountered difficulties in obtaining travel visas and other documentation to enter the U.S. and participate in depositions. Additionally, Colonel Ali represented to the Court that he could not travel outside of the United States. As a result of the difficulties in scheduling depositions, Plaintiffs sought a

[3] Letter of 23/01/87 from Major General Mohamed Said Hirsi (Morgan) to the Somali Ministry of Defense, reprinted in Mohamed Baroud Ali, *The Mourning Tree*, available from Ponte Invisibile (redsea-online.com) (2010).

voluntary dismissal without prejudice and under certain conditions, which the Court granted on April 29, 2005. (No. 1:04cv1361, Dkt. No. 83.)

Plaintiffs re-filed this case on June 13, 2005. Shortly thereafter, the Court entered an order allowing Plaintiffs' depositions to take place in the Republic of Somaliland by videoconference, beginning July 25, 2005. (No. 1:05cv701, Dkt. No. 3.) Plaintiffs also noticed the depositions of certain fact witnesses who also reside in Somaliland, in order to preserve their trial testimony. Colonel Ali then moved for a protective order, arguing that the United States does not recognize either the Republic of Somaliland or the Transitional Federal Government of the former Somalia. (No. 1:05cv701, Dkt. No. 9.) On June 27, 2005, the Court canceled the Plaintiffs' depositions and ordered Plaintiffs' counsel to contact State and report to the Court within thirty days regarding State's position on whether the Court would be authorized to participate in depositions in the Republic of Somaliland. (No. 1:05cv701, Dkt. No. 12.)

In an effort to avoid delay, however, Plaintiffs amended their requests and sought to conduct the depositions by videoconference in Addis Ababa, Ethiopia. (No. 1:05cv701, Dkt. Nos. 14, 15.) On July 13, 2005, the Court vacated its prior order to the extent that the order required Plaintiffs to obtain the position of the Department of State regarding depositions in Somaliland. However, the Court deferred a ruling on Plaintiffs' request to depose witnesses in Ethiopia pending the resolution of Colonel Ali's anticipated motion to dismiss, which motion actually was filed on July 20, 2005. (No. 1:05cv701, Dkt. No. 20.)

After receiving the briefing of Colonel Ali's motion to dismiss, the Court stayed this case "until either party provides the Court with a declaration from the Department of State that it has no objection to this action going forward and that taking discovery in Ethiopia will not interfere

with United States foreign policy." (No. 1:05cv701, Dkt. No. 26.) This case has remained stayed since August 2005.

### C. The Parallel *Samantar* Case

The instant matter is one of two cases pending before this Court against Somali war criminals who were found to be living in the Eastern District of Virginia. The other case is styled *Yousuf, et. al. v. Samantar*, No. 1:04cv1360, and it also was filed in November 2004. Because the immunity issues in these two cases overlapped to some extent, the Court's rulings in *Samantar* potentially affected this case as well.

Shortly after commencement of the *Samantar* case, Samantar filed a motion to dismiss, raising several immunity defenses, including immunity under the Foreign Sovereign Immunities Act ("FSIA"). (No. 1:04cv1360, Dkt. No. 4.) On January 7, 2005, the Court stayed the *Samantar* case so that Samantar could obtain State's position on the whether he was entitled to immunity. (No. 1:04cv1360, Dkt. No. 25.) The Court's stay of the *Ali* case followed in August 2005. (No. 1:05cv701, Dkt. No. 26.) Because State's position (and the Court's eventual ruling) on immunity issues in *Samantar* might have affected the *Ali* case (and vice versa), both cases remained dormant while State considered its position on immunity.

However, on January 22, 2007, the Court reactivated the *Samantar* case without any input from State, referring generally to changes in the political situation in Somalia and Ethiopia. (No. 1:04cv1360, Dkt. No. 73.) The *Samantar* plaintiffs amended their complaint with leave of the Court; and Samantar quickly renewed his motion to dismiss. (No. 1:04cv1360, Dkt. Nos. 82, 89.) On August 1, 2007, the Court dismissed the complaint in *Samantar* on the grounds that the FSIA cloaked Samantar with immunity. *Yousuf, et. al. v. Samantar*, No. 1:04cv1360, 2007 WL 2220579 (E.D. Va. Aug. 1, 2007). Because the Court's ruling, if affirmed, might be applied to the

*Ali* case, Plaintiffs did not seek reactivation of this suit while the Court considered Samantar's motion to dismiss and while the appeals of the Court's ruling on that motion were pending.

Upon remand to this Court following appeal to the U.S. Supreme Court, Samantar filed another motion to dismiss, this time asserting common-law immunity theories. (No. 1:04cv1360, Dkt. No. 138.) Again, the Court's disposition of that motion potentially affected this case. Thus, Plaintiffs here did not seek to lift the stay while the Court considered Samantar's common-law immunity defenses.

**D. State Weighs In Against Immunity And This Court Agrees**

On February 14, 2011, State filed its Statement of Interest in the *Samantar* case. (No. 1:04cv1360, Dkt. No. 147.) In that submission, State communicated the Executive Branch's position that Samantar does not have immunity. In support of that conclusion, State made two key points that apply with equal force here. First, State informed the Court that Samantar

> ... is a former official of a state with no currently recognized government to request immunity on his behalf, including by expressing a position on whether the acts in question were taken in an official capacity.

(No. 1:04cv1360, Dkt. No. 147, p. 7.) Second, State communicated the Executive Branch's position that U.S. residents who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of U.S. courts. *Id.*; *accord, Ahmed v. Magan*, No. 2:10-cv-342, Dkt. No. 45, p. 7 (S.D. Ohio, Dec. 6, 2010) (Ex. B).

On February 15, 2011, in the wake of State's position paper, the Court ruled that Samantar does not have common-law immunity. (No. 1:04cv1360, Dkt. No. 148.) On April 1, 2011, the Court denied Samantar's motion for reconsideration of that ruling and also denied the balance of Samantar's motion to dismiss. (No. 1:04cv1360, Dkt. No. 158.) Samantar filed a notice of appeal on April 29, 2011, and a motion to stay the *Samantar* case on May 13, 2011. (No. 1:04cv1360, Dkt. Nos. 160, 162.) On May 18, 2011, the Court denied the stay request and

certified as "frivolous" Samantar's appeal of the February 14 ruling denying him common law immunity. (No. 1:04cv1360, Dkt. No. 168.)

### E. The Court Permits Discovery In Ethiopia

In *Samantar*, a scheduling order is in place and discovery is proceeding. As occurred in this lawsuit in 2005, a dispute arose in the *Samantar* case over the location of depositions. The *Samantar* plaintiffs proposed that non-party depositions occur in Addis Ababa, Ethiopia. Samantar opposed this locale, leading to motion practice before this Court. (No. 1:04cv1360, Dkt. Nos. 173, 186.) After hearing from both sides, the Magistrate Judge granted the *Samantar* plaintiffs' motion to take depositions in Ethiopia. (No. 1:04cv1360, Dkt. No. 196.) Having taken the position that Samantar does not have immunity and the lawsuit against him may proceed, State unsurprisingly did not object to the depositions in Ethiopia. Despite Samantar's myriad protests, this Court also found no justification to refuse discovery in Ethiopia.

## III. BASIS FOR RELIEF FROM THE STAY

### A. The Executive Branch's Denial Of Immunity For Samantar Also Resolves That Issue With Respect To Colonel Ali

There is no need for this Court to wait any longer for State's position on immunity for Colonel Ali, because State's position regarding former Somali officials has been made clear. In *Samantar*, State informed the Court that the Executive Branch does not currently recognize any government of Somalia. (No. 1:04cv1360, Dkt. No. 147, p. 7.) Without such recognition, there is no sovereign with capacity to assert a claim of immunity on behalf of a former Somali official. (*Id.*) Thus, former Somali officials, such as Colonel Ali, cannot have official immunity, as sovereign immunity belongs to the state, not the individual. Likewise, there is no sovereign that can take a position on whether Colonel Ali's actions were done in an official capacity. (*Id.*) In short, there is no sovereign horse to which Colonel Ali may hitch his immunity wagon.

In its Statement of Interest, State also emphasized that those who enjoy the benefits of U.S. residency should submit to the jurisdiction of U.S. courts. (*Id.*) Colonel Ali has been living freely in the United States since 1996, enjoying the privileges of U.S. residency and protection of U.S. laws. Thus, if State's position in *Samantar* is to be credited, this Court certainly may (and should) assert jurisdiction over Colonel Ali.

In the *Samantar* case, State also made clear that legal actions against former Somali officials now residing in the U.S. do not interfere with U.S. foreign policy. Samantar occupied the highest echelons of the Somali government, yet the Executive Branch declined to recommend immunity. It follows that this case against Colonel Ali also is no threat to U.S. foreign policy. Colonel Ali commanded a brigade of several hundred troops in the Somali National Army. Samantar is the former Prime Minister and Defense Minister of Somalia, and as such, Samantar was one of Colonel Ali's ultimate superiors during the relevant time periods. The *Samantar* plaintiffs allege the same causes of action against Samantar as Plaintiffs here allege against Colonel Ali, based on atrocities committed against members of the Isaaq clan. While State cautiously noted that its position in *Samantar* might be different in "future cases presenting different circumstances" (*id.* p. 9), any argument that State would take a different position with regard to immunity for Colonel Ali is fanciful at best. There are just too many parallels between the *Ali* and the *Samantar* cases for Colonel Ali validly to contend that the circumstances here are different in any material way.

Congress has determined that the United States will not be a safe haven for war criminals or other perpetrators of gross human rights abuses. See 102 CONG. REC. S1379 (Jan. 3, 1991) (explaining that the TVPA will "serve notice to individuals engaged in human rights violations that the United States will not shelter human rights violators from being accountable"); *see also*,

e.g., 99 CONG. REC. S12949 (June 6, 1986) ("[P]roviding victims of gross human rights abuses access to the courts is of both practical and symbolic importance."). By declining immunity for Samantar, State also conveyed a strong message that the perpetrators of severe human rights violations who choose to live in the U.S., such as Colonel Ali, should not evade the measure of justice that the ATS and TVPA can provide. State's position in *Samantar* and *Magan*, rejecting immunity for former Somali military officials, likewise vitiates Colonel Ali's immunity claims, which claims were the impetus for the stay of this case.

### B. Given The Changed Circumstances, The Court Should Lift the Stay To At Least Take Up Any Remaining Issues Regarding Official Immunity For Colonel Ali

The circumstances that prompted the stay of this case have changed fundamentally from the lay of the land that existed in August 2005. The *Ali* plaintiffs no longer intend to conduct plaintiff depositions in Ethiopia. The Court has approved non-party depositions to occur there in the *Samantar* case. As a result of the positions taken by the Executive Branch in other cases involving former Somali officials, Plaintiffs submit that nothing remains of Colonel Ali's immunity defenses. Accordingly, this case immediately should be placed on a discovery and trial track, similar to what was done in the *Samantar* case in May 2011.

At a minimum, however, the Court should reactivate this case in order to address Colonel Ali's immunity defenses under the present circumstances. If Colonel Ali is going to press his immunity claims even after the recent statements from the Executive Branch and this Court's denial of immunity in *Samantar*, then restarting this litigation is the best way to work through these issues. Even if Colonel Ali could muster a colorable argument that State's position on official immunity might be different as to him, lifting the stay is still the right approach, so that the Court can evaluate and rule upon Colonel Ali's position. If the Court determines there is no

immunity for Colonel Ali, then this matter can progress to the completion of discovery and to trial within a few months.

The Court need not await (nor request) a statement of interest from the Executive Branch. Such a filing by State is not necessary to address the immunity issues in this case -- and that would be true even in the absence of current, on-point statements renouncing immunity for Somali military officials. Indeed, this Court was prepared to move ahead with the *Samantar* case and rule on the immunity issues in that proceeding even without the unsolicited Statement of Interest filed by the Executive Branch. (No. 1:04cv1360, Dkt. No. 136.)

Here, the circumstances are even more compellingly in favor of proceeding with this litigation. The Executive Branch has come down against immunity for a former Somali Minister of Defense (Samantar); and against immunity for a former Colonel in the Somali National Army (Magan). Plaintiffs submit that there are no facts or circumstance in this case that possibly could lead to a different conclusion with respect to Colonel Ali. If, on the other hand, the Court believes there are lingering questions regarding Colonel Ali's immunity defenses, then the stay should be lifted and those issues should be resolved without delay.

**C. The Possibility Of Discovery In Ethiopia Does Not Warrant A Stay**

The second question that led to the August 2005 stay order is moot because Plaintiffs do not intend to conduct party depositions in Ethiopia. In addition, this Court has ruled that non-party depositions may proceed in Ethiopia. (No. 1:04cv1360, Dkt. No. 196.)

Plaintiffs are not, at present, taking the position that any depositions in this case -- whether of parties or non parties -- must occur in Ethiopia. It may be that Djibouti or some other location will prove to be the best (or the only) alternative for certain non-party depositions. As for Plaintiffs, counsel anticipates that we will be able to secure their entry into the United States, assuming that Plaintiffs are sufficiently healthy to travel here. If any problems do arise,

Plaintiffs will seek appropriate relief from the Court, but at present there is no reason to think that Ethiopia would be the most logical alternative (as opposed to, for example, Djibouti).

Further demonstrating that discovery in Ethiopia is a non-issue, this Court has approved the taking of non-party depositions in Ethiopia in the *Samantar* case. The Court did so despite Samantar's objection that the Court's August 2005 order staying this case should foreclose any depositions in Ethiopia. (No. 1:04cv1360, Dkt. No. 186, pp. 2-3.) The Court also rejected all other arguments opposing discovery in Ethiopia put forward by Samantar and his counsel (who also represents Colonel Ali). Samantar also argued, through retained experts, that Ethiopia is an improper discovery venue due to supposed political and personal safety issues. (*Id.*, pp. 3-11.) The Court rejected these speculations. Finally, State has expressed no concerns about discovery in Ethiopia. Samantar argued that the Court should interpret that silence as a rejection of discovery in Ethiopia. (*Id.*, pp. 7-8.) The Court obviously disagreed.

Consequently, there is no credible argument for a continued stay of this lawsuit due to speculation that discovery possibly could occur in Ethiopia.

## IV. CONCLUSION

Plaintiffs respectfully request that the Court lift the stay of this case and order a scheduling conference to occur within 30 days of the Court's order granting this motion. Plaintiffs also request any further relief to which they are entitled.

Dated: October 14, 2011

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October, 2011, I caused a copy of the foregoing instrument to be served, in accordance with the Federal and Local Rules of Civil Procedure, on the following counsel of record:

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# EXHIBIT A

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

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|---|---|---|
| BASHE ABDI YOUSUF, *et al.*, | ) | |
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| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Civil Action No. 1:04 CV 1360 (LMB) |
| | ) | |
| MOHAMED ALI SAMANTAR, | ) | |
| | ) | |
| Defendant. | ) | |

## STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

Pursuant to 28 U.S.C. § 517, the United States respectfully submits this Statement of Interest to convey to the Court the Department of State's determination that Defendant Mohamed Ali Samantar is not immune from this suit. The various principles that underlie the foreign official immunity doctrine and the determination in this case are set forth below.[1]

### Procedural Background

1. Defendant Samantar, a U.S. resident, served in various high-ranking positions within the Somali government between 1980 and 1990, including as Minister of Defense and as Prime Minister. *See* Second Am. Compl., ¶¶ 6-7. Plaintiffs, who include U.S. citizens, allege that Samantar, while in office, exercised "command responsibility over, conspired with, or aided and abetted members of the Armed Forces of Somalia" and related entities in committing acts of

[1] The United States expresses no view on the merits of Plaintiffs' claims and takes no position on the other issues raised in Defendant's renewed motion to dismiss.

extrajudicial killings, torture, crimes against humanity, war crimes, arbitrary detention, and cruel, inhuman, or degrading treatment. *Id.* ¶ 2. The complaint further asserts that Samantar "had knowledge of and was an active participant in the enforcement of [the] system of repression and ill-treatment against members of the Isaaq clan." *Id.* ¶ 79. Plaintiffs brought this suit under the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note), and the Alien Tort Statute, 28 U.S.C. § 1350.

2. This Court dismissed Plaintiffs' Second Amended Complaint on the ground that Samantar was immune from suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611. *See* Mem. & Op., Doc. #106 (Aug. 1, 2007). Plaintiffs appealed, the Fourth Circuit reversed, and the Supreme Court affirmed the reversal and remanded the case for further proceedings. *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). Defendant filed a renewed motion to dismiss in which he argues, among other things, that Samantar is entitled to foreign official immunity. *See* Def.'s Mem., at 7-13, Doc. #139 (Nov. 29, 2010). The motion has now been fully briefed and awaits this Court's adjudication. Pls.' Opp'n, at 2-11, Doc. #143 (Dec. 14, 2010); Def.'s Reply, at 6-11, Doc. #144 (Dec. 22, 2010).

**Foreign Official Immunity Doctrine**

3. The Executive Branch's authority to determine the immunity of foreign officials from suit in United States courts is rooted in the general doctrine of foreign sovereign immunity, first enunciated in American jurisprudence in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). There, the Supreme Court held that, under the law and practice of nations, a foreign sovereign is generally immune from suits in the territory of another sovereign. *Id.* at 145-

46; *see Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004). To determine whether a foreign sovereign is immune from suit in any particular case, "Chief Justice Marshall introduced the practice since followed in the federal courts" of deferring to Executive Branch suggestions of immunity. *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945); *see Schooner Exchange*, 11 U.S. at 134. Thus, until the enactment of the FSIA in 1976, courts routinely "surrendered" jurisdiction over suits against foreign sovereigns "on recognition, allowance and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs when its certificate to that effect is presented to the court by the Attorney General." *Hoffman*, 324 U.S. at 34; *see Samantar*, 130 S. Ct. at 2284; *Ex parte Peru*, 318 U.S. 578, 587-89 (1943). The Supreme Court made clear that "[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Hoffman*, 324 U.S. at 35.

4. This deferential judicial posture was not merely discretionary, but was rooted in the separation of powers. Under the Constitution, the Executive is "the guiding organ in the conduct of our foreign affairs." *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). Given the Executive's leading foreign-policy role, it was "an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination" on questions of foreign sovereign immunity. *Hoffman*, 324 U.S. at 36; *see also Spacil v. Crowe*, 489 F.2d 614, 618 (5th Cir. 1974) ("[W]e are analyzing here the proper allocation of functions of the branches of government in the constitutional scheme of the United States. We are not analyzing the proper scope of sovereign immunity under international law.").

5. The immunity of a foreign state was, early on, generally understood to extend not only to the state, heads of state, and diplomatic officials, but also to other officials acting in an official capacity. For example, in *Underhill v. Hernandez*, 168 U.S. 250 (1897), the Supreme Court rejected a suit against a Venezuelan general for actions taken in his official capacity, holding that the defendant was protected by "[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders." *Id.* at 252.

6. In earlier proceedings in this case, the Supreme Court addressed whether the FSIA codifies the law of foreign official immunity, or instead whether it leaves the law of individual official immunity in the hands of the Executive Branch, as it was before the FSIA was passed. *Samantar*, 130 S. Ct. at 2291. The United States filed an amicus brief taking the position that the FSIA should not govern the immunity of individual foreign officials. The United States argued that the text, history, and purpose of the FSIA make clear that the Act relates principally to state, not individual, immunity. U.S. Br. at 13-24, *available at* 2010 WL 342031. And the government further argued that the conclusion that the FSIA does not govern the immunity of individual officials is reinforced by the "number of complexities that could attend the immunity determination," and the number of considerations that the Executive "might find it appropriate to take into account," *id.* at 24-25— "complexities that could not be accommodated under the rigid and ill-fitting statutory regime of the FSIA." *Id.* at 24.[2]

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[2] The relevant paragraph stated in full:

> The conclusion that the FSIA does not govern foreign official immunity is reinforced by the number of complexities that could attend the immunity determination in this and other (continued...)

7. The Supreme Court ultimately agreed with the government's proffered reading of the FSIA. The Court explained that, "[a]lthough Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity." *Samantar*, 130 S. Ct. at 2291. In so concluding, the Court found "no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity." *Id.* Thus, the Executive Branch continues to play the primary role in determining the immunity of foreign officials as an aspect of the President's

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[2](...continued)
cases—complexities that could not be accommodated under the rigid and ill-fitting statutory regime of the FSIA. Even in an ordinary case, in considering whether to recognize immunity of a foreign official under the generally applicable principles of immunity discussed above, the Executive might find it appropriate to take into account issues of reciprocity, customary international law and state practice, the immunity of the state itself, and, when appropriate, domestic precedents. But in this case, the Executive may also find the nature of the acts alleged—and whether they should properly be regarded as actions in an official capacity—to be relevant to the immunity determination. Respondents have not only relied on the ATS to assert a federal common law cause of action, but have also invoked the statutory right of action in the TVPA for damages based on torture and extrajudicial killing. And respondents, some of whom are United States citizens, have brought that action against a former Somali official who now lives in the United States, not Somalia.

U.S. Br. at 24-25. The government also noted the potential relevance of "the foreign state's position on whether the alleged conduct was in an official capacity" and whether "a foreign state [has sought] to waive the immunity of a current or former official, because immunity is accorded to foreign officials not for their personal benefit, but for the benefit of the foreign state." *Id.* at 25-26. The identification of certain considerations that the Executive could or might find it appropriate to take into account served to underscore the range of discretion properly residing in the Executive under the Constitution to make immunity determinations in particular cases. It did not reflect a judgment by the Executive that the considerations mentioned were exhaustive or would necessarily be relevant to any particular immunity determination if, as the United States argued to the Supreme Court, the responsibility for doing so was vested in the Executive and not governed by the FSIA. The present filing reflects the basis for the Executive's immunity determination in this case.

responsibility for the conduct of foreign relations and recognition of foreign governments. Accordingly, courts today must continue to defer to Executive determinations of foreign official immunity, just as they deferred to determinations of foreign state immunity before the enactment of the FSIA.

8. In *Samantar*, the Supreme Court explained that if the Department of State recognized and accepted the foreign government's request for a suggestion of immunity, "the district court surrendered its jurisdiction." 130 S. Ct. at 2284. The Executive's role traditionally has encompassed acknowledging that certain foreign government officials enjoy immunity because of their particular status as well as acknowledging whether the officials should be immune from suit for the conduct at issue. *See, e.g., Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971) (deferring to State Department's determination that alleged conduct was "of a public, as opposed to a private/commercial nature"). Taking into account the relevant principles of customary international law, the Department of State has made the attached determination on immunity in this case, and we explain below certain critical factors underlying the Executive's determination here. Because the Executive Branch is taking an express position in this case, the Court should accept and defer to the determination that Defendant is not immune from suit. *See Samantar*, 130 S. Ct. at 2284; *Isbrandtsen Tankers*, 446 F.2d at 1201 ("[O]nce the State Department has ruled in a matter of this nature, the judiciary will not interfere.").

**Grounds for Determination in this Case**

9. Upon consideration of the facts and circumstances in this case, as well as the applicable principles of customary international law, the Department of State has determined that Defendant enjoys no claim of official immunity from this civil suit. *See* State Dep't Letter, attached as Ex. 1. Particularly significant among the circumstances of this case and critical to the present Statement of Interest are (1) that Samantar is a former official of a state with no currently recognized government to request immunity on his behalf, including by expressing a position on whether the acts in question were taken in an official capacity, and (2) the Executive's assessment that it is appropriate in the circumstances here to give effect to the proposition that U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts, particularly when sued by U.S. residents.

10. The immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official. *See, e.g., Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, ¶ 61 (Feb. 14) (Merits) (a foreign official "will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity"). Former officials generally enjoy residual immunity for acts taken in an official capacity while in office. *Id.* Because the immunity is ultimately the state's, a foreign state may waive the immunity of a current or former official, even for acts taken in an official capacity. *See In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) ("Because it is the state that gives the power to lead and the ensuing trappings of power—including immunity—the state may therefore take back that which it bestowed upon its erstwhile leaders.").

11. The typical practice is for a foreign state to request a suggestion of immunity from the Department of State on behalf of its officials. *See Samantar*, 130 S. Ct. at 2284 (citing *Hoffman*, 324 U.S. at 34-36); *Ex parte Peru*, 318 U.S. 578; *Compania Espanola De Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68 (1938). Because the immunity belongs to the state, and not the individual, and because only actions by former officials taken in an official capacity are entitled to immunity under customary international law, the Executive Branch takes into account whether the foreign state understood its official to have acted in an official capacity in determining a former official's immunity or non-immunity.

12. This case presents a highly unusual situation because the Executive Branch does not currently recognize any government of Somalia. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition [of a foreign sovereign] is exclusively a function of the Executive."). Two competing putative governmental entities have sought to opine regarding the application of immunity to Samantar: the Transitional Federal Government ("TFG"), which has sought to assert residual immunity on behalf of Samantar; and the government of the "Republic of Somaliland," which has sought to waive any possible residual immunity. *See* Ex. 1. However, the United States does not currently recognize the TFG or any other entity as the government of Somalia. Absent a decision by the Executive Branch formally to recognize either entity as the government of Somalia or otherwise to recognize either of those competing assertions, neither entity is capable of waiving or asserting a claim of immunity on behalf of a former Somali official or of taking a position on whether Defendant's alleged acts were taken in an official capacity.

13. As noted, a former official's residual immunity is not a personal right. It is for the benefit of the official's state. In the absence of a recognized government authorized either to assert or waive Defendant's immunity or to opine on whether Defendant's alleged actions were taken in an official capacity, the Department of State has determined that such immunity should not be recognized here. That determination has taken into account the potential impact of such a decision on the foreign relations interests of the United States. *See* Ex. 1. In future cases presenting different circumstances, the Department could determine either that a former official of a state without a recognized government is immune from civil suit for acts taken in an official capacity, or that a former official of a state with a recognized government is not immune from civil suit for acts that were not taken in an official capacity.

14. The Executive's conclusion that Defendant is not immune is further supported by the fact that Defendant has been a resident of the United States since June 1997. *See* Br. in Support of Def.'s Mot. to Dismiss, Doc. #139, at 1 (Nov. 29, 2010). A foreign official's immunity is for the protection of the foreign state. Thus, a former foreign official's decision to permanently reside in the United States is not, in itself, determinative of the former official's immunity from suit for acts taken while in office. Basic principles of sovereignty, nonetheless, provide that a state generally has a right to exercise jurisdiction over its residents. *See, e.g., Schooner Exchange*, 11 U.S. at 136. In the absence of a recognized government that could properly ask the Executive Branch to suggest the immunity of its former official, the Executive has determined in this case that the interest in permitting U.S. courts to adjudicate claims by and against U.S. residents warrants a denial of immunity.

**Conclusion**

For the foregoing reasons, the United States has determined that Defendant Samantar is not entitled to official immunity in the circumstances of this case.

Dated: February 14, 2011

Respectfully submitted,

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*Counsel for the United States*

**CERTIFICATE OF SERVICE**

I hereby certify, this 14th day of February, 2011, that a true copy of the foregoing was sent via U.S. Mail and electronic mail to the following counsel of record in this matter:

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# EXHIBIT 1

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

February 11, 2011

The Honorable Tony West, Esq.
Assistant Attorney General
Civil Division
United States Department of Justice
950 Pennsylvania Ave. N.W.
Washington D.C. 20530

*Re: Yousuf v. Samantar*, Civil Action No 01-13760 (E.D. Va.)

Dear Assistant Attorney General West:

I write to request that the Department of Justice convey to the U.S. District Court for the Eastern District of Virginia in the above-referenced case the determination of the Department of State that Defendant Mohamed Ali Samantar does not enjoy immunity from the jurisdiction of U.S. courts with respect to this action.

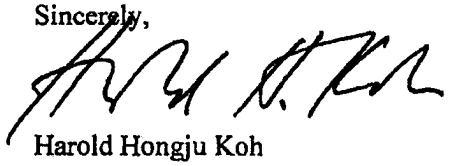
The Department of State has reviewed this matter carefully and has concluded that Defendant Mohamed Ali Samantar is not immune from the Court's jurisdiction in the circumstances of this case. Defendant Samantar, a U.S. resident, is being sued by U.S. citizen and Somali plaintiffs in the United States District Court for the Eastern District of Virginia under the Torture Victim Protection Act (TVPA) and the Alien Tort Claims Act (ATCA) for alleged responsibility for torture, extrajudicial killings, and other atrocities. Samantar is a former official of a state with no current government formally recognized by the United States, who generally would enjoy only residual immunity, unless waived, and even then only for actions taken in an official capacity.

Defendant Samantar served as First Vice President, Minister of Defense, and later as Prime Minister for the now-defunct Somali government of Mohamed Siad Barre during the 1980s. In January 1991, armed opposition factions drove the Barre regime from power, resulting in the complete collapse of Somalia's central government. Thereafter, Samantar fled Somalia, and according to plaintiffs, has been living in Virginia since 1997. Following the collapse of the Barre regime, reconciliation conferences among warring Somali factions have resulted in the creation of a transitional Somali government, the Transitional Federal Government (TFG). Although the United States recognized the Barre regime, since the fall of that government, the United States has not recognized any entity as the government of Somalia. The United States continues to recognize the State of Somalia, and supports the efforts of the TFG to establish a viable central government, but does not recognize the TFG or any other entity as the government of Somalia. The TFG has sought to assert immunity for Samantar, while a competing entity, the putative government of the "Republic of Somaliland," has sought to waive any possible

immunity. No recognized foreign government is thus available either to assert or waive any immunity Samantar might enjoy.

In light of these circumstances, taking into account the relevant principles of customary international law, and considering the overall impact of this matter on the foreign policy of the United States, the Department of State has determined that Defendant Samantar does not enjoy immunity from the jurisdiction of U.S. courts with respect to this action. Accordingly, the Department of State requests that the Department of Justice submit to the district court an appropriate filing setting forth this immunity determination.

Sincerely,



Harold Hongju Koh
The Legal Adviser

# EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**Abukar Hassan Ahmed,**

**Plaintiff,**

**v.**

**Abdi Aden Magan,**

**Defendant.**

**Case No. 2:10-cv-342**
**Judge Smith**
**Magistrate Judge Abel**

## STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

Pursuant to 28 U.S.C. § 517, the United States respectfully submits this Statement of Interest to convey to the Court the Department of State's determination that Defendant Abdi Aden Magan is not immune from this suit. The various principles that underlie the foreign official immunity doctrine and the determination in this case are set forth below.[1]

### Procedural Background

1. According to Plaintiff's complaint, Defendant Magan, a U.S. resident, "held the rank of Colonel and served as Chief of the [National Security Service] Department of Investigations – National Level ("NSS Investigations") at NSS Headquarters in the capital city of Mogadishu, Somalia." *See* Compl., ¶ 8; *see also* Def.'s Mot. to Dismiss, at 2-3, Doc. #18

[1] The United States expresses no view on the merits of Plaintiff's claims and takes no position on the other issues raised in Defendant's motion to dismiss.

(June 11, 2010). Plaintiff, "a native of Somalia and a naturalized citizen and resident of the United Kingdom," alleges that Defendant, while in office, "directed and participated in the interrogation and torture of Plaintiff and other civilians perceived as opponents of the Barre regime." *Id.* ¶¶ 9-10. The complaint further asserts that Magan "stood at the pinnacle of NSS Investigations, which systematically targeted ordinary citizens perceived as opponents of the Barre regime and subjected them to prolonged arbitrary detention, brutal interrogation, and torture." *Id.* ¶ 17. The complaint also alleges that Magan directly ordered Plaintiff's torture. *Id.* ¶¶ 36-37. Plaintiff brought this suit under the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note), and the Alien Tort Statute, 28 U.S.C. § 1350.

2. Defendant filed a motion to dismiss in which he argues, among other things, that Magan is entitled to foreign official immunity. *See* Def.'s Mot. to Dismiss, at 4-9, Doc. #18 (June 11, 2010). The motion has now been fully briefed and awaits this Court's adjudication. *See* Pl.'s Opp'n, at 3-11, Doc. #25 (July 6, 2010).

**Foreign Official Immunity Doctrine**

3. The Executive Branch's authority to determine the immunity of foreign officials from suit in United States courts is rooted in the general doctrine of foreign sovereign immunity, first enunciated in American jurisprudence in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). There, the Supreme Court held that, under the law and practice of nations, a foreign sovereign is generally immune from suits in the territory of another sovereign. *Id.* at 145-46; *see Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004). To determine whether a foreign sovereign is immune from suit in any particular case, "Chief Justice Marshall introduced

the practice since followed in the federal courts" of deferring to Executive Branch suggestions of immunity. *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945); *see Schooner Exchange*, 11 U.S. at 134. Thus, until the enactment of the Foreign Sovereign Immunities Act ("FSIA") in 1976, 28 U.S.C. §§ 1330, 1602-1611, courts routinely "surrendered" jurisdiction over suits against foreign sovereigns "on recognition, allowance and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs when its certificate to that effect is presented to the court by the Attorney General." *Hoffman*, 324 U.S. at 34; *see Samantar v. Yousuf*, 130 S. Ct. 2278, 2284 (2010); *Ex parte Peru*, 318 U.S. 578, 587-89 (1943). The Supreme Court made clear that "[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Hoffman*, 324 U.S. at 35.

4. This deferential judicial posture was not merely discretionary, but was rooted in the separation of powers. Under the Constitution, the Executive is "the guiding organ in the conduct of our foreign affairs." *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). Given the Executive's leading foreign-policy role, it was "an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination" on questions of foreign sovereign immunity. *Hoffman*, 324 U.S. at 36; *see also Spacil v. Crowe*, 489 F.2d 614, 618 (5th Cir. 1974) ("[W]e are analyzing here the proper allocation of functions of the branches of government in the constitutional scheme of the United States. We are not analyzing the proper scope of sovereign immunity under international law.").

5. The immunity of a foreign state was, early on, generally understood to extend not only to the state, heads of state, and diplomatic officials, but also to other officials acting in an

official capacity. For example, in *Underhill v. Hernandez*, 168 U.S. 250 (1897), the Supreme Court rejected a suit against a Venezuelan general for actions taken in his official capacity, holding that the defendant was protected by "[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders." *Id.* at 252.

6. The Supreme Court addressed whether the FSIA codifies the law of foreign official immunity, or instead whether it leaves the law of individual official immunity in the hands of the Executive Branch, as it was before the FSIA was passed. *Samantar*, 130 S. Ct. at 2291. The United States filed an amicus brief in that case taking the position that the FSIA should not govern the immunity of individual foreign officials. The United States argued that the text, history, and purpose of the FSIA make clear that the Act relates principally to state, not individual, immunity. U.S. Br. at 13-24, *available at* 2010 WL 342031. And the government further argued that the conclusion that the FSIA does not govern the immunity of individual officials is reinforced by the "number of complexities that could attend the immunity determination," and the number of considerations that the Executive "might find it appropriate to take into account," *id.* at 24-25— "complexities that could not be accommodated under the rigid and ill-fitting statutory regime of the FSIA." *Id.* at 24.[2]

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[2] The relevant paragraph stated in full:

> The conclusion that the FSIA does not govern foreign official immunity is reinforced by the number of complexities that could attend the immunity determination in this and other cases—complexities that could not be accommodated under the rigid and ill-fitting statutory regime of the FSIA. Even in an ordinary case, in considering whether to recognize immunity of a foreign official under the generally applicable principles of immunity discussed above, the Executive might find it appropriate to take into account issues of reciprocity, customary international law and state practice, the immunity of the

7. The Supreme Court ultimately agreed with the government's proffered reading of the FSIA. The Court explained that, "[a]lthough Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity." *Samantar*, 130 S. Ct. at 2291. In so concluding, the Court found "no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity." *Id.* Thus, the Executive Branch continues to play the primary role in determining the immunity of foreign officials as an aspect of the President's responsibility for the conduct of foreign relations and recognition of foreign governments. Accordingly, courts today must continue to defer to Executive determinations of

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> state itself, and, when appropriate, domestic precedents. But in this case, the Executive may also find the nature of the acts alleged—and whether they should properly be regarded as actions in an official capacity—to be relevant to the immunity determination. Respondents have not only relied on the ATS to assert a federal common law cause of action, but have also invoked the statutory right of action in the TVPA for damages based on torture and extrajudicial killing. And respondents, some of whom are United States citizens, have brought that action against a former Somali official who now lives in the United States, not Somalia.

U.S. Br. at 24-25. The government also noted the potential relevance of "the foreign state's position on whether the alleged conduct was in an official capacity" and whether "a foreign state [has sought] to waive the immunity of a current or former official, because immunity is accorded to foreign officials not for their personal benefit, but for the benefit of the foreign state." *Id.* at 25-26. The identification of certain considerations that the Executive could or might find it appropriate to take into account served to underscore the range of discretion properly residing in the Executive under the Constitution to make immunity determinations in particular cases. It did not reflect a judgment by the Executive that the considerations mentioned were exhaustive or would necessarily be relevant to any particular immunity determination if, as the United States argued to the Supreme Court, the responsibility for doing so was vested in the Executive and not governed by the FSIA. The present filing reflects the basis for the Executive's immunity determination in this case.

foreign official immunity, just as they deferred to determinations of foreign state immunity before the enactment of the FSIA.

8. In *Samantar*, the Supreme Court explained that if the Department of State recognized and accepted the foreign government's request for a suggestion of immunity, "the district court surrendered its jurisdiction." 130 S. Ct. at 2284. The Executive's role traditionally has encompassed acknowledging that certain foreign government officials enjoy immunity because of their particular status as well as acknowledging whether the officials should be immune from suit for the conduct at issue. *See, e.g., Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971) (deferring to State Department's determination that alleged conduct was "of a public, as opposed to a private/commercial nature"). Taking into account the relevant principles of customary international law, the Department of State has made the attached determination on immunity in this case, and we explain below certain critical factors underlying the Executive's determination here. *See* State Dep't Letter, attached as Ex. 1. Because the Executive Branch is taking an express position in this case, the Court should accept and defer to the determination that Defendant is not immune from suit.[3] *See Samantar*, 130 S. Ct. at 2284; *Isbrandtsen Tankers*, 446 F.2d at 1201 ("[O]nce the State Department has ruled in a matter of this nature, the judiciary will not interfere.").

[3] After the Supreme Court's remand in *Samantar*, the United States District Court for the Eastern District of Virginia applied these principles and deferred to the Executive Branch's determination: "The government has determined that the defendant does not have foreign official immunity. Accordingly, defendant's common law sovereign immunity defense is no longer before the Court, which will now proceed to consider the remaining issues in defendant's Motion to Dismiss." *Yousuf, et al. v. Samantar*, Civ. No. 04-1360, Doc. #148 (E.D. Va. Feb. 15, 2011).

**Grounds for Determination in this Case**

9. Upon consideration of the facts and circumstances in this case, as well as the applicable principles of customary international law, the Department of State has determined that Defendant enjoys no claim of official immunity from this civil suit. *See* Ex. 1. Particularly significant among the circumstances of this case and critical to the present Statement of Interest are (1) that Magan is a former official of a state with no currently recognized government to request immunity on his behalf, including by expressing a position on whether the acts in question were taken in an official capacity, and (2) the Executive's assessment that it is appropriate in the circumstances here to give effect to the proposition that U.S. residents like Magan who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts.

10. The immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official. *See, e.g., Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, ¶ 61 (Feb. 14) (Merits) (a foreign official "will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity"). Former officials generally enjoy residual immunity for acts taken in an official capacity while in office. *Id.* Because the immunity is ultimately the state's, a foreign state may waive the immunity of a current or former official, even for acts taken in an official capacity. *See In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) ("Because it is the state that gives the power to lead and the ensuing trappings of power—including immunity—the state may therefore take back that which it bestowed upon its erstwhile leaders.").

11. The typical practice is for a foreign state to request a suggestion of immunity from the Department of State on behalf of its officials. *See Samantar*, 130 S. Ct. at 2284 (citing *Hoffman*, 324 U.S. at 34-36); *Ex parte Peru*, 318 U.S. 578; *Compania Espanola De Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68 (1938). Because the immunity belongs to the state, and not the individual, and because only actions by former officials taken in an official capacity are entitled to immunity under customary international law, the Executive Branch takes into account whether the foreign state understood its official to have acted in an official capacity in determining a former official's immunity or non-immunity.

12. This case presents a highly unusual situation because the Executive Branch does not currently recognize any government of Somalia. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition [of a foreign sovereign] is exclusively a function of the Executive."). As noted, a former official's residual immunity is not a personal right. It is for the benefit of the official's state. In the absence of a recognized government authorized either to assert or waive Defendant's immunity or to opine on whether Defendant's alleged actions were taken in an official capacity, the Department of State has determined that such immunity should not be recognized here. That determination has taken into account the potential impact of such a decision on the foreign relations interests of the United States. *See* Ex. 1. In future cases presenting different circumstances, the Department could determine either that a former official of a state without a recognized government is immune from civil suit for acts taken in an official capacity, or that a former official of a state with a recognized government is not immune from civil suit for acts that were not taken in an official capacity.

13. The Executive's conclusion that Defendant is not immune is further supported by Defendant's statement that he has been a resident of the United States since May 2000. *See* Def.'s Mot. to Dismiss, Doc. #18, at 3 (June 11, 2010). A foreign official's immunity is for the protection of the foreign state. Thus, a former foreign official's decision to permanently reside in the United States is not, in itself, determinative of the former official's immunity from suit for acts taken while in office. Basic principles of sovereignty, nonetheless, provide that a state generally has a right to exercise jurisdiction over its residents. *See, e.g., Schooner Exchange*, 11 U.S. at 136. In the absence of a recognized government that could properly ask the Executive Branch to suggest the immunity of its former official, the Executive has determined in this case that the interest in permitting U.S. courts to adjudicate claims against U.S. residents warrants a denial of immunity.

**Conclusion**

For the foregoing reasons, the United States has determined that Defendant Magan is not entitled to official immunity in the circumstances of this case.

Dated: March 15, 2011

Respectfully submitted,

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*Counsel for the United States*

**CERTIFICATE OF SERVICE**

I hereby certify that on March 15, 2011, the foregoing Statement of Interest was filed using the Court's CM/ECF system, which will notify all counsel of record in this matter.

/s/ Eric J. Beane
Eric J. Beane
Trial Attorney

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

March 15, 2011

The Honorable Tony West, Esq.
Assistant Attorney General
Civil Division
United States Department of Justice
950 Pennsylvania Ave. N.W.
Washington D.C. 20530

*Re: Ahmed v. Magan*, Case No. 2:10-cv-342 (S.D. Ohio)

Dear Assistant Attorney General West:

I write to request that the Department of Justice convey to the United States District Court for the Southern District of Ohio in the above-referenced case the determination of the Department of State that Defendant Abdi Aden Magan does not enjoy immunity from the jurisdiction of U.S. courts with respect to this action. The Court invited the views of the Department on this matter and the U.S. Government indicated they would be provided by March 15, 2011.

The Department of State has reviewed this matter carefully and has concluded that Defendant Abdi Aden Magan is not immune from the Court's jurisdiction in the circumstances of this case. Defendant Magan, a U.S. resident, is being sued by a U.K. citizen in the United States District Court for the Southern District of Ohio under the Torture Victim Protection Act (TVPA) and the Alien Tort Claims Act (ATCA) for alleged responsibility for torture, arbitrary detention, and cruel, inhuman or degrading treatment. Among other things, Plaintiff alleges that Defendant Magan directly ordered his torture. Magan is a former official of a state with no current government formally recognized by the United States, who generally would enjoy only residual immunity, unless waived, and even then only for actions taken in an official capacity.

Defendant Magan served as a Colonel in the National Security Service of Somalia (NSS) and as Chief of the NSS Department of Investigations - National Level for the now-defunct Somali government of Mohamed Siad Barre from approximately 1988-1990. In January 1991, armed opposition factions drove the Barre regime from power, resulting in the complete collapse of Somalia's central government. Thereafter, Magan fled Somalia, and has been living in Ohio since 2000. Following the collapse of the Barre regime, reconciliation conferences among warring Somali factions have resulted in the creation of a transitional Somali government, the Transitional Federal Government (TFG). Although the United States recognized the Barre regime, since the fall of that government, the United States has not recognized any entity as the government of Somalia. The United States continues to recognize the State of Somalia, and supports the efforts of the TFG to establish a viable central government, but does not recognize

the TFG or any other entity as the government of Somalia. No recognized foreign government is thus available either to assert or waive any immunity Magan may enjoy.

In light of these circumstances, taking into account the relevant principles of customary international law, and considering the overall impact of this matter on the foreign policy of the United States, the Department of State has determined that Defendant Magan does not enjoy immunity from the jurisdiction of U.S. courts with respect to this action. Accordingly, the Department of State requests that the Department of Justice submit to the district court an appropriate filing setting forth this immunity determination.

Sincerely,

Harold Hongju Koh
The Legal Adviser

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

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| JANE DOE and JOHN DOE<br><br>Plaintiffs,<br><br>v.<br><br>YUSUF ABDI ALI,<br><br>Defendant. | ) | Civil Action No. 1:05 CV 701 (LMB/BRP) |

**[PROPOSED] ORDER**

Upon consideration of Plaintiffs' Motion to Lift Stay, and the memoranda in support thereof and any opposition thereto, it is hereby:

ORDERED that Plaintiffs' motion is GRANTED. The Court's stay order dated August 5, 2005 (Dkt. No. 26) is VACATED and the District Clerk is directed to restore this action to the Court's active docket and forward copies of this Order to counsel of record.

It is further ORDERED that a PRETRIAL CONFERENCE will be held on _____, 2011, at __:__ _.m. before a magistrate judge. The parties shall confer prior to this conference to develop a discovery plan that will complete discovery by _____, 201__.

Entered this ____ day of _____, 2011.

_____
Hon. Leonie M. Brinkema
United States District Judge