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

BASHE ABDI YOUSUF, *et alii,*	*	
	*	
Plaintiffs,	*	
	*	
versus	*	**Civil Action No. 1:04 CV 1360 (LMB/JFA)**
	*	
MOHAMED ALI SAMANTAR,	*	
	*	
Defendant.	*	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, your Defendant Mohamed Ali Samantar, by and through undersigned counsel, hereby moves this Honorable Court for summary judgment on all claims set forth in the Second Amended Complaint of Plaintiffs Bashe Abdi Yousuf, Aziz Mohamed Deria (in his capacities as the personal representative of the estates of Mohamed Deria Ali, Mustafa Mohamed Deria, James Does I, and James Does II), John Doe I, and John Doe II (collectively, "Plaintiffs"), on the grounds of lack of subject-matter jurisdiction, as well as pursuant to the act of state doctrine, the running of the statute of limitations, and the failure to state claims cognizable under the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victims Protection Act, 28 U.S.C. § 1350 note.

A Brief in Support of Defendant's Motion for Summary Judgment accompanies the instant Motion.

WHEREFORE, your Defendant respectfully requests that this Court enter an appropriate ORDER awarding summary pursuant to Defendant under Rule 56 of the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: 21 November 2011

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Defendant.	*	

DEFENDANT SAMANTAR'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Local Civil Rule 56, Defendant Mohamed Ali Samantar (hereinafter: "Samantar" or "Defendant"), by and through undersigned counsel, hereby sets forth the material facts as to which Samantar contends there is no genuine issue.

1. Samantar served as First Vice President and, in the President's absence, as Acting President of Somalia, from January 1976 to December 1986. Affidavit of Mohamed Ali Samantar (hereinafter: "Samantar Affidavit"), Memorandum in Support of Defendant Samantar's Motion to Dismiss (Docket Entry ("DE") #90, Exhibit 1), at ¶¶ 3, 6.

2. Samantar also served concurrently as Minister of Defense from 1971 to 1980 and from 1982 to 1986. *Id.* at ¶ 2.

3. In January 1987, Samantar was appointed Prime Minister and served in that position until approximately September 1990. *Id.* at ¶ 4.

4. During his various terms of office, Samantar conducted official state visits to the United States during which he met with then Vice President George Bush, Vice President Dan Quayle, and Secretary of State James Baker among other high-ranking officials. *Id.* at ¶ 8.

5. In 1990, Samantar stepped down as Prime Minister. The following year, after the collapse of the regime of President Muhammad Siad Barre, Samantar sought temporary asylum in Kenya and then emigrated to Italy. In June 1997, Samantar moved to the United States and took up his current residence in Fairfax, Virginia. *Id.* at ¶¶ 9-10.

6. Plaintiffs and the victims of the alleged abuses set out in the complaint are natives of Somalia and members of the Isaaq clan. Second Amended Complaint ("Complaint") (DE #76, Ex. 1) at ¶19.

Respectfully submitted,

Dated: 21 November 2011

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	*	
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BRIEF IN SUPPORT OF DEFENDANT SAMANTAR'S MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF FACTS

Defendant Mohamed Ali Samantar ("Samantar" or "Defendant") served as First Vice President and, in the President's absence, as Acting President of Somalia from January 1976 to December 1986. Affidavit of Mohamed Ali Samantar ("Samantar Affidavit"), Memorandum in Support of Defendant Samantar's Motion to Dismiss (Docket Entry ("DE") #90, Exhibit 1), at ¶¶ 3, 6. He also served concurrently as Minister of Defense from 1971 to 1980 and from 1982 to 1986. *Id.* at ¶ 2. In January 1987, Samantar was appointed Prime Minister and served in that position until approximately September 1990. *Id.* at ¶ 4. During his various terms of office, Samantar conducted official state visits to the United States during which he met with then Vice President George Bush, Vice President Dan Quayle, and Secretary of State James Baker among other high-ranking officials. *Id.* at ¶ 8.

In 1990, Samantar stepped down as Prime Minister. The following year, after the collapse of the regime of President Muhammad Siad Barre, Samantar sought temporary asylum in Kenya and then emigrated to Italy. In June 1997, Samantar moved to the United States and took up his current residence in Fairfax, Virginia. *Id.* at ¶¶ 9-10.

Plaintiffs and the victims of the alleged abuses set out in the complaint are natives of Somalia and members of the Isaaq clan. Plaintiffs allege that the Somali Government of which Samantar was a part undertook a "violent campaign to eliminate Isaaq clan opposition to the Government" and that this campaign "intentionally disregarded the distinction between civilians and [] fighters" within the Somali National Movement, an insurgency group established by members of the Isaaq clan. Second Amended Complaint ("Complaint") (DE #76, Ex. 1) at ¶¶ 19-21. Samantar allegedly should be liable for the abuses committed during this campaign because he intended to "further this system of repression and ill-treatment" and was "reckless or

indifferent to the risk" that the abuses alleged would occur during this campaign. *Id.* at ¶¶ 80, 83.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE NONJUDICIABLE IN THAT THEY WOULD REQUIRE THIS COURT TO PASS UPON FOREIGN ACTS OF STATE.

Adjudication of Plaintiffs' claims is barred by the so-called act of state doctrine. This prudential principle precludes federal courts from passing on the validity of a foreign government's official acts. "In the Eastern District of Virginia, the act of state doctrine applies when: (1) the act undertaken by the foreign state is public, and (2) the foreign state completes the act within the its territory." *Dominican Republic v. AES Corp.*, 466 F. Supp. 2d 680, 694-95 (E.D. Va. 2006) (declining to apply the doctrine because the outcome of the case did not turn upon the foreign governmental act in question).

The Second Amended Complaint asserts that the particular acts of which Samantar is accused were taken as part of an official government campaign "against perceived opponents, including civilians from disfavored clans." Complaint (DE #76, Ex. 1) at ¶ 17. Specifically, "[d]uring the 1980s, when Defendant Samantar was Minister of Defense and then Prime Minister, the government changed its approach [from economic measures] and unleashed the Armed Forces in a violent campaign to eliminate Isaaq clan opposition." *Id.* at ¶ 19. Military actions are quintessentially official acts. Thus, "if a court determines the military officer acted on behalf of a recognized government and if the lawsuit turns on a challenge to the officer's order, then the act of state doctrine bars adjudication of the matter." *Roe v. Unocal Corp.*, 70 F. Supp. 2d 1073, 1079 (C.D. Cal. 1999) (dismissing on act of state grounds a claim to compensation by a Burmese soldier for work performed for an American corporation under

orders from the Burmese military); *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 361-62 (1993) ("however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as particularly sovereign in nature").

In asserting an attempt to target a civilian population in order to further a military objective during civil unrest, the alleged facts resemble, in kind, if not degree, the facts in the case in which the U.S. Supreme Court first articulated the dimensions of the act of state doctrine. The plaintiff in *Underhill v. Hernandez*, 168 U.S. 250 (1897), an American citizen, complained that, though a noncombatant, he was the victim of "assaults and affronts" by order of a civil war military commander. *Id.* at 251. In language apt here, the Court held that "The 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, must necessarily extend to the agents of governments ruling by paramount force as a matter of fact." 168 U.S. at 251; *see also Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d at 1032; *In re Refined Petroleum Products*, 649 F. Supp. 2d at 588.

It is no challenge to the application of the act of state doctrine that the particular acts that are immune from challenge might have violated the law of the state or international law. In *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004), the conduct of local government officials of the People's Republic of China in repressing the Falun Gong movement was found to be protected by the act of state doctrine despite the claim that the repressive conduct transgressed the official laws of the state and were authorized only by covert unofficial policy. *Id.* at 1288-1307. Similarly, the conduct was found to be exempt from scrutiny despite arguments that the repressive actions violated substantially the same international norms alleged here to have

been violated by Samantar. *Id.*

Consideration of the claims against Samantar will cause this court to pass upon the legality of what Plaintiffs acknowledge to be the conduct of a military campaign incident to a civil war, and clan rivalries at issue in that civil war still inform U.S. efforts to achieve peace in Somalia. The claims accordingly are not subject to adjudication as raising political questions and as calling into question the internal acts of the Somali state, and judgment should respectfully be awarded to Samantar.

II. PLAINTIFFS' CLAIMS ARE TIME-BARRED.

The facts alleged by Plaintiffs in the Second Amended Complaint establish that the statute of limitations on Plaintiffs' claims had run prior to the commencement of this action, and the action accordingly is time barred.

A. In the absence of tolling, the limitations period had run at the time of commencement of this suit.

Plaintiffs allege that the victims suffered injuries and death at the hands of the Somali Armed Forces and others between 1981 and 1989. Samantar entered the United States in 1997. Plaintiffs filed their suit on November 10, 2004, more than 23 years after the allegation of first injury and 15 years after the occurrence of the final alleged event.

The statute limitations for claims under the Torture Victims Protection Act ("TVPA") is ten years. 28 U.S.C. § 1350 note, § 2(c). The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, contains no statute of limitations, but, since the enactment of the TVPA, it has been generally found, under borrowing principles, to be identical to that under TVPA. *See, e.g., Van Tu v. Koster*, 364 F.3d 1196, 1199 (10th Cir. 2004); *Deutsch v. Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003); *Hilao v. Marcos*, 103 F.3d 767, 773 (9th Cir. 1996). Regardless whether the limitations

period is ten years or a shorter period of two years if a more general preference for borrowing the most closely analogous state limitations period is followed,[1] the limitations period has run on the instant claims, and, absent the tolling of the limitations period, Samantar is respectfully entitled to judgment.

B. Equitable tolling is not available for claims under the TVPA or ATS.

In reliance on language in the Senate committee report that accompanied the TVPA, several courts have held that the running of the statute of limitations under the TVPA and ATS can be tolled in appropriate circumstances. *See, e.g., Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir. 2009). Equitable tolling is permissible, however, only where it is "[not] inconsistent with the text of the relevant statute." *See United States v. Beggerly*, 524 U.S. 38, 48 (1998). In *Beggerly*, the Supreme Court held that the 12-year statute of limitations under the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a(g), could not be tolled in large part because, as a consequence of "the unusually generous nature of the QTA's limitations time period, extension of the statutory period by additional equitable tolling would be unwarranted." 524 U.S. at 48-49.

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1 When a federal statute contains no express limitations period, the courts generally borrow the limitations period from the most analogous state statute unless a "rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when federal policies at stake and practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking," *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 35 (1995) (citation and internal quotation marks omitted). The only court to determine the limitations period for a claim under the ATS begun prior to the enactment of the TVPA in 1992 looked to the state law limitations period for personal injury actions applicable to the claim. The limitations period under Virginia law for personal injury claims is two years. Va. Code Ann. § 8.01-243(A). Following the enactment of the TVPA, courts have applied the TVPA limitations period of ten years to ATS claims, including claims other than those to which the TVPA might also pertain. *See, e.g., Deutsch v. Turner*, 324 F.3d at 717. This has made particular sense when substantive provisions of the TVPA have been given retroactive effect. Since retroactive effect is not appropriate here (see section IV.A. *infra*), an argument may be made that the traditional preference for borrowing a state limitations norm should prevail.

In *The Heheros v. Deutsche Afrika-Linien GMBLT & Co.*, 2006 WL 182078, at *9 (D.N.J. 2006), *aff'd*, 232 Fed. Appx. 90 (3d Cir. 2007), this principle was applied to the TVPA, in an action under the ATS, in order to reject equitable tolling in a claim similar to the instant one, by members of a tribe for alleged genocide in Namibia. As the court noted, "[T]he more generous 10 year limitations period [of the TVPA] imputed to the [ATS] permits alien plaintiffs to bring timely claims despite hindrances such as 'difficulties of gathering evidence sufficient to support a complaint; unavailability or hesitation of witnesses who may fear reprisal by a corrupt regime; other delays caused by ongoing human rights violations.'" *Id.* (quoting *Jama v. I.N.S.*, 343 F. Supp. 2d 338, 366 (D.N.J. 2004)). The remedial scheme of the TVPA, in providing an extended period of time for addressing any physical or political impediments to bringing a case, manifests an intention that equitable tolling not be available under such circumstances. [2] The ten-year limitations period in the TVPA and the identical period courts have found for claims made under the ATS thus suggest that equitable tolling is inconsistent with the provisions of the TVPA.

That equitable tolling should not be available under the TVPA and ATS also finds compelling support in the legislative history of the TVPA. The law as enacted was the text as it passed the House of Representatives. *See* Pub. L. No. 102-256, H.R. 2092, 106 Stat. 73 (Mar. 12, 1992). In adopting the House bill, which contained no reference to equitable tolling, the Congress rejected a provision of the Senate bill which recited, "All principles of equitable tolling, however, shall apply in calculating this limitation period." *See* S. Rep. No. 102-249, 102nd Cong., 1st Sess., 1991 WL 258662, at *2 (text of S. 313, § 2(c)). The excision of this

2 It is significant that the court in *The Hereros* also noted, consonant with Samantar's argument below as to the extent of any period of possible tolling, that those cases that have found tolling to be available due to a fear of reprisal and difficulty in obtaining access to the courts have limited that tolling to those periods when the oppressive regime remained in authority, a circumstance which the Plaintiffs have acknowledged ceased to exist in Somalia in 1991. 2006 WL 182078 at *8; Complaint at ¶ 24.

language not only strongly suggest that Congress did not intend for the TVPA, or by extension the ATS, to allow for equitable tolling, it also arguably made nugatory the language in the Senate report supporting broad availability for equitable tolling, language on which courts have relied in finding that the running of the statute had tolled. *See, e.g., Chavez*, 559 F.3d at 492.

C. Plaintiffs have not established a basis for equitable tolling.

Even if equitable tolling were potentially available to claimants under the TVPA and ATS, the Plaintiffs have not presented circumstances sufficient to satisfy the strict standards for tolling set out in the legislative history and court decisions. As the Supreme Court has noted, "Federal courts have typically extended equitable relief only sparingly." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). The Fourth Circuit determines whether to permit equitable tolling according to the "extraordinary circumstances" test, which requires a plaintiff to present (1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time. *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (citing *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000)). As otherwise stated by the Fourth Circuit, equitable tolling "must be reserved for those rare instances where – due to circumstances external to the party's own conduct – it would be unconscionable to enforce the limitations period against the party and gross injustice would result." *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000). Plaintiffs bear the burden of adducing facts to demonstrate the existence of such extraordinary circumstances. *Hall v. Johnson*, 332 F. Supp. 2d 904, 908 (E.D. Va. 2004).

Plaintiffs have alleged two bases for equitable tolling: (a) Samantar's establishment of residence in the United States in 1997; and (b) the "chaos and anarchy that pervaded Somalia until at least 1997," which prevented "investigation necessary to bring a case." Plaintiffs' First Opposition (DE #9) at 13. Neither circumstance warrants equitable tolling.

1. The running of the statute of limitations could not be tolled after Samantar entered Italy.

For their claim that tolling is available whenever a defendant is outside the United States, Plaintiffs have relied on language in the Senate TVPA committee report and several cases that, in turn, relied on the Senate report. Plaintiffs' Opposition to [third] Motion to Dismiss ("Plaintiffs' Third Opposition") (DE # 96) at 18 (citing S. Rep. No. 102-249, 1991 WL 258662, at **10-11); *see, e.g., Arce v. Garcia*, 434 F.3d 1254, 1264 (11th Cir. 2006); *Jean v. Dorelian*, 431 F.3d 776, 779-80 (11th Cir. 2005). As noted above, however, the Senate report cannot be used as authority for equitable tolling since it comments upon a provision of the Senate bill that was stricken from the legislation before final adoption. The House committee report contains no reference to tolling during times when a prospective defendant may have resided outside the United States. *See* H.R. Rep. No. 102-367(I), 102nd Cong., 1st Sess., 1991 WL 255964, at *5.

Even if the expansive language of the Senate report did provide guidance as to equitable tolling, this action still would not be timely against Samantar. The Senate report recites that the statute "should be tolled during the time the defendant was absent from the United States *or from any jurisdiction in which the same or a similar action arising from the same facts may be maintained by the plaintiff, provided that the remedy in that jurisdiction is adequate and available.*" S. Rep. No. 102-249, 1991 WL 258662, at *11 (emphasis added). The statute of limitations thus would have begun to run in 1991 when Samantar took up residence in Italy prior to entering the United States, since Italy offered Plaintiffs an adequate and available remedy according to the affidavit of Defendant's Italian law expert, Cosimo Rucellai, the founder and former senior partner of a Milan law firm. Mr. Rucellai, confirms, that Samantar could have been sued under all of the instant causes of action for the damages that Plaintiffs allegedly

suffered. Affidavit of Cosimo Rucellai, Exhibit 4 to Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss Second Amended Complaint (DE # 144, Ex. 4), at ¶¶ 5-11. The statute of limitations could accordingly have begun to run no later than 1991, and the current action, begun in 2004, is untimely.

2. Plaintiffs are not entitled to the tolling of the running of the statute of limitations on the basis of any fear of reprisals.

As a second basis for tolling, Plaintiffs assert that, "[u]ntil approximately 1997, [Plaintiffs'] reasonable fear of reprisals against themselves or members of their families still residing in Somalia served as an insurmountable deterrent" to bringing this action. Complaint (DE #76, Ex.1) at ¶ 87. This argument is also unavailing since, even if the assertion were properly supported and accurate, a fear of reprisal, when the abusive regime no longer is in authority, cannot warrant equitable tolling.

First, even the expansive language of the Senate report did not contemplate tolling based upon a plaintiff's personal circumstances except where the plaintiff was himself "imprisoned or otherwise incapacitated." S. Rep. No. 102-249, 1991 WL 258662, *11. Plaintiffs do not allege in the Complaint or any other pleadings that, as a consequence of the conditions in Somalia, any of the Plaintiffs suffered imprisonment or other incapacity through November 1994 such that the filing of this action in November 2004 would have been timely. Indeed, only one of the Plaintiffs, John Doe I, is alleged specifically to have been residing in Somalia on or after November 1994. Complaint (DE #76, Ex. 1), at ¶¶ 51 inter alia.

Second, the domestic circumstances under which courts have found a fear of reprisal to be a basis for equitable tolling have been limited, in the language of a recent case reviewing such circumstances, to "civil unrest at the hands of authoritarian governments that directly prohibited

the plaintiffs from bringing their claims to light." *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 694 (S.D. Tex. 2009); *see also Hilao v. Marcos*, 103 F.3d at 773 ("[a]ny action against Marcos [for torture, summary execution, and disappearances] . . . was tolled during the time Marcos was president" because of fear of intimidation and reprisals, but no longer). By contrast, the Plaintiffs assert in their Complaint that the alleged "human rights abuses were the hallmark of the military government that came to power in 1969 and brutally ruled Somalia until the government was toppled in 1991." Complaint (DE #76, Ex. 1) at ¶ 15. As attested by Alessandro Campo, an expert on Somali law who served as a participant in a United Nations Development Office mission to assess Somaliland's judicial system,

> After the fall of the Barre administration in 1991, a Somali bringing a claim for victimization against a former official of the Barre administration would have had little or no fear of reprisal for himself or family members still residing in Somaliland, the rest of Somalia, or outside of the area. The remnants of the Barre Administration do not exist in an organized fashion and would be incapable of taking retaliatory action against Plaintiffs or their families.

First Campo Affidavit (DE # 90, Exhibit 4) at ¶ 11.

Third, even if Plaintiffs were entitled to equitable tolling, it does not follow that this action, brought in 2004, seven years after the asserted tolling period expired, would be timely. When a period of equitable tolling ends, a plaintiff receives only a reasonable period with the exercise of diligence. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1991). As noted in *Cada*, tolling of a statute of limitations is "an equitable doctrine. It gives the plaintiff extra time if he needs it. If he doesn't need it there is no basis for depriving the defendant of the protection of the statute of limitations." *Id.* at 452; *see also Phillips v. Heine*, 984 F.2d 489, 492 (D.C. Cir. 1993) (tolling "gives the plaintiff extra time only if he needs it"). Plaintiffs have offered no explanation why, after Samantar entered the United States in 1997, they required an additional seven years to bring this action.

In *Burnett v. N.Y. Cent. R.R.*, 380 U.S. 424, 427 (1966), the Supreme Court indicated the purpose behind statutes of limitations. "Statues of limitation are primarily designed to assure fairness to defendants. Such statutes promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." By bringing this action more than 23 years after the occurrence of the first alleged act of wrongdoing and more than 15 years after the occurrence of the last, when the plaintiffs' action could effectively have brought the claim without grave adverse consequence years earlier in Italy and thereafter in the United States, Plaintiffs' have sought to revive claims that the statute of limitations had already barred. Fairness to Samantar, as well as consistent statutory and legal principles, dictate that Samantar's motion for summary judgment respectfully be granted.

III. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR RELIEF UNDER THE ATS.

Each of Plaintiffs' seven claims asserts a violation of the ATS. For the reasons set forth below, none of the claims states a cognizable claim because, to be actionable, a claim has to have been accepted as a basis for jurisdiction under the ATS at the time the events alleged in the complaint occurred. *See Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 123 (2d Cir.), *cert. denied*, 129 S. Ct. 1524 (2008). None of the instant claims is grounded in a norm that was universally accepted, and hence actionable, in 1984 or 1988/1989, when the relevant events allegedly took place. In addition, even if the respective cause of action existed, the particular facts adduced in many instances do not support liability.

A. The Plaintiffs do not make out their first claim for relief, for extrajudicial killing.

Plaintiffs fail to establish their first claim for relief for extrajudicial killing. The ATS

did not recognize any such cause of action at the time Samantar is alleged to have engaged in wrongdoing, and, even if the ATS did recognize such a cause of action, the facts do make out liability.

The ATS provides that: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004), the Supreme Court held that, "the ATS is a jurisdictional statute creating no new cause of action." The Court concludes: "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." *Id.* at 720. This set of actions was limited to "offenses against ambassadors, . . . violations of safe conduct . . ., and individual actions arising out of prize captures and piracy." *Id.* Any new norm that is the basis for the ATS claim must have "attained the status of binding customary international law" at the time of the actions alleged to make out a violation of that norm. *Id.* at 735. Courts must exercise "great caution in adapting the law of nations to private rights." *Id.* at 728.

A prohibition against extrajudicial killing did not represent an established norm in 1984 or again in 1989. As the *Sosa* court noted, a "clear mandate" to entertain such action based on extrajudicial killings or torture emerged with the enactment of the TVPA in 1992. The Supreme Court found that the international pronouncements on which courts *(see, e.g., Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1153-1154 (11th Cir. 2005) (decided after, but omitting any reference to, *Sosa*)) have relied in finding an international norm against torture and extrajudicial killing – the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) (the "Universal Declaration") and the International Covenant on Civil and Political Rights, Dec. 16, 1966, (U.N.T.S. 171 (the "International Covenant")) – did not establish a

"relevant and applicable rule of international law." *Sosa v. Alvarez-Machain*, 542 U.S. at 28.

Moreover, in enacting the TVPA to proscribe international torture and extrajudicial killing, the Congress thought it was creating new causes of action. As the Senate report recited, "[t]he purpose of this legislation is to *provide a Federal cause of action* against any individual who, under actual or apparent authority or under color of law of any foreign nation, subjects any individual to torture or extrajudicial killing." S. Rep. No. 102-249, WL 258662, at *3 (emphasis added). The House report recited that the law carries out international obligations of the U.S. by "*establishing* a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing." H.R. Rep. No. 102-367(I), 1991 WL 255944, at *1 (emphasis added). [3]

The only case authority that Plaintiffs have heretofore cited to support an assertion that a prohibition of extrajudicial killing was a binding norm in the 1980's is *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994). Plaintiffs' Opposition to Defendant's Motion to Dismiss Second Amended Complaint ("Opposition to Motion to Dismiss Second Amended Complaint") (DE # 143) at 23. That decision in turn relied for its conclusion wholly on an analysis in *Forti v. Suarez-Mason*, 694 F. Supp. 707, 710 (N.D. Cal. 1988). The court in *Forti* for its part, however, depended for its conclusion on the Universal Declaration and the International Covenant. The Supreme Court in *Sosa*, however, rejected both the Universal Declaration and the International Covenant as sources for finding a "relevant and applicable rule

3 Further militating against a finding that a norm against torture or extrajudicial killing existed prior to enactment of the TVPA is the statement in the Senate report that, "[w]hile nearly every nation now condemns torture and extrajudicial killing in principle, in practice more than one-third of the world's governments engage in, tolerate, or condone such acts." S. Rep. No. 102-249, WL 258662, at *3. The resistance of one-third of the world's governments to forgoing torture and extrajudicial killing in 1991 when the Senate report was written hardly describes norms that must be found, in the language of *Sosa*, to be "specific, universal, and obligatory." *Sosa v. Alvarez-Machain*, 542 U.S. at 732 (quoting *In re Estate of Ferdinand Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

of law." 562 U.S. at 728. Plaintiffs have failed accordingly to establish that extrajudicial killing was a tort cognizable under the ATS when the events relevant to Plaintiffs' claims allegedly took place.

Even if a prohibition against extrajudicial killing was actionable under the ATS during the 1980's, the facts set out in the complaint do not describe a violation of this proscription. As defined in the TVPA:

> "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

28 U.S.C. § 1350 note, § 3(a).

Four individuals are alleged to have been the victims of extrajudicial killing: Mohamed Deria Ali ("Ali"), Mustafa Mohamed Deria ("Deria"), James Doe I, and James Doe II. Complaint (DE #76, Ex. 1) at ¶ 25. The Second Amended Complaint provides no facts other than Deria's disappearance to suggest that Deria was killed, and no support whatsoever for the necessary finding that Deria's death resulted from a "deliberated killing not authorized by a previous judgment." *See id.* at ¶¶ 41-42. As for the deaths of James Doe I and James Doe II, they supposedly occurred only after a trial at which the two victims were represented by counsel (albeit one they only met at the beginning of the trial) and only after the court had heard testimony from two soldiers who testified that "the brothers had hidden SNM fighters and probably were themselves members of the SNM." *Id.* at ¶¶ 47-48. While the phrase "judicial guarantees which are recognized as indispensable by civilized peoples" does not find definition in the TVPA, the House report makes clear that the offense "excludes executions carried out under proper judicial authority." H.R. Rep. No. 102-367(I), 1991 WL 255964, at *5. Certainly

the requisite judicial guarantees cannot be more extensive than the guarantees established under our own Constitution which consist of a right by an accused to counsel and to an opportunity to confront the witnesses against him, both of which appear to have been accorded to the James Doe brothers. *See Avery v. Alabama*, 308 U.S. 444 (1940) (appointment of defense counsel just days before a capital trial does not represent a violation of an accused's Constitutional right to counsel).

Even the facts alleged in connection with the death of Ali would not, if true, make out a prima facie case of extrajudicial killing. The abbreviated time of several hours between Ali's arrest and death might permit an inference that his death was not authorized by a court after a proper trial. The Plaintiffs, however, also must allege facts to establish that the death was "deliberated" and thus manifested the "requisite extrajudicial intent." H.R. Rep. No. 102-367(I), 1991 WL 255964, at *4. Plaintiffs have failed to allege facts establishing deliberation.

B. The Plaintiffs do not make out their second claim for relief, for attempted extrajudicial killing.

The Plaintiffs have failed to establish any basis for relief for attempted extrajudicial killing. If no universal norm proscribed extrajudicial killing, an attempt to accomplish what was not proscribed could not be proscribed. It would further appear that a cause of action for attempted extrajudicial killing under the ATS has yet to be recognized, or even entertained, by any American court. Judgment should respectfully be awarded to Samantar on this claim.

C. The Plaintiffs do not make out their third claim for relief, for torture.

Much as with extrajudicial killing as discussed above, torture was not actionable under the ATS prior to the enactment of the TVPA. *See* section III.A *supra*. *But see Filartiga v. Pena-Irala*, 630 F.2d 876, 890 ("for purposes of civil liberty, the torturer has become – like the pirate

and slave trader before him – *hostis humani generis*, an enemy of all mankind"). In support of their assertion that torture was a binding norm of customary international law during the relevant period, Plaintiffs cite *Filartiga v.Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980), and *In re Estate of Ferdinand Marcos*, 25 F.3d at 1475. Opposition to Motion to Dismiss Second Amended Complaint) (DE # 143) at 23. Yet the former relies for its conclusion on a series of treaties, including the International Covenant, not incorporated into U.S. law at the time of the events alleged in the Complaint. *Filartiga*, 630 F.2d at 883-84. The latter relies in addition on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39 U.N. GAOR Supp. (No. 51), 23 I.L.M. 1027 (1987). *In re Estate of Ferdinand Marcos,* 25 F.3d at 1475. This Convention did not come into force until 1987 and, when ratified by the United States Senate in 1990, was declared not to be self-executing. *See Wang v. Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003). The TVPA was enacted in 1992 to give first effect to the proscriptions against torture in the Convention. Plaintiffs cannot accordingly establish that a prohibition against torture by a state of its own citizens was a norm of customary international law and actionable under the ATS in the 1980's.

D. The Plaintiffs do not make out their fourth claim, for cruel, inhuman, or degrading treatment or punishment.

If no action existed for extrajudicial killing or torture prior to enactment of the TVPA, then it should not be possible to find one for the lesser and less definable injuries resulting from cruel, inhuman or degrading treatment or punishment. In *Aldana v. DelMonte Fresh Produce, N.A., Inc*, 416 F.3d 1242, 1247 (11th Cir. 2005), the court indicated that, for actions that took place in 1999, "[w]e see no basis in law to recognize Plaintiffs' claims [under the ATS] for cruel, inhuman, degrading treatment or punishment." To identical effect, see *Forti v. Suarez-Mason*,

672 F. Supp. 1531 (N.D. Cal. 1987), *aff'd in part and modified in part on other grounds on reconsideration*, 694 F. Supp. 707 (N.D. Cal. 1988) (the boundaries of any norm proscribing cruel, inhuman, and degrading treatment were insufficiently defined as of 1988 to preclude its recognition as a tort actionable under the ATS); *see also Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1162 n. 190 (C.D. Cal 2004).

Plaintiffs have cited four cases for the proposition that these acts were recognized as torts when the events in the Complaint allegedly took place: *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004); *Taveras v. Taveras*, 397 F. Supp. 2d 908 (S.D. Ohio 2005); *Tachiona v. Mugabe*, 216 F. Supp. 2d 262 (S.D.N.Y. 2002), *rev'd on other grounds*, 386 F.3d 205 (2d Cir. 2004); *Jama v. I.N.S.*. 22 F. Supp. 2d 353 (D.N.J. 1998). Opposition to Motion to Dismiss Second Amended Complaint) (DE # 143) at 24. These cases, however, treated events that took place after the 1980's and cannot rebut the foregoing authorities that each held that during the relevant period any norms proscribing these acts were insufficiently defined to be actionable under the ATS.

E. The Plaintiffs do not make out their fifth claim, for arbitrary detention.

Arbitrary detention is not actionable in that it did not, in 1984 or 1989, represent a specific, universal, and obligatory norm of customary international law. In *Sosa*, the plaintiff argued that the ATS provided jurisdiction for a general prohibition against arbitrary detention. 542 U.S. at 736. The Supreme Court disagreed, finding that the plaintiff's view "expresses an aspiration that exceeds any binding customary rule having the specificity we require." *Id.* at 738.

Even if arbitrary detention might have represented an actionable tort under customary international law, the facts adduced by Plaintiffs do not support liability under any reasonable definition of the tort as to John Doe I and John Doe II. John Doe I was imprisoned for five days for questioning by military officers and subsequent trial. Complaint (DE #76, Ex. 1) at ¶¶ 43-47.

John Doe II was imprisoned for one day (in a cell that lacked sanitary facilities). *Id.* at ¶¶ 62-63.

Plaintiffs cite six cases for the proposition that arbitrary detention could be considered an actionable norm under the ATS. Opposition to Motion to Dismiss Second Amended Complaint) (DE # 143) at 24. While three of the cases do indeed treat events that took place during or prior to the events alleged in the Complaint, the facts of the cases, as recited by Plaintiffs, are readily distinguishable from the instant ones. In *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981), the relevant confinement lasted more than a year. In *Xuncax v. Gramajo*, 886 F. Supp. 330, 334 (S.D. Fla. 1994), the detention included torture resulting in permanent injury. In *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987), one plaintiff was held for more than four years and another arrested and never charged or released. These circumstances must be contrasted with the detentions of John Does I and II under the instant facts. John Doe I was imprisoned for five days and John Doe II was imprisoned for one day, albeit in a cell that lacked sanitary facilities. These detentions far more closely resemble the detention "of less than a day" without mistreatment that the Supreme Court in *Sosa* determined was not actionable under the ATS (542 U.S. at 738) than the lengthy or torture-tainted detentions that the courts found actionable in the cases cited by Plaintiffs. *See also* Restatement (Third) of Foreign Relations Law of the United States (1986) § 702 (international law may be violated by "*prolonged* arbitrary detention") (emphasis added).

F. The Plaintiffs do not make out their sixth and seventh claims, for crimes against humanity and for war crimes.

Plaintiffs' claims for crimes against humanity and war crimes, their sixth and seventh claims, simply restate the allegations of the first five claims but attach them to differently named causes of action. Since Plaintiffs have not stated causes of action cognizable under the ATS in

their first five claims, they have not established the predicate for these claims here, and these claims must also fail.

G. The Plaintiffs fail to state a claim for secondary liability.

As to each of the seven claims, Plaintiffs allege that Samantar was liable solely in that he "exercised command responsibility over, conspired with, or aided and abetted the alleged perpetrators of the wrongdoing" or that he was an "active participant in a joint criminal enterprise that resulted in" the wrongdoing alleged. *See, e.g.*, Complaint (DE #76, Ex. 1) at ¶¶ 95-96. To establish such secondary liability, Plaintiffs must demonstrate that customary international law recognized secondary liability in 1984 and 1989. "[A]n allegation of aiding and abetting a violation of international law or conspiring to violate international law asserts a distinct claim." *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 256 (S.D.N.Y. 2009).

Plaintiffs cannot show that customary international law recognized secondary liability in 1984 or 1989. The court in *In re South African Apartheid Litigation* conducted a lengthy review of the possible basis for an international norm imposing secondary liability. *Id.* at 255-62. Based upon this review, the court "decline[d] to recognize conspiracy as a distinct tort to be applied pursuant to ATCA jurisdiction." *Id.* at 262. As to aider and abettor liability, the court found some support in customary international law but relied for this finding principally on pronouncements in the Rome Statute of the International Criminal Court which first came into force on July 17, 1998. Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90.

Even then, the standard identified by the court in *In re South African Apartheid Litigation* would not support a cause of action for aider and abettor liability against Samantar in that such standard "requires that an aider and abettor know that its actions will substantially assist the

perpetrator in the commission of a crime or tort in violation of the law of nations." 617 F. Supp. 2d at 261. The requirement of knowing aid also finds support in *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996), a case which, like the instant one, considered the secondary liability of a senior military official for events committed by armed forces during the 1980's. The court there approved an instruction that a finding of liability required a determination either that the military commander was complicit in the specific acts of wrongdoing, a charge not made here, or that the commander "knew of such conduct by the military and failed to use his power to prevent it." 103 F.3d at 776.

This requirement of intentionality for secondary liability under the ATS (and TVPA) was recently approved by Fourth Circuit Court of Appeals in *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011). As the court stated in dismissing claims made against a chemical manufacturer that allegedly violated these statutes by selling a chemical to the Iraqi government which was in turn used the chemical to manufacture mustard gas to attack members of ethnic minority group, "we hold that for liability to attach under the ATS for aiding and abetting a violation of international law, a defendant must provide substantial assistance with the purpose of facilitating the alleged violation." *Id.*

The Plaintiffs' allegations do not meet this standard. Plaintiffs assert merely that Samantar "was reckless or indifferent to the risk that [the specific acts of wrongdoing alleged] would occur." Complaint (DE #76, Ex. 1) at ¶¶ 79, 83. Nothing in the Complaint does more than aver that Samantar, through his position, acquiesced in the commission of human rights abuses generally. There is no allegation, as is necessary to sustain a claim of secondary liability against Samanter, that Samantar was aware of the particular abuses that allegedly resulted in the injury to the Plaintiffs, much less that he provided assistance with the "purpose of facilitating the

alleged violation[s]." *Aziz v. Alcolac, Inc.*, 658 F.3d at 401. A requirement of knowledge or purposefulness cannot be met through allegations of recklessness or indifference. *See also United States v. Carr*, 303 F.3d 539, 540 (4th Cir. 2002) (extensively discussing distinction between knowledge and reckless indifference in context of downward sentencing adjustment permitted for knowingly causing death as opposed to causing death recklessly or negligently).

Because Plaintiffs cannot show that secondary liability was a norm of customary international law at the time Plaintiffs suffered injury and further fail to allege facts plausibly establishing secondary liability as the norm is currently understood, Samantar's motion for judgment on these claims should respectfully be granted.

IV. PLAINTIFFS HAVE FAILED TO STATE CLAIMS FOR RELIEF UNDER THE TVPA.

A. The TVPA does not apply to conduct that occurred before its enactment.

In addition to their claims for relief for torts arising under the ATS, the Plaintiffs assert, in Claims First through Third, violations by Samantar of the TVPA. The TVPA was enacted in 1992. All of the events alleged in the complaint as bases for liability against Samantar took place at least three years prior to enactment. Since the TVPA cannot be applied retroactively and the causes of action alleged under the TVPA were not available prior to enactment of the TVPA, Samantar's motion for judgment on Plaintiffs' TVPA claims should respectfully be granted.

In *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994), the Supreme Court confirmed the basic tenet of Constitutional jurisprudence that if a "statute would operate retroactively, out traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." The Court there held that "a new damages remedy . . . is the kind of provision that does not apply to events antedating its enactment in the

absence of clear congressional intent." *Id.* at 283. Nothing in the language of the TVPA or its legislative history evinces "clear congressional intent" that the TVPA be applied retroactively so as to overcome the Constitutional presumption against its retroactive application. Indeed, the responsible Congressional committees clearly thought that they were creating a new cause of action with the enactment of the TVPA. They indicated that the TVPA was intended to "*provide* a Federal cause of action" (Senate report) by "*establishing* a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing" (House report). Senate Report at *3; House Report at *1 (emphasis added).

Plaintiffs have not disputed that those few courts that have applied the TVPA retroactively have all relied, if perhaps not exclusively, on sources that the *Sosa* court indicated do not themselves establish norms of customary international law. [4] *Sosa*, 542 U.S. at 735. Not surprisingly, one of the few cases considering the retroactive application of the statute found the argument that the TVPA does not have retroactive effect to be a "credible" one. *Gonzalez-Vera v. Kissinger*, 2004 WL 5584378, *8 n.16 (D.D.C. 2004).

Moreover, these courts finding retroactivity determined only that torture was proscribed before the TVPA's enactment. Plaintiffs have pointed to no court that has ever applied the TVPA's proscriptions against extrajudicial killing retroactively.

The only basis for sustaining the TVPA claims in the Complaint would, accordingly, be a determination that the Plaintiffs are not seeking to apply the TVPA retroactively, *i.e.*, that subjecting the Samantar to the strictures of the TVPA would not, in the language of *Landgraf*,

4 Despite Plaintiffs claim to the contrary (Opposition to Motion to Dismiss Second Amended Complaint) (DE # 143) at 28), *Sosa* did not approve of *Filartiga*'s comment about mankind's condemnation of the torturer but only expressed approval of the method that *Filartiga* employed in seeking to determine whether a prohibition of torture had become a norm actionable under the ATS. *Sosa*, 542 U.S. at 732.

"impair rights [Samantar] possessed when he acted, increase [Samantar's] liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. As discussed above (in section III.A., *supra)*, however, it cannot be credibly argued that the TVPA did not create new liabilities or impair rights as to Samantar. [5]

Since the TVPA does not allow for retroactivity or codify pre-existing universal norms of international law, it cannot be applied against Samantar for conduct that occurred prior to the enactment of the TVPA, and Samantar's motion for judgment on Plaintiffs' TVPA should respectfully be granted.

B. Plaintiffs' have failed to allege a basis for secondary liability against Samantar.

For the reasons set forth in section III.G, *supra,* discussing the unavailability of a claim of secondary liability under the ATS, Plaintiffs have also failed to allege a basis for secondary liability against Samantar under the TVPA.

CONCLUSION

Plaintiffs have failed to establish subject matter jurisdiction for their claims, their claims are time barred, and the Plaintiffs have not set out cognizable causes of action under the ATS or the TVPA. For these reasons, Plaintiffs' motion for summary judgment should, respectfully, be granted.

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5 Significantly, the few cases applying the TVPA to conduct that occurred before the statute's enactment either were decided before *Sosa* or do not mention the comment in *Sosa* (542 U.S. at 28) that the Universal Declaration and the International Covenant do not themselves establish rules of international law. *See Cabello v. Fernandez-Larios,* 402 F.3d at 1153-54 (omitting any reference to *Sosa*); *Cabiri v. Assasie-Gyiman,* 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996) (pre-*Sosa*); *Xuncax v. Gramajo,* 886 F. Supp. 162 (D. Mass. 1995) (pre-*Sosa*).

Respectfully submitted,

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