No. 07-1893

In The

United States Court of Appeals

for the

Fourth Circuit

BASHE ABDI YOUSUF; AZIZ MOHAMED DERIA
(in his Capacity as Personal Representative of the Estates of
Mohamed Deria Ali, Mustafa Mohmed Deria, James Doe I and James Doe II);
OFFICER JOHN DOE I; JANE DOE I; and JOHN DOE II,

Plaintiffs-Appellants,

v.

MOHAMED ALI SAMANTAR,

Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Virginia in No. 04-CV-1360 (Hon. Leonie M. Brinkema, Judge)

BRIEF FOR DEFENDANT-APPELLEE

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No. 07-1983 Caption: Bashe Abdi Yousuf, et al. v. Mohamed Ali Samantar

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(name of party/amicus) (appellant/appellee/amicus)

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Jamie N. Sami
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January 2, 2008
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QUESTIONS PRESENTED

Is Defendant Mohamed Ali Samantar ("Samantar") entitled to immunity under the Foreign Sovereign Immunities Act, (the "FSIA"), 28 U.S.C. §§ 1602-11, as the District Court held, for actions that he took while Prime Minister, First Vice President, and Defense Minister of Somalia, when the Complaint and letters from officials of Somalia confirm that he took those actions in his official capacities?

Is Samantar entitled to have the Complaint dismissed on any other ground advanced to the District Court, including the availability to Samantar of head-of-state or other common law immunity, the running of the statute of limitations based on Samantar's amenability to suit in Italy during the period of Samantar's residence in that country, and the failure of Plaintiffs to exhaust local remedies in Somalia?

STATEMENT OF THE CASE

On November 10, 2004, Plaintiffs filed a Complaint in the United States District Court for the Eastern District of Virginia. Joint Appendix ("J.A.") at 28-65. The Complaint alleged that Samantar violated the human rights of a number of residents of Somalia while Samantar served variously as Prime Minister, First Vice President, and Defense Minister of Somalia from January 1980 to September 1990. (J.A. 102, 209).

Samantar filed a motion to dismiss the Complaint on December 1, 2004. (J.A. 3). At a hearing on the motion on January 7, 2005, the District Court stayed the proceedings, before ruling on the motion, to enable the United States Department of State ("State Department") to make its views known to the District Court on Samantar's eligibility for immunity. (J.A. 209).

A little over two years later, in the face of State Department inaction, the District Court reinstated the case to the active docket. (J.A. 210). With leave of court, the Plaintiffs filed a Second Amended Complaint. (J.A. 10). On March 29, 2007, Samantar moved to dismiss the Second Amended Complaint. (J.A. 11, 66). Samantar argued principally that Samantar enjoyed immunity from Plaintiffs' claims under the FSIA and common law, that Plaintiffs' claims were time barred, and that Plaintiffs had improperly failed to exhaust their legal remedies in Somalia. (J.A. 71-125).

As part of his motion, Samantar submitted a letter written by the Acting Prime Minister of Somalia, an official of the Transitional Federal Government (the "TFG"), to the United States Secretary of State on February 17, 2007. This letter was written, by its terms, "to indicate that the actions attributed to Mr. Samantar in the [instant] lawsuit in connection with the quelling of the insurgencies from 1981 to 1989 would have been taken by Mr. Samantar in his official capacities and to

reaffirm Mr. Samantar's entitlement to sovereign immunity from prosecution for those actions." (J.A. 105-07). At the hearing, the District Court also accepted into the record a substantially identical letter dated April 26, 2007, from the Prime Minister of Somalia. (J.A. 196-97).

Despite the passage of three months from the re-activation of the case to the hearing on Samantar's motion, Plaintiffs never conducted nor formally sought to conduct any discovery directed specifically to Samantar's jurisdictional arguments. Plaintiffs' Brief ("Brief") at 2, n.3.

On April 27, 2007, at the hearing on Samantar's motion to dismiss, the District Court, in open court, without reaching Samantar's other arguments, granted Samantar's motion on the basis that Samantar enjoyed immunity under the FSIA from Plaintiffs' claims. (J.A. 176-86).

Two months after the hearing, Plaintiffs sought leave to submit to the District Court two letters from putative officials of a country called the "Republic of Somaliland" addressed to the United States Secretary of State in which the authors of these letters had sought the United States Government's support for the lawsuit. (J.A. 187-97). The District Court never ruled on this motion. (J.A. 13).

The District Court issued its opinion, and judgment was entered in favor of Samantar, on August 1, 2007. (J.A. 13). This appeal followed.

STATEMENT OF FACTS

Samantar served in various senior capacities in the Government of Somalia from 1976 to 1990: First Vice President and, in the President's absence, Acting President (January 1976 to December 1986); Minister of Defense (1971 to 1980 and 1982 to 1986); Prime Minister (January 1987 to approximately September 1990). During his tenure as Vice President and Defense Minister, Samantar performed various duties as a member of Somalia's executive authority, including conducting an official state visit to the United States during which he met with then Vice President George H. W. Bush, among other high-ranking officials. As Prime Minister, he also traveled to the United States, meeting in 1989 with Vice President Dan Quayle and Secretary of State James A. Baker. (J.A. 102-04).

In 1991, after the collapse of the government of President Muhammad Siad Barre, Samantar sought temporary asylum in Kenya and then emigrated to Italy where he lived openly from February 20, 1991, to June 25, 1997. In June 1997, Samantar moved to the United States and took up his current residence in Fairfax, Virginia. (J.A. 103). During the time that Samantar lived in Italy an individual could have brought an action against him in an Italian court pursuant to Article 5 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (J.A. 112).

Since 1991, an individual resident in the region of Somalia called "Somaliland," the region where all of the alleged offenses occurred (J.A. 34-45), could have brought all of the instant claims before a relatively stable, independent, and functioning judiciary. (J.A. 110, 116, 124).

SUMMARY OF ARGUMENT

The District Court properly dismissed this case on the grounds that the FSIA accorded immunity to Samantar. Contrary to the argument that Plaintiffs make for the first time on appeal, Somalia is a foreign state for purposes of the FSIA, having been so recognized by the United States Government. Moreover, Plaintiffs had ample opportunity to seek jurisdictional discovery prior to the District Court's decision. In addition, as this Court has held, the FSIA's immunity covers government officials and such immunity does not lapse when an official leaves office. Such immunity extends to all official acts, including acts which might be highly objectionable. Further, the District Court correctly applied the reasoning of two recent decisions from other Circuits that held similarly. Finally, the District Court's decision preserves the scope that the Congress intended for cases under the Torture Victim Protection Act (the "TVPA"), 28 U.S.C. § 1350 note, and any

concern over that scope should be addressed to the political branches of Government.

The decision of the District Court also is sustainable on the basis of other arguments by Samantar not reached by the District Court. These include Samantar's eligibility for common law immunity, the running of the statute of limitations, and the wrongful failure of Plaintiffs to exhaust their remedies in Somalia.

ARGUMENT

I. SAMANTAR IS ENTITLED TO IMMUNITY UNDER THE FSIA.

A. Somalia must be deemed to be, and in fact is, a "foreign state" under the FSIA.

Plaintiffs contend for the first time on appeal that Samantar is not entitled to immunity under the FSIA because Somalia does not qualify as a "foreign state" under the FSIA. Plaintiffs may not raise this issue at this stage in the proceedings. Even if they could, the argument is nonetheless unavailing since the United States Government has diplomatic relations with Somalia and recognizes Somalia as an independent state.

1. Plaintiffs may not question Somalia's status as a foreign state for the first time on appeal.

This case was pending in the District Court for more than three years. During that time, the legal issues were twice fully briefed by the parties in response to Samantar's motions to dismiss. At no time did Plaintiffs assert that Samantar should not be entitled to immunity under the FSIA because Somalia did not qualify as a state under that act.

Indeed, Plaintiffs' failure to contest Somalia's eligibility for the protections accorded by the FSIA was the focus of comment by the District Court in its decision. In considering the availability of one or more possible exceptions to Samantar's basic immunity under the FSIA, the District Court remarked that "the plaintiffs do not argue in the alternative that Somalia does not qualify as a 'state' for purposes of the FSIA." Decision at 15, n.12 (J.A. 212).

"It is well settled that only in very exceptional cases can a point not brought to the attention of the court below and not passed upon by that court be raised upon appeal." *Deutser v. Marlboro Shirt Co.*, 81 F.2d 139, 143 (4th Cir. 1936).[1]

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[1] Plaintiffs, as a consequence of their attempt to expand the scope of appellate review, are seeking to evade a further principle of appellate procedure by trying to supplement the record for their arguments through judicial notice of material of questionable reliability that, in any event, could have been, but was not, offered as evidence to the District Court. *See* Plaintiffs' Motion for Judicial Notice in Support of Plaintiffs' Brief; Response to Plaintiffs' Motion for Judicial Notice.

The issue as to whether Somalia should be considered a state under the FSIA does not represent such an "exceptional case." "[T]he issue is solely one of fact and the [party seeking to introduce the new matter], although well aware of its importance, made no attempt during a prolonged period to bring it to the trial court's attention." *Tressler v. Comm'r*, 206 F.2d 538, 541 (4th Cir. 1953) (declining to consider an issue raised for the first time on appeal). Moreover, as set forth below, *infra* at pp. 8-10, there is no merit to Plaintiffs' assertion that Somalia is not a foreign state for purposes of the FSIA.

If this Court is persuaded that the issue of Somalia's status as a state under the FSIA should be considered, Samantar requests that the case be remanded for resolution of the question by the District Court. Decisions on the merits of issues not evaluated by a district court should be limited to instances "where the proper resolution is beyond any doubt" or "where injustice might otherwise result." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (citations and internal quotation marks omitted). Neither of these circumstances obtains here.

2. Somalia is a "foreign state" under the FSIA.

Plaintiffs assert the current government of Somalia "does not have formal relations with the United States and the United States has no diplomatic presence in any part of Somalia." Brief at 21. They claim that the President and the

executive branch do not recognize Somalia as a foreign state and that Somalia is not a foreign state for purposes of the FSIA. Brief at 21-22.

Plaintiffs are in error. The United States Government recognizes Somalia as an independent state and maintains diplomatic relations with Somalia. U.S. Dep't of State, Bureau of Intelligence and Research, *Fact Sheet: Independent States in the World* (Nov. 27, 2007), http://www.state.gov/s/inr/rls/4250.htm (last visited Jan. 02, 2008). Response to Plaintiffs' Motion for Judicial Notice, Ex. A. This recognition is determinative that Somalia is a foreign state for purposes of the FSIA. *See O'Bryan v. Holy See*, 490 F. Supp. 2d 826, 829 (W.D. Ky. 2005) (Vatican's recognition as a sovereign entity by the United States Government entitles it to immunity under the FSIA).

Plaintiffs would appear to be confusing recognition of a government with recognition of a state. These are however two different circumstances. An "argument that nonrecognition of a government is equivalent to nonrecognition of the state itself is simply not supported . . . by fundamental principles of international law regarding the distinction between recognition of a state and recognition of a government." *Iran Handicraft & Carpet Exp. Ctr. v. Marjan Int'l Corp.*, 655 F. Supp. 1275, 1281 (S.D.N.Y. 1987) (Iran is a "foreign state" for purposes of diversity jurisdiction despite non-recognition of Khomeini regime by

United States Government); *see Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 731 F. Supp. 619, 621 (S.D.N.Y.1990), *aff'd on other grounds*, 925 F.2d 566 (2d Cir. 1991) ("[i]nternational law sharply distinguishes the succession of state, which may create a discontinuity of statehood, from a succession of government, which leaves statehood unaffected"); *see also Kalasho v. Republic of Iraq*, 2007 WL 2683553, *5-6 (E.D. Mich. 2007); *Yucyco, Ltd. v. Republic of Slovenia*, 984 F. Supp. 209, 217 (S.D.N.Y. 1997).[2]

In short, Plaintiffs, by their inaction below, waived any assertion that Somalia is not a foreign state for purposes of the FSIA but, even if the claim had not been waived, it would fail in view of the executive branch's determination that Somalia is a foreign state.

B. The District Court did not err in the extent of the jurisdictional discovery it provided.

Plaintiffs' objection to a lack of jurisdictional discovery before the District Court fails for much the same reason as does its argument that Somalia is not a

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[2] In any event, the United States Government may well recognize the TFG as the government of Somalia. Recognition of a government may be de facto, based on actions short of a formal declaration. *See, e.g., Murarka v. Bachrack Bros.*, 215 F.2d 547, 552 (2d Cir. 1954) (Interim Indian Government considered to be recognized by the United States Government based on diplomatic exchanges between the two governments).

"foreign state." Even if the District Court had improperly denied plaintiffs an opportunity for discovery, the argument should have been addressed in the first instance to the District Court. "As this court has repeatedly held, issues raised for the first time on appeal generally will not be considered." *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993).

Nor do Plaintiffs posit the existence of the "very limited circumstances" which might warrant deviation from this rule, *e.g.*, "where refusal to consider the newly-raised issue would be plain error or would result in a fundamental miscarriage of justice." *Id.* The only jurisdictional discovery that Plaintiffs specifically assert that they might have pursued was "the validity or authenticity of the TFG letters." Brief at 26. Yet, even if the letters were discovered to be invalid and inauthentic, and Plaintiffs offer no support for such a proposition, the District Court's decision should not have been affected.

The District Court relied on the letters principally to support its conclusion that the actions allegedly taken by Samantar would have been taken by him in his official capacity and that, hence, he was entitled to the protections of the FSIA.[3] Decision at 21-24, 27 (J.A. 218-21, 224). In indicating that it was giving "'great

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[3] The District Court also relied on the letters for the limited and appropriate purpose of confirming that Somalia was not waiving Samantar's immunity. *See infra* at p. 20.

weight'" to these letters, the District Court quoted language in *Matar v. Dichter*, 500 F. Supp. 2d 284, 291 (S.D.N.Y. 2007) that held that the views of the government of an affected foreign state were relevant as to "whether one of its officials was acting within his official scope," *i.e.*, that the conduct was not "personal and private in nature." Decision at 19 (J.A. 216) (citations omitted); *see Matar*, 500 F. Supp. 2d at 291 and cases cited therein.

The District Court's use of the letters for this purpose was explicitly secondary to the Court's reliance on the language in the Complaint wherein Samantar's actions are repeatedly described as having been taken by him as a senior government official. Decision at 21 (J.A. 218) ("[t]he complaint repeatedly states that 'Defendant Samantar, as Minister of Defense,' or that 'Defendant, as Prime Minister,' had the power to take certain actions").[4]

Further, Plaintiffs' argument that the District Court denied Plaintiffs an opportunity for jurisdictional discovery is not reflected in the record. The

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[4] The District Court need not even have relied on the Complaint to establish that Samantar's actions were taken in his official capacity, since the use, or abuse, of a state's police powers necessarily represents an official and not a private act for purposes of the FSIA. *Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993) ("[t]he conduct boils down to abuse of the power of its police by the Saudi Government, and 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 peculiarly sovereign in nature").

District Court's order staying discovery was made in the context of suspending proceedings so that the United States Department of State might have an opportunity to comment on Samantar's entitlement to head-of-state immunity. When it became evident to the court after two years of delay that such a comment was not forthcoming, the District Court, by order of January 22, 2007, ordered the case reinstated to the "active docket" (J.A. 9). Plaintiffs thereafter had three months prior to the hearing on Samantar's motion in which to seek discovery directed specifically to Samantar's jurisdicational arguments, and Plaintiffs cannot now complain that they did not take advantage of this opportunity.[5]

Finally, the discovery Plaintiffs desired could well have been subject to proper objection before the District Court. Any discovery order would have to have recognized the "tension between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery." *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992) ("[a]t the very least, discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination"). It is difficult to see how

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[5] Plaintiffs may have requested additional time to address Samantar's statute of limitations arguments but never sought a delay to consider Samantar's jurisdictional arguments. (J.A. 177).

the TFG could have been questioned "circumspectly" about whether letters from its officials on official stationery should be disregarded because they may have been inauthentic or invalid.

Because the assertion of an alleged denial of discovery was never presented to the District Court and, in any event, because Plaintiffs had an opportunity for such discovery and such discovery might have been barred by protective order, Plaintiffs' claims for the right to conduct jurisdictional discovery should be denied.

C. The FSIA applies to former officials.

On the authority of *Dole Food Co. v Patrickson*, 538 U.S. 468 (2003), Plaintiffs assert incorrectly that the FSIA does not apply to a former government official. In *Dole Food*, the Court interpreted language in a provision of the FSIA specific to corporations and concluded that "the plain text of this provision, because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed." *Dole Food*, 568 U.S. at 478.

As noted in *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 789 (S.D.N.Y. 2005), the Supreme Court in *Dole Food* did not consider "the circumstances under which an individual is covered by the FSIA." The court went on to note, as to the immunity of individuals under the FSIA:

> Indeed, numerous other courts that have addressed this issue have held that the relevant inquiry for individuals is simply whether the acts in question were undertaken at a time when the individual was acting in an official capacity. [Citations omitted.] This Court considers that precedent to be more consistent with the FSIA and unaltered by the decision in *Dole Food*.

Id. (citing *Velasco v. Government of Indonesia*, 370 F.3d 392, 398-99 (4th Cir. 2004); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *Bryks v. Canadian Broadcasting Corp.*, 906 F. Supp. 204, 210 (S.D.N.Y. 1995)).

In *Velasco*, a decision issued more than a year after the decision in *Dole Food*, this Court rejected the proposition advanced by Plaintiffs. It held that the FSIA accorded immunity to an official of Indonesia for an action taken in his official capacity despite the commencement of the suit, as here, after the official had left office. *Velasco*, 370 F.3d at 398-99.

A distinction in the availability of immunity for prior acts under the FSIA between governmental entities and governmental officials is also supported by logic and sound public policy. When the ownership of a governmental entity, such as the defendant in *Dole Food*, changes hands, the new owners, as part of the acquisition transaction, have an opportunity to negotiate indemnification for any liabilities incurred by the entity before the shift from governmental ownership. On the other hand, officials leaving government service, such as Samantar and the

defendant in *In re Terrorist Attacks*, are the same persons before and after their departure and can rely only on the continuation of their internationally-recognized immunity to protect them from claims arising from actions that they took in their official capacities before their departure.

Notably, the Congress itself understood the FSIA to apply to former officials when it adopted the Torture Victim Protection Act (the "TVPA"), 28 U.S.C. § 1350 note. The Senate Report explicitly indicated that a "former official" could "avoid liability [under the TVPA] by invoking the FSIA" if he or she showed that the acts of which he or she were accused had been undertaken as an agent of the state. S. Rep. No. 249, 102d Cong., 1st Sess. (1991) at 8.

Plaintiffs' reliance on this Court's decision in *In re Grand Jury Proceedings*, 817 F.2d 1108 (4th Cir.), *cert. denied*, 484 U.S. 890 (1987), for the contrary proposition is misplaced. Indeed, that decision stands for just the opposite conclusion. In that case, this Court determined that the Philippine Government could waive immunity from process for former President Marcos and his wife and implicitly recognized that former officials were entitled to immunity. The question of the effectiveness of the Government's immunity waiver would never have arisen in that case if the President and his wife had,

consistent with Plaintiffs' theory in this case, sacrificed their immunity as soon as they left office.

D. The FSIA applies to individuals.

As noted above, *supra* at p. 15, this Court, in a carefully reasoned opinion, has concluded that the immunity of the FSIA extends "to an individual acting in his official capacity on behalf of a foreign state." *Velasco*, 370 F.3d at 398. The overwhelming majority of circuits that have considered the issue as to the application of the FSIA to individuals have found similarly. *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 390 (5th Cir. 1999); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1100-03 (9th Cir. 1990). Only one circuit arguably has found otherwise and, in that decision, the outcome may well have turned on a determination that the individual in question had not been acting in his official capacity. *See Enahoro v. Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005) ("[t]he FSIA has been applied to individuals, but in those cases one thing is clear: the individual must have been acting in his official capacity. If he is not, there is no immunity"). Plaintiffs have offered no arguments not previously considered for reversing this well-established precedent.

The legislative history of the TVPA itself provides clear evidence that the Congress understood the FSIA to apply to individuals. Only individuals may be liable under the TVPA. S. Rep. No. 249, 102d Cong., 1st Sess., at 7. Accordingly, if the FSIA had no application to individuals, the Congress need not have been concerned about the impact of the FSIA on the operation of the TVPA. Yet, the House of Representatives Report on the TVPA explicitly noted that "[t]he TVPA is subject to restrictions in the Foreign Sovereign Immunities Act of 1976 [FSIA]." H.R. Rep. No. 367, 102d Cong., 1st Sess. (1991) at 88. Similarly, the Senate Report notes that "[b]ecause all states are officially opposed to torture and extrajudicial killing, however, the FSIA should normally provide no defense to an action taken under the TVPA against a former official." S. Rep. No. 249, 102d Cong., 1st Sess., at 8. These comments would have been surplusage if the FSIA did not apply to individuals.

There can be no doubt, therefore, that the Congress that enacted the TVPA understood the FSIA to apply to individuals.[6] For this reason and for the other reasons adduced in this Court's decision in *Velasco* and similar decisions,

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[6] This language also demonstrates that Congress understood that torture can be perpetrated by officials acting within the scope of their government responsibilities (see *infra* at pp. 19-20) and that the protections of the FSIA are available to *former* officials such as Samantar (see *supra* at pp. 14-17).

Samantar respectfully requests that Plaintiffs' argument that the FSIA does not apply to individuals be rejected.[7]

E. Allegations of human rights abuses do not disqualify an official from being accorded immunity under the FSIA.

Plaintiffs assert that Samantar is not entitled to immunity under the FSIA because his actions could not have been taken within the scope of his authority since these actions allegedly violated Somali law and international norms. Brief at 33-34. Their arguments largely reiterate those made to the District Court and are thoughtfully addressed in the Court's decision. Decision at 19-20 (J.A. 216-17).

As for Plaintiffs' new point that the District Court should not have relied on the letters from the TFG officials to help establish the scope of Samantar's authority, several responses are in order. First, as noted above, *supra* at p. 9, the letters came from the officials of a state recognized by the United States and

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[7] Plaintiffs claim that certain views of the United States Department of State presented in another case should be considered. Those views, offered in a filing made several months before the decision by the District Court, cannot be pressed for the first time in this appeal. *See* Response to Plaintiffs' Motion for Judicial Notice. Moreover, even if those views were available to this Court, they deserve no special deference. *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004) ("interpretation of the FSIA's reach [is] a 'pure question of statutory construction [that is] well within the province of the Judiciary[,]'" meaning the Government's views on the subject "merit no special deference") (citations omitted).

warranted consideration. Second, the District Court's reliance on the letters to establish the governmental character of Samantar's actions was secondary to its reliance on the allegations of the Complaint which assert repeatedly that Samantar's actions were taken in his official capacity and which "does not allege that Samantar was acting on behalf of a personal motive or for private reasons." Decision at 21 (J.A. 218). Third, the letters confirmed to the District Court that Somalia did not repudiate his actions or waive his immunity under section 1606(a) of the FSIA. Decision at 21-22 (J.A. 218-19). These are determinations that only can be made by the foreign state affected.[8] The use of the letters by the District Court was accordingly limited and reasonable.

F. The District Court properly adopted and applied the reasoning of the courts in Belhas and Matar.

Plaintiffs try to distinguish the instant case from two decisions, *Belhas v. Ya'Alon*, 466 F. Supp. 2d 127 (D.D.C. 2006) and *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007), that helped inform the District Court's reasoning on the

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[8] Inaction by Somalia might, however, have accomplished the same result. "[C]ourts rarely find that a nation has waived its sovereign immunity without strong evidence that this is what the foreign state intended." *Rodriguez v. Transnave Inc.*, 8 F.3d 284, 287 (5th Cir. 1993).

application to Samantar of the FSIA. They also argue that these two cases were wrongly decided.

As for the distinctions, Plaintiffs point to four alleged fact differences between *Belhas* and *Matar* cases and the instant case, and they attempt to give these differences legal importance. As noted below, to the extent that any such fact differences do exist, they have no legal significance.

First, Plaintiffs assert that the two cases involved single acts of alleged wrongdoing, while this case involves multiple acts of wrongdoing. Brief at 39. Yet nothing in the FSIA would have immunity turn on whether the foreign state or its agencies or instrumentalities are accused of one or a succession of wrongful acts, and Plaintiffs have not cited to any authority for such a distinction. As an example of the contrary, see *Doe I v. Unocal Corp.*, 395 F.3d 932, 956 (9th Cir. 2002) (FSIA held to provide immunity against claims of multiple human rights abuses).

Second, Plaintiffs assert a distinction in that Somalia, unlike Israel, the foreign state at issue in the two cases, was a dictatorship at the time of the alleged abuses. Again, Plaintiffs have not cited to any authority that denies immunity to a foreign state under the FSIA because of the character of the government of the

state. For an example of the contrary, see *Doe I*, 395 F.3d at 956 (immunity recognized for military dictatorship and one of its instrumentalities).

Third, Plaintiffs allege a distinction in that this case involves charges against an official of a *former* government. Brief at 39. Again, Plaintiffs point to no authority for such a distinction. For contrary authority, see *Republic of Austria v. Altmann*, 541 U.S. 677 (U.S. 2004) (FSIA applies to insulate actions of Nazi government of Austria). *See also Kalasho v. Republic of Iraq*, 2007 WL 2683553, *5 (E.D.Mich.2007) (Post-Hussein Iraq is a foreign state under the FSIA for purposes of considering actions committed by the Hussein Government).

Lastly, Plaintiffs assert a distinction on the grounds that the United States State Department chose to present its views on immunity to the court in *Matar* and has not elected to do so here. Brief at 40-41. Once more, Plaintiffs offer no authority for a distinction drawn on this basis, and they acknowledge that the court in *Belhas* found immunity without the benefit of the views of the State Department. Brief at 40. It can hardly be claimed that courts are incompetent to determine immunity under the FSIA without prompting from the Executive Branch. *See, e.g., Velasco*, 370 F.3d at 402.

Finally, Plaintiffs challenge the holdings in *Belhas* and *Matar*, and claim that the District Court decision was equally infirm, for failing to consider whether

the defendants in the cases acted within the scope of their legal authority. Whatever analysis may have been conducted of the defendants' legal authority in the two cited cases,[9] the District Court gave careful consideration to the allegations of the Complaint reciting that Samantar acted in his official capacities and to the letters of TFG officials not repudiating that position. In the end, the District Court explicitly found, contrary to Plaintiffs' assertions, that Samantar "is entitled to sovereign immunity for the acts he undertook *on behalf of the Somali government*." Decision at 28 (J.A. 225) (emphasis supplied).

G. The District Court's decision does not "eviscerate" the TVPA.

Plaintiffs (and their amici curiae) argue finally that, under the District Court's decision, government officials accused of torture whose actions are not repudiated by their governments will be entitled to immunity, and this result will "effectively eviscerate" the TVPA. Brief at 18. Plaintiffs also assert that "the TVPA would essentially be rendered a nullity." Brief at 49. Since, as we have seen, the District Court's decision is wholly consistent with, and indeed mandated by, the language and the legislative history of the TVPA, Plaintiffs' arguments, if

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[9] The two cases gave ample consideration to the issue of whether the defendants had acted within the scope of their legal authority and concluded that they had. *See Belhas*, 466 F. Supp. 2d at 132; *Matar*, 500 F. Supp. 2d at 291-92.

accurate, are more appropriate for presentation to the Executive and Legislative Branches. *See Warner-Jenkinson Co., Inc. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 28 (1997) ("[t]he various policy arguments now made by both sides are thus best addressed to Congress, not this Court").

Plaintiffs and amici curiae also have an overly jaundiced view of the public policy implications of the decisions of the District Court and of the courts that have consistently ruled similarly. First, it must be recognized that the District Court's decision furthers the important principle of "comity among nations by ensuring that leaders can perform their duties without being subject to detention, arrest or embarrassment in a foreign country's legal system." *In re Grand Jury Proceedings*, 817 F.2d at 1110. Second, the District Court decision leaves open, as the Congress intended, numerous avenues for the prosecution of civil suits against foreign human rights abusers. Thus, if the acts are perpetrated by an official of an entity unrecognized by the United States, the entity is not a "foreign state" under the FSIA, and the FSIA affords no immunity to an action under the TVPA. Decision at 15 n.12 (J.A. 212); *see, e.g., Ungar v. Palestine Liberation Organization*, 402 F.3d 274, 288 (1st Cir. 2005). Alternatively, if the foreign state repudiates the actions of the official or perhaps, as the District Court suggests, merely fails to admit any knowledge or authorization of the relevant acts, a

circumstance that the Senate Report envisaged as the likely response of most states, then any protection of the FSIA would be waived. Decision at 15 n.12 (J.A. 212); 28 U.S.C. § 1605(a)(1); *see Paul v. Avril*, 812 F. Supp. 207, 210 (S.D. Fla. 1993) (waiver by Haiti); *Hilao v. Estate of Marcos*, 25 F.3rd 1467, 1472 (9th Cir. 1994) (waiver by Philippines). Furthermore, if the actions are those of a *non*-government official who acts under "color of law," the FSIA provides no protection. Decision at 23-24 (J.A. 220-21); *see, e.g., Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) ("[t]he appellants are entitled to prove their allegations that Karadzic acted under color of law of Yugoslavia by acting in concert with Yugoslav officials or with significant Yugoslavian aid"). Finally, section 1605(a)(7) of the FSIA, in conjunction with the so-called Flatow Amendment, waives the immunity from civil damage suits for injury or death of "[a]n official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency." 28 U.S.C. § 1605 note; Decision at 15 n.12 (J.A. 220); *see, e.g., Pugh v. Socialist People's Libyan Arab Jamahiriya*, 2006 WL 2384915, *9 (D.D.C. 2006).[10]

[10] While not strictly a suit under the TVPA, an action under the Flatow Amendment offers similar relief.

If Plaintiffs, and their amici curiae, feel that the FSIA unduly restricts the jurisdictional reach of the TVPA, they should take their argument to the political branches. It must be recognized, however, that those branches have already provided the TVPA with broad authorities against those who commit human rights abuses abroad, balanced however with due regard for the needs of international relations and comity.

II. THE STATUTE OF LIMITATIONS AND OTHER JUDICIAL PRINCIPLES SUPPORT THE DISTRICT COURT'S RESULT.

In sustaining the District Court, this Court is, of course, "not limited to evaluation of the grounds offered by the District Court to support its decision, but may affirm on any grounds apparent from the record." *United States v. Smith*, 395 F.3d 516, 519 (4th Cir. 2005). Should this Court conclude that the FSIA does not provide immunity to Samantar, Samantar requests that the District Court's decision be sustained on one of the other arguments advanced to the District Court, as those arguments are supplemented below.

A. Samantar enjoys immunity under the common law.

In the event Samantar is found not to enjoy immunity under the FSIA, he is entitled to immunity under the common law for his actions taken as Prime Minister, First Vice President, and Defense Minister of Somalia.

From the earliest times, the immunity of a sovereign was understood to extend to individual officers insofar as they acted on the sovereign's behalf. "It is well settled in the United States . . . that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States." 1 U.S. Op. Att'y Gen. 81 (1797) (concerning suit in a Virginia court against a British official). This immunity has come to be denominated "head-of-state" immunity. *See In re Grand Jury Proceedings*, 817 F.2d 1108 (4th Cir.), *cert. denied*, 484 U.S. 890 (1987). It has however never been narrowly limited to heads of state and encompasses others who occupy positions of governmental authority such that their actions may be considered as coincident with those of the sovereign.

Thus head-of-state immunity has been applied to a prime minister such as Samantar. *See Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988), *order aff'd in part and rev'd in part on other grounds*, 886 F.2d 438 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 932 (1990) (granting head of state immunity to English Prime Minister Margaret Thatcher against claims by Libyan residents); *see also* Restatement (Third) of Foreign Relations § 464 n.14. Immunity has also been made available to senior ministers occupying position akin to Samantar's as Defense Minister. Thus, in *Underhill v. Hernandez*, 168 U.S. 250 (1897), the

Supreme Court applied this immunity to reject a suit brought against a Venezuelan general for acts undertaken in his official capacity in Venezuela. *See also Schooner Exchange v. Mcfaddon*, 11 U.S. 116, 138 (1812) (under international law, "all civilized nations allow to foreign ministers" the same immunities as provided to the sovereign).

Moreover, this immunity continues after the official leaves office for actions that the official took during his or her service. *Abiola v. Abubakar*, 267 F. Supp. 2d 907 (N.D. Ill. 2003); *see also In re Grand Jury Proceedings*, 817 F.2d at 1111 (denying head-of-state immunity to former Philippine President Marcos because new government waived his immunity).

B. Plaintiffs' claims are time barred.

Plaintiffs contend that equitable tolling has extended the ten-year statutory tolling period under the TVPA and the Alien Tort Statute, 28 U.S.C. § 1350, so as to make timely this action commenced in 2004 for actions that took place no later than 1989. Equitable tolling is to be used sparingly so as not to burden courts with making difficult decisions as to individual hardship. As this Court has stated:

> any invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and

> subjective notions of fair accommodation. We believe, therefore, that any resort to equity 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 limitation period against the party and gross injustice would result.

Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000); *see also Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) ("[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants"); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (noting that equitable tolling "is to be applied sparingly").

Under the TVPA, equitable tolling is not appropriate during any period when there existed "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. 249, 102d Cong., 1st Sess., at 11. Plaintiffs have contested Samantar's argument that Plaintiffs had an adequate and available remedy in Somalia during all or any part of the limitations period. Plaintiffs do not, and cannot legitimately, contend, however, that Plaintiffs could not have brought this action against Samantar in Italy where Samantar lived openly from 1991 to 1997.

Alessandro Campo, a licensed Italian lawyer, employed as a Legal Expert for the United Nations and for the Italian Embassy to Somalia, has sworn that:

> according to Art. 5 of the UN Convention against torture, cruel or inhuman punishment or treatment (which Italy has ratified), a Somali could have brought an action against Mr. Samantar in an Italian court at a time during the period from February 20, 1991 (when Mr. Samantar moved to Italy) to November 9, 1997 (when Mr. Samantar left Italy).

Campo Affidavit 2 at ¶ 7 (J.A. 112). Plaintiffs' only rejoinder is to dismiss Mr. Campo as a "purported expert" and to assert that his analysis "begs for discovery." Brief, at 53, n.33. Yet, as noted above, *supra* at pp. 12-13, Plaintiffs had opportunity to seek and conduct discovery addressed specifically to this issue while the case was pending before the District Court. They have certainly not met their burden of establishing that timely filing was prevented by "extraordinary circumstances" beyond Plaintiffs' control. *See Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003).

Since the case could have been brought during the period from February 20, 1991, when Samantar took up residence in Italy, through the uninterrupted period of Samantar's continued residency in Italy and subsequent residency in the United States, the statute of limitations ran on February 20, 2001, long prior to the commencement of this action in 2004. This action is accordingly time barred.

C. Plaintiffs wrongfully failed to exhaust their legal remedies in Somalia.

The TVPA requires Plaintiffs to have exhausted their local remedies before bringing suit in the United States if those remedies are adequate and available. 28 U.S.C. § 1350 note. The United States Supreme Court has suggested that an exhaustion requirement may also apply to suits under the ATS. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733, n.21 (U.S. 2004). Attached to Samantar's motion to the District Court is ample expert authority establishing that Plaintiffs had not met this exhaustion requirement. *See, e.g.*, Campo Affidavit 2 at ¶ 6 (J.A.at 110-12); Nur Affidavit at ¶¶ 8-10 (J.A. at 120). Plaintiffs never rebutted this evidence with comparable authority. *See* S. Rep. No. 249, 102d Cong., 1st Sess., at 9-10 ("[o]nce the defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile").

CONCLUSION

Samantar is entitled to immunity under the FSIA for the acts alleged in the Complaint, as the District Court held. Alternatively, Samantar is entitled to common law immunity, the statute of limitations has run, or Plaintiffs failed to exhaust their local remedies in Somalia, as Samantar also argued to the District Court. Accordingly, Samantar respectfully requests that the District Court decision be affirmed.

Dated: January 2, 2008

MOHAMED ALI SAMANTAR
By counsel

By: _____

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ADDENDUM

STATUTORY ADDENDUM

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Section 1350. Alien's action for tort

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 note

Torture Victim Protection

Pub.L. 102-256, Mar. 12, 1992, 106 Stat. 73, provided that:

""Section 1. Short Title.

""This Act may be cited as the ''Torture Victim Protection Act of 1991''.

""Sec. 2. Establishment of civil action.

""(a) Liability.--An individual who, under actual or apparent authority, or color of law, of any foreign nation--

""(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

""(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

""(b) Exhaustion of remedies.--A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

""(c) Statute of limitations.--No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

""Sec. 3. Definitions.

""(a) Extrajudicial killing.--For the purposes of this Act, the term ''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.

""**(b) Torture.**--For the purposes of this Act--

""**(1)** the term ''torture'' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

""**(2)** mental pain or suffering refers to prolonged mental harm caused by or resulting from--

""**(A)** the intentional infliction or threatened infliction of severe physical pain or suffering;

""**(B)** the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

""**(C)** the threat of imminent death; or

""**(D)** the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.''''

- **United States Code**
  - **TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE**
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Section 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

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Section 1603. Definitions

For purposes of this chapter -
(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
(b) An "agency or instrumentality of a foreign state" means any entity -
(1) which is a separate legal person, corporate or otherwise, and
(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.
(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.
(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

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Section 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

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Section 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to -

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph -

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if -

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That -

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or

constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a) -

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on Discovery. -

(1) In general. - (A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the

incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset. - (A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would -

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. - The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss. - A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. - Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

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Section 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

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Section 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim -

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

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Section 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services - and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or

general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state -

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made -

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

- United States Code
  - TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
    - PART IV - JURISDICTION AND VENUE
      - CHAPTER 97 - JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

U.S. Code as of: 01/19/04

Section 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

- **United States Code**
  - **TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE**
    - **PART IV - JURISDICTION AND VENUE**
      - **CHAPTER 97 - JURISDICTIONAL IMMUNITIES OF FOREIGN STATES**

U.S. Code as of: 01/19/04

Section 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if -

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property -

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if -

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or (7), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if -

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7).

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7), the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries -

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver. - The President may waive any provision of paragraph (1) in the interest of national security.

- United States Code
  - TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
    - PART IV - JURISDICTION AND VENUE
      - CHAPTER 97 - JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

U.S. Code as of: 01/19/04

Section 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if -

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

28 U.S.C. § 1605 note

Civil Liability for Acts of State Sponsored Terrorism

Pub.L. 104-208, Div. A, Title I, §§ 101(c) [Title V, §§ 589], Sept. 30, 1996, 110 Stat. 3009-172, provided that:

""**(a)** An official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated under section 6(j) of the Export Administration Act of 1979 [section 2405(j) of the Appendix to Title 50, War and National Defense] while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code [subsec. (a)(7) of this section] for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7) [subsec. (a)(7) of this section].

""**(b)** Provisions related to statute of limitations and limitations on discovery that would apply to an action brought under 28 U.S.C. 1605(f) and (g) [subsecs. (f) and (g) of this section] shall also apply to actions brought under this section.

No action shall be maintained under this action [SIC] if an official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States.""

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1893 Caption: Bashe Abdi Yousuf et al. v. Mohamed Ali Samantar

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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January 2, 2008

Julian H. Spirer
Attorney for Appellee

CERTIFICATE OF SERVICE

United States Court of Appeals
for the Fourth Circuit
No. 07-1893

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BASHE ABDI YOUSUF; AZIZ MOHAMED DERIA (in his Capacity as Personal Representative of the Estates of Mohamed Deria Ali, Mustafa Mohmed Deria, James Doe I and James Doe II); OFFICER JOHN DOE I; JANE DOE I; and JOHN DOE II,
Plaintiffs-Appellants,

v.

MOHAMED ALI SAMANTAR,
Defendant-Appellee.

---)

I, J. Joseph Taylor, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Spirer & Goldberg, P.C., Attorneys for Appellee.

That on the **2nd day of January 2008**, I served 2 copies the within **Brief for Defendant-Appellee** in the above captioned matter upon:

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via Federal Express, overnight Delivery , by causing the documents to be deposited in a properly addressed wrapper, in an official depository maintained by FedEx.

Unless otherwise noted, 8 copies of each have been Hand-Delivered with the Court on the same date as above.

January 2, 2008