

LAW OFFICES
SHAUGHNESSY, VOLZER & GAGNER, P.C.
1101 FIFTEENTH STREET, N.W.
SUITE 202
WASHINGTON, D. C. 20005

PHILIP A. GAGNER
BRIAN W. SHAUGHNESSY
HARVEY J. VOLZER

(202) 828-0900
FAX (202) 530-1244

VIRGINIA OFFICE
216 SOUTH PATRICK STREET
ALEXANDRIA, VA 22314

December 30, 2004

United States District Court
for the Eastern District of Virginia
Alexandria Division
Clerk of the Court
401 Courthouse Square
Alexandria, Virginia 22314

Re: Civil Action No. 1:04 CV 1360
Bashe Abdi Yousuf, et al. v. Mohamed Ali Samantar

Dear Clerk of the Court:

On December 22, 2004, Defendant through his counsel filed a Reply in Support of Defendant's Motion to Dismiss for Lack of Personal Jurisdiction and for Failure to State a Claim Upon Which Relief Can Be Granted. After that Reply was filed, we discovered that the document contained typographical errors, at least one of which had the effect of altering the substance of the sentence in which it occurred.

We prepared a corrected version of the Reply. It has come to our attention that, due to miscommunication between Defendant's co-counsel, the corrected version has not yet been filed. Enclosed is that corrected version, along with the two exhibits and a new certificate of service.

Sincerely yours,



Harvey J. Volzer

Enclosures

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

ALEXANDRIA DIVISION

BASHE ABDI YOUSUF, ET AL.

Plaintiffs,

v.

MOHAMED ALI SAMANTAR

Defendant

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Civil Action No. 1:04 CV 1360

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS
FOR LACK OF PERSONAL JURISDICTION AND FOR
FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

ARGUMENT

INTRODUCTION

As a high-ranking member of Somalia's government from 1976 through 1990, Defendant Mohamed Ali Samantar ("Defendant") is immune from suit in the United States courts pursuant to the head-of-state doctrine. Despite Plaintiffs arguments to the contrary, the doctrine generally has not been applied as Plaintiffs would suggest – exclusively to sitting heads of state. Rather, courts and scholars have found that heads of government as well as cabinet members and other members of the executive fall within the doctrine's purview. Likewise shielded from suit are former officials, so long as any new government in the defendant's country has ^{not} waived the former leader's immunity. There is no evidence here of any such waiver.

With regard to whether the situation in Somalia warrants equitable tolling of the statute of limitations, the Plaintiffs maintain that "stable conditions for victims of human rights abuses to consider bringing such claims did not exist even in Somaliland until 1997." Plaintiffs' Opposition to Defendant's Motion to Dismiss and for Failure to State a Claim Upon Which Relief Can Be Granted ("Plaintiffs' Opposition") at 2. Even if true, and Defendant has presented evidence that an independent judiciary has existed in Somaliland at least since 1991, Plaintiffs entirely ignore that another available venue for bringing this suit also has existed since 1991, the year that Defendant moved to Italy. As will be discussed in greater detail below, Italy's ratification in 1989 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Apr. 18, 1988, 1465 U.N.T.S. 85, G.A. Res. 39/46, 39th Sess., U.N. GAOR Supp. No 51, at 197, U.N. Doc. A/39/51 (1988)^{has} required the availability of a cause of action comparable to that available in the United States, which Plaintiffs elected not to pursue.

Similarly, Plaintiffs' contention that until 1997 they could not have brought suit in any jurisdiction for fear of reprisal is without merit. First, after the collapse the Siad Barre government in 1990, an exiled former leader would have no power to exact revenge in Somalia against Plaintiffs for bringing a lawsuit outside of Somalia. As explained in several affidavits attached to Defendant's Motion to Dismiss and for Failure to State a Claim Upon Which Relief Can Be Granted ("Defendant's Motion"), the tribal conflict that has existed since the early 1990s has not involved any organized group of former government officials. See Affidavits of Alessandro Campo ("Campo Affidavit 1") (Exhibit 2 to Defendant's Motion); Affidavit of Mohammed Haji Nur ("Nur

Affidavit”) (Exhibit 3 to Defendant’s Motion); and Affidavit of Mohamed Abdirizak (“Abdirizak Affidavit”) (Exhibit 4 to Defendant’s Motion).¹ Indeed, many former officials were forced to leave the country, as was Defendant.

In addition, Plaintiffs state that “[e]ach of the Plaintiffs either resides in Somalia or has immediate family members there, dictating equitable tolling.” Plaintiffs’ Opposition at 19. According to the Complaint, however, many Plaintiffs and their families either have been living outside of Somalia altogether or may live in Somaliland (Complaint at ¶¶ 8-13, 36, 45, 54, 58, 64), which the Plaintiffs describe as having “obtained a minimum level [of] peace and security” and as “dominated by the Isaaq clan” (Plaintiffs’ Opposition at 6), the clan to which all of the Plaintiffs belong (Complaint at ¶¶ 8-13).

Further, Plaintiffs erroneously maintain that the requirement of the Torture Victims Protection Act (“TVPA”), 28 U.S.C. § 1350 note, for exhaustion of local remedies (a) has been satisfied because Somaliland’s courts do not provide available and adequate remedies, and (b) is inapplicable to the claims under the Alien Tort Claims Act (“ATCA”), 28 U.S.C. § 1350. As to the availability of an adequate remedy in Somaliland, as testified by Dr. Campo and verified by the United States Department of State, Somaliland has had a functioning judiciary for many years. Campo Affidavit 1 (Exhibit 2 to Defendant’s Motion) at ¶ 6; see, e.g., Dep’t of State 2003 Country Rep. on Human Rights Practices in Somalia (Feb. 25, 2004); Dep’t of State 2002 Country Rep. on

¹ If, as Plaintiffs maintain, the factual questions surrounding the issue of equitable tolling render it inappropriate for resolution in a motion to dismiss (Plaintiffs’ Opposition at 18, n. 14), the Court may and is requested to convert Defendant’s Motion into a motion for summary judgment under Federal Rule of Civil Procedure 56. See Brown v. Zavaras, 63 F.3d 967, 969 (10th Cir. 1995). Defendant joins in Plaintiffs’ request that, in the event that the Court elects to consider Defendant’s Motion as one for summary judgment, discovery on this issue be had and evidence taken before the issuance of a ruling (Plaintiffs’ Opposition at 18, n. 14).