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

ALEXANDRIA DIVISION

BASHE ABDI YOUSUF, ET AL.	*	
	*	
Plaintiffs,	*	**Civil Action No. 1:04 CV 1360**
	*	
v.	*	
	*	
MOHAMED ALI SAMANTAR	*	
	*	
Defendant	*	

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 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) 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 request 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).

Human Rights Practices in Somalia (Mar. 31, 2003); Dep't of State 2001 Country Rep. on Human Rights Practices in Somalia (Mar. 4, 2002); Dep't of State 2000 Country Rep. on Human Rights Practices in Somalia (Feb. 23, 2001); Dep't of State 1999 Country Rep. on Human Rights Practices in Somalia (Feb. 23, 2000); Dep't of State 1998 Country Rep. on Human Rights Practices in Somalia (Feb. 26, 1999). Moreover, specific causes of action addressing torture and extrajudicial killing are available in Somaliland. Campo Affidavit 1 (Exhibit 2 to Defendant's Motion) at ¶ 9. As to the inapplicability of an exhaustion requirement to the ACTA (Plaintiffs Opposition at 22), the case law is hardly as uniform as Plaintiffs suggest. See, e.g., Sosa v. Alvarez-Manchain, 124 S. Ct. 2739, 2766 at n. 21 (2004).

Finally, Defendant's request that the action be dismissed on the basis of forum non conveniens is entirely appropriate. First, there is an adequate and available alternative forum – Somaliland. Second, both the private and public interests favor adjudication in Somaliland. Virtually all of the witnesses and relevant documents are located in Somalia or Somaliland. This point now is underscored by Plaintiffs' discovery requests (attached hereto as Exhibit 1); responding fully to many of the interrogatories and document requests would require access to persons and materials located in Somalia.

The public interest of Somaliland similarly should incline this Court to defer to its jurisdiction. Somaliland is governed largely by members of the Isaaq clan, who "established the Somali National Movement ("SNM") to oppose the [Barre] government . . . [and] . . . [i]n response, the military government launched a brutal counterinsurgency campaign intended to eliminate the SNM and all other Isaaq clan opposition." (Plaintiffs'

Opposition at 4). No other jurisdiction could possibly have a stronger interest in redressing Plaintiffs' alleged harms.

BACKGROUND

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 Defendant, Mohammad Ali Samantar ("Samanatar Affidavit") (Exhibit 1 to Defendant's Motion) 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, Defendant was appointed Prime Minister and served in that position until about September 1990. Id. at ¶ 4.

During the period that Defendant held these positions within the Somali government, the United States maintained diplomatic relations with Somalia. Id. at ¶ 7. Defendant served Somalia in an official capacity and as a representative of Somalia's executive throughout the years during which Plaintiffs allegedly were victimized.

In 1990, Defendant stepped down as Prime Minister. The following year, after the collapse of the regime of President Muhammad Siad Barre, Defendant was forced to flee Somalia and sought temporary asylum in Kenya. In 1991, he emigrated to Italy, where he lived until 1997. In June 1997, Defendant moved to the United States and took up his current residence in Fairfax, Virginia. Id. at ¶¶ 9-10.

THE HEAD-OF-STATE DOCTRINE PROVIDES THE DEFENDANT WITH ABSOLUTE IMMUNITY FROM SUIT

Head-of-State Immunity Encompasses Defendant's Positions as Prime Minister, First Vice President, and Defense Minister

The Defendant is entitled to head-of-state immunity. There is no dispute that Defendant served as a high-ranking official of the Barre government beginning in 1971 and that he assumed the position of Prime Minister in 1987. He worked in this capacity until the government's collapse in 1990. Samantar Affidavit (Exhibit 1 to Defendant's Motion) at ¶ 2-6; Plaintiffs' Opposition at 3. At common law foreign leaders are accorded immunity from actions in the United States courts. See, e.g., We Ye v. Jiang Zemin, 383 F.3d 620 (7th Cir. 2004) (granting head-of-state immunity to former President of the People's Republic of China) ; Saltany v. Reagan, 702 F. Supp. 319 (D.D.C. 1988), order aff'd in part, 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 Prime Minister of the United Kingdom).[2]

The cases cited by Plaintiffs against this proposition are easily distinguishable. First, in First American Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1121 (D.D.C. 1996), the defendants had asserted head-of-state status, and were denied such, on the basis of their membership in the ruling family of Dubai, not their governmental positions. Id. at 1121. Similarly, in Republic of the Philippines v. Marcos, 665 F. Supp. 793 (N.D. Cal. 1987), the court declined to apply head-of-state immunity to the Philippine Solicitor General

[2] See also Kilroy v. Windsor, Civ. No. C-78-291 (N.D. Ohio 1978), excerpted in 1978 Dig. U.S. Prac. Int'l L. 641-43. Plaintiffs describe the case as being decided on diplomatic immunity grounds (Plaintiff's Opposition at 10), but the United States' suggestion of immunity in that case states "Under customary rules of international law, recognized and applied in the United States, the head of a foreign government, its foreign ministers and other diplomatic representatives, including senior officials on special diplomatice missions, are immune from the jurisdiction of the United States, Federal and State courts." 1978 Dig. U.S. Prac. Int'l L. at 642.

(clearly a position of lesser rank than those held by Defendant). However, the court also recognized that the head-of-state doctrine traditionally extends beyond the actual head of state to at least the foreign minister (citing The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch 116) 74, 86-88 (1812)). Moreover, the Marcos court concluded that "there is no need for such a step [granting head-of-state immunity] in this case" because "if Ordonez is found to qualify as a diplomatic agent, he is entitled to all the privileges and immunities accorded any other such agent under the Vienna Convention." 665 F. Supp. at 798. Finally, Plaintiffs themselves admit that, in El-Hadad v. Embassy of the United Arab Emirates, 69 F. Supp. 2d 69, 82 at n. 10 (D.D.C. 1999), the court did not rule on the question of head-of-state immunity. Plaintiffs' Opposition at 9-10. Rather, they point to dicta that the Ministers of Higher Education and Scientific Education (again, inferior posts to that of Prime Minister, First Vice President, and Defense Minister) would not have been granted such immunity, had the court ruled on the issue.

None of the cases that Plaintiffs cite directly denied head-of-state immunity to an official with a rank of Prime Minister or Vice President, and Plaintiffs themselves recognize that significant contrary authority exists. Plaintiffs' Opposition at 9-10. Neither this Court nor the Fourth Circuit has ruled on immunity for the most senior members of the executive branch of a foreign sovereign, and this Court is free to rule in this action based on the existing precedent, which largely supports head-of-state immunity for officials of the Defendant's stature.

Residual Head-of-State Immunity Applies to Former Leaders

Plaintiffs similarly ask the court to take the narrowest of approaches with regard to whether the Defendant's past service to Somalia qualifies him for immunity. Arguing

generally that former heads of state are not protected by the doctrine, Plaintiffs again attempt to support their position primarily through dicta. See Plaintiffs' Opposition at 10, citing "dicta" in El Hadad, 69 F. Supp. 2d 69, and referencing language in In re Mr. and Mrs. Doe v. United States, 860 F.2d 40, 45 (2d Cir. 1988) where the court failed "to reach the merits of the case." Similarly, Plaintiffs cite to First American Corporation for the proposition that head-of-state immunity applies only to a current leader – "a sitting head of state" (Plaintiffs' Opposition at 10, quoting First American Corp., 948 F. Supp. at 130). However, both defendants in that case were then present employees of the government of Dubai, one in a cabinet-level position. 948 F. Supp. at 1113. The quoted language was mere dicta explaining that neither defendant was a "sitting head of state." Id. at 1121.

Even less persuasive is Plaintiffs' reference to the court's grant of immunity to former President Jean-Bertrand Aristide as Haiti's "current" head-of-state in Lafontant v. Aristide, 844 F. Supp. 128 (1994). Rather than limiting head-of-state immunity to current leaders, as the quotation suggests, the court was distinguishing the ousted Aristide's position from that of the former Philippine dictator, Ferdinand Marcos. Both were exiled, but the United States no longer recognized the Marcos government, as President Corazon Aquino already had assumed leadership and disavowed immunity for Marcos. In contrast to Marcos' situation, the court reasoned, Haiti had not waived Aristide's "residual" head-of-state immunity and, as such, he was protected from suit. Id. at 133-34. Much like Aristide's circsumstances, Somalia has no new government to disavow Defendant's immunity. Plaintiffs' Opposition at 6. Moreover, at all relevant times, the United States recognized the Barre government and maintained diplomatic

relations with Somalia, an important factor in the Lafontant court's holding. See 844 F. Supp. at 132-33.

In sum, while the case law on head-of-state immunity is not entirely settled, the weight of the authorities favors bestowing its protections on a former Prime Minister and First Vice President of a nation enjoying United States recognition, so long as the country involved, as here, has not waived the immunity to which the official may be entitled. See Schooner Exchange v. M'Faddon, 11 U.S. at 138 (foreign ministers are immune); Chong Boon Kim v. Kim Young Shik, Civ. No. 125656 (Cir. Ct. 1st Cir., Haw. 1963), excerpted in 58 Am. J. Int'l L. 186 (1964) (Foreign Minister immune); Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994) (former President immune); Saltany v. Reagan, 702 F. Supp. 319 (D.D.C. 1988) (Prime Minister immune); Abiola v. Abukar, 267 F. Supp. 2d 907 (N.D. Ill. 2003).[3] In the case at bar, Defendant is entitled to immunity and the dismissal of Plaintiffs' claims.

PLAINTIFFS' CLAIMS ARE TIME-BARRED AND EQUITABLE TOLLING, IF APPLICABLE, WOULD NOT RENDER SUCH CLAIMS TIMELY

Plaintiffs contend that equitable tolling extends the ten-year statutory tolling period, 28 U.S.C. § 1350 note, § 2(c), until 2007 for events that allegedly took place between 1981 and 1989. While Defendant agrees that some degree of leniency in the filing deadline is appropriate in this case, the approximately two-decade extension that Plaintiffs seek is not.

[3] Plaintiffs correctly point out that in several of the cases discussed above, the Department of State ("DOS") had intervened and arranged for the filing of a suggestion of immunity on behalf of the defendant asserting head-of-state immunity. In all of those cases, the DOS's request for immunity was honored and almost uniformly held to be dispositive in granting immunity. See, e.g., Wei Ye v. Jiang Zemin, 383 F.3d 620 (7th Cir. 2004); Lafontant, 844 F. Supp. at 134. However, the absence of a suggestion of immunity does not bar a recognition of immunity. See, e.g., Abiola v. Abubakar, 267 F. Supp. 907, 915, 917 (N.D. Ill. 2003).

Plaintiffs acknowledge that equitable tolling is appropriate only where "extraordinary circumstances" beyond a plaintiff's control prevented timely filing. Plaintiffs' Opposition at 14, quoting Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003). However, they ask this Court to extend the tolling period well beyond the time during which such circumstances may have existed. Plaintiffs' Opposition asserts two circumstances which they purport to warrant tolling until 1997: (a) Defendant'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 under these statutes." Plaintiffs' Opposition at 13. Plaintiffs' first argument is simply misplaced and the second unpersuasive on the basis of the facts set forth in the Complaint.

The Plaintiffs cite the legislative history of the limitations provision in the TVPA to demonstrate that the ten-year limitation is subject to "all equitable tolling principles." Plaintiffs' Opposition at 15, quoting S. Rep. No. 249, 102d Cong., 1st Sess. (1991), at 10-11. Defendant has no quarrel with this analysis. However, he disagrees with Plaintiffs' assertion that, under the TVPA and ACTA, which share the limitation provision expressed in Section 1350, note, § 2(c), "the statute of limitations is tolled until the defendant enters the United States and is subject to the jurisdiction of the federal courts." Plaintiffs' Opposition at 16. This simply is not the case, if outside of the United States there exists:

> 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 . . . . It should also be tolled where the defendant has concealed his or her whereabouts or the plaintiff has been unable to discover the identity of the offender.

Plaintiffs' Opposition at 15-16, quoting S. Rep. No. 249, 102d Cong., 1st Sess., at 11.

Plaintiffs wrongly describe Defendant's proposition of the availability of an Italian remedy as "ha[ving] no bearing on the statute of limitations issue" and suggest that the question of bringing suit in Italy "confuses the doctrines of statute of limitations and exhaustion of remedies." Plaintiffs' Opposition at 20. The Congressional language quoted above makes clear that the statute of limitations will begin to run whenever the complainants have an adequate remedy in any jurisdiction, be it Italy or Somaliland, in which to bring the same or a similar action.

Defendant lived openly in Italy from 1991 to 1997. Samantar Affidavit (Exhibit 1 to Defendant's Motion) at ¶ 9. According to Alessandro Campo, a licensed Italian lawyer, who has been employed as the Legal Expert for the United Nations and the Italian Embassy to Somalia, Plaintiffs could have brought an action similar to that before this Court in Italy during this entire period. Campo Affidavit 2 (attached as Exhibit 2 hereto). In his recent affidavit, Mr. Campo confirms 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.

In light of the above, it is undeniable that Plaintiffs could have initiated an action in Italy that would have been "adequate and available," as Congress envisaged. See S. Rep. No. 249, 102d Cong., 1st Sess., at 11. Moreover, as will be discussed in greater detail in the section on forum non conveniens, Mr. Campo, who also is an expert on Somali law and served as a participant in a United Nations Development Office mission

to assess Somaliland's courts and judicial authorities, is of the opinion that "adequate and available" remedies also have been available in Somaliland at least since 1991.

> From my assessment of Somaliland's judiciary, and based upon information generated by the Somaliland Government that I deem to be reliable, there has been a relatively independent and functioning judiciary within Somaliland since 1991 . . . . Somaliland's judiciary is competent to hear claims such as these, for torture and crimes against humanity.

Campo Affidavit 1 (Exhibit 1 to Defendant's Motion) at ¶¶ 6-7.

Mr. Campo also disputes Plaintiffs' second basis for equitable tolling – that "fear of reprisal from the military by both plaintiffs and potential witnesses justifies tolling the limitations period in ACTA and TVPA cases." Plaintiffs' Opposition at 17. As stated in the affidavit attached to Defendant's Motion, Mr. Campo believes that conditions in Somalia since the fall of the Barre administration do not preclude investigation and do not present a risk of reprisal.

> 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.

Campo Affidavit (Exhibit 1 to Defendant's Motion) at ¶ 11.[4]

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[4] Hilao v. Marcos, 103 F.3d 767, 773 (9th Cir. 1996), referenced in Defendant's Motion, further buttresses Defendant's view that Plaintiffs' circumstances could only have tolled the statute of limitations until 1990, when Defendant left office, or at best, 1991, when the Barre administration ended and Plaintiffs were free to bring suit in Italy or Somaliland. In Hilao, the court ruled that "[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. Hilao at 773. Plaintiffs attempt to circumvent this ruling by referencing the lower court's findings (910 F. Supp. 1460, 1463 (D. Haw. 1995) that Marcos had fled to the United States after his ouster. Plaintiffs' Opposition at 17, n. 10. According to Plaintiffs, this represents proof that the unspoken reasoning behind the Hilao ruling was that Marcos' entry into the jurisdiction of the U.S. courts corresponded to the end of the tolling period. This view is consistent with Plaintiffs' erroneous reading of the TVPA's legislative history, but inconsistent with the court's opinions in both Hilao cases. Plaintiffs' Opposition at 17, n. 10.

Moreover, contrary to what Plaintiffs state in their Opposition, it appears that few Plaintiffs or their family members live (or have lived) in the part of Somalia that they describe as suffering from "chaos and clan-based warfare" (Plaintiffs' Opposition at 18). According to the Complaint, many Plaintiffs and their family live outside of Somalia altogether or may be living in Somaliland (Complaint at ¶¶ 8-13, 36, 45, 54, 58, 64). For several family members, the Complaint provides no information. A brief summary of the Plaintiffs' allegations in the Compliant with respect to their whereabouts and those of their families illustrates the point.

Plaintiff	Allegation dates	Where plaintiff resides	Where family resides
Bashe Abdi Yousuf	1981-1982; 1982-1989 (Complaint at ¶¶ 26-45)	Fled Somalia in or around May 1989; resides in US (Complaint at ¶ 36, ¶ 8)	No information
John Doe I	1984 (Complaint at ¶ 37)	Remained in N. Somalia (Complaint at ¶ 45, ¶ 9)	Extended family fled for safety to refugee camp in Ethiopia (Complaint at ¶ 45)
Jane Doe I	1985-89 (Complaint at ¶¶ 46-53)	Fled Somalia in 1989; returned to Somalia in 1991 (unclear where) (Complaint at ¶ 54, ¶ 10)	Family was in refugee camp in Ethiopia (Complaint at ¶ 54)
John Doe II	1988 (Complaint at ¶¶ 55-58	Fled Hargeisa and returned to Somalia in 1991 (unclear where) (Complaint at ¶ 58, ¶ 11)	No information
John Doe III	1989 (Complaint at ¶¶ 59-60)	Hid in Hargeisa and subsequently fled Somalia; lives in Kuwait (Complaint at ¶ 64, ¶ 12)	No information
John Doe IV	1989 (Complaint at ¶¶ 65-66)	Somalia (unclear where) (Complaint at ¶ 13)	No information

From the above, it is clear that Plaintiffs Bashe Abdi Yousuf and John Doe III have alleged no facts supporting their position that fear of reprisal warrants equitable tolling, as neither of them resides in Somalia and neither has alleged that family members reside (or resided) in Somalia after Barre was overthrown. Indeed, none of the Plaintiffs state where in Somalia they and their families reside and under what circumstances (e.g., in hiding in Northern Somalia or living openly in Somaliland, an area dominated by Plaintiffs' own Isaaq clan). Accordingly, they have failed to allege facts sufficient to raise the issue of equitable tolling on the basis of fear of reprisal.[5]

As noted in Defendant's Motion, the Eastern District of Virginia recently underscored that plaintiffs bear the burden of adducing facts that warrant application of equitable tolling. Hall v. Johnson, 332 F. Supp. 2d 904 (E.D. Va. 2004). Plaintiffs in the present action have failed to justify application of the doctrine of equitable tolling, and their claims now are time-barred and must be dismissed.

PLAINTIFFS CLAIMS SHOULD BE DISMISSED FOR FAILURE TO COMPLY WITH TVPA'S REQUIREMENT TO EXHAUST LOCAL REMEDIES AND ON THE BASIS OF FORUM NON CONVENIENS

Plaintiffs Have Not Exhausted Their Remedies in Somaliland

The TVPA requires that, before bringing suit in the United States the Plaintiffs first must have exhausted their legal remedies in Somalia or Somaliland. See 28 U.S.C. § 1350 note, § 2(b). As Plaintiffs correctly note, the exhaustion requirement generally has been held to apply only to Plaintiffs' TVPA claims. Plaintiffs' Opposition at 22.

[5] Plaintiffs' decisions to return and remain in Somalia also suggest that they considered the area the chose to settle in to be relatively safe after the departure of Barre.

However, in discussing exhaustion within the context of ACTA, the U.S. Supreme Court in Sosa v. Alvarez-Manchain, 124 S. Ct. 2739 (2004), noted:

> [T]he European Commission argues as amicus curiae that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other fora such as international claims tribunals. See Brief for European Commission as Amicus Curiae 24, n. 54 (citing I. Brownlie, Principles of Public International Law 472-481 (6th ed. 2003)); cf. Torture Victim Protection Act of 1991, § 2(b), 106 Stat 73 (exhaustion requirement). We would certainly consider this requirement in an appropriate case.

124 S. Ct. at 2766 n. 21 (emphasis added). The Supreme Court's dicta in Sosa suggests that this Court would be free to apply an exhaustion requirement if the Court deems such a measure "appropriate" in the instant action.

In any event, once a 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." Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1357-58 (S.D. Fla. 2003) (quoting S. Rep. No. 249 , 102d Cong., 1st Sess. (1991)).[6]

Plaintiffs have failed to make an adequate showing of exhaustion for those claims, thus requiring dismissal or, at best, they have presented some evidence for a different view of Somaliland's courts than that described by Defendant's legal expert, Mr. Campo. Plaintiffs' Opposition at 24-25. If the court determines that Plaintiffs have made a sufficient showing to withstand a motion to dismiss on the pleadings, Defendant respectfully requests that the Court, in its discretion, convert this portion of Defendant's

[6] Plaintiffs cite to the portion of Sinaltrainal that discusses the showing that a defendant must make in order to raise exhaustion as an affirmative defense, but they ignore the burden placed on the plaintiff once such a showing has been made. Plaintiffs' Opposition at 23, citing Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1358 (S.D. Fla. 2003).

Motion into one for Summary Judgment and permit both sides to conduct discovery on the question of exhaustion. See Brown v. Zavaras, 63 F.3d 967, 969 (10th Cir. 1995).

Adequate Discovery Can Not Be Conducted In the United States And Plaintiffs' Claims Should Be Dismissed On the Basis of Forum Non Coveniens

Dismissal on the basis of forum non conveniens is appropriate if a defendant can demonstrate: "(1) that there exists an adequate alternative forum . . . and (2) that the ordinarily strong presumption favoring a plaintiff's chosen forum is overcome by a balance of the relevant factors of private and public interest weighing heavily in favor of the alternative forum." Aguida v. Texaco, Inc., 142 F. Supp. 2d 534, 538-39 (S.D.N.Y. 2001). As discussed above, Somaliland provides an adequate alternative forum and, as will be explained below, the private interests of the parties and witnesses, as well as the public interest of Somaliland, favor dismissal of this action.

As Plaintiffs note, Defendant bears the "threshold burden . . . to demonstrate that an adequate alternative forum exists." Plaintiffs' Opposition at 26, quoting Abiola v. Abubakar, 267 F. Supp. 2d 907 (N.D. Ill. 2003). Defendant has met that burden. As described by Mr. Campo in Affidavit 1, Somaliland's courts function sufficiently to offer an adequate hearing to Plaintiffs' claims.

> From my assessment of Somaliland's judiciary, and based upon information generated by the Somaliland Government that I deem to be reliable . . . .
>
> Somaliland's judiciary is competent to hear claims such as these, for torture and crimes against humanity, and could do so relatively independent of political influence.
>
> A Somali bringing a claim for victimization against a former member of the Barre administration could bring such a claim in Somaliland for events that took place in Somaliland, in 'Puntland' for the events that took place in North East Somalia, and in Mogadishu for the events that took place in Benadir Region that is the district around Mogadishu. Somalia is to be

> considered as a de facto federal State with three national authorities (including their own judicial systems and law enforcement agencies) that control different areas of the country, i.e. Somaliland for NW Somalia, Puntland for NE Somalia and the Transitional National Government for Benadir Region.
>
> Somaliland's law provides causes of action for damages to victims of torture, prisoner abuse, and crimes against humanity.
>
> In the event of a judgment, Somaliland's judicial system provides adequate mechanisms for enforcement.

Campo Affidavit 1 (Exhibit 2 to Defendant's Motion) at ¶¶ 6-10.

Plaintiffs' arguments to the contrary largely are based upon the bald allegations in the Complaint. See Plaintiff's Opposition at 23-24. Plaintiffs attempt to bolster their position by citing to several inapposite and outdated[7] portions of the Department of State ("DOS") reports on Somalia previously referenced by Defendant, yet they overlook the most salient conclusion of the most recent Report that "Somaliland's Government included . . . a functioning civil court system." Dep't of State 2003 Country Rep. on Human Rights Practices in Somalia (Feb. 25, 2004).

Defendant has shown not only that Somaliland provides an adequate and available forum for Plaintiffs' action, but also that the public and private interests weigh in favor of dismissal. Plaintiffs describe the relevant private interest factors as:

> (1) relative ease of access to sources of proof; (2) availability of compulsory process for attendance of witnesses; (3) costs of bringing willing witnesses and parties to the place of trial; (4) access to physical evidence and other sources of proof; (5) enforceability of judgments; and (6) "all other practical problems that make trial of a case easy, expeditious and inexpensive."

Plaintiffs' Opposition at 27, n. 19, citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n. 6 (1981). Defendant's Motion addresses the difficulty that Defendant faces in

[7] Plaintiffs quote from the Department of State 1988 Country Report for the proposition that "[t]here is no national judiciary system" in Somalia. Plaintiffs' Opposition at 25. As the Barre regime was still in power and Somaliland had not come into existence, the DOS's conclusion is irrelevant to issues before this Court.

mounting an adequate defense without access to the witnesses and materials that are located in Somalia. Defendant's Motion at 13. Plaintiffs' discovery requests further highlight the problem. See generally Plaintiff's Interrogatories and Requests for Production of Documents (Exhibit 1).

Plaintiffs argue, however, that while, Defendant's Motion makes "arguments relating to the availability of witnesses and documents in Somalia (factors 1-4)," it does not address the enforceability of a Somaliland judgment in the United States. Plaintiffs' Opposition at 27. Since the United States and Somaliland do not have a treaty governing mutual recognition of judgments, enforceability will depend on "principles of comity and reciprocity." Glaverbel Societe Anonyme v. Northlake Mktg. & Supply, Inc., 48 U.S.P.Q.2d (BNA) 1344, 1998 U.S. Dist. Lexis 18820 at 79, n.1 (N.D. Ind. 1998), citing Hilton v. Guyot, 159 U.S. 113 (1895).

In deciding whether to enforce a judgment, the Supreme Court in Hilton considered whether the foreign judgment was rendered under circumstances where the parties were provided: (1) an opportunity for a full and fair trial; (2) trial before a court of competent jurisdiction; (3) citation and voluntary appearance of adversary parties; (4) adjudication upon regular proceedings; (5) a system of jurisprudence likely to secure an impartial trial; and (6) there existed no evidence of fraud in procuring the judgment, prejudice in the system of laws or the court, or any other special reason why comity should not be allowed. Hilton, 159 U.S. at 202. Mr. Campo's affidavits explain that Somaliland's system more than amply meets the requirements of Hilton. Campo Affidavits 1 and 2.

It is obvious that the parties to this action would enjoy far greater access to witnesses (factor 3) in Somaliland than in the United States. Furthermore, Mr. Campo's most recent affidavit addresses many of the factors involved in assessing both enforceability of a foreign judgment and the propriety of forum non conveniens dismissal generally. In addition to affirming that "it is clear that Somaliland presents an available and adequate forum for Plaintiffs' claims" (Campo Affidavit 2 at ¶ 6(j)), he provides additional support for Defendant's position that "Somaliland's judiciary is competent to hear claims . . . for torture and crimes against humanity, and could do so relatively independent of political influence" (Id. at ¶ 6(c)) (factors 2, 5, and 6), as well as the remaining factors (1 and 4). Mr. Campo explains:

> Numerous human rights abuse cases have been brought in Somaliland's courts . . . . [T]he UNOHCHR for Somalia and the UN independent expert of the UN Office of the High Commissioner for Human Rights closely monitored a case with which I am familiar and which illustrates the competency and independence of Somaliland's courts to hear human rights abuse cases.
>
> The case involves three 'Somalilanders' (plaintiffs) and the Total Oil Plant in Barbera . . . . The plaintiffs were recognized to be victims of inhuman treatment because they were forced to work in oil containers, painting them with toxic colors without having any protection (gloves, masks, uniforms, etc). The Somaliland Supreme Court found the Total Oil Plant responsible for the illnesses that the plaintiffs suffered and for the violation of their civil and human rights and awarded about US$ 500,000 to the three Somalilanders.

Id. at ¶¶ 6 (d)-(e). Mr. Campo's testimony demonstrates that Somaliland's judiciary has the capability of fairly and fully adjudicating a human rights claim. Thus, although the United States has no current recognition of judgments treaty with Somaliland, the relevant consideration in Hilton favor enforceability of a judgment rendered in that jurisdiction.

As Plaintiffs seem to recognize (Plaintiffs' Opposition at 27), the remainder of the factors relating generally to forum non conveniens incline toward Defendant's position.[8] The public interest factors are: (1) burden on the local courts and juries; (2) local interest in having the matter decided locally; and (3) familiarity with governing law and avoidance of conflicts of law or foreign law issues. Plaintiffs' Opposition at 28, n. 21, citing Gulf Oil Corp v. Gilbert, 330 U.S. 501, 508-09 (1947). Plaintiffs have raised no concerns about burdening the local judiciary, and there can be no doubt that issues involving Somali law can best be determined by the Somaliland courts. Therefore, the only relevant question is whether the United States or Somaliland holds a greater interest in the outcome of this case.

The only United States interest in adjudicating this action is "not being a haven to human rights abusers." Plaintiffs' Opposition at 28. This interest pales in comparison to that of Somaliland where, as Plaintiffs explain, the Isaaq clan "established the Somali National Movement ("SNM") to oppose the [Barre] government . . . , declared [Somaliland's] independence, reclaimed its previous name, and seceded from Somalia." Plaintiffs' Opposition at 4, 6. Somaliland's inhabitants were, according to Plaintiffs, persecuted by the Barre administration and now have established a civil government with its own judiciary. Id. Certainly, no other jurisdiction can complete with Somaliland's interest in presiding over the trials of those persons accused of victimizing its residents.

For the foregoing reasons, Plaintiffs' action should be dismissed on the basis of forum non conveniens.

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[8] Plaintiffs maintain that, without the submission of a witness list, dismissal on the basis of forum non conveniens would be inappropriate. Plaintiffs' Opposition at 27. The U.S. Court of Appeals for the Fourth Circuit has articulated no such requirement.

CONCLUSION

Plaintiffs' claims must be dismissed because head-of-state immunity bars this Court from exercising jurisdiction over Defendant, as the events complained of allegedly took place while Defendant was Somalia's Prime Minister, First Vice President, or Minister of Defense.

In addition to this Court's lack of personal jurisdiction over Defendant, Plaintiff's claims must be dismissed as untimely within the TVPA's ten-year statute of limitations, 28 U.S.C. § 1350 note, § 2(c), even if the Court grants some measure of equitable tolling (i.e., through the end of the Barre era or Defendant's assumption of residence in Italy).

Moreover, Plaintiffs should have brought this action in Somaliland. They failed to exhaust appropriate local remedies in Somaliland, as required by the TVPA, 28 U.S.C. § 1350, note, § 2(b), and Somaliland presents a more convenient and appropriate forum for this action.

WHEREFORE, Defendant respectfully requests that this Court grant Defendant's motion DISMISSING Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure 12 (b)(1) and 12(b)(6). In the alternative, Defendant asks the Court to convert any portions of Defendant's Motion to Dismiss that it deems inappropriate for a judgment on the pleadings into a Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Fred B. Goldberg, hereby certify that on this 22nd day of December, 2004, I caused to be served a true and correct copy of the foregoing Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss For Lack of Subject Matter Jurisdiction and For Failure to State a Claim Upon Which Relief Can Br Granted by first-class U.S. Mail, postage pre-paid, as indicated below on the following:

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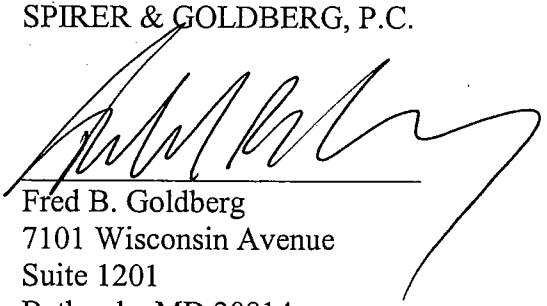

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EXHIBIT 1

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

ALEXANDRIA DIVISION

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

PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANT MOHAMED ALI SAMANTAR

Pursuant to Federal Rule of Civil Procedure 33, plaintiffs Bashe Abdi Yousuf, John Doe I, Jane Doe I, John Doe II, John Doe III and John Doe IV (collectively, "Plaintiffs") hereby request that defendant Mohamed Ali Samantar ("Defendant") answer separately and truthfully in writing under oath within 30 days of service hereof, each of the Interrogatories set forth below in accordance with the Definitions and Instructions as they appear below.

DEFINITIONS

A. "You" and "your" shall mean defendant, his representatives, subordinates, agents, employees, attorneys, companies or any other person or entities acting or purporting to act on his behalf.

B. "Somali" or "Somalia" shall refer to the Democratic Republic of Somalia, as it existed during the period 1980 through 1990.

C. "Somali Armed Forces" shall refer to any unit or member of the following: (a) the Somali military forces: army, navy, air force, or special forces; (b) the National Security Service ("NSS"); (c) the Red Berets; (d) any police organization including the Defense Intelligence Security Agency (also known as "Hangash"); (e) anyone acting or purporting to act under the

authority (whether actual or apparent) of the Somali Armed Forces; and (f) any other military force, unit, organization, department or agency of Somalia and any of the aforementioned predecessor or successor organizations or groups (whether or not formally instituted) and shall be construed so as to mean any of these organizations individually, severally, or collectively.

D. "Person" shall mean a natural person and any other cognizable entity, including without limitation, firms, partnerships, corporations, divisions, proprietorships, joint ventures, consortiums, clubs, associations, foundations, governmental agencies or instrumentalities, societies, orders, or any other organization or entity.

E. "Communicate" and "Communication" shall mean any transmission or exchange of information by any manner including telephonic "statements", voicemail, inquiries, negotiations, discussions, agreements, understandings, meetings, notes, mail, facsimile, letters, electronic mail (e-mail), telegrams, teletypes, telexes, telecopies, computer linkups, written memoranda, face-to-face conversations and any verbal or non-verbal assertion (or "statement") by one or more persons or among two or more persons.

F. "Document" and/or "thing" shall be synonymous in meaning and equal in scope to the usage of the term in Rule 34(a) of the Federal Rules of Civil Procedure and the term "Writing" as defined in the Rule 1001 of the Federal Rules of Evidence. Electronic correspondence is also included within the meaning of this term. A draft or non-identical copy is a separate document within the meaning of this term.

G. "Refer," "Relate" and "Concern" (and their forms), shall mean to refer to, relate to, pertaining to, having a relationship to, evidencing or constituting evidence of in whole or in part, to concern, involve, be connected with, reflect, indicate, disclose, summarize, explain, support, refute, exhibit, entail, illustrate, record, memorialize, discuss, include, implicate, name,