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)
	*	
MOHAMED ALI SAMANTAR,	*	
	*	
Defendant.	*	

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

Defendant Mohamed Ali Samantar ("Defendant"), by and through undersigned counsel, Spirer and Goldberg, P.C., and Shaughnessy, Volzer & Gagner, P.C., hereby submits this Reply to Plaintiffs' Opposition to Motion to Dismiss ("Reply").

INTRODUCTION

Plaintiffs' Opposition to Defendant's Motion to Dismiss ("Opposition") fails to demonstrate why the Second Amended Complaint should not be dismissed. First, the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332, 1391, and 1602-11 (2004) (the "FSIA"), immunizes foreign officials, such as Samantar, for actions taken in their official capacity even if those actions might represent violations of local and international norms. This result is wholly consistent with Congressional intent in enacting the Torture Victim Protection Act, 28 U.S.C. § 1350 note (the "TVPA") in that the Congress expected that the immunity under the FSIA enjoyed by former officials accused of serious violations of law would be waived by the foreign

state and not confirmed by the foreign state as Somalia has done here. Moreover, the immunity traditionally conferred upon foreign heads of state does extend to persons enjoying the positions of prime minister and defense secretary and continues to apply after those persons have left office for acts taken while in office. Second, despite Plaintiffs' assertions to the contrary, no United States court has recognized "joint criminal responsibility" as a basis for secondary liability, and such a theory of liability should not be allowed here. Third, the Plaintiffs readily could have sued Samantar as early as 1991 when he took up open residence in Italy, if not before while he resided in Somalia, and are not entitled to have the statute of limitations tolled after that date. Fourth and finally, Plaintiffs failed to exhaust their remedies in Somalia before bringing suit here. For these reasons, as more fully discussed in the memorandum supporting Samantar's Motion as supplemented below, this action should be dismissed.

ARGUMENT

I. SAMANTAR IS ENTITLED TO IMMUNITY UNDER THE FSIA AND AS A FORMER HEAD OF STATE

A. The FSIA Confers Immunity on Samantar

Plaintiffs concede that, under the FSIA, Samantar, as an instrumentality or agent of Somalia, is entitled to immunity with respect to his official acts. Opposition at 6-7. They argue however that the acts alleged in the Complaint, representing complicity in human rights abuses, can never constitute official acts for purposes of the FSIA because human rights abuses manifest violations of fundamental local and international law. Yet this conclusion finds support neither in the FSIA nor in the TVPA.

The FSIA details numerous exceptions to the general immunity accorded foreign states and the officials of those states. These are the only exceptions that Congress has chosen to

recognize and, according to the Supreme Court, no others can be established by implication. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989) ("[w]e think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts").

The FSIA contains no exception, as Plaintiffs would urge, for violations of local or international law by a state or its agents or instrumentalities. Indeed, this proposition was the precise one that the Supreme Court rejected in Amerada Hess. In holding that the owner of a shipping vessel could not sue a foreign state for the bombing of that vessel in clear violation of the laws of war, the Court stated simply, "immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions." 488 U.S. at 436.

If further evidence were needed that the FSIA contains no general exception for abuses of human rights by foreign officials, this evidence is provided by the exception for specified human rights abuses that the Congress did see fit to add in 1996. See 28 U.S.C. § 1605(a)(7), added by Pub. L. No. 104-132, 110 Stat. 1214 (1996). Under this exception, a foreign state and its officials are denied immunity for personal injury or death caused by the very acts of torture or extrajudicial killing urged against Samantar here, but only if the foreign state is a state sponsor of terrorism (the "State Sponsored Terrorism Exception"). This exception is conclusive as to Plaintiffs' claims in two respects. First, the exception demonstrates that Congress knew how to make foreign states and officials answerable in U.S. courts for human rights abuses. Congress elected to do so, however, only in carefully defined circumstances not here relevant. Second, by identifying the human rights abuses as those 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," the

exception refutes Plaintiffs' contention that "human rights abuses are, ipso facto, beyond the scope of an official's authority." 28 U.S.C. § 1606(a)(7) (emphasis supplied); Opposition at 6. Congress recognized that such abuses may indeed be committed by officials within the scope of their duties.

The TVPA does not operate to widen the reach of this State Sponsored Terrorism Exception to provide a general exception for human rights abuses committed by government officials. First, the State Sponsored Terrorism Exception to the FSIA was adopted four years after the enactment of the TVPA and would have been unnecessary if the TVPA itself had provided such an exception. Second, in enacting the TVPA, the Congress already had recognized that human rights abuses could be perpetrated by officials acting within the dimensions of their authority. In explaining the meaning of the phrase "actual or apparent authority or under color of law" in the TVPA, the Senate indicated that the language was used so to include abuses "committed by officials both within and outside the scope of their authority." S. Rep. No. 102-249 (1991), at 8 (emphasis supplied).

In arguing that Samantar could not have done the deeds alleged within the scope of his official capacity because those acts violated the Somali Constitution, Plaintiffs have confused illegal acts with those outside the scope of an official's duties. By definition, a civil lawsuit against an official like Samantar will challenge the lawfulness of the official's action. An official's immunity under the FSIA would be rendered meaningless if all that were needed were an assertion that the official's conduct violated either the laws of the foreign state or international norms.

In Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), Judge Learned Hand eloquently made this point in the context of the immunity from prosecution of two senior U.S. officials accused in

a civil suit of arbitrary detention within the United States. As Judge Hand noted, "it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole [immunity] doctrine." Id. at 581; see Waltier v. Thomson, 189 F. Supp. 319, 321 n.6 (S.D.N.Y. 1960) (applying Gregoire to preserve the immunity of a Canadian official accused of fraud).

As Gregoire indicates in the domestic arena and numerous other cases hold in the international arena, the distinction, in evaluating whether an official should be entitled to immunity, is not between whether the official's conduct was legal or illegal but whether it was "within the scope of his [official] powers" or not. Gregoire, 177 F.2d at 581; see also Waltier, 189 F. Supp. at 321; Herbage v. Meese, 747 F. Supp. 60, 67 (D.D.C. 1990); Kline v. Kaneko, 685 F. Supp. 386, 390 (S.D.N.Y. 1988). Stated in other words, the distinction is between whether the official's actions were public, such that the official's actions may be attributable to the state, or were private. See, e.g., Doe I v. Israel, 400 F. Supp. 2d 86, 104 (D.D.C. 2005) ("suits against officers in their personal capacities must pertain to private action – that is, to actions that exceed the scope of authority vested in that official so that the official cannot be said to have acted on behalf of the state"); see also El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996) (sustaining an official's immunity on the grounds that his activities "were neither personal nor private, but were undertaken only on behalf of the Central Bank [of Jordan]").

There can be no doubt that Samantar is being accused of actions taken by him in his official capacity and that he therefore is entitled to immunity. The complaint could not be more

specific that Samantar is being sued solely because "acting as Minister of Defense, and later as Prime Minister" he allegedly "bears responsibility" for certain human rights abuses allegedly forming a "part of a pattern and practice of widespread or systematic human rights violations." Second Amended Complaint at ¶ 65. There is no allegation that Samantar's activities were personal or private in nature. Accordingly, whether his actions were legal or illegal, Samantar is entitled to the official acts immunity of the FSIA

The allegations of the complaint closely follow those of the complaint in Belhas v. Ya'alon, 466 F. Supp. 2d 127 (D.D.C. 2006) ("Ya'alon"), a decision that Plaintiffs seek to dismiss in a footnote. See Opposition at 9 n.3. In both the complaint at issue in that case and the instant complaint, the defendant was a senior defense official charged with violations of local and international law, including extrajudicial killing and crimes against humanity on the basis of his command responsibility. In both, the plaintiffs allege, as they must for an action under the TVPA, that the defendants acted under color of law. Ya'alon, 466 F. Supp. at 132; Second Amended Complaint at ¶ 65. The court in Ya'alon found that military actions are uniquely within the province of official duties and concluded, as the court here should conclude, that the actions alleged were taken in the defendants' official capacities and that they are, as a consequence, "entitled to the FSIA presumption of immunity." Ya'alon, 466 F. Supp. at 131.

An interpretation of the FSIA that fails to find a general exception for foreign officials committing human rights abuses within the scope of their duties does not eviscerate the TVPA, as Plaintiffs assert. Congress anticipated that TVPA suits against foreign officials would go forward under an exception to the FSIA that Plaintiffs never discuss in their Opposition. Under the first exception to the FSIA, immunity is to be unavailable when "the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C.A. § 1605(a)(1). Although the

language speaks of a state's waiver of its immunity, the legislative history of the FSIA makes clear that the state has authority also to waive the immunity of its current and former officials. See H. R. Rep. 94-1487 (1976), at 18 ("[s]ince the sovereign immunity of a political subdivision, agency or instrumentality of a foreign state derives from the foreign state itself, the foreign state may waive the immunity of its political subdivisions, agencies or instrumentalities").

The Senate report on the TVPA indicates that the authors of the law anticipated that states would waive the immunity of officials accused of the most heinous abuses of their official positions. The report states, "Because 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. 102-249 (1991), at 8. The immunity of foreign officials has in fact been waived by the state to allow actions for human rights abuses to proceed. See, e.g., In re Grand Jury Proceedings, 817 F.2d 1108, 1110 (4th Cir.), cert. denied, 484 U.S. 890 (1987) (recognizing the Philippine Government's waiver of sovereign immunity otherwise enjoyed by the Marcoses).

The immunity enjoyed by Samantar under the FSIA has most definitely not been waived by Somalia. To the contrary, the most senior authority in Somalia has affirmed Samantar's immunity for the acts alleged. See Letter from Acting Prime Minister Salim Alio Ibro to Secretary of State Rice, Feb. 17, 2007, a copy of which was attached to the Memorandum of Law in Support of Defendant Samantar's Motion to Dismiss Second Amended Complaint, as Exhibit 2. Under these circumstances, and in the absence of any other exception under the FSIA, Samantar is immune from liability and this suit must be dismissed.

B. Samantar is Entitled to Head of State Immunity

Head of state immunity extends to the most senior government officials for acts taken during their tenure. Saltany v. Reagan, 702 F. Supp. 319, 320 (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) (immunity extended to Prime Minister Thatcher, who is identified not, as Plaintiffs allege, as the "effective head of state," Opposition at 13, but rather as the "head of government" much as was Samantar during his tenure as Prime Minister); see also Kim v. Kim Young Shik, Civ. No. 125656 (Cir. Ct. 1st Cir., Haw. 1963), excerpted in 58 Am. J. Int'l L. 186 (1964) (recognizing immunity of foreign minister).

Plaintiffs' reliance for contrary authority on First American Corp. v. Al-Nahyan, 948 F. Supp. 1107 (D.D.C. 1996), and Republic of Philippines v. Marcos, 665 F. Supp. 793 (N.D. Cal. 1987), is misplaced. Immunity was denied in the former case because the officials were found not to have performed the alleged acts in their official capacities but rather in furtherance of their private investment interests. 948 F. Supp. at 1120. Immunity was denied in the latter because the court determined that the enactment of the FSIA vitiated the common law doctrine of head of state immunity. 665 F. Supp. at 797.

As for the preservation of the immunity of a senior government official after the official has left office, the only case of which Samantar is aware in which this issue has been confronted under circumstances similar to the instant case sustained the continuation of the immunity. See Abiola v. Abubakar, 267 F. Supp. 2d 907 (N.D. Ill. 2003). Such an outcome is consistent with the policy behind head of state immunity of protecting the dignity and freedom of action of officials who embody the sovereignty of the state. Id. at 916 ("the rationale for head-of-state

immunity is no less implicated when a former head of state is sued in a United States court for acts committed while head of state than it is when a sitting head of state is sued").

II. PARTICIPATION IN A JOINT CRIMINAL ENTERPRISE IS NOT A RECOGNIZED BASIS FOR IMPOSING SECONDARY LIABILITY

In challenging Samantar's assertion that "joint criminal enterprise" has never been recognized as a basis of liability by a United States court, Plaintiffs cite decisions in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), and Bowato v. Chevron Corp., No. C 99-02506 SI, WL2455752 (N.D. Cal. Aug. 22, 2006). Neither decision alters Samantar's assertion. Far from adopting the theory of joint criminal enterprise, the Hamden court, in an opinion not commanding a majority of the Justices, simply mentioned the application of the theory by the International Criminal Tribunal for the former Yugoslavia in distinguishing such theory from the theory of conspiracy urged against the defendant in the case. 126 S. Ct. at 2785 n.40. The Bowato court merely mentioned the reference to such a theory by the plaintiff in a list of several possible grounds for indirect liability, all of which the court rejected. WL2455752 at *8 n.13.

III. THE STATUTE OF LIMITATIONS BARS PLAINTIFFS' CLAIMS

Plaintiffs challenge Samantar's assertion that any equitable tolling of Plaintiffs' claims had to cease no later than when Samantar became amenable to suit in Italy in 1991. They raise two objections: (a) that tolling is required in a TVPA action until the defendant could be sued in a United States courts, and (b) that Italy did not offer an adequate and available remedy. Both objections are insupportable.

As for the claim that the statute must toll on a TVPA claim until the defendant has entered the United States, Plaintiffs rely principally on a sentence in the decision in Arce v. Garcia, 434 F.3d 1254 (11th Cir. 2006), that appears to establish this proposition. Opposition

at 18. Elsewhere in the Arce decision, however, the court more fully states its position on tolling as follows: "Congress clearly intends that courts toll the statute of limitations so long as the defendants remain outside the reach of the United States courts or the courts of other, similarly fair legal systems." 434 F.3d at 1262 (emphasis supplied). [1] This additional language reinforces similar language in the Senate report accompanying the TVPA to the effect that tolling in appropriate only until such time as an adequate remedy in the is available either in the United States or elsewhere. S. Rep. No. 102-249 (1991), at 10-11.

As for the adequacy of the remedy in Italy, Plaintiffs raise two points. First, they assert, without expert support and in contradiction of the sworn statement of Samantar's expert, that the U.N. Convention Against Torture could not have supported an action for human rights abuses against Samantar in Italy. Opposition at 19-20. Their only basis for this proposition is a case that cites authority that the treaty was not self-executing under U.S. law. Id. at 20, citing Ogbudimkpa v. Ashcroft, 342 F.3d 207, 218 (3d Cir. 2003). They provide no evidence as to the status of the treaty under Italian law, i.e., that it was not self-executing under Italian law and that, if so, no implementing legislation was ever adopted. Second, Plaintiffs question the authority of Samantar's expert to opine as to the operation of human rights law in Italy. Opposition at 19 n.10. The expert Alessandro Campo holds an M.A. in law from the University of Rome and has served as a Legal Expert for the United Nations, the body under whose auspices the treaty was adopted. He should be expected to know whether a seminal United

[1] The other two cases cited by Plaintiffs do not contradict this expanded statement of the principle. In both Jean v. Dorelien, 431 F.3d 776 (11th Cir. 2005), and Hilao v. Marcos, 25 F.3d 767 (9th Cir. 1994), the defendants were never amenable to suit anywhere other than in the places where the alleged deeds occurred and in the United States.

Nations treaty might be enforceable in Italy under the laws of the country in which he received his degree.

Should additional support for the ability of the Plaintiffs to have brought their action against Samantar in Italy be required, Samantar has previously presented, in connection with Samantar's Motion to Dismiss the original Complaint, the affidavit of another Italian law expert, Cosimo Rucellai, the name partner and a senior member of a Milan law firm. Mr. Rucellai, who has a bachelor of law degree from Florence University in Italy and also a masters of law degree from the Harvard Law School, attests that a person domiciled in Italy during the times of Samantar's domicile could have been sued in an Italian civil court by nationals of other countries for crimes against human rights. Affidavit of Cosimo Rucellai, filed with this court on Jan. 14, 2005, at ¶¶ 4-6. A copy of this affidavit was omitted inadvertently from the Memorandum of Law in Support of Defendant Samantar's Motion to Dismiss Second Amended Complaint, and one is attached hereto and incorporated herein as Exhibit 1.

IV. PLAINTIFFS HAVE NOT EXHAUSTED THEIR REMEDIES.

Samantar recognizes that Plaintiffs' failure to exhaust their remedies, as made evident in the affidavits of Messrs. Nur and Campo, may be more appropriate for resolution as part of a motion for summary judgment, should one be required. [2] If this court converts this motion into a motion for summary judgment and concludes that no additional evidence is required, then Samantar urges a determination in his favor on the basis of the material currently before the Court.

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[2] The failure to exhaust remedies under the TVPA has been held to be an affirmative defense and hence less suitable for resolution in a motion to dismiss. See, e.g., Jean v. Dorelien, 431 F.3d at 781.

CONCLUSION

For the foregoing reasons, Samantar requests that this action be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Fred B. Goldberg, hereby certify that on this 23rd day of April, 2007, I caused to be served a true and correct copy of the foregoing Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss Second Amended Complaint by first-class U.S. Mail, postage pre-paid, on the following:

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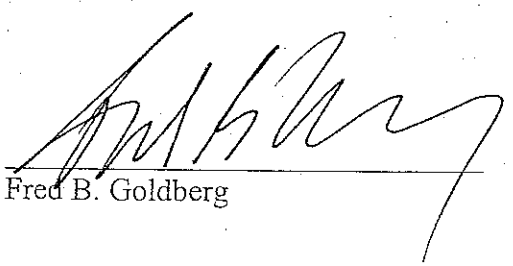

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IN THE EASTERN DISTRICT COURT FOR
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Plaintiffs,	*	Civil Action No. 1:04W1360
V.	*	
MOHAMED ALI SAMANTAR	*	
Defendant.	*	

AFFIDAVIT OF COSIMO RUCELLAI

I, Cosimo Rucellai, under oath, do hereby state as follows:

1. I am over eighteen years of age and am otherwise qualified to testify to the facts and opinions set forth below. All of the facts and opinions rendered herein are based upon the best of my

knowledge and belief.

2. I hold a bachelors of law degree from Florence University in Italy and a masters of law degree from the Harvard Law School in the United States.

3. I am a member of the bar of Italy and a senior member of the law firm of Rucellai & Raffaelli in Milan Italy.

4. Under Italian law, a person domiciled in Italy from February 20, 1991 to June 25, 1997 (including a foreign national) could have been sued in an Italian civil court by nationals of other countries: see art.4 of the Italian code of civil procedure – in force as of 21 April 1942 up to 1 September 1995 and thereafter art. 3 of law 31 May no. 218 in force as of 1 September 1995 (in other words art. 3 of law 31 May no. 218 contains the same provision previously contained in art. 4 of the Italian code of civil procedure).

5. If such a civil action were based on a fact considered as a crime by Italian law, the statute of limitations applicable to such action would be the same as the statute of limitations applicable to the crime itself (see art.2947 of the Italian civil code).

6. The statute of limitations applicable to killing outside of the judicial system would be 20 years (see art.157 of the Italian penal code with reference to art. 575 and art. 576 of the Italian penal code).

However, if the facts in question were deemed to be crimes against human rights, than no statute of limitations should apply (see art. 29 of law no. 232 of 12 July 1999, which provides that no statute of limitations is applicable to crimes coming within the jurisdiction of the International Criminal Court, instituted by final act adopted by the Diplomatic Conference of the United Nations in Rome on 17 July 1998 and ratified by Italy by virtue of the aforesaid law no.232/1999).

Before the entering into force of the aforesaid statute, crimes against human rights were already deemed, as a general rule of international law, not to be subject to any statute of limitations. This principle was specifically adopted by the military court of appeal of Rome in the Priebke case (see judgement dated 7 March 1998).

6. In the relevant civil actions, the plaintiffs could have claimed damages for injuries to themselves or, in the case of killing outside of the judicial system, for injuries to close family members, resulting from crimes against human rights.

I declare under penalty of perjury that the foregoing is true and correct.

7 January 2005

Cosimo Rucellai