

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' OPPOSITION TO MOTION TO DISMISS**

Robert R. Vieth (VSB #24304)  
Maureen P. Alger  
Tara M. Lee (VSB #71594)  
Sherron N. Thomas (VSB #72285)  
Cooley Godward Kronish LLP  
One Freedom Square  
11951 Freedom Drive  
Reston, Virginia 20190-5656  
(703) 456-8000

Matthew Eisenbrandt  
Maira Feeney  
Center for Justice & Accountability  
870 Market Street, Suite 684  
San Francisco, California 94102  
(415) 544-0444

## TABLE OF CONTENTS

	Page
INTRODUCTION .....	1
STATEMENT OF FACTS .....	2
STANDARD OF REVIEW .....	4
ARGUMENT .....	4
I. SAMANTAR IS NOT ENTITLED TO ANY FORM OF IMMUNITY.....	4
A. Samantar Is Not Entitled to Immunity Under the FSIA Because He Acted Outside the Scope of His Authority. ....	5
1. The FSIA Does Not Apply to Human Rights Violations Because Human Rights Violations in Contravention of International Law Cannot Be Deemed “Official Acts.” .....	6
2. Samantar’s Arguments Regarding Sovereign Immunity Are Inconsistent With Legislative History and Would Eviscerate the TVPA. ....	9
B. Samantar Is Not Entitled to Head of State Immunity. ....	12
1. Samantar Was Never a Head of State. ....	12
2. Samantar Is Not Entitled to Head of State Immunity Because the Doctrine Only Applies to Active Officials. ....	14
C. Samantar Is Not Entitled to Any Other “Common Law” Immunity. ....	14
II. PARTICIPATION IN A JOINT CRIMINAL ENTERPRISE IS A VIABLE SECONDARY LIABILITY THEORY. ....	15
III. THE STATUTE OF LIMITATIONS DOES NOT BAR PLAINTIFF’S CLAIMS.....	17
A. The Statute of Limitations Is Tolled Until Samantar Entered the United States in 1997.....	18
B. Samantar’s Time in Italy Is Properly Excluded from the Statute of Limitations Calculation.....	19
C. No Remedies Existed in Somaliland.....	21
D. The Statute of Limitations Is Tolled Until At Least 1997 Because of the Extraordinary Circumstances in Somalia Until That Time.....	21

**TABLE OF CONTENTS**  
(continued)

	<b>Page</b>
E. The Equitable Tolling Cases Relied Upon By Samantar Are Distinguishable. ....	23
IV. SAMANTAR’S ARGUMENT THAT PLAINTIFFS HAVE FAILED TO EXHAUST THEIR REMEDIES IN SOMALIA IS WITHOUT MERIT. ....	24
A. Plaintiffs Are Not Required to Exhaust Their Remedies in Somalia or Somaliland before Asserting Their Claims under the Alien Tort Statute. ....	24
B. Plaintiffs’ Complaint Fully Alleges They Have No Adequate or Available Remedies in Somalia or Somaliland. ....	25
CONCLUSION.....	28

**TABLE OF AUTHORITIES**

**Page**

**CASES**

*Abiola v. Abubakar*, 267 F. Supp. 2d 907 (N.D. Ill. 2003)..... 14

*Adams v. Bain*, 697 F.2d 1213 (4th Cir. 1982)..... 4

*Alfred Dunhill of London, Inc. v. Republic of Cuba*,  
425 U.S. 682 (1976)..... 15

*Anheuser-Busch v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995)..... 19

*Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006)..... 17, 18, 21

*Belhas v. Ya’alon*, 466 F. Supp. 2d 127 (D.D.C. 2006)..... 9

*Bowoto v. Chevron Corp*, No. C-99-02506-SI, 2006 WL 2455752 (N.D. Cal.  
2006)..... 16

*Burnett v. New York Cent. R.R.*, 380 U.S. 424 (1965)..... 17

*Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005)..... 17

*Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996)..... 6

*Chavez v. Carranza*, 2006 U.S. Dist. LEXIS 63257  
(W.D. Tenn., 2006)..... 17, 22

*Chiuidian v. Phillipine Nat’l Bank*, 912 F.2d 1095  
(9th Cir. 1990)..... 5, 15

*Deutsch v. Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003)..... 23, 24

*Doe I v. Israel*, 400 F. Supp. 2d 86 (D.D.C. 2005)..... 11, 15

*Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004)..... 21

*El Hadad v. Embassy of United Arab Emirates*,  
69 F. Supp. 2d 69 (D.D.C. 1999)..... 14

*El-Fadl v. Central Bank of Jordan*, 75 F.3d 668 (D.C. Cir. 1996)..... 8

*Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005)..... 24

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>Filartiga v. Pena-Irala</i> , 630 F.2d 876 (2d Cir. 1980).....	7
<i>First American Corp. v. Al-Nahyan</i> , 948 F. Supp. 1107 (D.D.C. 1996).....	13, 14
<i>Flores v. Southern Peru Copper Corp.</i> , 343 F.3d 140 (2d Cir. 2003).....	6
<i>Hamdan v. Rumsfeld</i> , 126 S. Ct. 2749 (2006) .....	15
<i>Heaney v. Spain</i> , 445 F.2d 501 (2d Cir. 1971) .....	15
<i>Herbage v. Meese</i> , 747 F. Supp. 60 (D.D.C. 1990).....	15
<i>Hilao v. Marcos</i> , 103 F.3d 767 (9th Cir. 1996) .....	17, 18, 21
<i>Hilao v. Marcos</i> , 25 F.3d 1467 (9th Cir. 1994) .....	5, 6
<i>Hoang Van Tu v. Koster</i> , 364 F.3d 1196 (10th Cir. 2004) .....	23
<i>In re Grand Jury Proceedings</i> , 817 F.2d 1108 (4th Cir. 1987), <i>cert. denied</i> , 484 U.S. 890 (1987).....	14
<i>In re Mr. and Mrs. Doe</i> , 860 F.2d 40 (2d Cir. 1988).....	14
<i>In re Terrorist Attacks</i> , 392 F. Supp. 2d 539 (S.D.N.Y. 2005).....	15
<i>Jean v. Dorelien</i> , 431 F.3d 776 (11th Cir. 2005).....	17, 18, 24, 25
<i>Kadic v. Karadzic</i> , 70 F.3d 232 (2d Cir. 1995).....	8, 24
<i>Krane v. Capital One Services, Inc.</i> , 314 F. Supp. 2d 589 (E.D. Va. 2004) .....	17
<i>Lafontant v. Aristide</i> , 844 F. Supp. 128 (E.D.N.Y. 1994) .....	12, 14
<i>Letelier v. Republic of Chile</i> , 488 F.Supp. 665 (D.D.C. 1980).....	11
<i>Liu v. Republic of China</i> , 892 F.2d 1419 (9th Cir. 1989) .....	11
<i>Lyders v. Lund</i> , F.2d 308 (N.D. Cal. 1929) .....	15

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>Ogbudimkpa v. Ashcroft</i> , 342 F.3d 207 (3d Cir. 2003).....	20
<i>Park v. Shin</i> , 313 F.3d 1138 (9th Cir. 2002).....	8, 9
<i>Price v. Socialist People’s Libyan Arab Jamahiriya</i> , 294 F.3d 82 (D.C. Cir. 2002).....	11
<i>Prosecutor v. Karemera (Karemera Amended Indictment)</i> , Case No. ICTR-98-44-I, Amended Indictment (Feb. 23, 2005).....	16
<i>Prosecutor v. Tadić</i> , Judgment, Case No. IT-94-1-A (ICTY App. Chamber, July 15, 1999) .....	16
<i>Republic of Philippines v. Marcos</i> , 665 F. Supp. 793 (N.D. Cal. 1987).....	13
<i>Rouse v. Lee</i> , 339 F.3d 238 (4th Cir. 2003) .....	17
<i>Saltany v. Reagan</i> , 702 F. Supp. 319 (D.D.C. 1988).....	13
<i>Sarei v. Rio Tinto, PLC</i> , 2007 U.S. App. LEXIS 8430, *79-80 (9th Cir. April 12, 2007).....	24
<i>Trajano v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)</i> , 978 F.2d 493 (9th Cir. 1992) .....	6
<i>U.S. v. Noriega</i> , 746 F. Supp. 1506 (S.D. Fla. 1990) .....	12
<i>Underhill v. Hernandez</i> , 168 U.S. 250 (1897).....	15
<i>Velasco v. Government of Indonesia</i> , 370 F.3d 392 (4th Cir. 2004) .....	15
<i>Velasco v. Indonesia</i> , 370 F.3d 392 (4th Cir. 2004) .....	5
<i>Wiwa v. Royal Dutch Petroleum Co.</i> , 226 F.3d 88 (2d Cir. 2000).....	27
<i>Xuncax v. Gramajo</i> , 886 F. Supp. 162 (D. Mass. 1995).....	6
<i>Xuncax v. Gramajo</i> , 886 F. Supp. 162 (D. Mass. 1995).....	25

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<b>STATUTES</b>	
104 P.L. 132, 110 Stat. 1214 (1996).....	10
28 U.S.C. § 1350 note, § 2(a) .....	12
28 U.S.C. § 1605(a)(7).....	10
Alien Tort Statute (“ATS”), 28 U.S.C. § 1350 .....	1, 20, 24
Torture Victim Protection Act (“TVPA”), 28 U.S.C. § 1350.....	1, 11, 20, 24
Va. Code Ann. § 8.01-465.10 .....	27
<b>OTHER AUTHORITIES</b>	
Conclusions and Recommendations of the Committee Against Torture, Italy, U.N. Doc. A/54/44 (1999) .....	20
Department of State (“DOS”) 2003 Country Report on Human Rights Practices in Somalia (Feb. 25, 2004).....	27
DOS 2006 Country Report on Human Rights Practices in Somalia (Mar. 6, 2007) .....	27
H.R. Rep. No. 94-1487 (1976).....	14
Philip Smith, <i>U.S.-Educated Architect Alleges Somali Torture</i> , THE WASHINGTON POST, Feb. 1, 1988.....	8
Rebecca L. Haffajee, <i>Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory</i> , 29 Harv. J. L. & Gender 201 (Winter 2006).....	16
Restatement (Third) on the Foreign Relations Law of the United States §§ 102, 702.....	11
S. Rep. No. 102-249 (1991).....	5, 7, 9, 11, 17, 18, 19, 25
<b>RULES</b>	
Federal Rules of Civil Procedure.....	4

## INTRODUCTION

This is a civil action for compensatory and punitive damages for torts in violation of international and domestic law. Plaintiffs, citizens of the United States and Somalia, instituted this action under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350,<sup>1</sup> and the Torture Victim Protection Act (“TVPA”), 28 U.S.C. § 1350 note, against Defendant Mohamed Ali Samantar, who served as Minister of Defense, First Vice-President and Prime Minister of Somalia in the 1980s.

Samantar now seeks to have Plaintiffs’ Second Amended Complaint (“Complaint”) dismissed. He argues that (1) he is entitled to immunity from suit pursuant to the Foreign Sovereign Immunities Act (“FSIA”), the head of state doctrine, and “common law principles” of immunity; (2) Plaintiffs fail to state a claim for secondary liability based on a theory of participation in a joint criminal enterprise; (3) Plaintiffs’ claims are time-barred; and (4) Plaintiffs have failed to exhaust allegedly adequate and available remedies in Somalia. Samantar’s arguments are each without merit and his motion should be denied.

First, Samantar is not entitled to immunity under the FSIA. The FSIA provides immunity only for acts carried out within the scope of the individual defendant’s legal authority. Human rights abuses are inherently beyond the scope of an official’s authority, and thus the FSIA does not even come into play when former officials are accused of such abuses. Nor is Samantar entitled to head of state immunity. He has never served as a head of state of Somalia, and in any event the doctrine only applies to currently active heads of state. Samantar’s argument that he is entitled to some alternative, ambiguous “common law immunity” is without any legal authority whatsoever.

---

<sup>1</sup> The ATS is also commonly referred to as the Alien Tort Claims Act or ATCA.



Second, the United States Supreme Court and other authorities have recognized the doctrine of joint criminal enterprise, and Samantar's motion to dismiss this aspect of the complaint must be denied.

Third, the Complaint is not barred by the ten-year statute of limitations. Samantar did not arrive in the United States until 1997, precluding jurisdiction by this Court until that time. Moreover, the facts alleged in the Complaint, which must be accepted as true for purposes of this motion, are more than adequate to state a claim for equitable tolling of the statute of limitations until 1997. The Complaint alleges that the stable conditions necessary for victims of human rights abuses to consider bringing such claims did not exist even in Somaliland prior to that time.

Fourth, the facts alleged in the Complaint are sufficient to show that neither Somalia nor Somaliland provides an adequate alternative to suit in the United States. Somalia remains without a functioning national government or national judicial system. Somaliland's court system lacks political independence as well as the properly trained judges and other legal personnel necessary to adjudicate complex human rights cases. Somaliland's courts also would be unable to assert personal jurisdiction over Samantar, who has not lived in Somalia since 1991. Thus, Samantar's exhaustion of remedies argument must fail as well. Samantar has shown no grounds on which to dismiss the Complaint and the motion should therefore be denied.

#### **STATEMENT OF FACTS**

Throughout the 1980s, the Somali Armed Forces committed widespread and systematic human rights abuses against the civilian population of Somalia, including torture, rape, arbitrary detention, and mass executions. (Complaint at ¶ 14.) The repression spanned the period Samantar served as Minister of Defense and Prime Minister. (*Id.*) These human rights abuses

were the hallmark of the military government that brutally ruled Somalia until its violent ouster in 1991. (*Id.*)

The Isaaq clan, which resides in the northwestern region of Somalia, was a special target of the military government. (Complaint at ¶ 19.) A pattern of state terror against the Isaaq clan reached its peak in 1988 during the period Samantar served as Prime Minister. (*Id.* at ¶ 23.) In June and July 1988, the Somali Armed Forces launched an indiscriminate aerial and ground attack on cities and towns in northwest Somalia, including Hargeisa, the second largest city in the country. (*Id.*) The Somali Army engaged in systematic assaults on unarmed civilians, leaving more than 5,000 dead in Hargeisa during this period. (*Id.*)

In 1991, Siad Barre and his supporters were violently ousted from power. (*Id.* at ¶ 24.) Samantar fled the country, moving to Italy and later arriving in the United States on June 26, 1997. (Mem. of Law in Support of Def. Samantar's Mot. to Dismiss Second Am. Compl. ("Mot. to Dismiss"), Aff. of Mohamed Ali Samantar ("Samantar Aff."), Def. Ex. 1 at ¶ 10.) He now lives in Fairfax, Virginia. (*Id.*)

After the ouster of the Barre regime, Somalia's central government completely collapsed and the country fell into anarchy. (Complaint at ¶ 86.) Today, Somalia remains without a national government and national judicial system. (*Id.* at ¶ 90.) Peace talks, held intermittently since 2000, have failed to create a functioning national government with a court system capable of reviewing human rights abuses committed by the military government in the 1980s. (*Id.*) The country remains in disarray due to the presence of competing clan leaders, warlords and criminal gangs, many of whom commit or countenance the commission of serious human rights abuses. (*Id.*)

In contrast to the rest of Somalia, the northwest region of the country has obtained a minimum level of stability. (*Id.* at ¶¶ 88-89.) This area, a region encompassing the former British protectorate of Somaliland, is dominated by the Isaaq clan. (*Id.* at ¶ 89.) In 1991, it declared its independence, reclaimed its previous name, and seceded from Somalia. (*Id.*) A rudimentary civil administration was established in Somaliland in 1993, but major armed conflicts in 1994 and 1996 plunged the region back into turmoil. (*Id.*) Since about 1997, Somaliland’s government has exercised a modicum of authority over its territory. (*Id.*)

### STANDARD OF REVIEW

Samantar’s motion is filed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. In considering a motion under Fed. R. Civ. P. 12(b)(6), the court must accept as true all the allegations of the complaint, and the complaint may not be dismissed “unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.” *Adams v. Bain*, 697 F.2d 1213, 1216 (4th Cir. 1982) (citations omitted).

### ARGUMENT

#### I. SAMANTAR IS NOT ENTITLED TO ANY FORM OF IMMUNITY.

Samantar argues that this case is barred because he is entitled to immunity from suit. (Mot. to Dismiss at 3-14.) His arguments for immunity under the FSIA, head of state immunity, and a creative but unsupported new “common law immunity” are overlapping and confusing, but ultimately all three immunity arguments fail.

First, Samantar is not entitled to immunity under the FSIA because the FSIA does not apply when officials act outside their legal authority, as Samantar did. Samantar argues that his actions were officially sanctioned and therefore immunized under the FSIA. This argument is

inconsistent with the factual record, caselaw, and legislative history. It defies logic and would eviscerate the TVPA if accepted by the courts.

Second, Samantar is not entitled to head of state immunity because such immunity is reserved for heads of state, and he was never a head of state. Even if Samantar had served as Somalia's head of state, which he did not, he would still be denied head of state immunity because such immunity is reserved for *sitting* heads of state.

Third, Samantar has failed to provide any authority whatsoever for any separate "common law doctrine" of immunity for "official acts." No doubt recognizing that neither sovereign immunity nor the head of state doctrines applies in this case, Samantar conflates the two paradigms in an attempt to invent a new common law doctrine of immunity which he terms "official act" immunity. (Mot. to Dismiss at 11.) There is no independent authority whatsoever for such a doctrine. The argument is mere smoke and mirrors and has no basis in law. Thus each of Samantar's immunity arguments fails and he is indeed subject to suit.

**A. Samantar Is Not Entitled to Immunity Under the FSIA Because He Acted Outside the Scope of His Authority.**

Sovereign immunity, as codified by the FSIA, extends to an individual acting in his official capacity on behalf of a foreign state. *Velasco v. Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004). This immunity, however, is not unlimited. The FSIA provides immunity only for acts carried out within the scope of the individual defendant's legal authority. *Id.* at 399 ("The FSIA, however, does not immunize an official who acts beyond the scope of his authority."); *Hilao v. Marcos*, 25 F.3d 1467, 1470 (9th Cir. 1994); *Chiuidian v. Phillipine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990). As such, "the FSIA should normally provide no defense to an action taken under the TVPA against a former official." S. Rep. No. 102-249 at 8 (1991) (Ex. 1).

**1. The FSIA Does Not Apply to Human Rights Violations Because Human Rights Violations in Contravention of International Law Cannot Be Deemed “Official Acts.”**

The human rights abuses alleged by Plaintiffs violate customary international law.

*Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 150 (2d Cir. 2003). Because they are violations of customary international law, human rights abuses are, *ipso facto*, beyond the scope of an official’s authority, and any official accused of such abuses is not entitled to immunity under the FSIA. *Marcos*, 25 F.3d at 1471 (FSIA inapplicable because alleged acts of torture, execution, and disappearances were “clearly outside of [former Philippine President Ferdinand Marcos’s] authority as President”); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) (FSIA inapplicable because acts of torture “fall outside the scope” of defendant’s official authority); *Xuncax v. Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995) (FSIA inapplicable because acts of torture, summary execution, arbitrary detention, disappearance and cruel, inhuman or degrading treatment “exceed anything that might be considered to have been lawfully within the scope of Gramajo’s official authority”). Such acts “cannot have been taken within any official mandate and therefore cannot have been acts of an agent or instrumentality of a foreign state within the meaning of the FSIA.” *Trajano v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 978 F.2d 493, 498 (9th Cir. 1992). Where an official’s “acts were not taken within any official mandate and were therefore not the acts of an agency or instrumentality of a foreign state within the meaning of FSIA . . . [n]o exception to [the] FSIA thus need be demonstrated.” *Marcos*, 25 F.3d at 1472.

Samantar’s argument rests largely upon a fundamental misunderstanding of the terms “official act” and “color of law.” An official may act under “color of law” but not in his “official capacity.” See *id.* at 1472 n.8 (An official “acting under color of authority, but not within an official mandate, can violate international law and not be entitled to immunity under FSIA.”); see

*also Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (noting that “Paraguay’s renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority.”); S. Rep. No. 102-249 at 8 (1991) (Ex. 1) (“[B]ecause no state officially condones torture or extrajudicial killings, few such acts, if any, would fall under the rubric of ‘official actions’ taken in the course of an official’s duties. Consequently, the phrase ‘actual or apparent authority or under color of law’ is used to denote torture and extrajudicial killings committed by officials both within and outside the scope of their authority.”)

Samantar misses (or ignores) this crucial distinction and confuses these two separate concepts, essentially arguing that any act taken by an official under color of law is an “official act.” (Mot. to Dismiss at 8 (“Any violation would remain attributable to the state itself rather than to Samantar personally—because the conduct at issue was not private in nature but rather was officially authorized by the state.”)) However, this assertion simply is not true, and the argument is inconsistent with both caselaw and legislative history.

The abuses alleged in the Complaint were not authorized by the state of Somalia. Article 27.1 of the Somali Constitution prohibited the use of torture. CONSTITUTION OF THE SOMALI DEMOCRATIC REPUBLIC ART. 27.1 (Ex. 2). Article 25.2 prohibited extrajudicial killings. *Id.* at ART. 25.2. Articles 26.2 and 26.3 prohibited arbitrary detention. *Id.* at ART. 26.2-26.3. Article 19 required Somalia to follow customary international law. *Id.* at ART. 19. Furthermore, representatives of the Somali government during the period at issue in this case publicly declared that Somalia’s policy was against the use of torture.<sup>2</sup> Although Samantar was acting “under

---

<sup>2</sup> Somalia’s ambassador to the United States, Abdullahi Agmed Addou, vehemently and publicly declared Somalia’s opposition to torture in 1988: “Whoever wrote that [statement smuggled from a Somali prison to western human rights organizations that claimed the author

color of law” for the purposes of the TVPA, his actions were not authorized by the state because both Somali law and Somali government policy prohibited the human rights violations Plaintiffs allege Samantar committed. Relying on *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), Samantar argues that sovereign immunity applies except to those rogue actors whose conduct contravened their governments’ expressed policies. This reliance is misplaced. In *Kadic*, the plaintiffs alleged that they were victims and representatives of victims of atrocities carried out by Bosnian-Serb military forces under the command of the defendant President of the Bosnian-Serb republic. *Id.* at 236-237. The defendant was not simply a rogue actor whose conduct was disavowed by his government—he was the true head of the Bosnian-Serb government. *Id.* at 237. The Second Circuit found that the plaintiffs had sufficiently alleged that the defendant acted under color of law, and permitted the suit to continue. *Id.* at 245. Furthermore, *Kadic* did not involve sovereign immunity under the FSIA. Samantar’s reliance on *Filartiga* is similarly misplaced because it was not a case about sovereign immunity. *Id.* at 890.

None of the other cases cited by Samantar support the “official act” principle he asserts. *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668 (D.C. Cir. 1996), and *Park v. Shin*, 313 F.3d 1138 (9th Cir. 2002), are inapplicable to this case because neither case involved human rights violations. *El-Fadl* involved a suit against two Jordan-based banks and their officials for wrongful termination, malicious prosecution, and false arrest. 75 F.3d at 669-670. *Park* was a suit by a former domestic servant against her employers, the Deputy Consul General of the

---

had been tortured by Somalia security police], I want to tell you that it’s not our character and our policy to torture people. Of course, anyone can write and say ‘I’ve been tortured.’ But what proof the person has, this is an allegation that to my knowledge is absolutely out of Somali character.” Philip Smith, *U.S.-Educated Architect Alleges Somali Torture*, THE WASHINGTON POST, Feb. 1, 1988, at A23. (Ex. 3.)

Korean Consulate in San Francisco and his wife, for violating employment laws during her employment.<sup>3</sup> 313 F.3d at 1140.

**2. Samantar's Arguments Regarding Sovereign Immunity Are Inconsistent With Legislative History and Would Eviscerate the TVPA.**

If Congress had intended for individual, former officials of foreign governments to be immunized under the FSIA, the TVPA would essentially have been stillborn the minute it was signed into law. In passing the TVPA in 1992, Congress was fully aware of the existence and scope of the FSIA. *See* S. Rep. 102-249, at 7-8 (Ex. 1). Congress clearly understood that the FSIA would provide immunity to governments for human rights abuses, but not individuals:

The legislation uses the term "individual" to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued. Consequently, the TVPA is not meant to override the Foreign Sovereign Immunities Act (FSIA) of 1976, which renders foreign governments immune from suits in U.S. courts, except in certain instances...[T]he committee does not intend these immunities [sovereign, diplomatic, and head of state] to provide *former* officials with a defense to a lawsuit brought under this legislation.

*Id.* at 7-8 (emphasis added).

Although his argument is not at all clear, Samantar seems to be arguing that affording sovereign immunity to officials in these circumstances will not eviscerate the TVPA because there are still a number of exceptions to the FSIA that may apply and the cases falling within those enumerated exceptions still will be within reach of U.S. courts. (Mot. to Dismiss at 8.) This argument fails because the exceptions are so narrow and those cases would be so few in number that the TVPA would be rendered a practical nullity.

---

<sup>3</sup> *Belhas v. Ya'alon*, 466 F. Supp. 2d 127 (D.D.C. 2006) is against the weight of authority and does not even reference the relevant legislative history of the TVPA.



First, Samantar cites 28 U.S.C. § 1605(a)(7) to say that abuses committed by state sponsors of terrorism could be brought under the TVPA. (Mot. to Dismiss at 8.) However, § 1605(a)(7) was not passed until 1996, four years after the enactment of the TVPA. See 104 P.L. 132, 110 Stat. 1214 (1996). If Congress had wanted to limit the TVPA to state sponsor of terrorism cases, it would have done so in 1992, or, at the very least, specifically stated in 1996 that § 1605(a)(7) was intended to limit the TVPA. Under Samantar's analysis, the TVPA would have been basically unusable for the first four years of its existence. Moreover, under that section the TVPA would only apply to officials of governments designated by the U.S. government as state sponsors of terrorism, a list which currently includes only five of the United States' greatest enemies—Cuba, Iran, North Korea, Sudan and Syria. See U.S. State Department, *State Sponsors of Terrorism*, available at <http://www.state.gov/s/ct/c14151.htm> (last visited Apr. 18, 2007). However, under the TVPA, U.S. courts must have personal jurisdiction over the defendant, S. Rep. 102-249 at 7 (Ex. 1), and because the countries on the list of state sponsors of terrorism are enemies of the United States, there is virtually no chance that any of their former officials would be permitted to enter the United States.

Second, while correctly stating that disputes arising from commercial activities of foreign states do not confer immunity, Mot. to Dismiss at 8, Samantar fails to mention that, as he states earlier in his brief, human rights abuses covered by the TVPA are not commercial activities and therefore do not fall under § 1605(a)(2) of the FSIA. *Saudi Arabia v. Nelson*, 507 U.S. 349, 362 (1993). Therefore, no TVPA cases would proceed under this section of the FSIA.

Third, Samantar argues that §1605(a)(5) of the FSIA would permit TVPA claims. This section provides an exception to immunity when “personal injury or death, or damage to or loss of property” caused by a foreign government occurs “in the United States.” 28 U.S.C.

§ 1605(a)(5). However, Congress explicitly intended the TVPA to apply to conduct *outside* the United States. S. Rep. 102-249, at 3-4 (“Judicial protection against flagrant human rights violations is often least effective in those countries where such abuses are most prevalent ... the Torture Victim Protection Act (TVPA) is designed to respond to this situation by providing a civil cause of action in U.S. courts for torture committed *abroad*.”) (emphasis added). Furthermore, the number of times that officials of a foreign government, acting under color of law, will commit torture or extrajudicial killing inside the United States will be miniscule. *See, e.g., Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989); *Letelier v. Republic of Chile*, 488 F.Supp. 665 (D.D.C. 1980). In any event these exceptions are irrelevant because, as set forth above, the FSIA does not apply at all.

The other cases cited by Samantar are easily distinguishable. *Doe I v. Israel*, 400 F. Supp. 2d 86 (D.D.C. 2005) concerns the validity of Israeli settlements in the West Bank, something the court found to be “an official policy of the sovereign State of Israel.” 400 F. Supp. 2d at 105. That case does not involve widespread torture, war crimes, and crimes against humanity like those alleged in this case. Indeed, the court acknowledges that “no court has squarely confronted the question posed here: does the Israeli policy regarding the volatile Israeli-Palestinian conflict violate *jus cogens* principles?” *Id.* The acts alleged in this case are violations of *jus cogens* norms, meaning they are peremptory rules of international law and allow no derogation. *See* Restatement (Third) on the Foreign Relations Law of the United States § 102, note k, § 702, note n. In addition, the *Doe* court did not consider whether the FSIA should apply in the first place; rather, the court only examined whether the allegations fit within one of the FSIA’s enumerated exceptions. 400 F. Supp. 2d at 105-08. The other case Samantar cites, *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002), only involved

claims against a government, not any of its individual officials, which renders it meaningless in a discussion of the TVPA, which only applies to individuals. *See* 28 U.S.C. § 1350 note, § 2(a).

**B. Samantar Is Not Entitled to Head of State Immunity.**

Samantar is not entitled to head of state immunity because such immunity is reserved for heads of state, and he concedes he was never actually a head of state. (Mot. to Dismiss at 2.) Even if Samantar had served as Somalia's head of state, he would not be entitled to head of state immunity because such immunity is reserved for *sitting* heads of state.

**1. Samantar Was Never a Head of State.**

Common law head of state immunity is strictly limited to foreign leaders who embody the conceptual identity of ruler and state. It is generally reserved for sitting presidents or *de facto* heads of state. *See, e.g., Lafontant v. Aristide*, 844 F. Supp. 128, 133-34 (E.D.N.Y. 1994) (affording head of state immunity to President of Haiti); *U.S. v. Noriega*, 746 F. Supp. 1506, 1519 (S.D. Fla. 1990) (denying head of state immunity to General Noriega because head of state recognized by the U.S. Government was President Delvalle).

Samantar never served as the head of state of Somalia. Throughout the entire relevant time period, the position of Head of State of the Somali Democratic Republic was held by President Major General Siad Barre.<sup>4</sup> (Ex. 4 at ¶ 10.) Article 79 of the Somali Constitution expressly states:

---

<sup>4</sup> Samantar states that he served as Acting President on several occasions when President Siad Barre "was absent from the country while performing official visits or because of health-related incapacity." The Somali Constitution, however, makes no provision for the transfer of power to the First Vice-President during the President's absence from the country for official visits. It provides for the transfer of power from the President to the First Vice-President only in case of a "temporary disability" of the President. CONSTITUTION OF THE SOMALI DEMOCRATIC REPUBLIC ART. 85 (Ex. 2 at 20). In any event, Samantar does not cite any authority for the proposition that a temporary Acting President may be considered the head of state and therefore entitled to head of state immunity.

The President of the Somali Democratic Republic shall be the Head of State and shall represent state power and the unity of the Somali people.

CONSTITUTION (Ex. 2 at 18).

Because Samantar never served as head of state of Somalia, he asserts instead that the various official positions he held within the government of Somalia—Prime Minister, First Vice-President, and Minister of Defense—entitle him to head of state immunity. However, Samantar concedes that in these positions he was only a “member” or “representative” of Somalia’s executive branch of government. (Mot. to Dismiss at 2-3.) In addition, he produces no authority for the proposition that such government representatives are entitled to head of state immunity.

The sole case cited by Samantar in support of his claim to such immunity for the period he served as Prime Minister of Somalia is easily distinguishable. In *Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988), the court found the United States government’s recommendation that Margaret Thatcher be granted immunity “conclusive” on the issue of head of state immunity. *Id.* at 320. Here, however, the United States government has not intervened with a similar recommendation. Moreover, although Ms. Thatcher was prime minister, in Great Britain the prime minister is the effective head of state. *Id.*

Samantar is also not entitled to head of state immunity for the period he served in the Somali cabinet. Cabinet members and other high-ranking officials are not considered heads of state and are therefore not entitled to the protections of head of state immunity. *See, e.g., First American Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1121 (D.D.C. 1996) (denying head of state immunity to defendants Minister of Defense and Director of Presidential Affairs of the United Arab Emirates); *Republic of Philippines v. Marcos*, 665 F. Supp. 793, 798 (N.D. Cal. 1987) (denying head of state immunity to Solicitor General of the Philippines).

**2. Samantar Is Not Entitled to Head of State Immunity Because the Doctrine Only Applies to Active Officials.**

Even if Samantar had at one time held the position of head of state, which he did not, he would still not be entitled to head of state immunity because only sitting heads of state are entitled to head of state immunity. *See, e.g., First American Corp.*, 948 F. Supp. at 1121 (denying defendants immunity because they were not sitting heads of state); *Aristide*, 844 F. Supp at 130 (granting immunity to Aristide because he was “current” head of state of Haiti); *El Hadad v. Embassy of United Arab Emirates*, 69 F. Supp. 2d 69, 82, n. 10 (D.D.C. 1999); *In re Mr. and Mrs. Doe*, 860 F.2d 40, 45 (2d Cir. 1988). *In re Grand Jury Proceedings*, 817 F.2d 1108 (4th Cir. 1987), *cert. denied*, 484 U.S. 890 (1987), didn’t reach this issue and almost all of the other cases cited by Samantar involved sitting heads of state. The sole cited case that involves a grant of head of state immunity to a former head of state absent an express recommendation from the United States government is *Abiola v. Abubakar*, 267 F.Supp.2d 907 (N.D. Ill. 2003), which conflicts with the weight of authority and cites no other authority for the principle that former heads of state are entitled to immunity.

**C. Samantar Is Not Entitled to Any Other “Common Law” Immunity.**

In a desperate attempt to salvage his immunity defense, Samantar attempts to craft a new common law doctrine from existing sovereign immunity and head of state immunity cases. Mot. to Dismiss at 11-14. The resulting analysis is a confusing conflation of the sovereign immunity and head of state doctrines that is both illogical and inapplicable.

The FSIA was intended serve as “the sole and exclusive standards to be used in resolving questions of sovereign immunity. . . .” H.R. Rep. No. 94-1487 (1976) at \*12 (Ex. 5). “It is intended to preempt any other State or Federal law ... for according immunity to foreign

sovereigns. . . .” *Id.* Thus, there is no common law “official acts” immunity separate from the FSIA.

In support of his “official acts” immunity argument, Samantar cites cases that interpret the Act of State Doctrine rather than sovereign immunity principles. (Mot. to Dismiss at 12.) For example, the United States Supreme Court has explicitly recognized that *Underhill v. Hernandez*, 168 U.S. 250 (1897), sets forth the traditional formulation of the Act of State Doctrine. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 691 n.7 (1976). Samantar has not asserted a defense under the Act of State Doctrine, so these cases are not relevant and do not support any novel common law “official act” immunity.

Other cases cited by Samantar in support of this doctrine merely repeat the standard courts have established for determining sovereign immunity under the FSIA. *Lyders v. Lund*, F.2d 308, 309 (N.D. Cal. 1929); *Heaney v. Spain*, 445 F.2d 501, 503 (2d Cir. 1971); *Chuidian*, 912 F.2d at 1101; *Velasco v. Government of Indonesia*, 370 F.3d 392, 398-99 (4th Cir. 2004), 399; *In re Terrorist Attacks*, 392 F. Supp. 2d 539, 551 (S.D.N.Y. 2005); *Doe I v. Israel*, 400 F. Supp. 2d 86, 104 (D.D.C. 2005); *Herbage v. Meese*, 747 F. Supp. 60, 66-67 (D.D.C. 1990).

## **II. PARTICIPATION IN A JOINT CRIMINAL ENTERPRISE IS A VIABLE SECONDARY LIABILITY THEORY.**

Samantar bases his entire challenge to the joint criminal enterprise theory of liability on the inaccurate assertion that this is a novel legal theory establishing a “new cause of action,” one that is “heretofore unrecognized by any United States court.” (Mot. to Dismiss at 14-15.) On the contrary, the United States Supreme Court recently recognized that the joint criminal enterprise liability theory is merely an embodiment of basic principles of secondary liability for war crimes dating back to the Nuremberg Trials of 1945-1949. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 n. 40 (2006), the Court acknowledged that the International Criminal Tribunal for the former

Yugoslavia (ICTY) adopted the joint criminal enterprise theory of liability by “drawing on the Nuremberg precedents” (citing *Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-A (ICTY App. Chamber, July 15, 1999)).<sup>5</sup> Commentators also have highlighted the Nuremberg-era roots of joint criminal enterprise liability. See, e.g., Rebecca L. Haffajee, *Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory*, 29 Harv. J. L. & Gender 201, 213 (Winter 2006).<sup>6</sup> And United States courts now recognize that joint criminal enterprise is a viable theory of secondary liability in ATS and TVPA cases. See *Bowoto v. Chevron Corp*, No. C-99-02506-SI, 2006 WL 2455752, n. 13 (N.D. Cal. 2006) (recognizing that joint criminal enterprise liability is one type of secondary liability applicable in ATCA and TVPA cases to violations of international law norms committed by government officials).<sup>7</sup>

In sum, joint criminal enterprise is a viable theory of secondary liability for violations of international law. Therefore, the Court should deny Samantar’s motion to dismiss the theory of joint criminal enterprise.

---

<sup>5</sup> United States law incorporates customary international law. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004). And U.S. courts look to international tribunals for guidance on theories of liability and other issues of international law. *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1289 (11th Cir. 2002).

<sup>6</sup> Moreover, contrary to Samantar’s assertion, the ICTY is *not* the only international criminal tribunal to recognize and apply joint criminal enterprise liability as a theory of secondary liability. Prosecutors at the International Criminal Tribunal for Rwanda (ICTR) have also invoked joint criminal enterprise as a theory of secondary liability. See, e.g., *Prosecutor v. Karemera (Karemera Amended Indictment)*, Case No. ICTR-98-44-I, Amended Indictment (Feb. 23, 2005).

<sup>7</sup> United States courts have incorporated other theories of liability used by international tribunals, including command responsibility. See, e.g., *Ford*, 289 F.3d at 1287-88.

### III. THE STATUTE OF LIMITATIONS DOES NOT BAR PLAINTIFF'S CLAIMS.

A complaint is not to be dismissed on statute of limitations grounds unless the defendant can establish that “the plaintiff cannot prove any set of facts that will support his or her claim and entitle him or her to relief.” *Krane v. Capital One Services, Inc.*, 314 F. Supp. 2d 589, 596 (E.D. Va. 2004). The Fourth Circuit permits equitable tolling if “extraordinary circumstances” beyond a plaintiff’s control prevent a suit within the limitations period. *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003). The “basic inquiry” in an equitable tolling analysis is “whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances.” *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 427 (1965).

In enacting the TVPA, Congress stated unequivocally that equitable tolling principles should be applied liberally.<sup>8</sup> S. Rep. No. 102-249 at 10-11 (1991). When confronted with claims under the TVPA and the ATS, courts have applied equitable tolling in accordance with legislative intent. *See, e.g., Arce v. Garcia*, 434 F.3d 1254, 1264 (11th Cir. 2006); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005); *Jean v. Dorelien*, 431 F.3d 776, 782 (11th Cir. 2005); *Hilao v. Marcos*, 103 F.3d 767, 773 (9th Cir. 1996); *Chavez v. Carranza*, 2006 U.S. Dist. LEXIS 63257, \*10 (W.D. Tenn., 2006). Samantar concedes that these tolling principles apply. (Mot. to Dismiss at 17.)

Pursuant to the doctrine of equitable tolling, this suit is timely. The statute of limitations must be tolled for the period of time Samantar was outside the United States. Samantar did not

---

<sup>8</sup> These equitable tolling principles extend to the ATS. The TVPA and the ATS share the same statute of limitations. *See Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1153 (11th Cir. 2005). Courts look to the legislative history of the TVPA when addressing ATS claims. *See Arce v. Garcia*, 434 F.3d 1254, 1262 n.17 (11th Cir. 2006).



enter the United States until 1997. At the time this suit was filed on November 10, 2004, Samantar had been in the United States for less than ten years. Also, the chaotic and dangerous conditions that persist in Somalia, including the inability to conduct the investigation necessary to bring this case and fears of reprisal, are extraordinary circumstances that mandate equitable tolling.

**A. The Statute of Limitations Is Tolled Until Samantar Entered the United States in 1997.**

Courts toll the statute of limitations for TVPA claims until the defendant has entered the jurisdiction of United States courts. *See Arce*, 434 F.3d at 1264 (“The TVPA’s legislative history shows Congress’s clear intent that courts toll the statute of limitations so long as the defendants are outside the reach of the United States courts.”); *see also Jean*, 431 F.3d at 779-780; *Hilao*, 103 F.3d at 773.<sup>9</sup> Congress intended the statute of limitations to be tolled until the defendant arrives in the United States. The Senate provided a list of “illustrative, but not exhaustive” situations in which courts were expected to toll the limitations period. S. Rep. No. 102-249 at 10-11 (1991). This list expressly covers the facts at issue here:

The statute of limitation should be tolled during the time the defendant was absent from the United States or from any jurisdiction in which the same or a similar action arising from the same facts may be maintained by the plaintiff, provided that the remedy in that jurisdiction is adequate and available.

*Id.* at 11 (citations omitted). By his own admission, Samantar did not enter the United States until 1997, so the statute of limitations must be tolled until that time.

---

<sup>9</sup> In other contexts the statute of limitations does not run until an action could be filed. *See, e.g., Young v. United States*, 535 U.S. 43 (2002) (tolling applied because the bankruptcy laws precluded plaintiff from filing an action); *Bergman v. Turpin*, 145 S.E.2d 135, 137 (Va. 1965) (tolling applies where defendant is beyond the jurisdiction of the court).

