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

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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,[1] 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.

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[1] 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. Phillippine 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.[2] Although Samantar was acting "under

[2] 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

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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.[3] 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.

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[3] *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.[4] (Ex. 4 at ¶ 10.) Article 79 of the Somali Constitution expressly states:

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[4] 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)).[5] 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).[6] 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).[7]

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.

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[5] 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).

[6] 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).

[7] Unites 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.[8] 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

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[8] 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."); s*ee also Jean*, 431 F.3d at 779-780; *Hilao*, 103 F.3d at 773.[9] 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.

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[9] 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).

B. Samantar's Time in Italy Is Properly Excluded from the Statute of Limitations Calculation.

Samantar argues that Plaintiffs could have brought this case in Italy during the period that Samantar lived there (before he came to the Unites States), and therefore the statute of limitations should not be tolled for the period of 1991 to 1997. However, his argument that the Court should consider possible remedies available in Italy depends on a single sentence in the Senate Report on the TVPA which suggests that the statute of limitations is only subject to tolling if the defendant is absent from a jurisdiction that provides remedies that are adequate and similar to the TVPA. S. Rep. No. 102-249 at 10-11 (1991). Samantar has not cited any case dismissing ATS or TVPA claims based on this portion of the Senate Report, or any case supporting the proposition he advances, namely, that the statute of limitations on a cause of action in the United States can expire before a defendant even became subject to suit. Thus, this Court does not need to examine the remedies that may have been available against Samantar while he resided in Italy.

Moreover, Samantar has not shown, and cannot show, that Italy provided adequate and available remedies to Plaintiffs between 1991 and 1997. Samantar argues that Italy's ratification of the U.N. Convention Against Torture ("CAT") was enough to allow Plaintiffs to initiate an action in Italy.[10] (Mot. to Dismiss at 18, Aff. of Alessandro Campo ("Campo Aff."), Def. Ex. 3,

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[10] Samantar's argument regarding Italy rests on the Affidavit of Alessandro Campo. Although Mr. Campo's affidavit exhibits that he has apparent expertise in the region of Somalia, it does not sufficiently establish him as an expert on Italian law, or Italian human rights law for that matter. It simply states, "I am a graduate of the University of Rome 'La Sapienza' and hold a M.A. degree in law." (Campo Aff., Def. Ex. 3 ¶ 2.) Samantar's arguments that depend on Mr. Campo's knowledge of Italian human rights law should not carry weight, particularly at the motion to dismiss stage.

¶ 7.)[11] However, mere ratification of a treaty does not provide victims of human rights abuses any remedies in national courts, much less adequate ones similar to the TVPA. *See, e.g., Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 218 (3d Cir. 2003) (a non-self-executing treaty such as CAT requires implementation by legislation before it gives rise to a private cause of action). Ratification of CAT is not equivalent to enacting implementing legislation similar to the TVPA or the ATS authorizing a private civil right of action against foreign citizens for torts in violation of customary international law that were committed outside Italy. Italy did not even have a statutory definition of torture during the relevant period. *See* Conclusions and Recommendations of the Committee Against Torture, Italy, U.N. Doc. A/54/44, para. 163-169 (1999) (Ex. 6). Therefore, Plaintiffs could not have brought an action for torture between 1991 and 1997, the dates when the Defendant lived in Italy.

Furthermore, Samantar relies on Italy's ratification of the UN Convention Against Torture as a basis for bringing an action in Italy. He makes no mention of claims outside the subject matter of the convention such as extrajudicial killing, crimes against humanity, war crimes, and arbitrary detention. Thus, Italy did not provide an "adequate and available" remedy and the statute of limitations must be tolled during the years Samantar lived in Italy.

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[11] Neither Samantar's attachment of various affidavits in support of his brief, nor Plaintiffs' use of the Declaration of Martin Ganzglass (Ex. 4), should be construed as converting the motion to dismiss briefing into summary judgment briefing. Should the court be inclined to convert the pending motion to dismiss into a summary judgment motion, Plaintiffs respectfully request that the Court give notice under Federal Rule of Civil Procedure 12(b) and allow Plaintiffs to conduct discovery and submit additional information. Discovery is just beginning and Plaintiffs should be given the opportunity, at a minimum, to test the veracity of Samantar's claim that limitations period should not be tolled. *Anheuser-Busch v. Schmoke*, 63 F.3d 1305, 1311 (4th Cir. 1995) (a court choosing to treat a motion to dismiss as one for summary judgment must provide the parties with notice and a reasonable opportunity to present their positions under Federal Rule of Civil Procedure 56). In any case, any doubts the Court has regarding factual disputes, must be resolved in favor of the allegations recited in the Complaint. *Adams*, 697 F.2d at 1216.

C. No Remedies Existed in Somaliland.

Plaintiffs could not have filed a case against Samantar in Somaliland, so this is not a factor in the calculation of the statute of limitations. Samantar argues that Somaliland has had a functioning judiciary since 1991. (Mot. to Dismiss at 18.) However, Samantar does not assert that it provides adequate and available remedies to victims of human rights abuses. In his brief, Samantar does not cite any provision of Somaliland law that would provide a civil cause of action for torture, extrajudicial killing, crimes against humanity, war crimes or arbitrary detention. Plaintiffs have also adequately alleged that there still are not remedies available today in Somaliland, and that even if they did, prior to 1997 it was too dangerous for Plaintiffs to pursue any claims. (Complaint ¶ 89.) Finally, Samantar has not lived in Somalia or Somaliland since 1991 and therefore would not be subject to the jurisdiction of the courts in that region.

D. The Statute of Limitations Is Tolled Until At Least 1997 Because of the Extraordinary Circumstances in Somalia Until That Time.

Extraordinary and chaotic conditions in Somalia also require that the statute of limitations be tolled until at least 1997. In human rights cases, the statute of limitations is tolled during times of extraordinary violence and danger in the home country. *See, e.g., Arce,* 434 F.3d at 1262 ("Justice may also require tolling where both the plaintiff and the defendant reside in the United States but where the situation in the home state nonetheless remains such that the fair administration of justice would be impossible, even in United States courts.") The statute of limitations is also tolled when circumstances in the home country prevent plaintiffs from gaining access to evidence or interfere with their ability to file suit. *See Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1155 (11th Cir. 2005) (statute of limitations tolled during the period of time when "the Chilean political climate prevented the Cabello family from pursuing any efforts to learn of the incidents surrounding Cabello's murder").

Fear of reprisals against plaintiffs and potential witnesses also justifies tolling the limitations period in ATS and TVPA cases. *Hilao*, 103 F. 3d at 773 (citing "intimidation and fear of reprisals" as factors supporting equitable tolling); *see also Doe v. Saravia*, 348 F. Supp. 2d 1112, 1147-48 (E.D. Cal. 2004) (tolling the statute from 1980 assassination that served as basis for complaint through filing of suit in 2003, based in part upon fear of reprisal which lasted well beyond the time El Salvadoran security forces were disbanded); *Chavez v. Carranza*, 2006 U.S. Dist. LEXIS 63257, *10 (W.D. Tenn., 2006) ("...the widespread human rights abuses carried out by the Salvadoran military against civilians during the country's civil war and Plaintiffs' fear of reprisal against themselves or their family members in El Salvador constitute 'extraordinary circumstances' sufficient to toll the statute of limitations").

The allegations of the Second Amended Complaint–which must be taken as true at this stage of the litigation–describe the well-documented chaos, violence, and clan-based warfare that has existed in much or all of Somalia since the overthrow of the military government in 1991 and throughout the 1990s.[12] (Complaint, ¶¶ 86-89.) During that time, each of the Plaintiffs either resided in Somalia or had immediate family members there. (*Id.* at ¶ 87.) Pursuit of human

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[12] If the Court intends to look beyond the four corners of the Complaint, Plaintiffs are entitled to discovery on Samantar's affidavits. Samantar asks this court to accept as true statements that the Plaintiffs should have no fear of reprisals because the Barre regime has disintegrated. (Campo Aff., Def. Ex. 4 ¶ 11; Mot. to Dismiss, Aff. of Mahmoud Haji Nur ("Nur Aff."), Def. Ex. 5, ¶ 12; Mot. to Dismiss, Aff. of Mohamed Abdirizak ("Abdirizak Aff."), Def. Ex. 6, ¶ 10.) Not only are Plaintiffs entitled to discovery on these issues, but the Court must carefully examine the assertions made in the affidavits. Mr. Abdirizak states that there has been no stability in Mogadishu and only "brief periods" of stability in areas outside Somaliland. (Abdirizak Aff., Def. Ex. 6, ¶ 9.) Yet, Messrs. Campo and Nur claim that victims of the Barre regime would have had no fear of reprisal and no difficulty in investigating a case anywhere in Somalia. (Nur Aff. Def. Ex. 5, ¶¶ 11-12; Campo Aff., Def. Ex. 3 ¶ 6.) Moreover, it appears that during the critical period of 1991-1997, none of Samantar's affiants were even in Somalia.

rights claims, even in the United States, would have exposed the Plaintiffs, their families or their witnesses to acts of reprisal. (*Id.*)

It took until approximately 1997 for one region, Somaliland, to establish conditions stable enough for victims of human rights abuses to safely consider a claim. (*Id.*) Somaliland declared independence in 1991 and established a rudimentary civil administration in 1993. (*Id.* at ¶ 89.) However, major armed conflicts erupted in 1994 and 1996 and plunged the region back into turmoil. (*Id.*) Since about 1997, Somaliland's government has exercised a modicum of authority over its own territory. (*Id.*)

Samantar's chart of the Plaintiffs' whereabouts achieves nothing to further his argument that equitable tolling should not apply in this case. Plaintiffs have sufficiently alleged in the Second Amended Complaint that each of the Plaintiffs, throughout the period alleged in the complaint and up to the present, either lived in Somalia or had immediate family still living there, fueling fears of reprisal. (Complaint ¶ 87.)

In sum, Plaintiffs have adequately alleged that prior to 1997, victims of human rights abuses perpetuated by the Somali military could not have been expected to pursue a cause of action in any country because of the reasonable fear of reprisals against themselves or members of their families still residing in Somalia, and because of their inability to investigate and prepare their case. The statute of limitations must be tolled at least until 1997, which renders this suit timely.

E. The Equitable Tolling Cases Relied Upon By Samantar Are Distinguishable.

Samantar relies on *Hoang Van Tu v. Koster*, 364 F.3d 1196 (10th Cir. 2004), and *Deutsch v. Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003), as examples where courts did not apply equitable tolling to the TVPA's ten year statute of limitations. (Mot. to Dismiss 16-17, 21.) These cases are inapposite to the facts presented here. The defendants in both cases were United States

citizens or subject to United States jurisdiction throughout the periods for which the plaintiffs sought equitable tolling.

In addition, in both *Koster* and *Deutsch*, none of the plaintiffs alleged exceptional facts. Unlike the Plaintiffs in the case at hand, the *Koster* and *Deutsch* plaintiffs could not show how they were prevented from filing similar suits in the United States at an earlier time. *Koster*, 354 F.3d at 1199-1200 ("even if some degree of equitable tolling were appropriate . . . plaintiffs have made no showing to justify tolling"); *Deutsch*, 317 F.3d at 1029 (allegations that defendants kept the plaintiffs ignorant of essential facts in the defendants' possession considered insufficient to trigger tolling). These cases are distinguishable from the current case in which Plaintiffs have pleaded ample facts about the chaotic and dangerous conditions in Somalia (*see* Complaint at ¶¶ 84-89), which constitute the type of extraordinary circumstances that appropriately trigger equitable tolling.

IV. SAMANTAR'S ARGUMENT THAT PLAINTIFFS HAVE FAILED TO EXHAUST THEIR REMEDIES IN SOMALIA IS WITHOUT MERIT.

Under the ATS, Plaintiffs are not required to exhaust local remedies. Under the TVPA, they are only required to exhaust those remedies that are "adequate and available." 28 U.S.C. § 1350 note, § 2(b). No remedies are available in Somalia or Somaliland, so Plaintiffs have met their obligations under the TVPA.

A. Plaintiffs Are Not Required to Exhaust Their Remedies in Somalia or Somaliland before Asserting Their Claims under the Alien Tort Statute.

Plaintiffs asserting claims under the ATS are not required to exhaust their remedies in the country in which the alleged violations of customary international law occurred. *See Sarei v. Rio Tinto, PLC*, 2007 U.S. App. LEXIS 8430, *79-80 (9th Cir. April 12, 2007); *Jean*, 431 F.3d at 781; *Enahoro v. Abubakar*, 408 F.3d 877, 889-90 (7th Cir. 2005) (Cudahy, J., dissenting in part) (footnotes omitted). In *Kadic*, the Second Circuit did not apply the TVPA exhaustion of

remedies requirement to the plaintiffs' ATS claims for torture and summary execution, even though plaintiffs asserted the same claims under the TVPA. 70 F.3d at 243-44. Thus, the exhaustion of remedies requirement does not apply to claims under the ATS and customary international law, even if plaintiffs also seek recovery under the TVPA.

Here, Plaintiffs' claims are not based solely on the TVPA. Plaintiffs' claims for crimes against humanity, war crimes, arbitrary detention, and cruel, inhuman or degrading treatment or punishment, are brought under the ATS. For these claims, Plaintiffs need not show that they have exhausted their remedies in Somalia or Somaliland. Plaintiffs' claims for extrajudicial killing, attempted extrajudicial killing, and torture are brought pursuant to *both* the ATS and TVPA. Samantar's exhaustion of remedies argument would be pertinent to these claims only if they were based solely on the TVPA, which they are not. Consequently, Plaintiffs' ATS claims are not subject to Samantar's exhaustion argument.

B. Plaintiffs' Complaint Fully Alleges They Have No Adequate or Available Remedies in Somalia or Somaliland.

To the extent Plaintiffs seek relief under the TVPA, there are no remedies to exhaust in Somalia or Somaliland. The exhaustion requirement under the TVPA "was not intended to create a prohibitively stringent precedent to recovery under the statute." *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995). Accordingly, exhaustion of remedies in a foreign forum is generally not required if the foreign remedies are "unobtainable, ineffective, inadequate or obviously futile." *Id.* (internal quotes omitted). Congress' intended operation of the exhaustion requirement is set forth in the TVPA's legislative history:

> [T]orture victims bring suits in the United States against their alleged torturers only as a last resort. . . . Therefore, as a general matter, the committee recognizes that in most instances the initiation of litigation under this legislation will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the

> torture occurred. The committee believes that courts should approach cases brought under the proposed legislation with this assumption.

S. Rep. No. 102-249, at 9-10 (1991). Additionally, exhaustion of remedies is an affirmative defense on which the defendant has a substantial burden of proof. *Id.; Jean*, 431 F.3d at 781. It is not the proper subject of a motion to dismiss, but rather a motion for summary judgment. *Jean,* 431 F.3d at 783. In any event, Samantar has not met his burden here.

Plaintiffs' Second Amended Complaint alleges there are no adequate or available remedies in Somalia. (Complaint ¶¶ 90-91.) Somalia remains without a functioning national judicial system in which victims of human rights abuses committed by the military government of the 1980s could bring their claims. (*Id.* at ¶ 90.) Somalia remains under the de facto control of warring factions, many of whom are responsible for on-going human rights violations. (*Id.*) Under these conditions, remedies are in the very least unobtainable and ineffective.

Plaintiffs further allege that the Somaliland courts do not offer an adequate or available remedy. Although relative civil order has prevailed there since approximately 1997, it remains impossible to seek judicial remedies in its courts for such claims. (*Id.* at ¶ 91.) The Somaliland government's human rights record is weak, and human rights activists are frequently arrested and detained. (*Id.*) In addition, Samantar does not reside within the borders of Somaliland, and thus may remain outside the jurisdictional reach of Somaliland courts. (*Id.*)

In light of these allegations, which must be accepted as true at this stage in the litigation, it is clear that Samantar has not met his burden. None of Samantar's experts state that remedies are adequate or available in Somalia or Somaliland for the specific claims brought here by the Plaintiffs. They merely state, with no citation to legal authority, that claims of torture, abuse and crimes against humanity can be brought in Somaliland. (*See* Nur Aff., Ex. 5 ¶ 10; Campo Aff., Ex. 4 ¶ 9.)

Samantar's affiants make no argument that there is an effective judiciary in Somalia, and Nur confirms that conditions in Somalia are chaotic and characterized by tribal warfare. (Nur Aff., Def. Ex. 5, ¶ 12.) Nor do they make mention of whether Plaintiffs would be entitled to a speedy or fair trial, or any other benefit of due process (probably because all indications point to otherwise). *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000).[13]

The U.S. State Department report relied upon by Samantar also fails to assist him in his burden. The report concludes that the Somaliland and Somalia justice system is an inadequate alternative to the United States' judicial system. *See* Department of State ("DOS") 2003 Country Report on Human Rights Practices in Somalia, at 4 (Feb. 25, 2004) (stating that there was "no national judicial system," and noting that while the Somaliland Constitution calls for an independent judiciary, "the judiciary was not independent in practice") (Ex. 7 at 4). The report, however, serves as a summary of the on-going human rights problems that plague the region. *Id.* The 2006 Report repeats the statement that the Somaliland judiciary was not independent in practice. DOS 2006 Country Report on Human Rights Practices in Somalia, at 3 (Mar. 6, 2007). (Ex. 8.) In addition, "[t]he country's poor human rights situation deteriorated further during the year, exacerbated by the absence of effective governance institutions or the rule of law, the widespread availability of small arms, and ongoing conflicts." *Id.* at 1.

Finally, Somaliland is not recognized as a country by the United States. Therefore, there is, at a minimum, a very serious question whether any "judgment" obtained in Somaliland "courts" will be enforceable against Samantar here in the Unites States where he resides. Va. Code Ann. § 8.01-465.10 (judicial decision not conclusive in Virginia if it "was rendered under a

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[13] Ganzglass affirms that no possibility for a remedy exists in Somaliland or the other chaotic and war-torn regions of Somalia. (Ex. 4 ¶¶ 18 – 20.)

system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law"). Samantar has not met his burden on exhaustion of remedies. Plaintiffs do not have to exhaust local remedies under the ATS, and there are no adequate or available remedies to exhaust under the TVPA.

CONCLUSION

For the foregoing reasons the Plaintiffs request that the Court deny the motion to dismiss.

Dated: April 18, 2007

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CERTIFICATE OF SERVICE

I hereby certify, this 18th day of April, 2007, that a true copy of the foregoing was sent by electronic mail and first-class mail to the following counsel of record:

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