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 DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, AND LACK OF SUBJECT MATTER JURISDICTION

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INTRODUCTION

Plaintiffs, by counsel, file this Opposition to the Motion to Dismiss for Lack of Personal Jurisdiction and for Failure to State a Claim Upon Which Relief Can be Granted, and Lack of Subject Matter Jurisdiction ("Second Motion to Dismiss") of Defendant Mohamed Ali Samantar ("Samantar"). Plaintiffs incorporate by reference herein their Opposition to Motion to Dismiss for Lack of Personal Jurisdiction and for Failure to State a Claim Upon Which Relief Can be Granted ("First Opposition to Motion to Dismiss") filed in opposition to Samantar's initial motion to dismiss. In his Second Motion to Dismiss, Samantar specifically argues: (1) that he is entitled to head of state immunity for periods during which he served as Somali Defense Minister, and (2) that the two plaintiffs who are naturalized citizens may not bring a claim under the Alien Tort Claims Act.

Samantar's Second Motion to Dismiss should be denied. Nothing raised by Samantar in his Second Motion to Dismiss warrants affording Samantar head of state immunity. Moreover, plaintiffs Yousuf and Deria, who are naturalized United States citizens, do not assert claims under the Alien Tort Claims Act. First Amended Complaint ¶ 3. Rather, they bring claims under the Torture Victims Protection Act, which permits claims by United States citizens for extrajudicial killing and torture. Accordingly, the Second Motion to Dismiss should be denied.

I. SAMANTAR IS NOT ENTITLED TO HEAD OF STATE IMMUNITY

Samantar's head of state immunity argument must fail for at least two reasons. First, head of state immunity is reserved for those individuals who are their nation's designated head of state, a position Samantar never held. Second, any head of state immunity for which he might have been qualified is no longer available, as Samantar is not a sitting head of state. Head of state immunity is not available to former heads of state, let alone to former cabinet officials such as Samantar.

A. Samantar Never Served As Somalia's Head Of State And Is Not Entitled To Head Of State Immunity.

Common law head of state immunity is based on, and limited by, the principle that sovereign states are immune from suit by other states. It is therefore strictly limited to foreign leaders who embody the conceptual identity of ruler and state. "Head of state immunity is primarily an attribute of state sovereignty, not an individual right." *In re Grand Jury Proceedings*, 817 F.2d 1108, 1111 (4th Cir. 1987). It is "founded on the need for comity among nations and respect for the sovereignty of other nations; it should apply only when it serves those goals." *Id.* Head of state immunity is therefore reserved for sitting heads of state recognized by the United States Government. *See, e.g., Lafontant v. Aristide*, 844 F. Supp. 128, 133-34 (E.D.N.Y. 1994) (according head of state immunity to President Aristide, the head of state recognized by the U.S. Government); *U.S. v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990) (denying head of state immunity to General Noriega because the head of state recognized by the U.S. Government was President Delvalle, not General Noriega).[1]

Samantar specifically argues in his Second Motion to Dismiss that he is entitled to head of state immunity for the period during which he served as Minister of Defense. Second Motion to Dismiss at 2. However, even **sitting** cabinet officials are not entitled to 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 sitting Minister of Defense because not sitting head of state); *see also Republic of Philippines v. Marcos*, 665 F. Supp. 793, 798 (N.D. Cal. 1987) (denying head of state immunity to sitting Solicitor General of the Philippines); *El-Hadad v. Embassy of the United Arab Emirates*, 69 F. Supp. 2d 69, 82, n. 10 (D.D.C. 1999) (without

[1] The common law doctrine of head of state immunity also may extend to foreign ministers, who embody the sovereign with respect to its relations with other countries. *See Schooner Exchange v. McFadden*, 7 Cranch 116, 11

reaching issue, but stating that head of state immunity would not have afforded protection to a sitting minister and other executive officials because they were not head of state), *rev'd in part on other grounds*, 216 F. 3d 29 (D.C. Cir. 2000).

Indeed, in *First American Corp. v. Al-Nahyan*, 948 F. Supp. 1107 (D.D.C. 1996) -- to our knowledge the only case in which a U.S. court directly considered head of state immunity for a sitting Minister of Defense – the court denied the Defense Minister such immunity. There, the U.S. State Department filed a suggestion of immunity on behalf of the sitting president of the United Arab Emirates ("U.A.E.") and the court afforded that defendant head of state immunity. *First American*, 948 F. Supp. at 1119. Other defendants in the case (identified by the court as the "Dubai Defendants") included the estate of the former ruler of the Emirate of Dubai and his son, who was the **sitting** Minister of Defense of the U.A.E. *Id.* at 1113. The Emirate of Dubai was recognized by the United States as part of the U.A.E. but not as an independent state. *Id.* at 1113, 1121. The court held that "even were Dubai entitled to recognition as an independent state, the Dubai Defendants would not be entitled to head of state immunity, because none is a sitting head of state." *Id.* at 1121. Thus, the court specifically declined to afford head of state immunity for the sitting Defense Minister of the U.A.E.

Samantar's reliance on an English magistrate court's refusal to issue a criminal arrest warrant for the **current** Israeli Defense Minister, (Bow St. Mag. Ct. Feb. 12, 2004) (Pratt, Dist. J.), *reprinted in* 53 *Int'l & Comp. L.Q.* 769 (the "*Mofaz*" decision), is misplaced. Looking to the case law of a foreign jurisdiction is unnecessary when U.S. courts have expressly addressed this issue, and in so doing have expressly denied head of state immunity to a defense minister and other cabinet level positions. *See, e.g., First American*, 948 F. Supp. at 1121

U.S. 116 (1812); *Republic of Austria v. Altmann*, 541 U.S. 677, 124. S.Ct. 2240, 2247 (2004). This is not relevant here, however, as Samantar never served as Foreign Minister of Somalia.

(declining to afford head of state immunity to defense minister). Moreover, *Mofaz* concerns a **current** Minister of Defense, which Mr. Samantar is not, and is therefore inapposite to the facts at issue in this case. Finally, *Mofaz* relies on a single United Nation's International Court of Justice decision that accorded diplomatic immunity to a sitting minister of foreign affairs. In light of the facts and legal authority on which *Mofaz* is based, which are fundamentally different from those presented here, *Mofaz* provides no support whatsoever for Samantar's claim that he is entitled to head of state immunity.

B. The Head Of State Doctrine Does Not Provide Immunity To Former Heads Of State.

Even if Samantar had at one time held the position of head of state, which he did not, he must still be denied head of state immunity. Only sitting heads of state are entitled to head of state immunity. *See, e.g. First American Corp*, 948 F. Supp at 1121 (denying estate of former prime minister and other defendants immunity because they were not "a sitting head of state"); *Aristide*, 844 F. Supp at 130 (granting immunity to Aristide because he was "current" head of state of Haiti); *see also El Hadad*, 69 F. Supp. 2d at 82, n. 10 (dismissing case on other grounds, but stating in dicta that head of state immunity would not have applied because "[n]one of the defendants invoking head of state immunity is alleged to be the sitting, official head of the U.A.E."); *In re Mr. and Mrs. Doe v. United States of America*, 860 F.2d 40, 45 (2d Cir. 1988) ("were we to reach the merits of the case, we believe there is respectable authority for denying head of state immunity to a former head of state for private or criminal acts in violation of American law."). The sovereign immunity accorded to heads of state is based upon a defendant's *status* at the time of the suit, and is not based on a defendant's *conduct* before the suit was filed. *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240, 2259 (2004)

(Breyer, J., concurring); *Dole Food v. Patrickson*, 538 U.S. 468, 478 (2003) (eligibility for immunity under Foreign Sovereign Immunities Act is "determined at the time suit is filed").

The rationale for denying head of state immunity to former heads of state reflects the principles on which head of state immunity itself is based. The doctrine was developed to afford sitting foreign officials a degree of protection from suit as a gesture of comity to allow them to conduct official state business. *See Dole Food*, 538 U.S. at 479. It was not intended to immunize officials for their conduct; rather, it developed to facilitate the conduct of official duties. *See In re Grand Jury Proceedings*, 817 F.2d 1108, 1109 (4th Cir. 1987). ("[T]he rationale of head-of-state immunity is to promote comity among nations by ensuring that leaders can perform their duties without being subject to detention, arrest or embarrassment in a foreign country's legal system."). Thus, once an official becomes a private citizen, and no longer performs official duties, he is not entitled to head of state immunity. *See In re Grand Jury Proceedings*, 817 F.2d at 1111 ("Head of state immunity is primarily an attribute of state sovereignty, not an individual right."). The extension of such immunity to a former head of state – who no longer embodies the sovereignty of a nation or conducts its official business– improperly detaches head of state immunity from principles of state sovereignty and transforms it into an individual right.

Moreover, to create a new type of immunity for former heads of state would violate the plain intent of Congress when it passed the Torture Victims Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 Note) ("TVPA"). The legislative history of the TVPA makes clear that while Congress was aware of pertinent immunities, it did not intend to shield former governmental officials from claims under the TVPA. The Report of the Senate Committee on the Judiciary noted that the United Nations Convention on Special

Missions would immunize foreign officials during official visits, stating that, "visiting heads of state [should not] be subject to suit under the TVPA." S. Rep. 102-249, at 8 (1991) (the Senate Report was attached to the Plaintiffs' First Opposition to Motion to Dismiss as Exhibit 1). The Senate Report went on to state, however, that "the committee does not intend these immunities to provide *former* officials with a defense to a lawsuit brought under this legislation." *Id.* (emphasis supplied).[2] Thus Congress properly understood the head of state immunity doctrine to have no application to former officials in cases alleging human rights abuses (such as this one).

The cases upon which Samantar relies to argue head of state immunity is available to former heads of state are distinguishable. Samantar, in his efforts to induce the United States Department of State to file a suggestion of immunity on his behalf, has brought to the attention of the State Department a few cases he presumably will rely on to likewise support his motion to dismiss. These cases are inapposite.

First, *Abiola v. Abubakar*, 267 F. Supp. 2d 907 (N.D. Ill. 2003), appears to be the only case where head of state immunity is afforded a former head of state absent an express suggestion of immunity from the Department of State. This decision conflicts with prevailing judicial opinion, *see e.g., First American Corp.*, 948 F. Supp. at 1121; *El Hadad*, 69 F. Supp. 2d at 82, n. 10. Moreover, contrary to the policies behind head of state immunity, the decision detaches head of state immunity from principles of sovereign immunity and transforms it into an individual right. Finally, and most significant to the present case, the court in *Abiola* only afforded immunity for the period defendant was the actual head of state and did not provide

[2] The Senate Report on the TVPA expressly endorsed the pre-existing Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, on which Plaintiffs' claims also are based, and it endorsed Judge Kaufman's ATCA opinion in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). S. Rep. 102-249, at 4-5 (1991). Thus, the TVPA legislative history also "casts light" on the scope of the ATCA. *Xuncax v. Gramajo*, 886 F. Supp. 162, 172 n.2 (D. Mass. 1995).

immunity for the period the defendant served as Chief of Defense Staff – the third highest political and military position in the country. *Abiola*, 267 F. Supp. 2d at 908, 916-17.

Second, the case *Hatch v. Baez*, 7 Hun. 596, 599-600 (N.Y. Sup. Ct. 1876), quoted in *Underhill v. Hernandez*, 65 F. 577, 580 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897), which involved a past president of the Dominican Republic, was decided under different standards of immunity.[3] It was decided well before the current standards for head of state immunity and predated both the Foreign Sovereign Immunities Act and the "Tate Letter," which announced the State Department's 1950s-era announcement of a more restrictive theory of foreign sovereign immunity. *See, e.g., Lafontant v. Aristide,* 844 F. Supp. 128, 135 (E.D.N.Y. 1994) (discussing the Tate Letter). It is significant, moreover, that the *Hatch* case involved an actual head of state – the president – and not a cabinet-level official. Finally, the *Hatch* case limited immunity to the official acts of the president. As the courts repeatedly have recognized, torture and other human rights violations are not official acts, and therefore a former government official is not immune from charges of such human rights violations. *See, e.g., Hilao v. Marcos*, 25 F. 3d 1467, 1471 (9th Cir. 1994) (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) (acts of torture fall "outside the scope" of defendant's official authority); *Xuncax v. Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995) (acts of torture, summary execution, arbitrary detention, disappearance and cruel, inhuman or degrading treatment "exceed anything that might be considered to have been

[3] In his submission to the State Department, Samantar also cites to *Mumtaz v. Ershad*, a New York state case in which the State Department submitted pleadings which relied upon the *Hatch* case. Plaintiffs' argument regarding the *Hatch* case is equally applicable.

lawfully within the scope of Gramajo's official authority"). In sum, Samantar is not entitled to head of state immunity. Accordingly, his motion to dismiss on this ground should be denied.

II. THE COURT HAS SUBJECT MATTER JURISDICTION OVER THE TVPA CLAIMS OF BASHE ABDI YOUSUF AND AZIZ DERIA

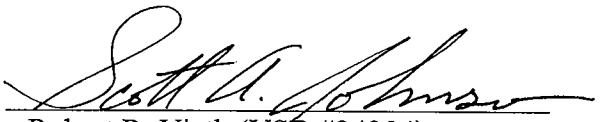
Plaintiffs Bashe Abdi Yousuf and Aziz Deria bring their claims for torture and extrajudicial killing under the Torture Victims Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 Note). The TVPA makes such claims available to citizens of the United States. Id. As framed in the First Amended Complaint, Count I (Extrajudicial Killing) and Count III (Torture) of the First Amended Complaint seek relief under both the TVPA and the Alien Tort Claims Act, 28 U.S.C. § 1350. Although Yousuf and Deria do not assert claims under the ACTA, jurisdiction over their Torture Victims Protection Act claims is appropriate under 28 U.S.C. § 1331. *See, e.g., Estate of Cabello v. Fernandez-Lazario*, 157 F. Supp. 2d 1345, 1354-55 (S.D. Fla. 2001) (recognizing that courts have exercised subject matter jurisdiction over TVPA claims because they arise under the laws of the United States for federal question jurisdiction purposes); *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995) (finding TVPA provided federal question jurisdiction for suit brought by U.S. citizen).

CONCLUSION

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

Dated: February 22, 2005

BASHE ABDI YOUSUF
AZIZ DERIA
JOHN DOE I
JANE DOE I
JOHN DOE II
JOHN DOE III and
JOHN DOE IV
By Counsel

By: 

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CERTIFICATE OF SERVICE

I hereby certify, this 22nd day of February, 2005, that a true copy of the foregoing was served via U.S. Mail, postage prepaid, to the following counsel of record:

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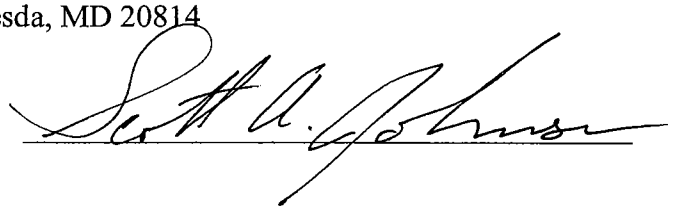

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