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 FOR LACK OF PERSONAL JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Robert R. Vieth (VSB #24304)
Tara M. Lee
Cooley Godward LLP
One Freedom Square
11951 Freedom Drive
Reston, Virginia 20190-5656
(703) 456-8000

Welly Tantono
Deval Zaveri
Cooley Godward LLP
4401 Eastgate Mall
San Diego, California 92121
(858) 550-6000

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

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

RULES

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 Claims Act ("ATCA"), 28 U.S.C. § 1350, and the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, against Defendant Mohamed Ali Samantar ("Samantar"), who served as Minister of Defense, First Vice-President and Prime Minister of Somalia in the 1980s. Plaintiffs allege that Samantar exercised command responsibility over, conspired with, or aided and abetted subordinates in the Armed Forces of Somalia, or persons or groups acting in coordination with them, to commit acts of extrajudicial killing; attempted extrajudicial killing; torture; crimes against humanity; war crimes; cruel, inhuman, or degrading treatment or punishment; and arbitrary detention, and to cover up those abuses.

Samantar now seeks to have Plaintiffs' Complaint dismissed. He argues that (1) he is entitled to immunity from suit pursuant to the head of state doctrine and the Foreign Sovereign Immunities Act ("FSIA"); (2) Plaintiffs' claims are time-barred; (3) Plaintiffs have failed to exhaust allegedly adequate and available remedies in Somalia; and (4) the case should be dismissed in favor of Plaintiffs' reinstatement of their suit in Somaliland, a former British Protectorate located in the northwest section of former Somalia. Samantar's arguments are without merit and his motion should be denied.

First, Samantar is not entitled to head of state immunity because he is neither a sitting head of state nor a former one. The Somali Constitution expressly recognized the President of Somalia as the nation's head of state and Samantar concedes, as he must, the he never held this office. Nor is he 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. Because human rights abuses are beyond the scope of an official's authority, officials accused of such acts are never entitled to immunity under the FSIA.

Second, 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 an equitable tolling of the applicable ten-year statute of limitations until 1997. Samantar did not arrive in the United States until 1997, precluding jurisdiction by this court until that time. Moreover, throughout the 1990s, Somalia was consumed by a brutal clan-based civil war that was characterized by mass starvation, clan-based killings and the commission of gross and systematic human rights abuses by rival clan leaders. 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 until 1997. Accordingly, the facts alleged in the Complaint provide sufficient basis to toll the statute of limitations until 1997, and the filing of the Complaint in November 2004 was timely.

Third, the facts alleged in the Complaint also are sufficient to state a claim 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 – which has been in existence for barely ten years – 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. Moreover, because Somaliland is not recognized as an independent sovereign nation, it is highly uncertain whether a Somaliland judgment would be enforceable in the United States, where Samantar has lived since 1997. Thus, Samantar's exhaustion of remedies and forum non conveniens arguments must fail.

Because Samantar has shown no grounds on which to dismiss the Complaint, the motion must be denied.

STATEMENT OF FACTS

Throughout the 1980s, the Somali Armed Forces, working closely with the Somali security forces, committed widespread and systematic human rights abuses against the civilian population of Somalia, including torture, rape, arbitrary and prolonged detention, and mass executions. Complaint ("Compl.") at ¶14. This deliberate reign of state terror began during the period Samantar served as Minister of Defense, and reached its peak in 1988 when he was serving as 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.*

This military regime dates back to October 1969 when a coup led by Major General Mohamed Siad Barre ("Siad Barre") overthrew the first and only democratic government of the new nation of Somalia. *Id.* at ¶15. Power was assumed by the Supreme Revolutionary Council ("SRC"), which consisted primarily of the Army officers who had supported and participated in the coup, including Samantar. *Id.* The SRC suspended the existing Constitution, closed the National Assembly, abolished the Supreme Court and banned all forms of opposition. *Id.*

In 1979, Somalia adopted a new Constitution designed largely to legitimize the military dictatorship. The 1979 Constitution established a government headed by a president and recognized the president as Somalia's Head of State. *See* Constitution of the Somali Democratic Republic ("Somali Constitution"), Article 82.[1] Siad Barre held this position until the collapse of

[1] The Somali Constitution is attached to the Declaration of Martin R. Ganzglass ("Ganzglass Decl.") submitted with this Opposition.

the regime in 1991.[2] The Somali Constitution also required Somalia to follow "generally accepted rules of international law," including those proclaimed in the Universal Declaration of Human Rights. *Id.* at Article 19. For example, the Somali Constitution expressly prohibited torture, extra-judicial killings and arbitrary detention. *Id.* at Articles 25.2, 26.2, 26.3, and 27.1. The military government that ruled Somalia throughout the 1980s, however, consistently and flagrantly violated these prohibitions.

The Isaaq clan, which resides in the northwestern region of Somalia, was a special target of the military government. Compl. ¶ 20. The Isaaq were among the best-educated and most prosperous Somalis and were perceived from the outset as potential opponents to the regime. *Id.* In the 1970s, the military government implemented harsh and discriminatory economic measures to weaken the Isaaq clan. *Id.* Necessarily, these policies further undermined Isaaq support for the military government. *Id.* at ¶ 21. In 1981, members of the Isaaq clan established the Somali National Movement ("SNM") to oppose the government. *Id.* In response, the military government launched a brutal counterinsurgency campaign intended to eliminate the SNM and all other Isaaq clan opposition. *Id.* at ¶ 22.

This calculated program of state repression included a clear and systematic pattern of arbitrary and prolonged detention, torture and extrajudicial killings that intentionally disregarded the distinction between civilian and SNM combatants. *Id.* The Somali Armed Forces routinely killed and looted livestock, blew up water reservoirs, destroyed homes, tortured and detained alleged SNM supporters, and indiscriminately killed civilians as collective punishment for SNM activities. *Id.* Such acts were intended to, and did, spread terror among the Isaaq clan in order to deter them from assisting the SNM. *Id.*

---

[2] *Id.* The Constitution provided for the transfer of power from President Siad Barre to the First Vice-President only in case of a "temporary disability" of the president. *Id.* at Article 85.

This pattern of state terror against the Issaq clan reached its peak in 1988 during the period Samantar served as Prime Minister. *Id.* at ¶ 23. In June and July 1988, following SNM attacks on military targets, 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.* A U.S. State Department report found that the Somali Army engaged in systematic assaults on unarmed civilians, leaving more than 5,000 dead. *Id.* As a result of the fighting, approximately 400,000 Somalis fled to Ethiopia, a country itself racked by drought and internal conflict, where they remained in refugee camps for many years. *Id.* More than a million people were displaced internally. *Id.*

In 1991, Siad Barre and his supporters were violently ousted from power. *Id.* at ¶ 82. Samantar fled the country, moving to Italy and later arriving in the United States on June 26, 1997. Affidavit of Mohamed Ali Samantar ("Samantar Aff."), 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, Compl. at ¶ 82. Fighting among rival clan leaders resulted in the killing, displacement, and mass starvation of tens of thousands of Somalia citizens. *Id.* The ensuing chaos led the United Nations to intervene militarily in 1992, though it proved incapable of restoring order. *Id.* Indeed, Somalia's clan-based civil war and anarchic violence proved to be so brutal that it drove the United Nations from the country in 1994. *Id.* Rival clan militias continued to commit gross and systematic human rights abuses in the years after the United Nations' departure, including the deliberate killing and kidnapping of civilians because of their clan membership. *Id.*

Today, Somalia remains without a national government and national judicial system. *Id.* at ¶ 86. Shari'a courts operate in some regions of the country, filling the vacuum created by the absence of governmental authority, but such courts impose religious and local customary law often in conflict with universal human rights conventions. *Id.* 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 who 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 peace and security. *Id.* at ¶ 85. This area, a region encompassing the former British protectorate of Somaliland, is dominated by the Isaaq clan. *Id.* In 1991, it declared its independence, reclaimed its previous name, and seceded from Somalia. *Id.* A rudimentary civil administration was established there 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).

Samantar's immunity arguments arguably implicate the subject matter jurisdiction of this court. On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), unlike a motion pursuant to Rule 12(b)(6), the court may consider evidence outside the complaint to resolve factual disputes. *Carter v. Arlington Public School System*, 82 F. Supp. 2d 561, 564 (E.D. Va. 2000).

ARGUMENT

I. SAMANTAR IS NOT ENTITLED TO HEAD OF STATE IMMUNITY

Samantar argues that this case is barred because he is entitled to immunity from suit. (Opening Br. at 3-6.) Samantar's immunity argument fails for at least three reasons. First, Samantar is not entitled to head of state immunity because such immunity is reserved for heads of state, a position he concedes he never held. Second, even if Samantar had served as Somalia's head of state, which he did not, he still must be denied head of state immunity because such immunity is reserved for sitting heads of state. Finally, Samantar is not entitled to immunity under the FSIA because that statute provides immunity to officials only for acts carried out within the scope of their legal authority. Here, Plaintiffs allege that Samantar's actions violated norms of customary international law and were unauthorized by Somali law. Accordingly, Samantar is not entitled immunity and his motion on these grounds must be denied.

A. Samantar At No Time Served As Somalia's 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 based on, and limited by, the principle that sovereign states are immune from suit by other states. "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.* It is therefore 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) (according head of state immunity to President Aristide); *U.S. v. Noriega*, 746 F. Supp. 1506 (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 implicitly concedes, as he must, that he never served as Head of State of Somalia. Nowhere in his brief does he claim to have held this position. Nor could he make this claim. 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. Ganzglass Decl. at ¶ 10. Article 79 of the Somali Constitution expressly states:

> 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.

It is simply beyond dispute that Defendant ever served as Somalia's Head of State.[3]

Because Samantar never served as Head of State of Somalia, he claims 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. Samantar concedes that in these positions he was only a "member" or "representative" of Somalia's executive branch of government. (Opening Br. at 2-3). Individuals holding such positions, however, are not 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.

---

[3] 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. Somali Constitution, Article 85. Samantar makes no specific showing that he temporarily assumed the presidency pursuant to these constitutional procedures. *See also* Ganzglass Decl. at ¶ 12. Nor does he cite authority for the proposition that a temporary Acting President may be considered the head of state and therefore entitled to head of state immunity.

Supp. 319 (D.D.C. 1988), plaintiffs filed suit against several people including the sitting Prime Minister of the United Kingdom, Margaret Thatcher. The United States government intervened and recommended that Thatcher be granted immunity "as the sitting head of government of a friendly foreign state." *Id.* at 320. The court found the United States government's recommendation "conclusive" on the issue of head of state immunity and dismissed the complaint as to Thatcher solely on these grounds. *Id.* Here, the United States government has not intervened to recommend that a similar exception to the principles limiting head of state immunity be made for Samantar. Moreover, the constitutional regime of the United Kingdom vests sovereignty in its purely ceremonial monarch; the immunity for Prime Minister Thatcher – the United Kingdom's *de facto* head of state – achieved the policies on which head of state immunity rests. By contrast, Article 82 of the Somali Constitution expressly vested the powers inherent in state sovereignty in the President, such as the power to ratify international agreements, declare war and command the Armed Forces.

Samantar also must be denied 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 denied 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 because neither was a head of state); *Republic of Philippines v. Marcos*, 665 F. Supp. 793 (N.D. Cal. 1987) (denying head of state immunity to Solicitor General of the Philippines because not head of state); *see also El-Hadad v. Embassy of the United Arab Emirates*, 69 F. Supp. 2d 69, 82, n. 10 (D.D.C. 1999) (without reaching issue, but stating that head of state immunity would not have afforded protection to defendants Minister of Higher

Education and Scientific Research and officials of other executive department because they were not head of state); *cf., Tachiona v. Mugabe*, 386 F.3d 205, 220-21 (2d Cir. 2004) (affirming grant of immunity to foreign minister but on grounds of *diplomatic* immunity, not head of state immunity as granted by lower court); *Kilroy v. Windsor*, Civ. No. C-78-291 (N.D. Ohio 1978), *excerpted in* 1978 Dig. U.S. Prac. Int'l L. 641-43 (1978) (same); *Chong Book Kim v. Kim Yong Shik* (Hawaii Cir. Ct. 1963), *excerpted in* 58 Am. J. Int'l L. 186-87 (1964) (same).

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 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 sole case granting 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).[4] This decision squarely conflicts with prevailing judicial opinion

---

[4] The case of *Wei Ye v. Jiang Zemin*, 383 F.3d 620 (7th Cir. 2004), the only other instance in which a former head of state was granted head of state immunity, was based on the State Department's request that the defendant be entitled to immunity. The court granted head of state immunity to former Chinese President Jiang Zemin on the

declining to extend head of state immunity to former heads of state. *See, e.g., El Hadad*, 69 F. Supp. 2d at 82, n. 10; *First American Corp*, 948 F. Supp at 1121; *Aristide*, 844 F. Supp at 130; *In re Mr. and Mrs. Doe*, 860 F.2d at 45. It is also directly contrary to the policies on which head of state immunity rests. The extension of such immunity to a former head of state – who no longer embodies the sovereignty of a nation – improperly detaches head of state immunity from principles of state sovereignty and transforms it into an individual right. *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.") Accordingly, this Court should expressly decline to follow the *Abubakar* court and should deny Samantar head of state immunity.

C. The Foreign Sovereign Immunities Act Does Not Protect Officials For Acts Outside Their Official Capacities.

Samantar appears also to claim that he is entitled to immunity under the FSIA. (Opening Br. at 6, note 2). As Samantar concedes, the FSIA provides immunity only for acts carried out within the scope of the individual defendant's legal authority. *Velasco v. Gov't of Indon.*, 370 F.3d 392, 399 (4th Cir. 2004). Courts have specifically held that human rights abuses are, *ipso facto*, beyond the scope of an official's authority and that the official therefore is not entitled to immunity under the FSIA. *Hilao v. Marcos*, 25 F.3d 1467, 1471 (9th Cir. 1994) (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-*

---

grounds that "a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff." *Id.* at 626.

Two other cases have recognized a waiver of head of state immunity for a former head of state, thus allowing a suit to proceed against a former head of state without needing to resolve the former official's immunity. In so doing, however, both courts expressed skepticism about the character of any head of state immunity held by a former head of state. *See In re Grand Jury Proceedings*, 817 F.2d at 1111 (current Philippine government waived whatever head-of-state immunity was enjoyed by Ferdinand and Imelda Marcos."); *Paul v. Avril*, 812 F. Supp. 207, 211 (S.F. Fla. 1992) (current Haitian government waived Avril's "residual head of state immunity.")

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").

Plaintiffs here allege that Samantar can be held legally responsible for the acts of torture, extrajudicial killing, arbitrary detention, war crimes and crimes against humanity committed against them and their families during the period he served as Minister of Defense and Prime Minister of Somalia. Compl. ¶¶ 1-2. All of these acts were unauthorized by Somali law and violated customary norms of international law.

The acts alleged by Plaintiffs were expressly prohibited by the Somali Constitution and violate customary international law.[5] *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d. Cir. 2003) ("official torture, extrajudicial killings, and genocide, do violate customary international law."). Accordingly, Plaintiffs sufficiently have alleged that Defendant's actions were committed outside the scope of his legal authority, and the FSIA does not apply.

II. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.

Dismissal of a complaint because it is barred by the applicable statute of limitations is proper only if "the defendant . . . establish[es] 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). Samantar argues that the Court should dismiss this case based on his affirmative defense that the ten-year limitations period has expired. The

---

5 For example, Article 27.1 of the Somali Constitution prohibited the use of torture. Article 25.2 prohibited extrajudicial killings. Articles 26.2 and 26.3 prohibited arbitrary detention. Article 19 required Somalia to follow customary international law.

doctrine of equitable tolling, however, which applies with particular force in claims filed pursuant to the ATCA and TVPA, makes clear that the statute of limitations was tolled at least until 1997, for two separate reasons.[6] First, Samantar did not enter the United States until 1997, so no U.S. court would have had jurisdiction over him until that date. Second, extraordinary circumstances, and in particular the chaos and anarchy that pervaded Somalia until at least 1997, did not permit investigation necessary to bring a case under these statutes. Therefore, under accepted principles of equitable tolling, Plaintiffs' claims are timely.

A. The Law Of Equitable Tolling.

"'Equitable tolling' is the doctrine under which plaintiffs may sue after the statutory time period has expired if they have been prevented from doing so due to inequitable circumstances." *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998). Limitations periods are "customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal citations and quotation marks omitted); *accord*, *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003).

The scope of any tolling to be accorded to a relevant statute is determined by congressional intent. "[T]he basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Burnett v. New York Central R. Co.*, 380 U.S. 424, 427 (1965). To decide whether and how equitable tolling applies, Courts "examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." *Id.*

---

6 Samantar acknowledges that the applicable ten-year statute of limitations is subject to equitable tolling, but he suggests that the tolling period ended when the Barre government was overthrown. (Opening Br. at 10.) For the reasons stated herein, Samantar's admission that tolling applies is correct, but his choice of the date of termination of the tolling period is wrong.

Furthermore, as a matter of equity, courts permit tolling in certain situations where a plaintiff is prevented from asserting his claims earlier. *Rouse*, 339 F.3d at 246. Under this test, a plaintiff is entitled to equitable tolling "if he presents (1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time." *Id.* Such "extraordinary circumstances" include the inability to obtain evidence necessary to successfully prosecute a claim. *See In re M&L Business Machine Co.*, 75 F.3d 586, 591-92 (10th Cir. 1996) (applying the "extraordinary circumstances" standard to permit equitable tolling on the grounds that a bankruptcy trustee could not obtain access to key evidence, thus hampering trustee's investigation of bankruptcy estate).

As shown below, the legislative histories of the ATCA and the TVPA make clear that Congress intended that the ten-year statute of limitations be equitably tolled, under the circumstances of this case, at least until 1997. The case law confirms this conclusion.

B. The Statute Of Limitations Is Tolled Until 1997 Because Samantar Did Not Enter The U.S. Until That Date, And Therefore No U.S. Court Would Have Had Jurisdiction Over Him Until 1997.

By his own admission, Samantar did not enter the United States until 1997. Samantar Aff., ¶ 10. The courts of the United States could not assert jurisdiction over him until that time, and hence, Plaintiffs could not have filed suit any earlier. As discussed below, Congress clearly intended that, in the context of the TVPA and ATCA, the statute of limitations be tolled for the duration of a defendant's absence from the United States. Thus, in this case, the statute of limitations is tolled until 1997; accordingly, this suit has been brought well within the ten-year limitations period.

In enacting the TVPA, Congress intended to (1) provide an avenue for torture victims to pursue claims against their torturers in the United States because "[j]udicial protection against flagrant human rights violation is often least effective in those countries where such abuses are

most prevalent," S. Rep. No. 102-249, at 3 (1991);[7] and (2) denounce and deter foreign torturers from seeking haven in this country.[8] Such congressional intent is best given effect by tolling the limitations period when a defendant is outside of the reach of United States courts. Indeed, if the statute of limitations were permitted to run on ATCA and TVPA claims while human rights defendants such as Samantar remained outside the United States, the goals of Congress would be stymied. Under such a legal regime, foreign torturers would merely have to wait until the statute of limitations expired before entering the United States, safe in the knowledge that they could no longer be sued for their human rights violations. This is not what Congress intended.

Indeed, Congress expressly contemplated this exact factual scenario. Initial drafts of the TVPA went so far as to reject any limitations period whatsoever for the statute. S. 1629, 101st Cong. § 2(b) (1989) ("The court shall not infer the application of any statute of limitations or similar period of limitations in an action under this section."). While the TVPA ultimately did incorporate a ten-year limitations period, 28 U.S.C. § 1350 note, § 2(c), both houses of Congress stated unequivocally that equitable tolling should apply. In its Report on the TVPA, the Senate, observing that "all equitable tolling principles" should apply under this law, provided a list of "illustrative, but not exhaustive" situations in which courts were expected to toll the limitations period. S. Rep. No. 249, 102d Cong., 1st Sess., 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

---

7 For the Court's convenience, the Senate Report on the TVPA is attached as Exh. 1.

8 *See, e.g.,* 138 Cong. Rec. S4176, at 4176 (daily ed. Mar. 3, 1992) (statement of Sen. Arlen Specter) ("[o]ne reason for enacting [the TVPA] is to discourage torturers from ever entering this country."); 137 Cong. Rec. H34785, at 34785 (daily ed. Nov. 25, 1991) (statement of Rep. Mazzoli) ("[The TVPA] puts torturers on notice that they will find no safe haven in the United States."); *Id.* (statement of Rep. Yatron) (TVPA "sends a distinct and forceful message that the U.S. will not host torturers within its borders."). Where, as here, statements of individual legislators are consistent with statutory language and other legislative history, "they provide evidence of Congress' intent." *Brock v. Pierce County*, 476 U.S. 253, 263 (1986).

> 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. Excluded also from calculation of the statute of limitations would be the period when a defendant has immunity from suit. The statute of limitations should also be tolled for the period of time in which the plaintiff is imprisoned and otherwise incapacitated. It should also be tolled where the defendant has concealed his or her whereabouts or the plaintiff has been unable to discover the identity of the offender.

Id. at 11 (emphasis added, citations omitted). The House Report on the TVPA likewise confirms that in certain instances equitable tolling "may apply to preserve a claimant's rights." H.R. Rep. No. 367, 102d Cong. 1st Sess., at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 88.[9] Committee Reports such as these represent "the authoritative source" for determining legislative intent. *Garcia v. United States*, 469 U.S. 70, 76 (1984), citing *Zuber v. Allen*, 396 U.S. 168, 186 (1969).

These equitable tolling principles also extend to the ATCA. The TVPA establishes "an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act)." *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (emphasis omitted) (quoting TVPA legislative history). Cases have further identified a "close relationship" between the ATCA and TVPA for limitations purposes. *Papa v. United States*, 281 F.3d 1004, 1012 (9th Cir. 2002). Further, the legislative history of the TVPA "casts light on the scope of the Alien Tort Claims Act." *Xuncax v. Gramajo*, 886 F. Supp. 162, 172 n.2 (D. Mass. 1995).

The courts that have applied these principles in ATCA and TVPA cases have concluded that the statute of limitations is tolled until the defendant enters the United States and is subject to the jurisdiction of the federal courts. In *Hilao*, 103 F.3d at 773, the court cited the Senate Report on the TVPA as authority that equitable tolling under the statute included "periods in

---

[9] For the Court's convenience, the House Report on the TVPA is attached as Exh. 2.