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

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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 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.*

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[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.

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[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

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[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-*

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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

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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.*

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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

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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

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

which the defendant was absent from the jurisdiction."[10] Similarly, in *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1368 (S.D. Fla. 2001), the court held that the defendant's participation in the federal witness protection program tolled the statute of limitations, reasoning that during his participation "the Defendant was ostensibly absent from this jurisdiction, in that he could not be served."[11]

In this case, tolling the statute of limitations for Plaintiffs' claims until 1997 is necessary to effectuate congressional intent that the United States not become a "haven for torturers," and that the limitations be tolled during the period of Samantar's absence from the United States.[12]

C. In The Alternative, The Statute Of Limitations Must Be Tolled Until At Least 1997 When Sufficiently Stable Conditions, Permitting Investigations Into Past Human Rights Abuses, Returned To One Region Of Somalia.

In human rights cases, courts have tolled the running of the statute of limitations when extraordinary circumstances in the country where the human rights violations occurred prevented plaintiffs from gaining access to evidence necessary to prosecute their claims. Thus, the fear of reprisal from the military by both plaintiffs and potential witnesses justifies tolling the limitations period in ATCA and TVPA cases. *Hilao*, 103 F.3d 767, 773 (9th Cir. 1996) (citing

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10 The defendant contends that *Hilao* only tolled the limitations period "during the time Marcos was president," but no longer. (Opening Br. at 8). However, as the lower court's findings of fact show, the duration when Marcos was President coincides with the period during which he was outside of the jurisdiction of the United States. 910 F. Supp. 1460, 1463 (D. Haw. 1995) (finding that Marcos, his family and others loyal to him fled to the United States when the Marcos government was overthrown).

11 Although the court, responding to new information contained in the Second Amended Complaint, later found that the defendant may not have participated in the witness protection program, it nevertheless upheld its decision to toll the limitations period on alternative grounds. *Cabello Barrueto v. Fernandez Larios*, 205 F.Supp.2d 1325, 1330 (S.D. Fla. 2002).

12 The expression of this principle in federal law is by no means limited to the ATCA and TVPA. For example, the statute governing contract actions brought by the United States or any officer or agency thereof provides that the period during which "the defendant or the res is outside the United States" shall be excluded from computation of the limitations period. 28 U.S.C. § 2416(a). The same rule applies in criminal actions relating to tax offenses. *See* 26 U.S.C. § 6531; *see also United States v. Myerson*, 368 F.2d 393, 395 (2d Cir. 1966) ("There is nothing unreasonable or arbitrary about the tolling of the statute of limitations during an offender's absence from the country").

"intimidation and fear of reprisals" as factors supporting equitable tolling).[13] Similarly, courts have tolled the statute of limitations for periods when plaintiffs could not obtain judicial relief in the country where the human rights violations occurred. *Unocal*, 963 F. Supp. at 897 (applying equitable tolling for periods when plaintiffs "could obtain no relief in Burma because there is no functioning judiciary there"); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1550 (N.D. Cal. 1987) (tolling limitations period for duration that plaintiffs were denied access to Argentine courts), *reversed on other grounds*, *Forti v. Suarez-Mason*, 694 F.Supp. 707 (N.D. Cal. 1988).

Those are precisely the type of extraordinary circumstances that exist in the present case, which foreclosed any possibility prior to 1997 of acquiring the documentary and testimonial evidence necessary for the successful litigation of Plaintiffs' claims.[14] Indeed, the following allegations of the Complaint – which must be taken as true at this stage of the litigation – make it clear that the extraordinary circumstances in the former country of Somalia prevented the plaintiffs from filing these human rights claims until, at the earliest, 1997:

- The Complaint contains a description of the well-documented chaos and clan-based warfare that has existed in much or all of Somalia since the overthrow of the Siad Barre government in 1991. Compl. ¶ 82.

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13 *See also John Doe I v. Unocal*, 963 F. Supp. 880, 897 (C.D. Cal. 1997) ("For those plaintiffs who remain in Burma, attempts to access courts in this country may present a threat of reprisal [to them]"), *reversed on other grounds*, *John Doe I v. Unocal Corp.*, 2002 WL 31063976 (9th Cir. 2002), *rehearing en banc granted, opinion vacated by*, *Doe v. Unocal Corp.*, 2003 WL 359787 (9th Cir. 2003).

14 Neither Samantar's attachment of various affidavits in support of his brief, nor Plaintiffs' use of the Ganzglass Declaration, 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. No discovery has taken place in this case 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. *Harrods Ltd. v. Sixty Internet Domain Names*, 110 F. Supp. 2d 420, 427 (E.D. Va. 2000) (converting the motion to dismiss into a motion for summary judgment would be premature because discovery had not begun and the evidentiary record had not been established). 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.

- Each of the Plaintiffs either resides in Somalia or has immediate family members there. Pursuant of human rights claims, even in the United States, would have exposed the Plaintiffs, their families or their witnesses to acts of retribution. *Id.* at ¶ 83.
- Somalia has no functioning government or judiciary that could have protected Plaintiffs, their family members or potential witnesses from clan-based reprisals. *Id.*
- While Somaliland declared its own independence in 1991 and established a rudimentary civil administration in 1993, major armed conflicts erupted in 1994 and 1996 and plunged the region back into turmoil. It was not until 1997 that Somaliland's government exercised a modicum of authority over its own territory. *Id.* at ¶ 85.[15]
- As of today, only Somaliland has sufficiently stable conditions that permit victims of human rights abuse to consider bringing their claims. *Id.* at ¶ 84.

Prior to 1997, given the circumstances described above, victims of human rights abuses perpetuated by the Somali Armed Forces or associated security services could not have been expected to pursue a cause of action in the United States against former military commanders or high-ranking government officials because of the reasonable fear of reprisals against themselves or members of their families still residing in Somalia. *Id.* at ¶ 83.

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15 Samantar asks this court to accept as true bare-boned statements from three affiants that the Plaintiffs should have no fear of reprisals because the Barre regime has disintegrated. Affidavit of Alessandro Campo ("Campo Aff.") ¶ 11; Affidavit of Mahmoud Haji Nur Affidavit ("Nur Aff.") ¶ 12; Affidavit of Mohamed Abdirizak ("Abdirizak Aff.") ¶ 10. Clearly, these are disputed conclusions, and the court must reject them. Moreover, although there has been no discovery, Plaintiffs direct the court's attention to the attached Declaration of Martin Ganzglass, who believes that, based on current conditions in Somalia, any Isaaq plaintiffs asserting human rights claims would have reasonable fear of reprisals against them by former members of the Somali military. Ganzglass Decl. ¶ 21.

Despite Plaintiffs' recitations of these allegations in their Complaint, Samantar contends that Plaintiffs, nevertheless, should pursued their claims either in Somaliland or Italy during the time he was outside of United States jurisdiction. His argument confuses the doctrines of statute of limitations and exhaustion of remedies. While the condition of the Somaliland court system arguably is relevant to the exhaustion of remedies argument (*infra,* section III), it has no bearing on the statute of limitations issue. Similarly, the argument that Plaintiffs could have sued Samantar while he lived in Italy may have had minimum relevance to the exhaustion of remedies inquiry – although it is now moot because Samantar no longer lives there – but is inapplicable to a statute of limitations analysis, where the only relevant inquiry is whether the limitations period for bringing TVPA and ATCA claims *in the United States* is tolled.

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

Samantar relies on three cases to support his argument that equitable tolling is not warranted in this case. *See Alexander v. Oklahoma*, 382 F.3d 1206 (10th Cir. 2004) (seeking 80-year tolling), *Deutsch v. Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003) (seeking 60-year tolling), and *Hoang Van Tu v. Koster*, 364 F.3d 1196 (10th Cir. 2004) (seeking 22-year tolling). These cases are clearly inapposite to the facts presented here. Indeed, a close reading of the facts of these three cases show that all the defendants shared one thing in common – they were United States citizens or otherwise subject to United States jurisdiction throughout the periods for which the plaintiffs sought equitable tolling.

Furthermore, in each of these cases, none of the plaintiffs alleged exceptional facts. The *Alexander* plaintiffs did not plead factors to show they were being kept out of the court system, and the *Deutsch* and *Koster* plaintiffs similarly could not show how they were prevented from filing similar suits in the United States at an earlier time. *Alexander*, 382 F.3d at 1220 (plaintiffs failed to allege "they were prohibited from accessing the courts in the 1970s, 1980s, or 1990s");

Alexander v. Oklahoma, 2004 U.S. Dist. LEXIS 5131, at *32 (finding that the era of intimidation ended in the 1960's); *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160, 1181 (N.D. Cal. 2001) ("None of the allegations in the Korean and Chinese plaintiffs' complaints suggest that they could not have attempted to bring these claims sooner."); *Koster*, 354 F.3d at 1199-1200 ("even if some degree of equitable tolling were appropriate . . . plaintiffs have made no showing to justify tolling").

In summary, unlike the cases relied upon by Samantar, here, Plaintiffs' claims are not barred by the statute of limitations. Because Samantar entered the United States in 1997, Plaintiffs' claims – as a matter of law – are timely. In the alternative, in light of the conditions in former Somalia, including chaos and violence and, until relatively recently, a lack of stability in every region of that former country, Plaintiffs' claims are timely because they legitimately feared reprisals against themselves, their family members, and/or possible witnesses, relating to these claims. Samantar's motion based on the statute of limitations must be denied.

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

Samantar appears to argue that all of Plaintiffs' claims should be dismissed because Plaintiffs have not exhausted their remedies in Somalia or Somaliland, as required by Section 2(b) of the TVPA. Section 2(b) of the TVPA provides:

> A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

28 U.S.C. § 1350 note, § 2(b).

Here, Plaintiffs' claims are not based solely on the TVPA. Plaintiffs' claims for cruel, inhuman or degrading treatment or punishment, war crimes and crimes against humanity are brought under the ATCA and customary international law. For these claims, Plaintiffs need not

show that they have exhausted their remedies in Somalia or Somaliland. Plaintiffs' claims for extra-judicial killing, attempted extra-judicial killing, and torture are brought pursuant to **both** the ATCA 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. In any event, Samantar's exhaustion argument lacks merit.

A. Plaintiffs Are Not Required To Exhaust Their Remedies In Somalia Or Somaliland Before Asserting Their Claims Under The Alien Tort Claims Act.

Plaintiffs asserting claims under ATCA 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*, 221 F. Supp. 2d 1116, 1133 (C.D. Cal. 2002) ("The court is not persuaded that Congress' decision to include an exhaustion of remedies provision in the TVPA indicates that a parallel requirement must be read into the ATCA."); *see also Jama v. I.N.S.*, 22 F. Supp. 2d 353, 364 (D.N.J. 1998) (noting that "nothing in the ATCA which limits its application to situations where there is no relief available under domestic law").

In *Kadic v. Karadzic*, the Second Circuit Court of Appeals held that "[t]he scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act." 70 F.3d 232, 241 (2d Cir. 1995). The *Kadic* court did not apply the TVPA exhaustion of remedies requirement to the plaintiffs' ATCA claims for torture and summary execution, even though plaintiffs asserted the same claims under the TVPA. *Id.* at pp. 243-244. Thus, the exhaustion of remedies requirement does not apply to claims under the ATCA and customary international law, even if plaintiffs also seek recovery under the TVPA. Consequently, Plaintiffs' ATCA claims are not subject to Samantar's Exhaustion argument.

B. It Is Sufficient At This Stage Of The Case That Plaintiffs' Complaint Alleges They Have No Adequate Or Available Remedies In Somalia Or Somaliland.

To the extent Plaintiffs seek relief under the TVPA, they are not required to exhaust whatever remedies may exist 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.
>
> More specifically, . . . the interpretation of § 2(b) should be informed by general principles of international law. The procedural practice of international human rights tribunals generally holds that the respondent has the burden of raising the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that claimant did not use. . . . The ultimate burden of proof and persuasion on the issue of exhaustion of remedies . . . lies with the defendant.

S. Rep. No. 249, 102d Cong., 1st Sess., at 9-10 (1991). Samantar "must demonstrate not only that the foreign forum is amenable, but also that it . . . [offers] certain rights, such as the right to a speedy and fair trial." *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1358 (S.D. Fla. 2003).

Because exhaustion of remedies is an affirmative defense on which the defendant has the burden of proof and persuasion, it is not the proper subject of a motion to dismiss, particularly

when Plaintiffs' Complaint alleges they have no adequate or available remedies. The Complaint alleges that Somalia remains without a functioning national judicial system in which victims of Barre-era human rights abuses could bring their claims. 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. Compl. ¶ 86.

Plaintiffs further allege that the Somaliland courts do not offer an adequate or available remedy. Although civil order has prevailed there since 1997, it remains impossible to seek judicial remedies in its courts for such claims. Compl. ¶ 87. The Somaliland government's human rights record is weak, and human rights activists are frequently arrested and detained. *Id.* The judicial system remains very tied to religious and political elites and lacks the properly trained judges and other legal personnel necessary to litigate complex human rights cases. *Id.* In light of these allegations, which must be accepted, it is clear that Samantar has not met his burden. Samantar has offered the affidavit of Alessandro Campo, but nowhere does Campo state that remedies are adequate or available in Somalia or Somaliland. Nor does Campo identify what types of legal claims or remedies are actually available to Plaintiffs in Somalia or Somaliland. He also makes no 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).

Even the authorities cited by Samantar conclude 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 ("Country Rep."), p. 5 (Feb. 25, 2004) (noting that while the Somaliland Constitution calls for an independent

judiciary, "the judiciary is not independent in practice"); DOS 2002 Country Rep., p. 7 (Mar. 31, 2003) (concluding that there is a "serious lack of trained judges and of legal documentation in Somaliland."); DOS 2001 Country Rep., p. 7 (Mar. 4, 2002) (finding that "[u]ntrained police and other persons reportedly served as judges."); DOS 2000 Country Rep., p. 6 (Feb. 23, 2001) (same); DOS 1999 Country Rep., p. 5 (Feb. 25, 2000) (explaining that in Somaliland "a special security committee that includes the mayor of Hargeisa and local prison officials can order an arrest without a warrant and sentence persons without a trial"); DOS 1988 Country Rep., p. 1 (Feb. 26, 1999) (stating "[t]here is no national judiciary system" in Somalia).

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 in the country of his residence (the United States). Va. Code Ann. § 8.01-465.10.[16] Plaintiffs are aware of no case that stands for the proposition that a United States court is legally obligated to recognize a decision rendered by the "courts" of an unrecognized territory, or that a plaintiff must exhaust remedies in such a court system. Thus, any remedies in Somaliland are inadequate.

IV. SAMANTAR'S RELIANCE ON THE DOCTRINE OF FORUM NON CONVENIENS IS WITHOUT MERIT

Samantar contends, in passing and without merit, that this case should be dismissed on *forum non conveniens* grounds so that Plaintiffs' claims can be heard in Somaliland.

A. The Law Of Forum Non Conveniens.

As the party moving to dismiss based on the doctrine of *forum non conveniens*, Samantar bears the burden of showing (a) that there is an adequate alternative forum, and (b) that the

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[16] A decision is not conclusive in Virginia if it "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." Va. Code. Ann. § 8.01-465.10. For the reasons mentioned above, the "courts" of Somaliland appear to be neither adequate nor impartial.

balance of private and public interest factors favor dismissal. *See Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1226 (3rd Cir. 1995). *See also Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1390 (8th Cir. 1995) (finding that because the defendant made only conclusory allegations regarding his *forum non conveniens* allegation, the district court did not abuse its discretion in declining to dismiss for that reason); *Hodson v. A. H. Robins, Co., Inc.*, 528 F. Supp. 809, 817 (E.D. Va. 1981) (holding that a defendant has a "heavy burden" in proving that dismissal due to *forum non conveniens* is warranted), *abrogated on other grounds*, *Broadcasting Co. of the Carolinas v. Flair Broad.*, 892 F.2d 372 (4th Cir. 1989).[17] As demonstrated below, the *forum non conveniens* doctrine offers Samantar no relief.

B. Samantar Has Failed To Meet His Burden On The Threshold Issue Of An Adequate Alternative Forum.

As discussed above,[18] Somaliland does not offer an adequate alternative forum. *See Abiola*, 267 F. Supp. 2d at 918 ("the defendant's threshold burden is to demonstrate that an adequate alternative forum exists"). Thus, Samantar has not met his burden on the first prong of the *forum non conveniens* test.

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17 As the Court considers this issue, it should note the concerns identified in other human rights cases:

> [a] motion for dismissal on *forum non conveniens* grounds raises special concerns when the claims . . . are brought . . . [for] human rights abuses. Dismissal "can represent a huge setback in a plaintiff's efforts to seek reparations for acts of torture" due to "the enormous difficulty of bringing suits to vindicate such abuses." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105, 106 (2d Cir. 2000).. . . *Cf.* H.R. Rep. No. 102-367, pt. 1, at 3 (1991) ("Judicial protections against flagrant human rights violations are often least effective in those countries where such abuses are most prevalent. . . . The general collapse of democratic institutions characteristic of countries scourged by massive violations of fundamental rights rarely leaves the judiciary intact.").

Abiola v. Abubakar, 267 F. Supp. 2d 907, 918 (N.D. Ill. 2003) (citations omitted).

18 *See supra* section III.

C. Private And Public Interest Factors Do Not Support Dismissal Of This Case.

The balance of private and public interest factors do not support dismissal.

1. Private Interests Favor The Retention Of This Case In This Court.

Consideration of the "private interest" factors[19] is dominated by the fact that any judgment from a court in Somaliland likely would not be enforceable in Virginia (factor 5). *See ESI, Inc. v. Coastal Power Prod. Co.*, 995 F. Supp. 419, 427-28 (S.D.N.Y. 1998) (denying *forum non conveniens* argument in part because it was not shown that a foreign judgment would be enforceable in the U.S.).

Samantar's arguments relating to the availability of witnesses and documents in Somalia (factors 1 – 4) fall short because he has not identified a single witness in Somalia, even though such a list of witnesses has been held to be a prerequisite for *forum non conveniens* dismissal. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 341 (S.D.N.Y. 2003) (internal citations omitted). Nor has Samantar made a showing that Somaliland has compulsory process for the attendance of witnesses. Finally, while some witnesses and plaintiffs do live in Somalia, many live in the United States, including Samantar, Plaintiff Yousuf, and others (including some of the affiants whose testimony was presented in support of Samantar's motion). *See Calava Growers of Calif. v. Generali Belgium*, 632 F.2d 963, 969 (2d Cir. 1980) (Newman, J., concurring) (noting that it is "often quicker and less expensive to transfer a witness or a document than to transfer a lawsuit").[20]

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19 The private interest factors are: (1) relative ease of access to sources of proof; (2) availability of compulsory process for attendance of witnesses; (3) costs of bringing willing witnesses and parties to the place of trial; (4) access to physical evidence and other sources of proof; (5) enforceability of judgments; and (6) "all other practical problems that make trial of a case easy, expeditious and inexpensive." *See Piper Aircraft Co.*, 454 U.S. at 241 n.6, (*citing Gulf Oil Corp. v. Gilbert*, 330 U.S. at 501, 508 (1947)).

20 Samantar has made no showing on the sixth private interest factor.

2. The Public Interest Favors The Retention Of This Case In This Court.

The public interest factors do not support dismissal of this case.[21] Samantar does not cite to a single court proceeding in Somaliland demonstrating that Somaliland has an interest in adjudicating claims remotely similar to those at issue here. Furthermore, the United States has an interest in deciding this case because it has an interest in not being a haven to human rights abusers, and it has an interest in vindicating Samantar's violations of international human rights law. *See Wiwa*, 226 F.3d at 106 ("The new formulations of the Torture Victim Protection Act convey the message that torture committed under color of law of a foreign nation in violation of international law is 'our business,' as such conduct not only violates the standards of international law but also as a consequence violates our domestic law."); *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 339-40 (similar).[22] Thus, Samantar's argument for dismissal based on the doctrine of *forum non conveniens* should be denied.

CONCLUSION

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

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21 The public interest factors are: (1) burden on local courts and juries; (2) local interest in having the matter decided locally; and (3) familiarity with governing law and avoidance of unnecessary problems in conflicts of law or application of foreign law. *Gulf Oil Corp.*, 330 U.S. at 508-09. Samantar has offered no evidence on the first or third factor.

22 Notably, the *Wiwa* court reversed a *forum non conveniens* dismissal to the United Kingdom in part because the trial court had "failed to give weight" to "the interests of the United States in furnishing a forum to litigate claims of violations of international standards of the law of human rights." *Wiwa*, 226 F.3d at 106. *Wiwa* is instructive because it refused to send a case to the U.K. where the courts are regarded as "exemplary in their fairness and commitment to the rule of law." *Id.* at 101.

Dated: December 15, 2004

BASHE ABDI YOUSUF
JOHN DOE I
JANE DOE I
JOHN DOE II
JOHN DOE III and
JOHN DOE IV
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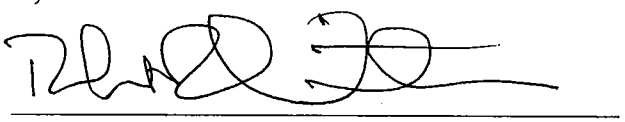

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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

BASHE ABDI YOUSUF, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1:04 CV 1360 (LMB/BRP)
	)	
MOHAMED ALI SAMANTAR	)	
	)	
Defendant.	)	

EXHIBITS TO

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

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Exhibit 1

P.L. 102-256, *1 THE TORTURE VICTIM PROTECTION ACT OF 1991

SENATE REPORT NO. 102-249
November 26, 1991
[To accompany S. 313, as amended]

The Committee on the Judiciary, to which was referred the bill (S. 313), having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

CONTENTS

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Torture Victim Protection Act of 1991".

*2 SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) Liability.-An individual who, under actual or apparent authority or under color of law of any foreign nation, subjects another individual to torture or extrajudicial killing shall be liable for damages in a civil action to that individual (or that individual's legal representative) or a beneficiary in a wrongful death action with respect to the death of that individual.

(b) Exhaustion of Remedies.-A court shall decline to hear a claim under this section if it appears that the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of Limitation.-No action shall be maintained under the provisions of this section unless it is commenced within 10 years of the time when the cause of action arose. All principles of equitable tolling, however, shall apply in calculating this limitation period.

SEC. 3. DEFINITIONS.

(a) Extrajudicial Killing.-For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture.-For the purposes of this Act-

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on a discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from-

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses of personality.

I. LEGISLATIVE HISTORY

This legislation was first introduced on June 6, 1986, by Senator Specter as S. 2528. The Senator reintroduced it in the 100th Congress on March 24, 1987, as S. 824 and, in the 101st Congress, on September 14, 1989, as S. 1629. On June 22, 1990, the Subcommittee on Immigration and Refugee Affairs held a hearing on this legislation. Witnesses at the hearing were: John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice; David P. Stewart, Assistant Legal Adviser for Human Rights and Refugee Affairs, U.S. Department of State; Robert F. Drinan, professor of law at Georgetown Law School, speaking on behalf of the American Bar Association; Michael H. Posner, executive director, Lawyers Committee for Human Rights; and John Shattuck, vice chairman, board of directors, Amnesty International, U.S.A. Senate bill 1629 was reported favorably by the subcommittee on July 19, 1990, by a 2-to-1 vote.

In the 102d Congress, Senator Specter reintroduced the bill as S. 313 on January 31, 1991. The Senate Judiciary Committee reported *3 S. 313 favorably by voice vote with an amendment in the nature of a substitute on November 21, 1991. This legislation is now cosponsored by Senators Leahy, Kennedy, Kohl, Heflin, Adams, Akaka, Bryan, D'Amato, Inouye, Jeffords, Kerry, McCain, Wellstone, and Wirth.

II. NEED FOR LEGISLATION

Official torture and summary execution violate standards accepted by virtually every nation. This universal consensus condemning these practices has assumed the status of customary international law. As the Second Circuit Court of Appeals held in a decision written by then-Chief Judge Irving R. Kaufman, "official torture is now prohibited by the law of nations." Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980). Senator Kennedy explained at the June 22, 1990, subcommittee hearing why torture is so universally condemned: "There are few actions so dehumanizing as torture. Victims bear the physical and psychological scars of their experience for life. Its use is designed to terrorize and oppress entire populations." The prohibition against summary executions has acquired a similar status.

These universal principles provide little comfort, however, to the thousands of victims of torture and summary executions around the world. Despite universal condemnation of these abuses, many of the world's governments still engage in or tolerate torture of their citizens, and state authorities have employed extrajudicial killings to execute many people. For 1990 alone, Amnesty International reports over 100 deaths attributed to torture in over 40 countries and 29 extrajudicial killings by death squads. See "Amnesty International Report 1991." Too often, international standards forbidding torture and summary execution are honored in the breach. As Senator Specter noted in introducing S. 313 on January 31, 1991,

> While nearly every nation now condemns torture and extrajudicial killing in principle, in practice more than one-third of the world's governments engage in, tolerate, or condone such acts.

The purpose of this legislation is to provide a Federal cause of action against any individual who, under actual or apparent authority or under color of law of any foreign nation, subjects any individual to torture or extrajudicial killing. This legislation will carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was ratified by the U.S. Senate on October 27, 1990. The convention obligates state parties to adopt measures to ensure that torturers within their territories are held legally accountable for their acts. This legislation will do precisely that-by making sure that torturers and death squads will no longer have a safe haven in the United States.

Judicial protection against flagrant human rights violations is often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law. Consequently, the Torture Victim Protection Act (TVPA) is designed to respond to this situation ***4** by providing a civil cause of action in U.S. courts for torture committed abroad.

The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 of title 28 of the U.S. Code, derived from the Judiciary Act of 1789 (the Alien Tort Claims Act) which permits Federal district courts to hear claims by aliens for torts committed "in violation of the law of nations." (28 U.S.C. 1350). Section 1350 has other important uses and should not be replaced. In Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir., 1980), the Court of Appeals for the Second Circuit held that section 1350 afforded it subject matter jurisdiction over a tort claim in which two citizens of Paraguay alleged that a former Paraguayan inspector general of police had tortured and killed a member of their family in Paraguay. After finding that torture has been condemned and renounced as an instrument of official policy by virtually all countries of the world, Chief Judge Irving R. Kaufman further held that customary international law provides individuals with the right to be free from torture by government officials. Consequently, section 1350 gave Federal courts jurisdiction over allegations of torture since torture violates the "law of nations."

As Judge Kaufman explained in the Filartiga decision:

Among the rights universally proclaimed by all nations *** is the right to be free of physical torture. Indeed for purposes of civil liability, the torturer has become-like the pirate and slave trader before him-hosts humani generis, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

The Filartiga case has met with general approval. In Forti v. Suarez Mason, 672 F.Supp. 1531 (N.D. Cal., 1987) motion to reconsider granted in part on other grounds, 694 F.Supp. 707 (N.D. Cal., 1988), the court followed Filartiga and held that allegations of official torture constituted a violation of the law of nations, as did prolonged arbitrary detention, summary execution, and "causing disappearance" of individuals. Suarez Mason was an action under section 1350 by Argentine citizens against former Argentine General Suarez Mason for damages arising out of alleged torture, murder, and prolonged arbitrary detention by military and police personnel under Suarez Mason's authority and control. The revised draft of the Restatement of Foreign Relations Law of the United States provides that there should be a cause of action where a state practices "[summary] murder or causing disappearance [or] disappearance," among other wrongs, because these practices violate the law of nations. [FN1]

At least one Federal judge, however, has questioned whether section 1350 can be used by victims of torture committed in foreign nations absent an explicit grant of a cause of action by Congress. In a concurrence in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir., 1984), cert. denied, 470 U.S. 103 (1985), Judge Robert H. ***5** Bork questioned the existence of a private right of action under the Alien Tort Claims Act, reasoning that separation of powers principles required an explicit grant by Congress of a private right of action for lawsuits which affect foreign relations.

The TVPA would provide such a grant, and would also enhance the remedy already available under section 1350 in an important respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad. Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. [FN2] Consequently, that statute should remain intact.

Furthermore, legislation allowing for the civil suits against torture occurring abroad is by no means unknown. States have the option, under international law, to decide whether they will allow a private right of action in their courts for violations of human rights that take place abroad. Several states have established that the international law of human rights can be enforced on behalf of individuals in their courts. See Memorandum for the United States as Amicus Curiae, Filartiga v. Pena-Irala, reprinted in 19 I.L.M. 585, 602-03 (1980) (citing cases from the Constitutional Court of Germany, the Supreme Court of the Philippines, and the Court of First Instance of Courtrai (Belgium)). In addition, according to the doctrine of universal jurisdiction, the courts of all nations have jurisdiction over "offenses of universal interest." [FN3]

III. CONGRESS' POWER TO ENACT THIS LEGISLATION

Congress clearly has authority to create a private right of action for torture and extrajudicial killings committed abroad. Under article III of the Constitution, the Federal judiciary has the power to adjudicate cases "arising under" the "law of the United States." The Supreme Court has held that the law of the United States

includes international law. [FN4] In Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 481 (1983), the Supreme Court held that the "arising under" clause allows Congress to confer jurisdiction on U.S. courts to recognize claims brought by a foreign plaintiff against a foreign defendant. Congress' ability to enact this legislation also drives from article I, section 8 of the Constitution, which *6 authorizes Congress "to define and punish *** Offenses against the Laws of Nations." [FN5]

IV. ANALYSIS OF LEGISLATION

The legislation authorizes courts in the United States [FN6] to hear cases brought by or on behalf of a victim of any individual who, under actual or apparent authority of or under color of law of any foreign action, subjects any person to torture or extrajudicial killing.

A. Extrajudicial killing

The TVPA incorporates into U.S. law the definition of extrajudicial killing found in customary international law. This definition conforms with that found in the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field (1949). [FN7] This definition further excludes killings that are lawful under international law-such as killings by armed forces during declared wars which do not violate the Geneva Convention [FN8] and killings necessary to effect a lawful arrest or prevent the escape of a person lawfully detained. [FN9] Thus, only killings which are truly extrajudicial in nature and which violate international law are actionable under the TVPA.

B. Torture

The definition of torture in this bill includes word-for-word the understandings included by the Senate concerning the definition of torture in the Torture Convention when it ratified that convention on October 27, 1990 (Understandings 1 (a) and (b)). See Congressional Record at S 17491-92 (daily ed. Oct. 27, 1990).

The definition of torture exempts those actions pursuant to "lawful sanctions." There has been some confusion whether this phrase refers to sanctions which are lawful under the foreign state's laws, even if they violate international law, or whether this phrase only includes sanctions which are lawful under international law. This debate was resolved by the U.S. Senate during the ratification of the Torture Convention and courts construing the term "lawful sanctions" in this legislation's definition of torture should refer for guidance to the following legislative history of the ratification of the Torture Convention. When the U.S. Senate ratified the Torture Convention, it included an understanding, "Understanding 1(c)," which states that the term "lawful sanctions" refers to sanctions *7 authorized by domestic law or by judicial interpretation of such law. The understanding continues, however:

> Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.

As Assistant Secretary for Legislative Affairs with the Department of State Janet G. Mullins explained in a December 11, 1989, letter to Senator Claiborne Pell, chairman of the Senate Committee on Foreign Relations, the U.S. Government "does not regard authorized sanctions that unquestionably violate international law as 'lawful sanctions' exempt from the prohibition on torture."

C. Who can sue

The legislation permits suit by the victim or the victim's legal representative or a beneficiary in a wrongful death action. The term "legal representative" is used only to include situations in which the executor or executrix of the decedent's estate is suing or in which an individual is appearing in court as a "friend"of the victim because of that victim's mental or physical incapacity or youthful age. The term "beneficiary in a wrongful death action" is generally intended to be limited to those persons recognized as legal claimants in a wrongful death action under Anglo-American law. [FN10]

D. Who can be sued

First and foremost, only defendants over which a court in the United States has personal jurisdiction may be sued. In order for a Federal court to obtain personal jurisdiction over a defendant, the individual must have "minimum contacts" with the forum state, for example through residency here or current travel. [FN11] Thus, this legislation will not turn the U.S. courts into tribunals for torts having no connection to the United States whatsoever.

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, [FN12] which renders foreign governments immune from suits in U.S. courts, except in certain instances.

The TVPA is not intended to override traditional diplomatic immunities which prevent the exercise of jurisdiction by U.S. courts over foreign diplomats. The United States is a party to the Vienna Convention on Diplomatic Relations, under which diplomats are immune from civil lawsuits except with regard to certain commercial activities. [FN13]

***8** Nor should visiting heads of state be subject to suit under the TVPA. Article 2(1) of the United Nations Convention on Special Missions provides that, when one state sends an official mission to another, the visiting head of state "shall enjoy in the receiving State or in a third State the facilities, privileges and immunities accorded by international law to Heads of State on an official visit." [FN14]

However, the committee does not intend these immunities to provide former officials with a defense to a lawsuit brought under this legislation. To avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state, which would require that the state "admit some knowledge or authorization of relevant acts." 28 U.S.C. 1603(b). Because all states are officially opposed to torture and extrajudicial killing, however, the FSIA should normally provide no defense to an action taken under the TVPA against a former official.

Similarly, the committee does not intend the "act of state" doctrine to provide a shield from lawsuit for former officials. In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), the Supreme Court held that the "act of state" doctrine is meant to prevent U.S. courts from sitting in judgment of the official public acts of a sovereign foreign government. Since this doctrine applies only to "public" acts, and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation. [FN15]

E. Scope of liability

In order for a defendant to be liable, the torture or extrajudicial killing must have been taken "under actual or apparent authority or under color of law of a

foreign nation." Consequently, this legislation does not cover purely private criminal acts by individuals or nongovernmental organizations. However, because 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. Courts should look to principles of liability under U.S. civil rights laws, in particular section 1983 of title 42 of the United States Code, in construing "under color of law" as well as interpretations of "actual or apparent authority" derived from agency theory in order to give the fullest coverage possible.

The legislation is limited to lawsuits against persons who ordered, abetted, or assisted in the torture. It will not permit a lawsuit *9 against a former leader of a country merely because an isolated act of torture occurred somewhere in that country. However, a higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts-anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them. [FN16] In Forti v. Suarez Mason, the court found Suarez Mason liable as Commander of the First Army Corps under the theory that the alleged acts of torture and summary execution were committed by personnel under his command "acting pursuant to a 'policy, pattern and practice' of the First Army Corps." Suarez Mason, 672 F.Supp. at 1537-38. Thus, although Suarez Mason was not accused of directly torturing or murdering anyone, he was found civilly liable for those acts which were committed by officers under his command about which he was aware and which he did nothing to prevent.

Similarly, in In re Yamashita, 327 U.S. 1 (1946), the Supreme Court held a general of the Imperial Japanese Army responsible for a pervasive pattern of war crimes committed by his officers when he knew or should have known that they were going on but failed to prevent or punish them. [FN17] Such "command responsibility" is shown by evidence of a pervasive pattern and practice of torture, summary execution or disappearances. [FN18]

Finally, low-level officials cannot escape liability by claiming that they were acting under orders of superiors. Article 2(3) of the Torture Convention explicitly states that "An order from a superior official or a public authority may not be invoked as a justification for torture."

F. Exhaustion of remedies

A court may decline to exercise the TVPA's grant of jurisdiction only if it appears that adequate and available remedies can be assured where the conduct complained of occurred, and that the plaintiff has not exhausted local remedies there. Cases involving torture abroad which have been filed under the Alien Tort Claims Act show that torture victims bring suits in the United States against their alleged torturers only as a last resort. Usually, the alleged torturer has more substantial assets outside the United States and the jurisdictional nexus is easier to prove outside the United States. Therefore, as a general matter, the committee recognizes that in most instances the initiation of litigation under this *10 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.

More specifically, as this legislation involves international matters and judgments regarding the adequacy of procedures in foreign courts, the interpretation of section 2(b), like the other provisions of this act, should be

informed by general principles of international law. The procedural practice of international human rights tribunals generally holds that the respondent has the burden of raising the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that the claimant did not use. [FN19] Once the defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile. The ultimate burden of proof and persuasion on the issue of exhaustion of remedies, however, lies with the defendant.

This practice is generally consistent with common-law principles of exhaustion as applied by courts in the United States. See, e.g., Honig v. Doe, 484 U.S. 305, 325-29 (1988) (allowing plaintiffs to by-pass administrative process where exhaustion would be futile or inadequate). Courts in the United States are familiar with the operation of the exhaustion requirement. [FN20] As in the international law context, courts in the United States do not require exhaustion in a foreign forum when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile. [FN21] In this determination, courts in the United States are equipped to deal with the intricacies of determining issues of foreign law and will have to undertake a case-by-case approach. [FN22]

If a final judgment has been rendered against the plaintiff abroad, the court will have to determine whether to recognize that judgment and dismiss the case. In such a case, the usual principles of res judicata apply. [FN23] Grounds for nonrecognition of foreign judgments include situations much like those that exempt a plaintiff from the exhaustion of remedies requirement: unfairness of the judicial system, unfair procedures, and lack of competence. [FN24] Courts also will not recognize or enforce foreign judgments contrary to public policy or fundamental notions of decency and justice. [FN25]

G. Statute of limitations

The legislation provides for a 10-year statute of limitations, but explicitly calls for consideration of all equitable tolling principles ***11** in calculating this period with a view toward giving justice to plaintiff's rights. [FN26] Illustrative, but not exhaustive, of the types of tolling principles which may be applicable include the following. [FN27] 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. 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 or otherwise incapacitated. [FN28] 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. [FN29]

However, the explicit reference in this legislation to principles of equitable tolling is in no way intended to suggest that such principles do not apply in other statutes adopted by Congress which do not explicitly contain equitable tolling clauses.

V. ESTIMATED COST OF LEGISLATION

In accordance with paragraph 11(a) of Rule XXVI of the Standing Rules of the Senate and section 404 of the Congressional Budget Act of 1974, the committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. Congress,

Congressional Budget Office,

Washington, DC, November 21, 1991.

Hon. Joseph R. Biden, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office (CBO) has reviewed S. 313, the Torture Victim Protection Act of 1991, as ordered reported by the Senate Committee on the Judiciary on November 21, 1991. The bill makes any person who, under the authority of any foreign nation, tortures or extrajudicially kills any person liable to the injured party or the injured party's representative in a civil action.

Enactment of the bill would have no significant budget impact on Federal, State, or local governments. Also enactment of S. 313 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

***12** If your would like further details on this estimate, we will be pleased to provide them. The CBO staff contact is Kent Chritensen, who can be reached at 226-2840.

Sincerely,
Robert D. Reischauer, Director

VI. REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b), rule XXVI, of the Standing Rules of the Senate, the committee, after due consideration, concludes that the act will not have a direct regulatory impact.

***13** I. MINORITY VIEWS OF MESSRS. SIMPSON AND GRASSLEY

We certainly condemn acts of cruelty and inhumanity, and we share Senator Specter's deeply felt concern that atrocious and frequent offenses of torture are too often not remedied. One offense not remedied is too many. Senate bill 313, however, is not an appropriate way to remedy foreign acts of torture.

We oppose S. 313, the Torture Victims Protection Act, for four reasons: (1) it is in tension with the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (2) it possibly exceeds Congress' constitutional authority, (3) it inappropriately establishes U.S. courts as the forum in which suits that have no substantial connection with the United States could be brought, and (4) it might create serious difficulties with the management of foreign policy.

THE U.N. CONVENTION AGAINST TORTURE

Under S. 313, a foreign national who commits torture in a foreign country could be held liable in a U.S. court, no matter the victim's domicile. The Department of Justice noted, and we agree, that "[s]uch a unilateral assertion of extraterritorial jurisdiction would be in tension with the framework of the [U.N.

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment]." Statement of John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, before the Senate Subcommittee on Immigration and Refugee Affairs, June 22, 1990 (concerning S. 1629 and H.R. 1662, substantially similar to S. 313).

The convention was ratified by the Senate October 27, 1991. According to the administration, the convention requires countries to provide remedies for acts of torture which took place only within their own territory. In fact the convention specifically declined to extend coverage to acts committed outside the country in which the lawsuit is brought. We do not wish to second-guess the experts who drafted this treaty, and believe it is unwise to do explicitly what its drafters chose not to do-extend the coverage to extraterritorial actions.

CONGRESSIONAL AUTHORITY

Senate bill 313 also appears to over-extend Congress' constitutional authority. Congress has the power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." Article I, section 8, clause 10. But as the Department of Justice has noted,

> [t]he reference in the constitutional text to "punish[ing] Piracies and Felonies * * * and Offenses" suggests that the Founders intended that Congress use this power to define crimes. It ***14** is a difficult and unresolved question, therefore, whether that power extends to creating a civil cause of action in this country for disputes that have no factual nexus with the United States or its citizens.

In short, we simply do not agree with the contention in the majority views that Congress "clearly has authority to create a private right of action for torture and extrajudicial killings committed abroad." The majority views cite Verlinden B.V. v. Central Bank of Nigeria (461 U.S. 480 (1983)) as justification for this bill. However, in that case there was a clear U.S. connection. The case involved a contract between a Dutch corporation and the Government of Nigeria (which wished to purchase 240,000 metric tons of cement). When Central Bank of Nigeria issued an unconfirmed letter of credit through Morgan Guaranty Trust Company of New York, the Dutch corporation filed suit, claiming an anticipatory breach of contract.

The connection to the United States in this case is clear: while the plaintiff and defendant in the breach of contract suit were foreign entities, an instrumentality of that breach-however unintended-was a United States corporation, Morgan Guaranty Trust Company, of New York, which acted as a correspondent bank to the Central Bank of Nigeria. Thus, the Verlinden case does consider some actions occurring within the United States, while S. 313 would address actions which occurred wholly outside the United States, with no connection to the United States.

We must concur with the Department of Justice's reservations about the constitutionality of this statute.

ESTABLISHES INAPPROPRIATE FORUM

The principle behind the common law doctine of forum non conveniens, which prevents parties from having their dispute adjudicated in a forum with which they have no connection, describes our overriding problem with S. 313. The doctrine addresses the logistical problems of bringing witnesses and evidence from one state to another when the parties and witnesses have no connection to the forum state and to which the evidence does not have even a remote attachment.

For example, a Montana plaintiff should not bring a Wyoming defendant to a New

York Federal District Court when the action originates far from New York and when the parties have no substantial connection with New York. For exactly the same reasons, the United States is not the appropriate forum for a foreign national to hold a foreign defendant to answer for action which occurred far from the United States.

DIFFICULTIES WITH THE MANAGEMENT OF FOREIGN POLICY

The executive branch, through the Department of Justice, has expressed a most serious concern with S. 313, which we share. Senate bill 313 could create difficulties in the management of foreign policy. For example, under this bill, individual aliens could determine the timing and manner of the making of allegations in a U.S. court about a foreign country's alleged abuses of human rights.

***15** There is no more complex and sensitive issue between countries than human rights. The risk that would be run if an alien could have a foreign country judged by a U.S. court is too great. Judges of U.S. courts would, in a sense, conduct some of our Nation's foreign policy. The executive branch is and should remain, we believe, left with substantial foreign policy control.

In addition the Justice Department properly notes that our passage of this bill could encourage hostile foreign countries to retaliate by trying to assert jurisdiction for acts committed in the United States by the U.S. Government against U.S. citizens. For example, if this bill's principles were adopted abroad, Saddam Hussein could try a United States citizen police officer who happened to be present in Iraq, in an Iraqi court, for alleged human rights abuses against any United States citizen that the policeman happened to arrest while performing his duties in the United States.

We very much wish to avoid that result, and believe that this legislation unintentionally would encourage such actions.

CONCLUSION

This bill has noble objectives. However, we believe that the possible negative consequences are too great, and the constitutional authority for Congress to act too tenuous, to allow us to vote in favor of this legislation.

Alan K. Simpson.
Chuck Grassley.

FN1 Restatement (revised) of the Foreign Relations Law of the United States, Secs. 702, 703 (Tent. Draft No. 6, 1985).

FN2 For example, outside of the torture and summary execution context, several Federal court decisions have relied on sec. 1350. See Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C., 1985) (finding that sec. 1350 granted Federal court jurisdiction to hear claim that the Swedish diplomat Raoul Wallenberg was arrested, imprisoned and possibly killed by representatives of the Soviet Union); Adra v. Clift, 195 F.Supp. 857 (D. Md., 1961) (in a child custody dispute between two aliens, the court held that wrongful withholding of custody is a tort, and defendant's falsification of child's passport in order to procure custody violated the law of nations).

FN3 Section 404 of the Restatement, supra fn. 1, sets forth the doctrine of universal jurisdiction: even where there is no other basis for jurisdiction, a

"state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern ***." See also United States v. Yunis, 924 F.2d 1086 (D.C. Cir., 1991) (finding terrorism to be an offense of universal concern).

FN4 The law of nations is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." "The Paquete Habana," 175 U.S. 677, 700 (1900).

FN5 In Ex parte Quirin, 317 U.S. 1, 28 (1942), the Supreme Court interpreted the "define and punish" clause to allow Congress to make substantive laws incorporating international rules intended to govern individual behavior.

FN6 While the legislation specifically provides Federal districts courts with jurisdiction over these suits, it does not preclude state courts from exercising their general jurisdiction to adjudicate the same type of cases. As a practical matter, however, state courts are not likely to be inclined or well-suited to consider these cases. International human rights cases predictably raise legal issues-such as interpretations of international law-that are matters of Federal common law and within the particular expertise of Federal courts.

FN7 Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31.

FN8 See Geneva Convention, supra at fn. 7, art. 3, sec. 1; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 15, sec. 2 (excluding "deaths resulting from lawful acts of war" from the prohibition against extrajudicial killings).

FN9 See European Convention, supra fn. 8, art. 2, sec. 2.

FN10 Where application of Anglo-American law would result in no remedy whatsoever for an extrajudicial killing, however, application of foreign law recognizing a claim by a more distant relation in a wrongful death action is appropriate. In re Air Crash Disaster Near New Orleans, Louisiana, on July 9, 1982, 789 F.2d 1092, 1097-98 (5th Cir., 1986) (recognizing claim of nephew for wrongful death of aunt where Louisiana law on wrongful death action would have afforded no remedy)

FN11 See International Shoe Co. v. Washington, 326 U.S. 310 (1945); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

FN12 The FSIA is codified at 28 U.S.C. 1330, 1332(A) (2)-(3); 1391(f), 1441(d), and 1602-1611.

FN13 Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, art. 31, 35.

FN14 Convention on Special Missions and Optional Protocol Concerning the Compulsory Settlement of Disputes, G.A. Res. 2530, 24 U.N. GAOR Supp. (No. 30) at 99, U.N. Doc. A/7799 (1969).

FN15 Accord Trajano v. Marcos, 878 F.2d 1439 (9th Cir., 1989) (unpublished

decision reversing lower court dismissal of a lawsuit against former Philippines President Ferdinand Marcos under the "act of state" doctrine and remanding for further adjudicating on the merits). See also Restatement, supra fn. 1, sec. 469, comment c (rejecting the act of state defense in suits alleging violations of fundamental human rights). It is precisely because no state officially condones torture or extrajudicial killings that the Senate in its ratification of the Torture Convention made clear that official sanctions of a state could not possibly include acts of torture. See supra sec. IV(B).

FN16 Article 4(1) of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides: "Each State Party shall ensure that all acts of torture are offenses under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in the torture." (Emphasis added.) Article 3 of the Inter-American Convention to Prevent and Punish Torture similarly provides:

The following shall be held guilty of the crime of torture: (a) A public servant or employee who, acting in that capacity, orders, instigates or induces the use of torture, or directly commits it or who, being able to prevent it, fails to do so.

FN17 See also L. Oppenheim, "International Law: A Treatise," vol. II, sec. 253(a), 572-74 (7th ed., 1965).

FN18 As the opinion of the Tokyo War Crimes Trial tribunal explained: "that crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge." "The Tokyo War Crimes Trial," reprinted in 2 L. Friedman (ed.) "The Law of War: A Documentary Study," 1039 (1972).

FN19 See, e.g., American Convention of Human Rights, adopted Nov. 4, 1950, art. 46(2), O.A.S.T.S. No 36, and European Convention on Human Rights, supra at fn. 8, art. 26. See generally P. Schochet, "A New Role for an Old Rule: Local Remedies and Expanding Human Rights Jurisdiction Under the Torture Victim Protection Act," 19, "Columbia Human Rights Law Review," 223, 232-50 (1987).

FN20 See Parratt v. Taylor, 451 U.S. 527, 543-44 (1981) (no federal civil rights action against state officials for deprivation of property where the plaintiff did not resort to state remedies).

FN21 See, e.g., Watergate II Apartments v. Buffalo Sewer Authority, 46 N.Y. 2d 52, 57 (1978).

FN22 Fed. R. Civ. p. 44.1 (Determination of Foreign Law).

FN23 Hilton v. Guyot, 159 U.S. 113, 166-67 (1895).

FN24 Restatement, supra at fn. 1, Sec. 492.

FN25 Id. Sec. 492, comment f.

FN26 See Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965) (justice of plaintiff's rights usually outweighs protection of defendant in considering equitable tolling).

FN27 See generally Anderson v. Wisconsin Gas Co., 619 F. Supp. 635 (E.D. Wisc.,

1985) (discussing factors that give rise to equitable tolling).

FN28 Boag v. Chief of Police, 669 F. 2d 587 (9th Cir., 1982) (plaintiff's imprisonment suspends running of time limit), cert. denied, 459 U.S. 849 (1982); Brown v. Bigger, 622 F. 2d 1025 (10th Cir., 1980) (same); Origet v. Washtenaw County, 549 F. Supp. 792 (E.D. Mich., 1982) (infancy).

FN29 Cerbone v. International Ladies' Garment Workers Union, 768 F. 2d 45 (2d Cir., 1985) (fraudulent concealment tolled time limitation).

S. REP. 102-249, S. Rep. No. 249, 102ND Cong., 1ST Sess. 1991, 1991 WL 258662 (Leg.Hist.)

END OF DOCUMENT

Exhibit 2

H.R. REP. 102-367(I), H.R. Rep. No. 367(I), 102ND Cong., 1ST Sess. 1991, 1992 U.S.C.C.A.N. 84, 1991 WL 255964 (Leg.Hist.)
(Cite as: H.R. REP. 102-367(I), 1992 U.S.C.C.A.N. 84)

****84** P.L. 102-256, ***1** TORTURE VICTIM PROTECTION ACT OF 1991
DATES OF CONSIDERATION AND PASSAGE
House: November 25, 1991
Senate: March 3, 1992
Cong. Record Vol. 137 (1991)
Cong. Record Vol. 138 (1992)
House Report (Judiciary Committee) No. 102-367,
Nov. 25, 1991 [To accompany H.R. 2092]
Senate Report (Judiciary Committee) No. 102-249,
Nov. 25, 1991 [To accompany S. 313]
The House bill was passed in lieu of the Senate bill. The House Report is set out below, and the President's Signing Statement follows.

HOUSE REPORT NO. 102-367(I)
November 25, 1991
[To accompany H.R. 2092 which on July 29, 1991, was referred jointly to the Committee on Foreign Affairs and the Committee on the Judiciary]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2092) to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing, having considered the same, report favorably thereon with an amendment and recommend that the bill, as amended, do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Torture Victim Protection Act of 1991".

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) Liability.-An individual who, under actual or apparent authority, or color of law, of any foreign nation-

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of Remedies.-A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of Limitations.-No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

***2** SEC. 3. DEFINITIONS.

(a) Extrajudicial Killing.-For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment

pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture.-For the purposes of this Act-

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from-

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the sense or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

**84 EXPLANATION OF AMENDMENT

Inasmuch as H.R. 2092 was ordered reported with a single amendment in the nature of a substitute, the contents of this report constitute an explanation of that amendment.

SUMMARY AND PURPOSE

The purpose of H.R. 2092 is to provide a Federal cause of action against any individual who, under actual or apparent authority, or **85 color of law, of any foreign nation, subjects any individual to torture or extrajudicial killing.

HEARINGS

No hearings were held on H.R. 2092 during the 102d Congress. Predecessor legislation, H.R. 1417, was the subject of hearings before the Foreign Affairs Subcommittee on Human Rights on March 23, 1988, and April 20, 1988.

COMMITTEE VOTE

On November 19, 1991, a reporting quorum being present, the Committee on the Judiciary ordered H.R. 2092 favorably reported to the House by voice vote with a single amendment in the nature of a substitute.

DISCUSSION

I. Background

Official torture and summary execution violate standards accepted by virtually every nation. The universal consensus condemning these practices has assumed the status of customary international *3 law. As the Second Circuit Court of Appeals held in 1980, "official torture is now prohibited by the law of nations."Filartiqa v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980). The prohibition against summary executions has acquired a similar status.

These universal principles provide scant comfort, however, to the many thousands of victims of torture and summary executions around the world. Despite universal condemnation of these abuses, many of the world's governments still engage in or tolerate torture of their citizens, and state authorities have killed hundreds of thousands of people in recent years. (See "Amnesty International, Political Killings by Governments 5" (1983).) Too often, international standards forbidding torture and summary executions are honored in the breach.

For this reason, recent international initiatives seeking to address these human rights violations have placed special emphasis on enforcement measures. A notable example is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted, with strong support from the U.S. Government, by the U.N. General Assembly on December 10, 1984. The Convention was signed by the United States on April 18, 1988 and ratified by the U.S. Senate on October 27, 1990. Essentially enforcement-oriented, this Convention obligates state parties to adopt measures to ensure that torturers are held legally accountable for their acts.

One such obligation is to provide means of civil redress to victims of torture. Judicial protections agains flagrant human rights violations are often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law. The general collapse of democratic institutions characteristic of countries scourged by massive violations of fundamental rights rarely leaves **86 the judiciary intact. The Torture Victim Protection Act [TVPA], H.R. 2092, would response to this situation.

II. Need for legislation

The TVPA would establish 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), which permits Federal district courts to hear claims by aliens for torts committed "in violation of the law of nations." (28 U.S.C. sec. 1350). Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing.

In the case of Filartiqa v. Pena-Irala, the Second Circuit Court of Appeals recognized a right of action against foreign torturers under the rarely invoked Alien Tort Claims Act. Citizens of Paraguay brought suit in Federal court against a former inspector general of police, who had tortured to death a family member of the plaintiffs, and who was present in the United States. The district court dismissed the complaint for lack of jurisdiction, construing the phrase "law of nations" narrowly; the Court of Appeals reversed. The appellate court unanimously acknowledged that although torture of one's own citizens was not recognized as a violation *4 of the law of nations in 1789, when the Alien Tort Claims Act was

enacted, the universal prohibition of torture had ripened into a rule of customary international law, thereby bringing torture squarely within the language of the statute. (See Filartiqa, 630 F.2d at 844- 85).

The Filartiqa case met with general approval. At least one Federal judge, however, questioned whether section 1350 can be used by victims of torture committed in foreign nations absent an explicit grant of a cause of action. In Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), cert. denied 470 U.S. 103 (1985), a case involving terrorist activities of the Palestine Liberation Organization, Judge Bork questioned the existence of a private right of action under the Alien Tort Claims Act, reasoning that separation of powers principles required an explicit-and preferably contemporary-grant by Congress of a private right of action before U.S. courts could consider cases likely to impact on U.S. foreign relations.

The TVPA would provide such a grant, and would also enhance the remedy already available under section 1350 in an important respect: While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad. Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered be section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

**87 III. Summary of H.R. 2092, as amended

The legislation authorizes the Federal courts to hear cases brought by or on behalf of a victim of any individual who, under actual or apparent authority, or color of law, of any foreign nation, subjects a person to torture or extrajudicial killing. It defines "torture" and "extrajudicial killing' in accordance with international standards. The bill would apply only to those acts undertaken under color of official authority. Only "individuals," not foreign states, can be sued under the bill. Striking a balance between the desirability of providing redress for a victim and the fear of imposing additional burdens on U.S. courts, the bill recognizes as a defense the existence of adequate remedies in the country where the violation allegedly occurred.

In cases of extrajudicial killing, because the victim will not be alive to bring suit, the victims "legal representative' and 'any person who may be a claimant in an action for wrongful death" may bring suit. Courts may look to state law for guidance as to which parties would be proper wrongful death claimants.

The definition of "torture" in the legislation is limited to acts by which severe pain or suffering, whether physical or mental, is intentionally inflicted for such purposes as obtaining a confession, punishment, or coercion. This language tracks the definition of "torture" adopted in the Torture Convention and the understandings included in the Senate's ratification of the Convention. Like *5 the definition included in the Torture Convention, this one also specifically excludes "pain and suffering arising only from or inherent in, or incidental to, lawful sanctions." Thus, the act would not permit suits based on the pain inherent in lawfully imposed punishments.

The term "extrajudicial killing" is defined in the bill as "a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The definition thus excludes executions carried out under proper judicial authority. The inclusion of the word "deliberated" is sufficient also to include killings that lack the requisite extrajudicial intent, such as those caused by a police officer's authorized use of deadly force. The concept of

"extrajudicial killings" is derived from article 3 common to the four Geneva Conventions of 1949.

The phrase "under actual or apparent authority, or color of law" makes clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim. Courts should look to 42 U.S.C. Sec. 1983 is construing "color of law" and agency law in construing "actual or apparent authority." The bill does not attempt to deal with torture or killing by purely private groups.

The bill provides that a court shall decline to hear and determine a claim if the defendant establishes that the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred. This requirement ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred. **88 It will also avoid exposing U.S. courts to unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries.

A ten year statute of limitation insures that the Federal Courts will not have to hear stale claims. In some instances, such as where a defendant fraudulently conceals his or her identification or whereabouts from the claimant, equitable tolling remedies may apply to preserve a claimant's rights.

The TVPA is subject to restrictions in the Foreign Sovereign Immunities Act of 1976 [FSIA]. Pursuant to the FSIA, "a foreign state," or an "agency or instrumentality" thereof, shall be immune from the jurisdiction of the courts of the United States and of the States," with certain exceptions as elsewhere provided in the FSIA, and subject to international agreements to which the United States was a party at the time of the FSIA's enactment.

While sovereign immunity would not generally be an available defense, nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity. These doctrines would generally provide a defense to suits against foreign heads of state and other diplomats visiting the United States on official business.

IV. History of legislation

Action in 100th Congress

Legislation virtually identical to H.R. 2092 was introduced by Mr. Yatron and cosponsored originally by Judiciary Committee *6 Chairman Rodino and Mr. Leach on March 4, 1987. The bill, H.R. 1417, was jointly referred to the Committee on Foreign Affairs and the Committee on the Judiciary. The Foreign Affairs Subcommittee on Human Righs held hearings on March 23 and April 20, 1988, and the Foreign Affairs Committee marked up and reported the bill favorably to the House with an amendment on June 7, 1988. The Judiciary Committee adopted an amendment in the nature of a substitute and reported the bill, as amended, favorably to the House by voice vote on September 30, 1988. This amended bill passed the House by voice vote on October 5, 1988.

Action in 101st Congress

Legislation virtually identical to H.R. 2092 was also introduced in the 101st Congress. The bill, H.R. 1662, was introduced by Mr. Yatron on April 4, 1989, and jointly referred to the Committee on the Judiciary and the Committee on Foreign Affairs. Original cosponsors included Judiciary Committee Chairman Brooks and Foreign Affairs Committee Chairman Fascell. The bill was marked up by the Subcommittee on Immigration, Refugees, and International Law on April 5, 1989, and ordered favorably reported, with an amendment, to the full Judiciary Committee by voice vote. The Judiciary Committee ordered the bill favorably reported, with amendments, to the House by voice vote on April 25, 1989. This amended bill passed

the House by a vote of 362-4 on October 2, 1989.

**89 Action in 102d Congress

H.R. 2092 was introduced by Mr. Yatron on April 24, 1991 and jointly referred to the Committee on Foreign Affairs and the Committee on the Judiciary. On September 12, 1991, the Subcommittee on International Law, Immigration and Refugees ordered the bill favorably reported to the full Judiciary Committee by voice vote.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this reports.

COMMITTEE ON GOVERNMENT OPERATIONS OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Operations were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to *7 the bill H.R. 2092, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. Congress,

Congressional Budget Office,

Washington, DC, November 21, 1991.

Hon. Jack Brooks,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office (CBO) has reviewed H.R. 2092, the Torture Victim Protection Act of 1991, as ordered reported by the House Committee on the Judiciary on November 19, 1991. The bill makes any person who, under the authority of any foreign nation, tortures or extrajudicially kills any person liable to the injured party or the injured party's representative in a civil action.

Enactment of the bill would have no significant budget impact on federal, state

or local governments. Also, enactment of H.R. 2092 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

**90 If you would like further details on this estimate, we will be pleased to provide them. The CBO staff contact is Kent Christensen, who can be reached at 226-2840.

Sincerely,

Robert D. Reischauer,

Director.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 3048 will have no significant impact on prices and costs in the national economy.

H.R. REP. 102-367(I), H.R. Rep. No. 367(I), 102ND Cong., 1ST Sess. 1991, 1992 U.S.C.C.A.N. 84, 1991 WL 255964 (Leg.Hist.)

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Exhibit 3

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.	)	

DECLARATION OF MARTIN R. GANZGLASS

I, Martin R. Ganzglass, declare as follows:

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

Background

2. I graduated from Harvard Law School in 1964 with an LL.B. degree. I am admitted to the Bars of the State of New York and the District of Columbia. I am currently a principal in the firm of O'Donnell, Schwartz & Anderson, P.C. and have been a principal in that firm since 1988. From 1972 until 1988 I was a principal in the firm of Delson & Gordon.

3. As described below, I have had substantial involvement with countries in the Horn of Africa, including the former country of Somalia. As a result of this involvement I am very familiar with current conditions, and the current state of the legal system, in the regions of the former country of Somalia.

4. From 1966 to 1968, I was a Peace Corps Volunteer in Somalia, serving as Legal Advisor to the Somali National Police Force. I am author of "The Penal Code of the Somali Democratic Republic: Cases, Commentary and Examples," published by Rutgers University Press in 1971. That book became the primary work on the Somali Penal Code. Rutgers University Press donated 500 copies to Somalia, and it was used at the Somali National Police Academy and was widely distributed to Somali courts.

5. I also was a contributor to Constitutions of the Countries of the World, Oceana Publications, Blaustein & Flanz, Editors, for the portion on Somalia in 1971, 1979 and 1981.

6. From 1972 through 1988, while I was with the law firm of Delson & Gordon, I represented the Embassy of the Somali Democratic Republic in the United States and the Somali Ministry of Mineral and Water Resources. During this time I also did occasional work for Somali Airlines. While I was with the firm of Delson & Gordon I made at least four visits to Somalia between 1979 and 1986.

7. In November 1992, then President George Bush authorized "Operation Restore Hope" which sent U.S. troops to Somalia to safeguard the delivery of humanitarian assistance to Somali civilians, caught in the chaos, murder, rape and mayhem, following the collapse of the Siad Barre regime. In April 1993, while Operation Restore Hope was ongoing, I served in Somalia as Special Assistant to U.S. Ambassador Robert Gossende and Admiral Howe, the Special Representative of the U.N. Secretary General. Later I authored an article entitled "The Restoration of the Somali Justice System," which appeared in "Learning from Somalia: the Lessons of Armed Humanitarian Intervention," Westview Press, Clarke & Herbst, Editors, 1997.

8. I currently represent the Embassy of Eritrea in the United States and the Eritrean Ministry of Justice. I have assisted the Ministry in drafting a Penal Code and Code of Criminal Procedure and in preparing a long term plan for development of the Ministry and the Eritrean court system.

9. I have continued to remain in contact with Somali friends in the United States and Canada and to read about developments in Somalia. I am a subscriber to and regularly receive The Journal of the Anglo-Somali Society, which reports on events in Somaliland and Somalia. I am also a member of that Society.

The Barre Government

10. From 1969 until 1991, Somali's President was Siad Barre. Barre served as the head of the Somali state. During the time that the Barre government was in power, the defendant Ali Samantar held high ranking positions in the Barre government.

11. A copy of the 1979 Constitution of the Somali Democratic Republic is attached as Exhibit A. To the best of my knowledge this Constitution remained in effect in Somalia until 1991.

12. As Article 79 of the Constitution makes clear, the President served as the Head of State of the Somali Democratic Republic. To the best of my knowledge, from the time Siad Barre took power in 1969 until the time his government was overthrown in 1991, I do not believe there ever was an occasion when he stepped down from his office as President.

The Post-Barre Somalia

13. In 1991 the government of Siad Barre was ousted from power. Following the overthrow of the Siad Barre regime, Somalia ceased to exist as a nation. It disintegrated into regions or districts, controlled by war lords using clan based militias to practice extortion,

murder, rape, and robbery. Today, there is no central government in Somalia, no seat of government in the capital, Mogadishu, and no Constitution providing for or recognizing a federal system of government.

14. The purpose of my April 1993 assignment as Special Assistant to Ambassador Gossende and Admiral Howe was to assess the state of the Somali judiciary and police and make recommendations for the restoration and rebuilding of the Somali justice system after the Barre regime was overthrown. As part of my mission in Somalia in 1993, I visited Police Stations and courts in Mogadishu (on both sides of the Green Line that separated areas controlled by two warring factions), the towns of Baidoa and Bardera in the south, the town of Borama in what is now known as Somaliland, and the town of Bosasso in the northeast, in what is now known as Puntland.

15. My recommendations from my assignment and 1993 visit were contained in a report to the United States Agency for International Development and in an article I wrote for a symposium conducted by the Woodrow Wilson School at Princeton University. This article was later published by Westview Press. As explained in that report, it was clear at that time that there was no functioning court system in Somalia, with the exception of a very few local courts in small areas of homogenous populations where local judges could administer a rudimentary form of justice acceptable to the local community. Generally speaking, however, Somalia was in a state of chaos, with an inadequate police force and judicial system.

16. Within the past few months, a new transitional federal government, (TFG) was elected by delegates to the latest of many lengthy, internationally sponsored conferences convened outside of Somalia, for security reasons. The TFG itself has not moved to Mogadishu

due to security concerns. Instead, at the November 2004 United Nations Security Council meeting held in Nairobi Kenya, the newly elected TFG President, Abdullahi Yusuf, himself a war lord from Puntland, requested that the United Nations provide a protective force for the TFG so it could sit in Mogadishu.

17. The government of Somaliland, located in the northwest region of former Somalia, is not part of the newly elected TFG. Despite persistent efforts, Somaliland has not been recognized as an independent country by the United States, Great Britain or any member of the European Union. While Somaliland insists that it is independent, the position of the other regional governments in the former Somalia, as well as the position of the TFG, is that Somalia should remain a unified country, consisting of all of the territory comprising Somalia from its independence in 1960 through the end of the Siad Barre regime.

18. Absent any recognition of Somaliland by the United States, there is a serious question as to whether any legal judgment rendered by the courts of Somaliland would be enforceable in the United States. If not recognized, such a judgment would be worthless against a former official of the Siad Barre regime living outside of Somaliland, unless that official submitted to the jurisdiction of the courts of Somaliland. It is my opinion that plaintiffs cannot obtain a meaningful remedy from the Somaliland courts.

19. In addition, it is not clear that Somaliland's judiciary is adequate to the task of fairly deciding cases involving human rights violations. As recently as 1999, an international conference on Human Rights in Somaliland was held in Hargeisa, Somaliland. A report on the conference was issued by Amnesty International and International Cooperation for Development. The conference was attended by representatives of those two

organizations as well as Somaliland Government Officials and local non-governmental organizations (NGOs). With respect to justice and prison conditions, the report concluded in part:

> The legal system in Somaliland is most staffed by unqualified people ...Corruption is common and it is alleged that a legal case can be won or lost on the basis of financial leverage. There are numerous violations of human rights due to the underdeveloped legal system.

20. The court system in the other parts of Somalia, that is Puntland, Mogadishu and the south, is even more chaotic. It is my opinion that given the lack of functioning courts and trained judges in the former Somali Republic, and the continued dominance of warlords throughout the country, plaintiffs would not be able to bring a human rights case in the other parts of Somalia.

21. In my opinion, a member of the Isaaq clan who prosecutes a human rights claim against a member or members of the former Barre government would reasonably fear reprisals by former members of the Red Berets and the National Security Service. While the Barre government no longer holds power in Somalia, many positions in the Barre government were based on clan affiliation. In Somalia today, clan affiliation has become even more significant since the overthrow of the Barre regime. Presently, in the absence of any strong central or regional government, security for any Somali depends on being in an area where his or her clan is in the majority.

22. Most members of the Red Berets and National Security Service ("NSS") were members of Siad Barre's clan, the Marehan. The Red Berets and the NSS were responsible for many of the human rights abuses suffered by the Isaaqs and other clans. In my opinion, an Isaaq who was known to be prosecuting a human rights case relating to acts taken by the Red Berets or the NSS, or searching for information to support such a case, would

reasonably fear for his or her own safety, as well as for the safety of his or her family members, if that person or a family member encountered a Marehan former Red Beret or NSS member.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 13, 2004.

Martin R. Ganzglass

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Exhibit A

THE SOMALI DEMOCRATIC REPUBLIC

Preamble to the Constitution

The Somali People collectively and individually struggling for a life of dignity and equality, and engaged in a fight to establish lasting peace and stability internally and externally, to realize the general interests of the working masses, and accomplish the major objectives of the revolution, unity of the nation, socialist construction in order to create a society founded on social justice, equality and democracy in which the individual attains higher levels of political and social consciousness and strengthens the pillars of the revolution and national sovereignty, in order to achieve rapid political and socio-economic development, have resolved to adopt this constitution which shall constitute the basis of the struggle for the development of the Somali society, peaceful co-existence and mutual cooperation among nations of the world, especially those whose interests shall coincide.

The Constitution of the Somali Democratic Republic

Chapter I

General Principles

Section 1

The Republic

Article 1

The Somali State.

1. The Somali Democratic Republic is a socialist state led by the working class, and is an integral part of the Arab and African entities.

2. All sovereignty belongs to the people who shall exercise it through their representative institutions.

Article 2

Flag, Emblem and the Capital

1. The national flag shall be azure in color, rectangular, and shall have a white star with five equal points emblazoned in its center.

2. The emblem of the Somali Democratic Republic shall be composed of an azure escutcheon with a gold border and shall bear a silver five pointed star. The eschutcheon surmounted by an embattlement with five points in moorish style, the two lateral points halved, shall be borne by two leopards rampant in natural form facing each other, resting on two lances crossing under the point of the

escutcheon, with two palm-leaves in natural form interlaced with a white ribbon.

3. Mogadisho (Hamar) shall be the capital of the Somali Democratic Republic.

Article 3

Religion and Language

1. Islam shall be the state religion.

2. Somali is the language which all Somalis speak and through which they recognize each other; Arabic is the language which links the Somali people with the Arab nation, of whom they are an integral part, and the two languages shall constitute the official languages of the Somali Democratic Republic.

Article 4

The Unity of the Somali People

1. The Somali nation is one and Somali nationality is indivisible.

2. The law shall determine the modes of acquiring and losing Somali Citizenship.

Article 5

State Territory

1. The state territory shall be sacred and inviolable.

2. The territorial soveriegnty shall extent over land, the sea, the water column sea-bed and subsoil continental shelf, and island and airspace.

Article 6

Equality of Citizens

All citizens regardless of sex, religion, origin and language shall be entitled to equal rights and duties before the law.

Section Two

The Party

Article 7

Authority and Leadership of the Party

1. The Somali Revolutionary Socialist Party shall be the only legal party in the Somali Democratic Republic; no other party or political organization may be established.

2. The Somali Revolutionary Socialist party shall have supreme authority of political and socio-economic leadership in the Somali Democratic Republic.

Article 8

Unitary Nature of the Leadership

The leadership of the country shall be founded on the unitary system of political leadership of the party and state.

Article 9

Deliberations, Decisions and Executions

1. Political institutions elected at all levels shall function in accordance with the principle of collective deliberations, majority decisions and collective responsibility in execution.

2. Within the party institutions the afore-stated principles shall dictate the unity of view points, sensitivity, purpose and collective work.

Article 10

Complementarity of Party and State Duties

1. Party and state institutions shall discharge their respective duties as prescribed by the law, each pursuing its own methods in order to accomplish the common objectives.

2. The political mobilization of the country shall be based on the complement of the duties or party and state institutions as prescribed by the laws establishing them.

Article 11

Party Statute

The structure and functions of the party institutions shall be determined by the statute of the Somali Revolutionary Socialist Party.

Article 12

Social Organizations

1. The state shall allow the establishment of social organizations of the workers, cooperatives, youth and women.

2. Social organizations shall be established on national, local production levels and in educational centers.

3. The specific structure, laws and programs of the social organizations shall be in consonance with the general interests of the masses, the Constitution, the statute and the program of the Somali Revolutionary Socialist Party.

Article 13

Powers and Duties of Social Organizations

Social organizations shall participate in the leadership of State and social affairs and resolution of political, economic, social and cultural matters in accordance with the duties prescribed in their respective laws.

Article 14

Democratic Centralism

The principle of Democratic centralism shall be the basis of mobilization, and functions of party and state.

Section Three

Foreign Policy

Article 15

The Principle of Self-Determination

1. The Somali Democratic Republic shall firmly uphold the principle of self-determination of peoples and fully supports the national liberation movements, and all the peoples fighting for their freedom and independence.

2. It shall resolutely oppose colonialism, neo-colonialism, international imperialism and racial discrimination.

Article 16

Somali Territories Under Colonial Occupation

The Somali Democratic Republic adopting peacful and legal means shall support the liberation of Somali territories under colonial occupation and shall encourage the unity of the Somali people through their free will.

Article 17

Policy of Neutrality and Peaceful Co-Existence

1. The Somali Democratic Republic shall pursue a policy of positive neutrality.

2. It shall fully recognize the principle of peaceful coexistence of the peoples of the world.

Article 18

Policy of Cooperation

The Somali Democratic Republic shall promote a policy of cooperation among all peoples and states based on mutual benefit, equality, and respect for the independence and political system peculiar to each state.

Article 19

International Legal Norms

The Somali Democratic Republic shall recognize the Universal declaration of human rights and generally accepted rules of international law.

Chapter 2

Fundamental Rights, Freedoms and Duties of the Citizen and Individual

Article 20

Political, Economic, and Social Rights

Every citizen shall be entitled to participate fully in the political, economic, social and cultural activities in accordance with the constitution and laws.

Article 21

Right to Work

1. Every citizen shall be entitled to work. Work is a duty, honor and the foundation of a socialist society.

2. The state shall promote the creation of employment in order to realize the citizen's fundamental right to work.

Article 22

Right to Election

Every citizen who fulfills the conditions prescribed by the law shall be entitled to elect and be elected.

Article 23

Right to Education

Every citizen shall have the right to free education.

Article 24

Freedom of Processions, Publications and Opinion

1. Every citizen shall be free to participate in an assembly, demonstration, or in their organization.

2. The citizen shall further be entitled to express his opinion in any manner, freedoms of publication and speech.

3. The exercise of the freedoms mentioned in paragraph 1 and 2 of this article shall not contravene the Constitution, the laws of the land, general morality and public order, or the freedoms of other citizens.

Article 25

Right to Life and Personal Security

1. Every individual shall have the right to life and personal security

2. The law shall determine the conditions in which the death sentence may be passed.

Article 26

Personal Liberty

1. Every person shall have the right to personal integrity.

2. No person shall be liable to any form of detention or other restrictions of personal liberty, except when apprehended in flagrante delicto or pursuant to an act of the competent judicial authority in the cases and in the manner prescribed by the law.

3. Any person who shall be detained on grounds of security shall without delay be brought before the Judicial authority which has competence over the offence for which he is detained within the time limit prescribed by law.

4. Every person who shall be deprived of his personal liberty shall forthwith be informed of the offence of which he is accused.

5. No person shall be searched except in the conditions mentioned in paragraph 2 of this article, or under laws relating to judicial, sanitary, fiscal and security matters, and in the manner prescribed by the law, giving due respect to the honor and integrity of the person.

Article 27

Security of the person under detention

1. A detained person shall not be subjected to physical or mental torture.

2. Corporal punishment shall be prohibited.

Article 28

Private Ownership

1. Private ownership shall be guaranteed by law, which shall define the modes of acquisition and forfeiture, and the contents and limits of its enjoyment for the purpose of safeguarding its social functions.

2. The use of private property shall in no case be contrary to the public interest, and the objectives of the revolution.

3. Private property may be expropriated or requisitioned for reasons of public interest, in exchange for equitable compensation.

Article 29

Privacy of the Home

Every person shall be entitled to the inviolability of his home or any other place reserved for personal use except in the cases referred to in paragraphs 2 and 5 of article 26.

Article 30

Freedom of Communication

The right of secrecy of correspondence and other means of communication shall not be tempered with, except in the cases determined by the law.

Article 31

Freedom of Religion

Every person shall be entitled to profess any religion or creed.

Article 32

Right to Institute Legal Proceedings and Right of Defence

1. Every person shall have the right to institute legal proceedings before a competent court.
2. Every person shall have the right of defense before a court.
3. The state shall guarantee free legal aid in the conditions and in the manner prescribed by law.

Article 33

Penal Liability

1. Penal Liability shall be personal.

2. The accused shall be presumed innocent until the conviction becomes final.

Article 34

Non-retroactivity of Penal Laws

No person may be punished for an act which was not an offence under the law at the time when it was committed, nor may a punishment be imposed other than the one prescribed by the law enforced at the time such offence was committed.

Article 35

Extradition and Political Asylum

1. The Somali Democratic Republic may extradite a person who has committed a crime in his country or another, and has taken refuge in the Somali Democratic republic, provided that there is an extradition treaty between the Somali Democratic Republic and the state requesting the extradition of the accused or offender.

2. The Somali Democratic Republic may grant political asylum to a person who has fled his country or another for political reasons while struggling for the interests of the masses, human rights or peace.

Article 36

Protection of Public Property

Every citizen shall have the duty to protect and consolidate public property.

Article 37

Participation in Economic Growth

Every person shall have the duty to participate in the economic growth of the country, payment of taxes, contributions to state expenditure according to his capacity and the laws of the country.

Article 38

Defence of the Motherland

The defence of the motherland and the consolidation of the unity of the Somali people shall be a sacred duty of every citizen.

Article 39

Observance of the Constitution and Laws

Every person shall have the duty to faithfully observe the constitution and laws of the state.

Chapter 3

Socio-Economic Foundation

Section I

The Economy

Article 40

Economic Development

1. The State shall develop the economy of the country, and raise

production, while assuring an equitable distribution.

2. The state shall encourage the principle of self help for the rapid development of the country.

Article 41

The economy of the Somali Democratic Republic shall comprise the following sectors.

The state sector which shall constitute the vanguard in the economic development of the country and shall be given special priority;

The cooperative section which shall be instrumental in promoting the living standards of cooperative members, while promoting the rapid growth of the national economy, and the state shall participate in its planning and encouragement;

The Private sector which shall be based on non-exploiting private ownership;

The mixed sector which shall be based on the joint ownership between the Somali state and others.

Article 42

Land and Marine Resources

1. The land, natural marine and land based resources shall be state property.

2. The state shall promulgate a law prescribing the best methods for exploiting such resources.

Article 43

Economic Planning

1. The economy of the country shall be founded on socialist state planning.

2. The plan shall have a judicial authority superior to other laws.

3. There shall be a supreme state planning institution, and the law shall establish its structure, duties and powers.

Article 44

External and Internal Trade

In promoting the economic development of the country the state shall guide external and internal trade.

Article 45

Protection of Currency

The state shall organize the fiscal and monetary system of the country, and shall be law fix taxes.

Section 2

Promotion of Education & Science

Article 46

Education

1. The state shall give special priority to the promotion, expansion and dissemination of education and science, and shall consider education as the ideal investment which shall play the leading part in the Somali political and socio-economic development.

2. Education in the Somali Democratic Republic shall favor the working class, and shall conform to the special conditions and environment of the Somali Society.

Article 47

Compulsory Education

Education, in the Somali Democratic Republic shall be free. It shall be compulsory up to the intermediate school level.

Article 48

Eradication of Illiteracy

Eradication of illiteracy and adult education shall be a national duty towards which the people and state shall pool their resources in its fulfillment.

Article 49

Promotion of Science and Arts

1. The state shall promote science and arts, and shall encourage scientific and artistic creativity.

2. Copy rights and patent rights shall be regulated by law.

Article 50

Youth and Sports

In order to ensure healthy physical and mental growth of the youth, and to raise their level of education and political consciousness the state shall give special importance to the promotion and encouragement of gymnastics and sports.

Section 3

Cultural and Social Welfare

Article 51

Promotion of Culture

1. The state shall promote the progressive culture of the Somali people, while benefiting from the international culture of human society.

2. It shall promote art, literature and the national folklore.

3. It shall protect and preserve nations, historic objects and sites.

Article 52

Social Customs

The state shall preserve the good customs, and shall liberate society from outdated customs and those inherited from colonialism specially tribalism, nepotism, and regionalism.

Article 53

Child Care

The state shall promote child care homes and revolutionary youth centers.

Article 54

Rural Development

The state shall promote the program of permanent rural development campaign in order to eradicate ignorance and to narrow the gap between rural and urban life.

Article 55

Health

The state in fulfilling the policy of general health care shall promote the prevention of contagious diseases, and encourage general hygiene, and free medical treatment.

Article 56

Family Welfare

1. The state recognising the family as the basis of society shall protect the family and shall assist the mother and child.

2. The state shall be responsible for the care of the handicapped, children of unknown parents and the aged, provided they shall not have anybody to care for them.

3. The state shall guarantee the care of children whose parents die while defending the country.

Article 57

Work and the Workers

1. The state shall safeguard and promote work and its various types.

2. The minimum age for work in the Somali Democratic Republic shall be fifteen years.

3. The workers shall be entitled to receive without discrimination a remuneration equal to the amount and value of work done.

4. The workers shall be entitled to weekly rest and annual leave.

5. The law shall determine the working hours, conditions of service and persons suitable for certain jobs.

Article 58

Evaluation of Work

In evaluating work the state shall apply the principle; "from each according to his ability, to each according to his work."

Article 59

Social Insurance and Assistance

The state shall promote the system of social insurance and assistance and shall strengthen general insurance institutions of the country.

Chapter 4

State Structure

Capital One

Functions and Rules of the People's Republic

Article 60

Legislative Power

Legislative power in the Somali Democratic Republic shall exclusively be vested in the People's Assembly.

Article 61

Election to the People's Assembly

1. The People's Assembly shall consist of deputies elected by the people through free direct and secret ballot.

2. Every Somali has attained the age of twenty one years shall be eligible for election as a deputy. The law shall determine the grounds for ineligibility for election to the People's Assembly.

3. The number of deputies, conditions and procedure for election shall be established by a special law.

4. The President of the Somali Democratic Republic may nominate to the People's Assembly up to six persons from among people dedicated to science, Arts, and culture or highly esteemed patriots.

Article 62

Term of Office

1. The term of office of each People's Assembly shall be five years beginning from the declaration of election results.

2. In the event of circumstances which shall render the holding of elections impossible, the President of the Somali Democratic Republic shall, after consultations with the Central Committee of the Somali Revolutionary Party, have the power to extend the term of the Assembly for a period not exceeding one year.

Article 63

Dissolution of the People's Assembly

1. The People's Assembly may be dissolved before the expiry of its term of office on the proposal of one-third of the deputies and the approval of two-thirds of the membership.

2. The People's Assembly may also be dissolved by the President of the Republic after consultations with the Central Committee of the Somali Revolutionary Socialist Party and the Standing Committee of the People's Assembly.

3. The election to the new People's Assembly shall take place within three months beginning from the date of dissolution.

Article 64

Sessions

1. The People's Assembly shall hold two sessions annually.

2. The People's Assembly may be convened in an extraordinary session by a resolution of the Standing Committee, or on the request of one-third of the membership.

3. The President of the Somali Democratic Republic shall have the power to convene an extraordinary session of the People's Assembly.

Article 65

Meetings and Decisions

1. The People's Assembly at its initial meeting shall elect from among its members: Chairman, vice-chairman and a standing committee.

2. The meetings of the People's Assembly shall be public. However closed meetings may be held on the motion of the President of the Republic, the Standing Committee, Government or not less than one fourth of the deputies, and on the approval of the Assembly.

3. The majority of the deputies of the Assembly shall form a quorum.

4. The Assembly shall reach its decisions by a majority vote except when a special majority is required by the constitution or by law.

Article 66

Rules of procedure

1. The conduct of business in the Assembly shall be governed by rules of procedure adopted by the Assembly.

Article 67

Powers of the Assembly

1. Amendment of constitution:

2. Legislation and approval of decisions on national development;

3. Election and dismissal of the President of the Somali Democratic Republic as expressly stated in article 80 of this constitution;

4. Election and dismissal of the Standing Committee of the Assembly;

5. Ratification of international treaties relating to political, economic and commercial matters or agreements entailing financial obligation for the state;

6. Ensuring observance of the constitution and the laws of the country;

7. Approval of the national economic development plan;

8. Approval of the annual budget and accounts;

9. Enforcing accountability within the Government and its members;

10. Any other powers granted to the Assembly by the constitution;

Article 68

Delegation of Legislative Power

1. The People's Assembly may for a limited period delegate to the Government the power to legislate on specified matters. The enabling legislation may establish the principles or directives which the government shall follow.

2. Legislative power delegated to the government shall be exercised through Presidential Decrees.

Article 69

Emergency Decree - Laws

1. In the event of special emergency circumstances, the government may pass Decree laws which shall have temporary effect, and shall be issued by Presidential Decrees. Such Decrees shall within a month be submitted before the People's Assembly or the Standing Committee for conversion into laws.

2. The People's Assembly when in session, or the Standing Committee when the Assembly is in recess, shall reach a decision within fifteen days beginning from the date of the presentation of the decree.

Article 70

Draft Laws

The President of the Somali Democratic Republic, the Standing Committee, or the government may present a draft law to the People's Assembly. A draft law may also be proposed by a member of the people's Assembly provided one third of the membership agreed to such a proposal.

Article 71

Laws Relating to Party Strategy

Every draft law concerning Party strategy for the realization of revolutionary objectives and the system of the national leadership shall initially be approved by the central Committee, before the People's Assembly shall reach a final decision.

Article 72

Promulgation and Publication of Laws

1. Every law approved by the People's Assembly or the Standing Committee shall be promulgated by the President within forty-five days.

2. The President of the Somali Democratic Republic shall, within the period mentioned in paragraph 1 of this article, have the power to resubmit such a law to the Assembly stating the grounds thereof with a request to reconsider the law and reach a decision.

3. Where the Assembly shall approve such a law for the second time by a two-third majority, the President shall promulgate it within forty-five days.

4. Every law approved by the Assembly and promulgated by the President shall be published in the official bulletin and shall come into force after the fifteenth day of its publication, unless the law shall prescribe a different time limit.

Article 73

The Deputy

1. Every deputy shall represent the general interests of the Somali people.

2. Before assuming functions in the Assembly a Deputy shall take the following oath:

> In the name of God and country I swear that I shall faithfully, selflessly and with full confidence serve the Somali people, implement the principles of the Revolution of 21st October, 1969, abide by the Constitution and laws of the country, carry out the socialist principles, protect the general interests of the people and the Somali state, defend with all my ability the freedom, sovereignty and unity of the country, place the general interest before private interest, and practice equality and justice among the Somali people.

3. A Deputy shall not be prosecuted for views and opinions expressed before the assembly and its various committees in the exercise of his responsibilities.

4. No criminal proceedings shall be instituted against a deputy, nor shall he be arrested, or his person or domicile be subjected to search, except in cases of flagrante delicto or with the authorizat of the Assembly or the Standing Committee, when the Assembly is not in session provided that such an act shall be subsequently validated by the Assembly.

5. A Deputy shall discharge his responsibilities in the Assembly while pursuing his ordinary duties. While the Assembly is in session, or when entrusted with tasks relating to his Assembly responsibility, a Deputy shall be entitled to an honorarium which shall be fixed by a special law.

Article 74

Removal and Recall of a Deputy

1. Every deputy who shall fail to fulfill the conditions of his membership or shall fail to discharge the duties relating to his responsibility shall be relieved of such responsibility.

2. The electors may recall any deputy in whom they have lost confidence on the proposal of one-fourth of the electors.

3. The decision to relieve the deputy from responsibility shall be by a simple majority of the People's Assembly.

Article 75

Investigations by the Assembly

1. Every Deputy shall have the right to propose motions and put questions to the Government or its members, which the Government shall be obliged to answer within twenty days.

2. The Assembly may order investigations through committees comprising its members.

Section Two

The Standing Committee

Article 76

Functions and Powers of the Standing Committee

The Standing Committee shall be the organ which shall direct the business of the Assembly and shall discharge the functions of the Assembly between recesses and shall have with the exclusion of its powers those mentioned in article 67, paragraphs 1, 3, 7 and 8 and article 82 paragraphs 3 and 12 of the Constitution.

Article 77

Membership of the Standing Committee

1. The Standing Committee shall comprise the following members: chairman, vice-chairman, secretary, and ten members.

2. The chairman and vice-chairman of the Assembly shall become the chairman and vice-chairman of the Standing Committee.

Article 78

The Powers of the Standing Committee

The Standing Committee shall have the following powers:

1. Legislation and amendment of laws during recesses, subject to subsequent approval by the Assembly.

2. Interpretation of laws and resolutions of the Assembly.

3. The convening of ordinary and extraordinary sessions of the Assembly.

4. Supervision of election of deputies to the Assembly.

5. Any other powers granted by the Constitution or the People's Assembly.

Capital II

President of the Somali Democratic Republic

Article 79

Head of State

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.

Article 80

Election and Term of Office

1. The candidate for the President of the Republic shall be proposed by the central committee of the Somali Revolutionary Socialist Party and shall be elected by the People's Assembly.

2. The election of the President shall be by a majority of two-thirds of the deputies on the first and second ballots. A simple majority shall suffice on the third ballot.

3. The Assembly may relieve the President of his responsibility in accordance with the procedure laid down in paragraphs 1 and 2 of this article.

4. The President of the Republic shall hold office for six years beginning from the date of taking the Oath of Office and shall be eligible for re-election.

5. Before assuming office, the President shall take the Oath of Office set out in article 73 of this Constitution.

Article 81

Conditions for Election

Every Somali whose parents are of Somali origin, shall not have married a person not of Somali origin, has fulfilled the conditions for election to the Assembly, and has attained the age of forty may be eligible for election to the Presidency of the Somali Democratic Republic. The President of the Republic while in office shall not marry a person not of Somali origin.

Article 82

Duties and Powers of the President

In addition to the powers and duties granted by the Constitution and the laws, the President of the Somali Democratic Republic shall have the following powers and duties:

1. Representation of the state in relations with foreign states.

2. Representation of the unitary nature of the political leadership of party and state.

3. Ratification of international treaties relating to defense and security, sovereignty and independence of the Republic, on the approval of the Central Committee of the Party and People's Assembly.

4. Ratification of other international agreements.

5. Reception and accreditation of ambassadors and heads of foreign missions.

6. Chairmanship of joint meetings of party and state institutions.

7. Appointment and dismissal of ministers and deputy-ministers.

8. Appointment and dismissal of the President of the Supreme Court, Attorney-General of the state, having heard the opinion of the Central Committee of the Somali Revolutionary Socialist Party.

9. Appointment and dismissal of senior state officials having heard the opinion of the Counsil of Ministers.

10. Grant pardon and commute sentences.

11. To be Commander-in-Chief of the armed forces and chairman of the National Defence Council.

12. Declare states of war and peace after authorization by the Central Committee of the Party and the People's Assembly.

13. Initiate a referendum when the country is faced with important issues.

14. To issue Presidential decrees.

15. Confer medals and other state honors.

Article 83

Extraordinary Powers of the President

1. The President of the Somali Democratic Republic, shall have the power, after consultations with the National Defence Council, tc proclaim emergency rule throughout the country or a part of it, and take all appropriate measures when faced with grave matters endangering the sovereignty, internal or external security of the country, or in circumstances of absolute necessity.

2. In the event of a state of war the President shall assume power over the entire country, and those articles of the Constitution which shall be incompatible with such a situation shall be suspe

Article 84

Vice Presidents

1. The President of the Somali Democratic Republic having heard the opinion of the Central Committee of the party and People's Assembly may appoint one or more vice-presidents.

2. Before assuming functions the vice-president or vice-presidents shall take the oath of office set out in article 73 of the Constitution.

Article 85

Incapacity to Discharge Responsibility

1. In case of death, resignation, or permanent disability of the President of the Somali Democratic Republic, a new President shall be elected within sixty days in accordance with the procedure laid down in article 80 of the Constitution.

2. Until the election of a new President, or in case of a temporary disability of the President the first vice-president shall temporarily assume the presidency.

Capital III

The Government

Section I

Central Government

Article 86

Council of Ministers

1. The Council of Ministers shall be the supreme executive organ of the Central Government.

2. The Council of Ministers shall consist of the chairman of the council and ministers.

3. The President of the Somali Democratic Republic shall be the chairman of the Council of Ministers.

4. The President may appoint a Prime Minister if he shall deem it appropriate.

Article 87

Powers of the Council of Ministers

In addition to the powers granted by the Constitution and laws the Council of Ministers shall have the following powers:

1. To present draft laws to the People's Assembly.

2. To direct, coordinate and supervise Government activities.

3. To issue decrees.

4. To direct activities relating to the defence and security of the state.

5. To prepare the annual budget and accounts.

6. To lay down the plan for the economic development of the country.

7. To conclude agreements with foreign countries and international institutions.

8. To take every step to safe guard the interest of the state and public order within the powers granted by the Constitution.

Article 88

Organization of the Government

1. A Special law shall establish the powers and functions of the Council of Ministers not specified by the Constitution.

2. The organization of the Council of Ministers, ministeries and related offices shall be determined by presidential decrees.

Article 89

Penal Liability of Ministers

1. Ministers shall be liable for crime resulting from the execution of their functions.

2. The law shall determine the procedure for prosecuting ministers for crimes mentioned in subsection 1 of this article and any other crimes.

Article 90

Oath of Office

Before assuming their functions government members shall take the Oath of Office set out in article 73 of the Constitution, before the President of the Republic.

Article 91

Government Program

Subsequent to its appointment, the Government shall present its program to the central committee of the Party and the People's Assembly.

Article 92

Deputy Ministers

Ministers in their functions may be assisted by deputy ministers appointed by the President of the Republic, having heard the opinion of the Council of Ministers.

Section 2

Decentralization of Power and Administration

Article 93

Administrative Decentralization

As far as possible administrative functions shall be decentralized to local administration and public bodies.

Article 94

Local Administration

1. Local administrative powers shall be an integral part of the central government powers of the Somali Democratic Republic.

2. The law shall determine local administrative powers in accordance with the principle of democratic centralism.

Article 95

People's Local Councils

1. The people shall directly elect members of the People's local councils.

2. The law shall determine the structure, powers, sources of revenue and the relationship between the People's local councils, the Party, People's Assembly and the State.

Capital IV

The Judiciary

Section I

Principles of Justice

Article 96

Objectives of Justice

1. The courts and the office of the Attorney-General shall protect the socialist system of the State and its social structure.

2. The courts and the office of the Attorney-General, in the fulfillment of their responsibility shall inculcate in the Somali citizen a spirit of participation in the construction of the country, defence of the socialist system, observance of the laws, social cooperation and the faithful discharge of state and social duties.

3. The Judiciary shall ensure observance of the laws, and shall guarantee the protection of the freedom, rights, and life of the citizen, interests and dignity of the human being.

Article 97

Unity of the Judiciary

The Judiciary of the Somali Democratic Republic shall be unified.

Article 98

Independence of the Judiciary

Judges and Attorney-Generals shall be independent in the performa of their functions and shall be guided by the rule of law; they shall not be relieved of their responsibilities except in conditions provided by the law.

Article 99

Court Proceedings

1. The court proceedings shall in principle be oral and shall be open to the public. The law shall determine the conditions in which the proceedings shall be in Camera.

2. Judgments of courts shall be pronounced in the name of the Somali people.

Section 2

The Courts

Article 100

Courts of the Republic

1. The courts of the Somali Democratic Republic shall comprise the following: The Supreme Court, Courts of Appeal, Regional courts, District courts, Judicial committees, Military courts.

2. Special courts whose jurisdiction and structure shall be determined by law, may be established.

3. People's judges shall participate in the courts as determined by special law.

Article 101

The Supreme Court

The Supreme Court shall be the highest judicial organ in the Somali Democratic Republic. It shall regulate , and supervise the activities of all the courts.

Article 102

Organization of the Judiciary

The organization of the Judiciary in the Somali Democratic Republic and the mode of appointment of judges shall be determined by a special law.

Section 3

Article 103

The Attorney-General of the State

1. The office of the state Attorney-General shall comprise: the attorney-general and his deputies.

2. The establishment of the office of the Attorney-General and its functions shall be determined by a special law.

Article 104

Responsibilities of the State Attorney-General

1. The office of the state Attorney-General shall ensure the strict observance of the laws of the country.

2. It shall ensure that the decisions, orders and directions of state institutions are in accordance with the Constitution and the laws of the country.

3. It shall initiate proceedings against anyone who shall commit a crime.

4. It shall supervise the prisons and reformatories.

5. It shall protect the rights of the weaker section of society.

6. It shall fulfill any other functions prescribed by the law.

Section 4

The Higher Judiciary Counsil

Article 105

Responsibility of the Higher Judiciary Council

1. The Higher Judiciary Council shall be the organ which shall direct the general policy and administration of the Judiciary.

2. The Higher Judiciary Council shall advise the President of the Republic on amnesty, appointment, transfer, promotion, and dismissal of judges and members of the office of the Attorney-General.

3. It shall supervise the functions and conduct of judges and members of the office of the Attorney-General.

4. The structure of the Higher Judiciary Council and its functions shall be determined by a special law.

Article 106

Chairmanship of the Higher Judiciary Council

The President of the Somali Democratic Republic shall be the chairman of the Higher Judiciary Council.

Article 107

Constitutionality of laws

1. There shall be a constitutional court which shall have the power to decide on the constitutionality of laws.

2. The constitutional court shall be composed of the supreme court along with members from the people's Assembly nominated by the President of the Republic having heard, the opinion of the standing committee.

3. The Procedure composition and the term of the constitutional court shall be determined by a special law.

Chapter V

Defense and Security of the Country

Article 108

Responsibilities of the Armed Forces

1. The armed forces shall protect the sovereignty and independence of the Somali Democratic Republic, the achievements and fruits of the Revolution against internal and external enemies, ensure internal security and peace and shall participate in the construction of the country.

2. The state shall develop the capability and technical expertise of the armed forces, raise their political consciousness, and inculcate in them the spirit of nationalism and self-sacrifice for the motherland.

Article 109

Structure of the Armed Forces

The structure and the organization of the armed forces shall be determined by a special law.

Article 110

National Defense Council

1. The responsibilities of the National Defense Council shall be to evaluate conditions relating to the defense and the security of the country and mobilize all resources necessary for meeting the defense needs of the country.

2. The President of the Somali Democratic Republic shall be the Chairman of the National Defense Council and shall appoint other members.

3. The law shall determine the powers of the National Defense Council both in time of peace and war.

Chapter VI

Miscellaneous Provisions

Article 111

The Basic Law

1. The Constitution shall have supreme legislative authority.

2. The Constitution of the Somali Democratic Republic shall be the basis for all laws, decrees and order of state institutions.

Article 112

Amendments to the Constitution

1. Amendments to the Constitution may be proposed by the President of the Somali Democratic Republic, the Central Committee of the Party or one-third of the membership of the People's Assembly.

2. The People's Assembly shall approve Amendments to the Constitution by a two-thirds majority.

3. Amendments to the Constitution shall not affect the following:
   a) the Republican system of the country
   b) the adoption of the principle of socialism
   c) territorial unity
   d) the fundamental rights and freedoms of the citizen and individual.

Article 113

Transitional Provisions

1. The laws at present in force shall continue to apply and those sections which are found incapatible with the Constitution shall be amended within one year.

2. Until such time that the institutions prescribed by the Constitution are established, their powers shall be excercised by existing institutions.

Article 114

Entry into Force

The Constitution shall come into force with effect from the date of the declaration of results of the referendum.