IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

BASHE ABDI YOUSUF, *et alii.*	*	
	*	
Plaintiffs,	*	
	*	
versus	*	**Civil Action No. 04-1360 (LMB/JFA)**
	*	
MOHAMED ALI SAMANTAR,	*	
	*	
Defendant.	*	

BRIEF IN SUPPORT OF
DEFENDANT SAMANTAR'S
MOTION TO DISMISS SECOND AMENDED COMPLAINT

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Dated: 29 November 2010

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TABLE OF CONTENTS

STATEMENT OF FACTS

Your Defendant, *viz.*, Mohamed Ali Samantar (hereinafter: "Samantar" or "Defendant"), served as First Vice President and, in the President's absence, as Acting President of Somalia, from January 1976 to December 1986. Affidavit of Mohamed Ali Samantar ("Samantar Affidavit"), Memorandum in Support of Defendant Samantar's Motion to Dismiss (Docket Entry ("DE") #90, Exhibit 1), at ¶¶ 3, 6. He also served, concurrently, as Minister of Defense from 1971 to 1980 and from 1982 to 1986. *Id.* at ¶ 2. In January 1987, Samantar was appointed Prime Minister and served in that position until approximately September 1990. *Id.* at ¶ 4. During his various terms of office, Samantar conducted official state visits to the United States, during which he met with then Vice-President George H. W. Bush, Vice-President Dan Quayle, and Secretary of State James Baker among other high-ranking officials. *Id.* at ¶ 8.

In 1990, Samantar stepped down as Prime Minister. The following year, after the collapse of the regime of President Muhammad Siad Barre, Samantar sought temporary asylum in Kenya, and then emigrated to Italy. In June 1997, Samantar moved to the United States and took up his current residence in Fairfax, Virginia. *Id.*, at ¶¶ 9-10.

Your Plaintiffs, who claim to be the victims of the alleged abuses set out in the Second Amended Complaint, are natives of Somalia and members of the Isaaq clan. Your Plaintiffs allege that the Somali Government, of which Samantar, was a part, undertook " a violent campaign to eliminate Isaaq clan opposition" to the Government, and that this campaign "intentionally disregarded the distinction between civilians and . . . fighters" within the Somali National Movement, an insurgency group established by members of the Isaaq clan. Second Amended Complaint[1] (DE #76, Ex. 1) at ¶¶ 19-21. Samantar allegedly should be liable for the

1 It bears mention that your Plaintiffs lodged their Second Amended Complaint specimen in tandem with their Motion to Amend [Document 76], filed on 22 February 2007, and that said

abuses committed during this campaign because he intended to "further this system of repression and ill-treatment" and was "reckless or indifferent to the risk" that the abuses alleged would occur during this campaign. *Id.* at ¶¶ 80, 83.

This Honorable Court dismissed Plaintiffs' Second Amended Complaint on grounds that Samantar was immune from this lawsuit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1332, 1391, and 1602-1611. Memorandum and Opinion (DE #106) (Aug. 1, 2007). Plaintiffs appealed, and the U.S. Court of Appeals for the Fourth Circuit reversed, concluding that immunity under the FSIA does not apply to individual foreign officials and in any event does not apply to an official who had left office at the time a lawsuit was filed against him or her. *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009) (DE #111). Samantar appealed, and the Supreme Court of the United States upheld the Fourth Circuit on the sole basis that the FSIA only codified the law of immunity of foreign states and that Samantar's immunity would have to be tested under the common law. *Samantar v. Yousuf*, 130 S.Ct. 2278 (2010) (DE #118).

ARGUMENT

I. *THIS COURT LACKS SUBJECT MATTER JURISDICTION*

A. *Plaintiffs' claims are nonjudiciable as political questions and acts of state.*

The Second Amended Complaint in this case, accepting its factual allegations to be true, questions the legality of actions taken by the Somali Government, a government then recognized by the United States, and by its army and "intelligence gathering agencies," to quell a "campaign of violent resistance" by members of the Isaaq clan, operating through the Somali National

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motion was granted by this Honorable Court on 9 March 2007 [Document 82]. However, the PACER (acronym for Public Access to Electronic Court Records, managed by the Administrative Office of the United States Courts) docketing system does not display a discrete docket entry for such Second Amended Complaint. Accordingly, such pleading is referenced, *passim*, in the instant Brief, as (DE #76, Ex. 1).

Movement ("SNM"), aimed at undermining the policies of that Government. Second Amended Complaint (DE #76, Ex. 1), at ¶¶ 20-21.

Your Plaintiffs concede that this "violent confrontation between the SNM and the Armed Forces of Somalia from 1983 to 1990 constituted an armed conflict not of an international character." *Id.* at ¶ 22. The armed conflict represented an extension of a purported military policy that favored certain clans and "targeted other clans, including in particular the Isaaq clan in the Northern regions." *Id.* at ¶ 16. Every alleged victim is a member of the Isaaq clan, complaining of abuses allegedly carried out by the Somali National Army and their alleged "principal intelligence gathering agencies." *Id.* at ¶¶ 8-12, 18.

The Second Amended Complaint also acknowledges, as it must, that "conditions [in Somalia] remain dangerous and unstable throughout the country. Clan allegiances are still very strong, violence is still a daily possibility, and fear of clan-based repercussions is still of paramount concern to the anonymous plaintiffs in this case." *Id.* at ¶ 89.

The Assistant Secretary of State for African Affairs recently remarked that it is a policy of the United States Government to "look for ways to end Somalia's protracted political and humanitarian crisis." Statement of Johnnie Carson, Assistant Secretary of State, Bureau of African Affairs (14 June 2010), http://www.state.gov/p/af/rls/rm/2010/143144.htm, a copy of which is attached hereto as Exhibit 1. As part of this peace process, the United States Government has "provided limited military support to the Transitional Federal Government ["TFG"] . . . in the firm belief that the TFG seeks to end the violence in Somalia." *Id.* As the Assistant Secretary earlier noted, any successful outcome to this peace process must "take . . . into account the importance of the history, culture, clan, and sub-clan relations that have driven the conflict in Somalia for the past 20 years." Remarks of Assistant Secretary of State Carson

(21 March 2010), http://www.state.gov/p/af/rls/rm/2010/138314.htm, a copy of which is attached as Exhibit 2.

In advancing the peace process, the executive and legislative branches, the branches of our government principally entrusted with the conduct of foreign affairs, must answer the same question as that posed to this Honorable Court in this action as to the whether past government actions that might have targeted certain clans should be reproved. Any substantive determination by this Honorable Court will necessarily express, in the language of *Baker v. Carr*, 369 U.S. 186 (1962),"a lack of respect due the coordinate branches of government" and carries "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217.[2]

The Supreme Court held, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), that "[q]uestions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." In *Baker v. Carr*, 369 U.S. at 217, the Court articulated the six factors that courts are to consider in determining whether to dismiss a case because of its "non-judiciability on the grounds of a political question's presence." Of these six factors, the two principally implicated by this case are "[4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or . . . [6] the potentiality of embarrassment from multifarious

2 The potential political impact of any decision in this case has been underscored in a letter to the U.S. Secretary of State from the Prime Minister of the TFG, noting that the prosecution of this lawsuit would, "we feel, hinder our efforts 'in forming a viable central government and in working together to improve the quality of life for all Somalis'. Mr. Samantar, as you are intimately aware, has played a key role in the process to rebuild our national armed forces. We also have concerns that the selective nature of the allegations in the lawsuit against Mr. Samantar will exacerbate the inter-clan tensions that have been at the root of so many of the difficulties that our country has faced and will face in the challenging process ahead." Letter from Prime Minister Mohamed Abdullahi Mohamed to Secretary of State Clinton (28 November 2010), a copy of which is attached as Exhibit 3.

pronouncements by various departments on one question." *Id.* Dismissal of this case is mandated if any "one of these formulations is inextricable from the case at bar." *Id.*

This case poses a question similar to that which the U.S. District Court for the District of Columbia found to raise a non-judiciable political question in *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005), *appeal dismissed*, 473 F.3d 345 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 2931 (2008). A claim in that case questioned whether an oil company with majority Indonesian government ownership aided and abetted the Indonesian army in seeking to eliminate a segment of the Indonesian population. In dismissing the claim, the court held that a resolution of the claim would "create a significant risk of interfering in Indonesian affairs and thus U.S. foreign policy concerns." 393 F. Supp. 2d at 28; *see also Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1032 (W.D. Wash. 2005) (finding that any decision to restrict trade with Israel posed a non-judiciable political question); *In re Refined Petroleum Products Antitrust Litigation*, 649 F. Supp. 2d 572, 596-98 (S.D. Tex. 2009) (declining to consider as a nonjudiciable political question the legality of an alleged conspiracy between oil producers and OPEC states to fix the price of oil products).

The court in *Doe v. Exxon Mobil* had the benefit, in its determination, of a cautionary letter from the U.S. State Department. 393 F. Supp. 2d at 22. Whether, *vel non*, the Department intervenes in the instant matter, *sub judice*, the ultimate decision as to the existence of a non-justiciable political question resides with this Honorable Court. *See*: *id.* at 23.

Adjudication of your Plaintiffs' claims also is barred by the act of state doctrine. This prudential principle precludes federal courts from passing on the validity of a foreign government's official acts. "In the Eastern District of Virginia, the act of state doctrine applies when: (1) the act undertaken by the foreign state is public, and (2) the foreign state completes the

act within the its territory." *Dominican Republic v. AES Corp.*, 466 F. Supp. 2d 680, 694-95 (E.D. Va. 2006) (declining to apply the doctrine because the outcome of the case did not turn upon the foreign governmental act in question).

The averments contained in the Second Amended Complaint acknowledge that the particular acts of which Samantar is accused were taken as part of an official government campaign "against perceived opponents, including civilians from disfavored clans." (DE #76, Ex. 1) at ¶ 17. Specifically, "[d]uring the 1980s, when Defendant Samantar was Minister of Defense and then Prime Minister, the government changed its approach [from economic measures] and unleashed the Armed Forces in a violent campaign to eliminate Isaaq clan opposition." *Id.* at ¶ 19.

In purporting to describe an attempt to target a civilian population in order to further a military objective during a period of civil unrest, your Plaintiffs have alleged a sequence of putative facts which resemble, in kind, if not degree, those in the case in which the U.S. Supreme Court first articulated the dimensions of the act of state doctrine. That case, *viz.*, *Underhill v. Hernandez*, 168 U.S. 250 (1897), involved an American citizen who complained that, though a noncombatant, he was the victim of "assaults and affronts" by order of a civil war military commander. *Id.* at 251. In language apropos here, the Court held, "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment of the acts of the government of another, done within its own territory." 168 U.S. at 252; *see also: Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d at 1032; *In re Refined Petroleum Products*, 649 F. Supp. 2d at 588.

It is no challenge to the application of the act of state doctrine that the particular acts that are immune from challenge might have violated the law of the state or international law. In *Doe*

v. Qi, 349 F. Supp. 2d 1258 (N.D. Cal. 2004), the conduct of local government officials of the People's Republic of China in repressing the Falun Gong movement was found to be protected by the act of state doctrine despite the claim that the repressive conduct transgressed the official laws of the state and were authorized only by covert unofficial policy. *Id.* at 1288-1307. Similarly, the conduct was found to be exempt from scrutiny despite arguments that the repressive actions violated substantially the same international norms alleged here to have been violated by Samantar. *Id.*

Because consideration of the claims against Samantar will cause this Honorable Court to pass upon the legality of what your Plaintiffs acknowledge to be the conduct of a military campaign incident to a civil war and because the clan rivalries at issue in that civil war still inform U.S. efforts to achieve peace in Somalia, the claims are not subject to adjudication and must be dismissed as political questions and internal acts of the Somali state.

B. *Samantar Enjoys Immunity under Common Law Principles of Foreign Official Act and Head of State Immunity.*

Samantar is entitled to immunity from this suit under the common law doctrines of foreign official act and head of state immunity. These immunity doctrines extend deep into American jurisprudence and apply to immunize one who, like Samantar, is accused of actions taken in his official capacity. They operate with particular force where that capacity consists of service in the most senior positions of government. [3]

3 For an application of these principles by the Justice and State Departments in support of official act immunity for a former Director of the Israeli General Security Service, see Statement of Interest of the United States in *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (Civil Case No. 05-cv-10270), http://www.state.gov/documents/organization/98806.pdf . The reasoning and language of the instant analysis owes much to that Statement of Interest.

1. ***Samantar cannot be sued for actions taken in his official capacity.***

In the earliest days of the Republic, the "absolute" immunity of a foreign sovereign [4] was understood to encompass not only the state and the head of state, but also other individual officials insofar as they acted on the sovereign's behalf. In concluding that a French governor was immune from civil suit in connection with the seizure of a ship, the Attorney General stated:

> I am inclined to think, if the seizure of the vessel is admitted to have been an official act, done by the defendant by virtue, or under color, of the powers vested in him as governor, that it will of itself be a sufficient answer to the plaintiff's action; that the defendant ought not to answer in our courts for any mere irregularity in the exercise of his powers; and that the extent of his authority can, with propriety or convenience, be determined only by the constituted authorities of his own nation.

1 Op. Att'y Gen. 45, 46 (1794); *see also* 1 Op. Att'y Gen. 81 (1797) ("it is as well settled in the United States as in Great Britain, that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States").

Subsequent expressions of official act immunity appear in case law. In finding the Venezuelan general immune from suit for an assault upon a civilian, the Supreme Court, in *Underhill v. Hernandez*, 168 U.S. at 252, held that "[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agent of governments ruling by paramount force as matter of fact." 168 U.S. at 252; *see Jones v. Le Tombe*, 3 U.S. (3 Dall.) 384, 385 (1798); *Lyders v. Lund*, 32 F.2d 308, 309 (N.D. Cal. 1929) ("in actions against the officials of a foreign state not clothed with diplomatic immunity, it can be said that suits based upon official, authorized acts, performed within the scope of their duties on

4 Language of Chief Justice John Marshall in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), "came to be regarded as extending virtually absolute immunity to foreign sovereigns." *Verlinden v. B.V. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

behalf of the foreign state, and for which the foreign state will have to respond directly or indirectly in the event of a judgment, are actions against the foreign state"); *Heaney v. Spain*, 445 F.2d 501, 504 (2d Cir. 1971) (noting in *dicta* that the immunity of a foreign state extends to any official or agent of the state with respect to their official acts); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990); *accord, e.g., Velasco v. Indonesia*, 370 F.3d 392, 399 (4th Cir. 2004); *In re Terrorist Attacks*, 392 F. Supp. 2d 539, 551 (S.D.N.Y. 2005); *Doe I v. Israel*, 400 F. Supp. 2d 86, 104 (D.D.C. 2005); *Herbage v. Meese*, 747 F. Supp. 60, 66 (D.D.C. 1990), *aff'd*, 946 F.2d 1564 (D.C. Cir. 1991) (per curium) ("a government does not act but through its agents").

Your Plaintiffs acknowledge that Samantar's actions were taken in the course of his official duties. "Defendant, acting as Minister of Defense, and later as Prime Minister, bears responsibility" for the alleged wrongdoing. Second Amended Complaint (DE #76, Ex.1) at ¶65.[5]

Your Plaintiffs argue, however, that human rights abuses, as violations of law, cannot be deemed to be official acts. Plaintiffs' Opposition to [first] Motion to Dismiss ("Plaintiffs' First Opposition") (DE # 9) at 12. This argument is logically flawed, runs counter to the principle underlying official act immunity, and gains no force from the assertion that Samantar's actions might have violated customary international norms.

A civil lawsuit against a government official will almost always challenge the lawfulness of the official's acts. Hence, the official's immunity would be rendered meaningless if it could be overcome by allegations of lawfulness alone. *See: Waltier v. Thomson*, 189 F. Supp. 319, 321 n.6 (S.D.N.Y. 1960) (applying Judge Learned Hand's reasoning as to the immunity of U.S.

5 The TFG has confirmed the official character of any actions taken by Samantar. *See* Letter from Acting Prime Minister Salim Alio Ibro to Secretary of State Rice (17 February 2007) (DE # 90, Ex. 2).

officials for alleged lawlessness, in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), to hold immune a Canadian official accused of fraud); *Herbage v. Meese*, 747 F. Supp. at 67 (rejecting argument that officials lost immunity by virtue of "acting illegally," finding that conduct was within the scope of their official capacities); *Kline v. Kaneko*, 685 F. Supp. 386, 390 (S.D.N.Y. 1988) (holding that plaintiff's claim that Mexican immigration official expelled her without due process "is in no way inconsistent with [the official] having acted in his official capacity").

The availability of official act immunity for serious violations of law flows directly from the principle underlying such immunity. An official acting in an official capacity is an agent and manifestation of the state, and the official's acts are attributable to the state rather than to the official personally. As the Supreme Court held, in finding that alleged police torture was "sovereign" rather than commercial activity, and thus protected by sovereign immunity:

> [H]owever monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature. . . . Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce. "[S]uch acts as legislation, or the expulsion of an alien, or a denial of justice, cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such."

Saudi Arabia v. Nelson, 507 U.S. 349, 361-62 (1993) (citations omitted); *see, also: El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996) (defendant's activities were immune in that they "were neither personal nor private, but were undertaken only on behalf of the Central Bank [of Jordan]"); *Doe I v. Israel*, 400 F. Supp. 2d at 104 (D.D.C. 2005); *Belhas v. Ya'alon*, 466 F. Supp. 2d 127, 130 (D.D.C. 2006); *cf. Park v. Shin*, 313 F.3d 1138 (9th Cir. 2002) (Korean official being sued by a personal family employee was not immune because he was not acting within the scope of his official duties).

Any contrary rule would invite an end-run around the immunity of the state. The immunity of a foreign state is not subject to any vague "unlawfulness" exception. It is subject only to those immunity exceptions specifically set forth in the FSIA; *see Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433-35 (1989). In *Amerada Hess*, the Supreme Court held that a foreign state's immunity was not subject to any general exception for alleged violations of international law brought under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. 488 U.S. at 435-43. By Your Plaintiffs' reasoning, the litigants in *Amerada Hess*, which involved the bombing of a neutral ship by the Argentine military, could have avoided dismissal simply by naming the defense minister as defendant rather than the Argentine government itself. *See also Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242-45 (2d Cir. 1997); *Princz v. Germany*, 26 F.3d 1166, 1173-75 (D.C. Cir. 1994); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d at 1102; *Park v. Shin*, 313 F.3d at 1144 (in determining whether acts at issue were performed in an official capacity, courts should "consider whether [the] action against the foreign official is merely a disguised action against the nation that he or she represents").

Nothing in the foregoing analysis is changed by the fact that your Plaintiffs allege that Samantar's conduct violated customary international norms. Individuals "acting in their official capacities as agents of" a foreign government are entitled to immunity "no matter how heinous the alleged illegalities." *Herbage*, 747 F. Supp. at 67; *see Waltier*, 189 F. Supp. At 321, n.6.; *Doe I v. Israel*, 400 F. Supp. 2d at 105 ("even assuming that the . . . defendants have engaged in *jus cogens* violations, . . . *[j]us cogens* violations, without more, do not constitute an implied waiver of FSIA immunity").

Samantar retained his official act immunity despite his departure from office. *See, e.g.: Underhill v. Hernandez*, 65 F. 577, 579-80 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897); *Hatch v.*

Baez, 14 N.Y. Sup. Ct. 596, 600 (1876) ("The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity."). The immunity of foreign officials arises from the official character of their acts and not from their status at time of suit. *Id.* (Immunity "springs from the capacity in which the acts were done, and protects the individual who did them."). "The Executive Branch has . . . recognized that the immunity enjoyed by a foreign official generally survives his departure from office." Brief for the United States as *Amicus Curiae* Supporting Affirmance, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555), 2010 WL 342031, at 11.

Customary international law recognizes the residual immunity enjoyed by former government officials. *See, e.g.*, Vienna Convention on Diplomatic Relations ("VCDR"), done Apr. 18, 1961, art. 39(2), 23 U.S.T. 3227, 3245; Report of the International Law Commission on the Work of its Forty-Third Session at 25, U.N. Doc. A/46/10 (Supp.) (Sept. 1, 1991) (Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property).

Affording immunity to former officials also promotes the United States' interests in comity with other nations. *See: Schooner Exchange*, 11 U.S. at 137; *Hatch*, 14 N.Y. Sup. Ct. at 600; *see also: Boos v. Barry*, 485 U.S. 312, 323-24 (1988). Finally, it encourages an international regime of law under which former U.S. officials can travel abroad with less fear of being haled before a foreign tribunal to answer for their official acts.

2. *Samantar is entitled to immunity as a former head of state.*

Samantar also is entitled to immunity as a head of state. "[H]ead-of-state immunity is distinct from, and provides greater protection than, the immunity of lower-level foreign officials." Brief for the United States as *Amicus Curiae* Supporting Affirmance, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555), 2010 WL 342031, at 11 n.5. While in office, this

immunity may extend to acts beyond those committed by senior officials in their official capacity. After leaving office, the immunity is retained for official acts. *Id.*; *see, e.g.*, *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 916 (N.D. Ill. 2003) ("the rationale for head-of-state immunity is no less implicated when a former head of state is sued in a United States court for acts committed while head of state than it is when a sitting head of state is sued").

There can be little doubt, if any, that Samantar is entitled to head of state immunity for the period during which he served as Prime Minister and head of government (1987 to September 1990). *See: Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988), *order aff'd in part, rev'd in part on other grounds*, 886 F.2d 438 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 932 (1990) (granting head of state immunity to Margaret Thatcher, Prime Minister of the United Kingdom, as a head of government, against claims by Libyan residents); *see also* Restatement (Third) of Foreign Relations § 464 n. 14 (1987).

Similarly, case law and the principles undergirding head of state immunity support the recognition of such immunity during Samantar's tenure as Defense Minister and First Vice President. The actions of a Defense Minister and First Vice President are closely identified with the actions of the sovereign itself and must enjoy the immunity accorded the state itself. *See: Schooner Exchange*, 11 U.S. at 138 (under international law, "all civilized nations allow to foreign ministers" the same immunities as provided to the sovereign); *Kim v. Kim Young Shik*, Civ. No. 125656 (Cir. Ct. 1st Cir., Haw. 1963), *excerpted in* 58 Am.J.Int'l L. 186 (1964) (recognizing immunity of foreign minister).

II. *PLAINTIFFS' CLAIMS ARE TIME BARRED.*

The facts alleged by your Plaintiffs in the Second Amended Complaint establish that the statute of limitations on your Plaintiffs' claims had run prior to the commencement of this action,

and the action accordingly is time barred.[6]

A. *In the absence of tolling, the limitations period had run at the time of commencement of this suit.*

Your Plaintiffs allege that the victims suffered injuries and death at the hands of the Somali Armed Forces and others between 1981 and 1989. Samantar entered the United States in 1997. Your Plaintiffs filed their suit on November 10, 2004, more than 23 years after the allegation of first injury and some 15 years after the occurrence of the final alleged event.

The statute limitations for claims under the Torture Victims Protection Act ("TVPA") is ten years. 28 U.S.C. § 1350 note, § 2(c). The ATS contains no statute of limitations, but, since the enactment of the TVPA, it has been generally found, under borrowing principles, to be identical to that under TVPA. *See, e.g., Van Tu v. Koster*, 364 F.3d 1196, 1199 (10th Cir. 2004); *Deutsch v. Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003); *Hilao v. Marcos*, 103 F.3d 767, 773 (9th Cir. 1996). Regardless whether the limitations period is ten years or a shorter period of two years, if a more general preference for borrowing the most closely analogous state limitations period is followed,[7] the limitations period has run on the instant claims, and, absent the tolling of

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6Ordinarily, the defense of the running of the statute of limitations might first be considered in connection with a ruling on a motion for summary judgment. However, the Fourth Circuit has held that, "[w]here facts sufficient to rule on an affirmative defense– including the defense that the plaintiff's claim is time-barred–are alleged in the Second Amended Complaint, the defense may be reached by a motion to dismiss filed under Rule 12(b)(6)." *Pressley v. Tupperware Long Term Disability Plan*, 553 F.3d 334, 336 (4th Cir. 2009) (quoting *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (*en banc*)) (interior quotations omitted).

7 When a federal statute contains no express limitations period, the courts generally borrow the limitations period from the most analogous state statute unless a "rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when federal policies at stake and practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking," *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 35 (1995) (citation and internal quotation marks omitted). The only court to determine the limitations period for a claim under the ATS begun prior to the enactment of the TVPA in 1992 looked to the state law limitations period for personal injury actions applicable to the claim. The limitations period under Virginia law for personal injury claims is two years. Va. Code Ann. § 8.01-243(A). Following the enactment of the TVPA, courts have applied the TVPA limitations period of ten

the limitations period, the claims should be dismissed.

B. *Equitable tolling is not available for claims under the TVPA or ATS.*

In reliance on language in the Senate committee report that accompanied the TVPA, several courts have held that the running of the statute of limitations under the TVPA and ATS can be tolled in appropriate circumstances. *See, e.g.: Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir. 2009). Equitable tolling is permissible, however, only where it is "[not] inconsistent with the text of the relevant statute." *See: United States v. Beggerly,* 524 U.S. 38, 48 (1998). In *Beggerly*, the Supreme Court held that the 12-year statute of limitations under the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a(g), could not be tolled in large part because, as a consequence of "the unusually generous nature of the QTA's limitations time period, extension of the statutory period by additional equitable tolling would be unwarranted." 524 U.S. at 48-49. The ten-year limitations period in the TVPA and the identical period courts have found for claims made under the ATS thus suggest that equitable tolling is inconsistent with the provisions of the TVPA.

That equitable tolling should not be available under the TVPA and ATS also finds compelling support in the legislative history of the TVPA. The law as enacted was the text as it passed the House of Representatives. *See*: Pub. L. No. 102-256, H.R. 2092, 106 Stat. 73 (Mar. 12, 1992). In adopting the House bill, which contained no reference to equitable tolling, the Congress rejected a provision of the Senate bill which recited, "All principles of equitable tolling, however, shall apply in calculating this limitation period." *See* S. Rep. No. 102-249, 102nd Cong., 1st Sess., 1991 WL 258662, at *2 (text of S. 313, § 2(c). The excision of this

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years to ATS claims, including claims other than those to which the TVPA might also pertain. *See, e.g., Deutsch v. Turner*, 324 F.3d at 717. This has made particular sense when substantive provisions of the TVPA have been given retroactive effect. Since retroactive effect is not appropriate here (see section IV.A. *infra*), an argument may be made that the traditional preference for borrowing a state limitations norm should prevail.

language not only strongly suggest that Congress did not intend for the TVPA, or by extension the ATS, to allow for equitable tolling, it also arguably rendered nugatory the language in the Senate report supporting broad availability for equitable tolling, language on which courts have relied in finding that the running of the statute had tolled. *See, e.g.: Chavez*, 559 F.3d at 492.

1. *Your Plaintiffs have not established a basis for equitable tolling.*

Even if equitable tolling were potentially available to claimants under the TVPA and ATS, your Plaintiffs have not presented circumstances sufficient to satisfy the strict standards for tolling set out in the legislative history and court decisions. As the Supreme Court has noted, "Federal courts have typically extended equitable relief only sparingly." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). The Fourth Circuit determines whether to permit equitable tolling according to the "extraordinary circumstances" test, which requires a plaintiff to present (1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time. *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (citing *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000)). As otherwise stated by the Fourth Circuit, equitable tolling "must be reserved for those rare instances where – due to circumstances external to the party's own conduct – it would be unconscionable to enforce the limitations period against the party and gross injustice would result." *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000). Your Plaintiffs bear the burden of adducing facts to demonstrate the existence of such extraordinary circumstances. *Hall v. Johnson*, 332 F. Supp. 2d 904, 908 (E.D. Va. 2004).

Your Plaintiffs allege two bases for equitable tolling: (a) Samantar's establishment of residence in the United States in 1997; and (b) the "chaos and anarchy that pervaded Somalia until at least 1997," which prevented "investigation necessary to bring a case." Plaintiffs' First

Opposition (DE #9) at 13. Neither circumstance warrants equitable tolling.

2. *The running of the statute of limitations could not be tolled after Samantar entered Italy.*

For their claim that tolling is available whenever a defendant is outside the United States, your Plaintiffs rely on language in the Senate TVPA committee report and two Eleventh Circuit cases that, in turn, relied on the Senate report. Plaintiffs' Opposition to [third] Motion to Dismiss ("Plaintiffs' Third Opposition") (DE # 96) at 18 (citing S. Rep. No. 102-249, 1991 WL 258662, at **10-11); *Arce v. Garcia*, 434 F.3d 1254, 1264 (11th Cir. 2006); *Jean v. Dorelian*, 431 F.3d 776, 779-780 (11th Cir. 2005). As noted above, however, the Senate report cannot be used as authority for equitable tolling since it comments upon a provision of the Senate bill that was stricken from the legislation before final adoption. The House committee report contains no reference to tolling during times when a prospective defendant may have resided outside the United States. *See:* H.R. Rep. No. 102-367(I), 102nd Cong., 1st Sess., 1991 WL 255964, at *5.

Even if the expansive language of the Senate report did provide guidance as to equitable tolling, this action still would not be timely against Samantar. The Senate report recites that the statute "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.*" S. Rep. No. 102-249, 1991 WL 258662, at *11 (emphasis added). The statute of limitations thus would have begun to run in 1991 when Samantar took up residence in Italy prior to entering the United States, since Italy offered your Plaintiffs an adequate and available remedy according to the affidavit of Defendant's Italian law expert, Cosimo Rucellai, the name partner and a senior member of a Milan law firm. Mr. Rucellai, who has a bachelor of law degree from

Florence University in Italy and a masters of law degree from the Harvard Law School, attests that a person domiciled in Italy during the times of Samantar's domicile there could have been sued in an Italian civil court by nationals of other countries for crimes against human rights. Affidavit of Cosimo Rucellai, Defendant's Reply to Plaintiffs' Opposition to Motion to Dismiss (DE #100, Exhibit 2) at ¶¶ 4-6.

As a second basis for tolling, your Plaintiffs assert that, "[u]ntil approximately 1997, [Plaintiffs'] reasonable fear of reprisals against themselves or members of their families still residing in Somalia served as an insurmountable deterrent" to bringing this action. Second Amended Complaint (DE #76, Ex.1) at ¶ 87. This argument is also unavailing since a fear of reprisal, when the plaintiff is not incapacitated and the abusive regime no longer is in authority, cannot warrant equitable tolling, and your Plaintiffs have not alleged a basis for any such fear.

First, even the expansive language of the Senate report does not contemplate tolling based upon a plaintiff's personal circumstances except where the plaintiff is himself "imprisoned or otherwise incapacitated." S. Rep. No. 102-249, 1991 WL 258662, *11. Plaintiffs do not allege in the Second Amended Complaint or, for that matter, any other pleadings that, as a consequence of the conditions in Somalia, any of your Plaintiffs suffered imprisonment or other incapacity through November 1994, such that the filing of this action in November 2004 would have been timely. Indeed, only one of your Plaintiffs, John Doe I, is alleged specifically to have been residing in Somalia on or after November 1994. Second Amended Complaint (DE #76, Ex. 1), at ¶¶ 51, *inter loci.*

Second, the domestic circumstances under which courts have found a fear of reprisal to be a basis for equitable tolling have been limited, in the language of a recent case reviewing such circumstances, to "civil unrest at the hands of authoritarian governments that directly prohibited

the plaintiffs from bringing their claims to light." *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 694 (S.D. Tex. 2009); *see also Hilao v. Marcos*, 103 F.3d at 773 ("[a]ny action against Marcos [for torture, summary execution, and disappearances] . . . was tolled during the time Marcos was president" because of fear of intimidation and reprisals, but no longer). By contrast, your Plaintiffs assert in their Second Amended Complaint that the alleged "human rights abuses were the hallmark of the military government that came to power in 1969 and brutally ruled Somalia until the government was toppled in 1991." Second Amended Complaint (DE #76, Ex. 1) at ¶ 15. Your Plaintiffs provide nary a scintilla of evidence that either Samantar or any other members of the toppled government could have taken or directed retaliation against any of the victims or the members of their family after 1991. Moreover, your Plaintiffs' threadbare assertions as to a fear of reprisal are contradicted by Alessandro Campo, an expert on Somali law who served as a participant in a United Nations Development Office mission to assess Somaliland's judicial system, who has attested that.

> After the fall of the Barre administration in 1991, a Somali bringing a claim for victimization against a former official of the Barre administration would have had little or no fear of reprisal for himself or family members still residing in Somaliland, the rest of Somalia, or outside of the area. The remnants of the Barre Administration do not exist in an organized fashion and would be incapable of taking retaliatory action against Plaintiffs or their families.

First Campo Affidavit (DE # 90, Exhibit 4) at ¶ 11.

Third, your Plaintiffs have adduced no facts to support their assertion, *ipse dixit*, that a fear of reprisal deterred the bringing of this action. The Second Amended Complaint makes no mention of any threats made against any of your Plaintiffs or their families. Indeed, it is unclear who could even have been the object of such threats. Only John Doe I – who is alleged to have resided in Somalia at or after November 1994 – and James Doe(s) I and II – who are cited as

having family members in Somalia on or after November 1994 – could have, theoretically, been the target of such threats. [8]

III. *PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR RELIEF UNDER THE ATS.*

Each of your Plaintiffs' seven claims asserts a violation of the ATS. For the reasons set forth below, none of the claims states a cognizable claim because, to be actionable, a claim has to have been accepted as a basis for jurisdiction under the ATS at the time the events alleged in the Second Amended Complaint occurred. *See: Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 123 (2d Cir.), *cert. denied*, 129 S. Ct. 1524 (2008). None of the instant claims is grounded in a norm that was universally accepted, and hence actionable, in 1984 or in 1988/1989, when the relevant alleged events took place. In addition, even if the respective cause of action existed, the particular facts adduced in many instances do not support liability.

A. *The Plaintiffs do not make out their first claim for relief, for extrajudicial killing.*

Your Plaintiffs fail to establish their first claim for relief for extrajudicial killing. The ATS did not recognize any such cause of action at the time Samantar is alleged to have engaged in wrongdoing, and, even if the ATS did recognize such a cause of action, the facts do make out liability.

The ATS provides, in pertinent part, that: "The district courts shall have original

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8 Even if your Plaintiffs were entitled to equitable tolling, it does not follow that this action, brought in 2004, some seven years after the asserted tolling period expired, would be timely. When a period of equitable tolling ends, a plaintiff receives only a reasonable period with the exercise of diligence. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1991). As noted in *Cada*, tolling of a statute of limitations is "an equitable doctrine. It gives the plaintiff extra time if he needs it. If he doesn't need it there is no basis for depriving the defendant of the protection of the statute of limitations." *Id.* at 452; *see also: Phillips v. Heine*, 984 F.2d 489, 492 (D.C. Cir. 1993) (tolling "gives the plaintiff extra time only if he needs it"). Your Plaintiffs offer no explanation why, after Samantar entered the United States in 1997, they required an additional seven years to bring this action.

jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004), the Supreme Court held that, "the ATS is a jurisdictional statute creating no new cause of action." The Court concludes: "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." *Id.* at 720. This set of actions was limited to "offenses against ambassadors, . . . violations of safe conduct . . ., and individual actions arising out of prize captures and piracy." *Id.* Any new norm that is the basis for the ATS claim must have "attained the status of binding customary international law" at the time of the actions alleged to make out a violation of that norm. *Id.* at 735. Courts must exercise "great caution in adapting the law of nations to private rights." *Id.* at 728.

A prohibition against extrajudicial killing did not represent an established norm in 1984 or again in 1989. As the Supreme Court, in *Sosa*, noted, a "clear mandate" to entertain such action based on extrajudicial killings or torture emerged with the enactment of the TVPA in 1992. **The Supreme Court found that the international pronouncements on which courts (*see, e.g.*: *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1153-1154 (11th Cir. 2005) (decided after, but omitting any reference to, *Sosa*)) have relied in finding an international norm against torture and extrajudicial killing – the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) (the "Universal Declaration") and the International Covenant on Civil and Political Rights, Dec. 16, 1966, (U.N.T.S. 171 (the "International Covenant")) – did not establish a "relevant and applicable rule of international law." *Sosa v. Alvarez-Machain*, 542 U.S. at 28.

Moreover, in enacting the TVPA to proscribe international torture and extrajudicial killing, the Congress indicated that it was creating new causes of action. As the Senate report

recited, "[t]he 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." S. Rep. No. 102-249, WL 258662, at *3 (emphasis added). The House report recited that the law carries out international obligations of the U.S. by "*establishing* a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing". H.R. Rep. No. 102-367(I), 1991 WL 255944, at *1 (emphasis added). [9]

Even if a prohibition against extrajudicial killing was actionable under the ATS during the 1980's, the facts set out in the Second Amended Complaint do not describe a violation of this proscription. As defined in the TVPA:

> "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.

28 U.S.C. § 1350 note, § 3(a).

Four individuals are alleged to have been the victims of extrajudicial killing: Mohamed Deria Ali ("Ali"), Mustafa Mohamed Deria ("Deria"), James Doe I, and James Doe II. Second Amended Complaint (DE #76, Ex. 1) at ¶ 25. The Second Amended Complaint provides no facts other than Deria's alleged disappearance to suggest that Deria was killed, and no support,

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9 Further militating against a finding that a norm against torture or extrajudicial killing existed prior to enactment of the TVPA is the statement in the Senate report that, "[w]hile 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." S. Rep. No. 102-249, WL 258662, at *3. The resistance of one-third of the world's governments to forgoing torture and extrajudicial killing in 1991 when the Senate report was written hardly describes norms that must be found, in the language of *Sosa,* to be "specific, universal, and obligatory." *Sosa v. Alvarez-Machain*, 542 U.S. at 732 (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

whatsoever, for the necessary finding that Deria's supposed death resulted from a "deliberated killing not authorized by a previous judgment." *See id.* at ¶¶ 41-42. As for the deaths of James Doe I and James Doe II, they are said to have occurred only after a trial at which the two victims were represented by counsel (albeit one they only met at the beginning of the trial), and only after the court had heard testimony from two soldiers who testified that "the brothers had hidden SNM fighters and probably were themselves members of the SNM." *Id.* at ¶¶ 47-48. While the phrase "judicial guarantees which are recognized as indispensable by civilized peoples" does not find definition in the TVPA, the House report makes clear that the offense "excludes executions carried out under proper judicial authority." H.R. Rep. No. 102-367(I), 1991 WL 255964, at *5. Certainly the requisite judicial guarantees cannot be more extensive than the guarantees established under our own Constitution which consist of a right by an accused to counsel and to an opportunity to confront the witnesses against him, both of which appear to have been accorded to the James Doe brothers. *See: Avery v. Alabama*, 308 U.S. 444 (1940) (appointment of defense counsel just days before a capital trial does not represent a violation of an accused's Constitutional right to counsel).

Even the facts alleged in connection with the death of Ali would not, if true, make out a *prima facie* case of extrajudicial killing. The abbreviated time of several hours between Ali's arrest and death might permit an inference that his death was not authorized by a court after a proper trial. The Plaintiffs, however, also must allege facts to establish that the death was "deliberated" and thus manifested the "requisite extrajudicial intent." H.R. Rep. No. 102-367(I), 1991 WL 255964, at *4. Your Plaintiffs have failed, utterly, to allege facts establishing deliberation.

B. ***Your Plaintiffs do not make out their second claim for relief, for attempted extrajudicial killing.***

Your Plaintiffs have failed to establish any basis for relief for attempted extrajudicial killing. If no universal norm proscribed extrajudicial killing, any attempt to accomplish what was not proscribed could not, itself, be proscribed. It would further appear that a cause of action for attempted extrajudicial killing under the ATS has yet to be recognized, or even entertained, by any American court. This claim should be dismissed.

C. ***Your Plaintiffs do not make out their third claim for relief, for torture.***

Much as with extrajudicial killing as discussed above, torture was not actionable under the ATS prior to the enactment of the TVPA. *See* section III.A *supra*. *But see*: *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 ("for purposes of civil liberty, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind"). This claim should be dismissed.

D. ***The Plaintiffs do not make out their fourth claim, for cruel, inhuman, or degrading treatment or punishment.***

If no action existed for extrajudicial killing or torture prior to enactment of the TVPA, then it should not be possible to find one for the lesser and less definable injuries resulting from cruel, inhuman, or degrading treatment or punishment. In *Aldana v. DelMonte Fresh Produce, N.A., Inc*, 416 F.3d 1242, 1247 (11th Cir. 2005), the court indicated that, for actions that took place in 1999, "[w]e see no basis in law to recognize Plaintiffs' claims [under the ATS] for cruel, inhuman, degrading treatment or punishment." To identical effect, *see*: *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D.Cal. 1987), *affirmed in part and modified in part on other grounds on reconsideration*, 694 F. Supp. 707 (N.D.Cal. 1988) (the boundaries of any norm proscribing cruel, inhuman, and degrading treatment were insufficiently defined as of 1988, to preclude its

recognition as a tort actionable under the ATS); *see also*: *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2D 1116, 1162 n. 190 (C.D.Cal 2004). This claim must accordingly be dismissed.

E. ***Your Plaintiffs do not make out their fifth claim, for arbitrary detention.***

Arbitrary detention is not actionable in that it did not, in 1984 or 1989, represent a specific, universal, and obligatory norm of customary international law. In *Sosa*, *supra*, the plaintiff argued that the ATS provided jurisdiction for a general prohibition against arbitrary detention. 542 U.S. at 736. The Supreme Court disagreed, finding that the plaintiff's view "expresses an aspiration that exceeds any binding customary rule having the specificity we require." *Id.* at 738.

Even if arbitrary detention might have represented an actionable tort under customary international law, the facts adduced by your Plaintiffs do not support liability under any reasonable definition of the tort as to John Doe I and John Doe II. John Doe I was imprisoned for five days for questioning by military officers and subsequent trial. Second Amended Complaint (DE #76, Ex. 1) at ¶¶ 43-47. John Doe II was imprisoned for one day (albeit in a cell that lacked sanitary facilities). Id. at ¶¶ 62-63.

F. ***Your Plaintiffs do not make out their sixth and seventh claims, for crimes against humanity and for war crimes.***

Your Plaintiffs' claims for crimes against humanity and war crimes, their sixth and seventh claims, simply restate the allegations of the first five claims but attach them to differently named causes of action. Since Plaintiffs have not stated causes of action cognizable under the ATS in their first five claims, they have not established the predicate for these claims here, and, accordingly, these claims must fail as well.

G. ***Your Plaintiffs fail to state a claim for secondary liability.***

As to each of the seven claims, your Plaintiffs allege that Samantar was liable, solely, in that he "exercised command responsibility over, conspired with, or aided and abetted the alleged perpetrators of the wrongdoing" or that he was an "active participant in a joint criminal enterprise that resulted in" the wrongdoing alleged. *See, e.g.*, Second Amended Complaint (DE #76, Ex. 1) at ¶¶ 95-96. To establish such secondary liability, your Plaintiffs must demonstrate that customary international law recognized secondary liability in 1984 and 1989. "[A]n allegation of aiding and abetting a violation of international law or conspiring to violate international law asserts a distinct claim." *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 256 (S.D.N.Y. 2009).

Your Plaintiffs cannot show that customary international law recognized secondary liability in 1984 or 1989. The court in *In re South African Apartheid Litigation* conducted a lengthy review of the possible basis for an international norm imposing secondary liability. *Id.* at 255-62. Based upon this review, the court "decline[d] to recognize conspiracy as a distinct tort to be applied pursuant to ATCA jurisdiction." *Id.* at 262. As to aider and abettor liability, the court found some support in customary international law but relied for this finding principally on pronouncements in the Rome Statute of the International Criminal Court which first came into force on July 17, 1998. Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90.

Even then, the standard identified by the court in *In re South African Apartheid Litigation* would not support a cause of action for aider and abettor liability against Samantar, in that such standard "requires that an aider and abettor know that its actions will substantially assist the perpetrator in the commission of a crime or tort in violation of the law of nations." 617 F. Supp. 2d at 261. The requirement of knowing aid also finds support in *Hilao v. Estate of Marcos*, 103

F.3d 767 (9th Cir. 1996), a case which, like the instant one, considered the secondary liability of a senior military official for events committed by armed forces during the 1980's. The court there approved an instruction that a finding of liability required a determination either that the military commander was complicit in the specific acts of wrongdoing, a charge not made here, or that the commander "knew of such conduct by the military and failed to use his power to prevent it." 103 F.3d 767 at 776.

Your Plaintiffs, palpably, do not meet this standard. Rather, they assert, merely, that Samantar "was reckless or indifferent to the risk that [the specific acts of wrongdoing alleged] would occur." Second Amended Complaint (DE #76, Ex. 1) at ¶¶ 79, 83. A requirement of knowledge cannot be met through allegations of recklessness or indifference. *See*: *United States v. Carr*, 303 F.3d 539, 540 (4th Cir. 2002) (extensively discussing distinction between knowledge and reckless indifference in the context of downward sentencing adjustment permitted for causing death recklessly or negligently as opposed to knowingly causing death).

Because your Plaintiffs cannot show that secondary liability was a norm of customary international law at the time your Plaintiffs suffered injury and further fail to allege facts plausibly establishing secondary liability as the norm is currently understood, all of the claims against Samantar must be dismissed.

IV. *PLAINTIFFS HAVE FAILED TO STATE CLAIMS FOR RELIEF UNDER THE TVPA.*

A. *The TVPA does not apply to conduct that occurred before its enactment.*

In addition to their claims for relief for torts arising under the ATS, your Plaintiffs assert, in Claims First through Third, violations by Samantar of the TVPA. The TVPA was enacted in 1992. All of the events alleged in the Second Amended Complaint as bases for liability against

Samantar took place at least three years prior to enactment. Since the TVPA cannot be applied retroactively and the causes of action alleged under the TVPA were not available prior to enactment of the TVPA, your Plaintiffs' TVPA claims must be dismissed.

In *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994), the Supreme Court confirmed the basic tenet of Constitutional jurisprudence that if a "statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." The Court there held that "a new damages remedy . . . is the kind of provision that does not apply to events antedating its enactment in the absence of clear congressional intent." *Id.*, at 283. Nothing in the language of the TVPA or its legislative history evinces "clear congressional intent" that the TVPA be applied retroactively so as to overcome the Constitutional presumption against its retroactive application. As found in one of the few cases considering the retroactive application of the statute, "[t]he TVPA . . . does not have retroactive effect." *Gonzalez-Vera v. Kissinger*, 2004 WL 5584378, *8 (D.D.C. 2004).

The only basis for sustaining the TVPA claims in the Second Amended Complaint would, accordingly, be a determination that your Plaintiffs are not seeking to apply the TVPA retroactively, *i.e.*, that subjecting the Samantar to the strictures of the TVPA would not, in the language of *Landgraf*, "impair rights [Samantar] possessed when he acted, increase [Samantar's] liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. As discussed above (in section III.A., *supra)*, however, it cannot be credibly argued that the TVPA did not create new liabilities or impair rights as to Samantar. [10]

10 Significantly, the few cases applying the TVPA to conduct that occurred before the statute's enactment either were decided before *Sosa, supra,* or do not mention the comment in *Sosa* (542 U.S. at 28) that the Universal Declaration and the International Covenant do not themselves establish rules of international law. *See: Cabello v. Fernandez-Larios*, 402 F.3d at 1153-54 (omitting any reference to *Sosa*); *Cabiri v. Assasie-Gyiman*, 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996) (pre-*Sosa*); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995). (pre-*Sosa*).

Since the TVPA does not allow for retroactivity or codify pre-existing universal norms of international law, it cannot be applied against Samantar for conduct that occurred prior to the enactment of the TVPA, and Plaintiffs' TVPA claims must be dismissed.

B. ***Your Plaintiffs have failed to allege a basis for secondary liability against Samantar.***

For the reasons set forth in section III.G *supra*, discussing the unavailabilty of a claim of secondary liability under the ATS, your Plaintiffs have also failed to allege a basis for secondary liability against Samantar under the TVPA.

CONCLUSION

Your Plaintiffs have failed to establish subject matter jurisdiction for their claims, their claims are time barred, and the Plaintiffs have not set out cognizable causes of action under the ATS or the TVPA. For these reasons, Plaintiffs' claims must be dismissed.

Respectfully submitted,

Dated: 29 November 2010, at Alexandria, Virginia

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ATTORNEY AND COUNSELLOR,
IN PRAESENTI, FOR
MOHAMED ALI SAMANTAR

CERTIFICATE OF SERVICE

I, Joseph Peter Drennan, undersigned, hereby and herewith certify that, on this twenty-ninth day of the month of November, 2010, a true, cyclostyled facsimile of the foregoing was despatched by carriage of First Class Post, through the United State Postal Service, with adequate postage prepaid thereon, enshrouded in a suitable wrapper, unto:

Joseph W. Whitehead, Esquire
Thomas P. McLish, Esquire
W. Randolph Teslik, Esquire
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036-1564, and that, on even date, an electronic copy of the foregoing was sent, by *e-mail*, unto the said Messrs. Whitehead, McLish & Teslik, at the respective *e-mail* addresses of each, *viz.*: jwhitehead@akingump.com , tmclish@akingump.com , & rteslik@akingump.com .

Respectfully submitted,

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ATTORNEY AND COUNSELLOR,
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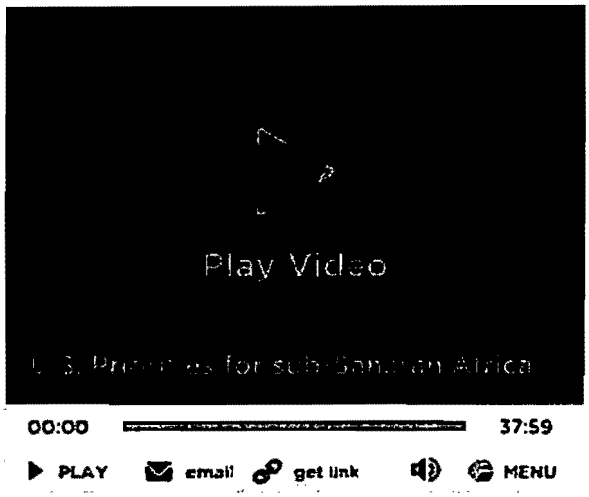
Exhibit 1

U.S. DEPARTMENT OF STATE
DIPLOMACY IN ACTION

U.S. Priorities for sub-Saharan Africa

Johnnie Carson
Assistant Secretary, Bureau of African Affairs
Diplomacy Briefing Series: Conference on sub-Saharan Africa
Washington, DC
June 14, 2010

Good afternoon. I would like to thank the Bureau of Public Affairs for organizing the Diplomacy Briefing Series and for inviting me to join all of you today to examine our key priorities in Africa.



I want to begin today by emphasizing the strong commitment of this Administration to working with our African partners to bring about a more peaceful, stable, and prosperous Africa. This Administration sees immense potential in Africa, and we are determined to work with Africans across the continent to help realize this promise.

Often, Africa has been overlooked as a top policy priority for the U.S. Government. I can tell you that this is not the case with this Administration. President Obama is not complacent about Africa, and is determined to forge a deeper and more lasting impact on our relationship with the continent, not just through words, but through concrete action.

As evidence of this commitment, Vice President Biden concluded just yesterday a week-long trip to Africa—a trip in which I participated. Some in the media focused on the World Cup as the centerpiece of this Africa visit, but this trip was more about substance than sport. The Vice President used this trip to focus on one of the Administration's highest priorities in Africa: the current situation in Sudan. In Egypt, the Vice President met with President Mubarak and other senior government officials to discuss Sudan policy. In Kenya, we met with Salva Kiir, the President of the Government of South Sudan and other South Sudanese leaders. And in South Africa, I accompanied the Vice President to his extended meeting with Thabo Mbeki, the AU's point person on Sudan.

The Vice President's trip was just the most recent example of high-level engagement by this Administration in Africa. The President's visit to Ghana last July, the earliest visit made by a U.S. president to the continent, underscored Africa's importance to the U.S. And last September, at the UN General Assembly, the President hosted a lunch with 26 African heads of state. Over the past year, he has also met in the oval office with President Ellen Johnson-Sirleaf of Liberia,

President Kikwete of Tanzania, President Khama of Botswana, and Prime Minister Morgan Tsvangarai of Zimbabwe. And during the Nuclear Summit in April of this year, the President also met with President Goodluck Jonathan of Nigeria and President Zuma of South Africa.

All of the President's senior foreign policy advisors have followed his lead by traveling to Africa. The U.S. Permanent Representative to the United Nations Ambassador Susan Rice visited five African countries last June, including Liberia and Rwanda. Deputy Secretary of State Jack Lew traveled to Ethiopia and Tanzania in June 2009, and was in Mali and Nigeria just last month.

Under Secretary of State for Democracy and Global Affairs Maria Otero headed the U.S. delegation to the African Union Summit in Addis Ababa in January 2010, where we discussed a range of issues, including democracy and governance, climate change, and food security. Last month, she led the U.S. delegation to Abuja to the first meeting of the Democracy and Governance working group of the U.S.-Nigeria Binational Commission. And last August, Secretary Clinton made an 11-day, seven-country trip across the continent.

These high-level visits are a testament to the importance this Administration places on Africa, and our commitment to meet and work with our partners to address the immense challenges facing the continent. Through our engagement and programs, the Administration is seeking to advance five key policy priorities on the continent.

First: We are working with African governments, the international community, and civil society to strengthen democratic institutions and protect the democratic gains made in recent years in many African countries.

Since the 1990's, we have witnessed an impressive wave of democratic transitions, during which dozens of African countries moved from dictatorship to democracy, in one of the most impressive political transformations in history. Recent democratic elections, including those in South Africa, Botswana, Namibia, Mauritius, and Ghana, have served to remind the world of the importance that Africans attach to democracy, as well as the values that underpin it. The recent elections in Ghana and Mauritius were especially impressive, as they have resulted in a peaceful, democratic transition between two political parties.

Nonetheless, we have seen worrying signs of backsliding in terms of democracy and good governance in a number of countries as a result of flawed elections, harassment of opposition groups, and attempts by presidents to extend their term limits. We have also seen a recurrence of military coups and interventions in several countries.

The political and economic success of Africa depends a great deal on the effectiveness, sustainability, and reliability of its democratic institutions. We are encouraging governments across the continent to get elections right. To level the playing field, clean up the voter rolls, open up the media, count the votes fairly, and give democracy a chance.

In that vain we have been deeply engaged in helping to resolve political crises on the continent, including in Nigeria, where we encouraged political leaders to follow their constitution and stay on a democratic path and where we encouraged the military to stay in the barracks and out of politics. We have been active diplomatically in Guinea-Conakry during its difficult transition period, as well as in Niger and Mauritania over the past year.

Second: The Administration is committed to working alongside African countries to promote and advance sustained economic development and growth.

Despite impressive economic growth in recent years, Africa remains one of the poorest regions of the world, and the continent has yet to be fully integrated into the global economy. Africa's share of world trade is less than two percent and

Africa also faces a massive digital divide with the rest of the world, which further inhibits the ability of African companies to compete on the global stage.

The Administration is bringing significant resources and programs to the table to help address these challenges. We are actively working to promote economic growth and development, including through our new $3.5 billion dollar food security initiative, Feed the Future, which will assist 12 African focus countries that are engaged in growing and modernizing their agricultural sectors. The Obama Administration will continue to work with our African partners to maximize the opportunities created by the African Growth and Opportunity Act–AGOA. We will also continue to actively explore ways to promote African private sector growth and investment, especially for small and medium-sized businesses.

Third: Historically the United States has focused on public health and health-related issues in Africa. We are committed to continuing that focus. We will work side-by-side with African governments and civil society to ensure that quality treatment, prevention, and care are easily accessible to communities throughout Africa.

From HIV/AIDS to malaria, Africans endure and suffer a multitude of health pandemics that weaken countries on many fronts. Sick men and women cannot work and they cannot contribute to the growth of their nation's economies or well being.

To help solve the health crisis that is occurring throughout the entire continent, Africans as well as the international community must invest in Africa's public health systems, in training more medical professionals, and in helping African countries fight diseases that simply should not kill people in this day and age.

The Obama Administration will continue the PEPFAR Program and the previous administration's fight against HIV/AIDS. In addition to combating HIV/AIDS, malaria, TB, and polio, the Obama Administration has pledged $63 billion to meet public health challenges throughout Africa.

Fourth: The U.S. is committed to working with African states and the international community to prevent, mitigate, and resolve conflicts and disputes. Conflict destabilizes states and borders, stifles economic growth and investment, and robs young Africans of the opportunity for an education and a better life. Conflicts can set back nations for a generation. Throughout Africa, there has been a notable reduction in the number of conflicts over the past decade.

The brutal conflicts in Sierra Leone and Liberia have come to an end, and we have seen Liberia transform itself into a democracy under the able leadership of Ellen Johnson Sirleaf, Africa's first female head of state. Liberia is an example of what can be accomplished in a short period of time and should give us hope for resolving other conflict situations in Africa.

Despite the successes, pockets of turmoil and political unrest persist in Somalia, Sudan, and the Democratic Republic of Congo, as well as in Madagascar. These conflicts create both internal and regional instability and undermine Africa's chances for economic growth.

The Obama Administration has taken a keen interest in working with African leaders and African regional organizations to help resolve these conflicts. Over the past 18 months, Special Presidential Envoy for Sudan, General Scott Gration has been focused on ensuring the full implementation of the 2005 Comprehensive Peace Agreement, which will permit the people of South Sudan to vote in January 2010 for independence or unity with the North. As part of our effort to ensure the referendum takes place, we are collaborating closely with the Special Envoys of the AU and UN, who will be in this building for talks on Wednesday. We are also enhancing our diplomatic presence in South Sudan by assigning ten new officers to our Consulate in Juba, including a very senior officer, a former ambassador, who will arrive in Juba in the next few days.

Former Congressman Howard Wolpe has been working intensely to bring peace and stability to the Eastern Congo and end the extreme violence against women. This remains a top priority for this Administration. In close coordination with Ambassador-at-Large for War Crimes Steve Rapp and Ambassador-at-Large for Global Women's Issues, Special Advisor Wolpe is working to address these and other pressing issues in the Congo, including stemming the trade of conflict minerals which continues to fuel conflict and instability.

We will also continue our cooperation with regional leaders to look for ways to end Somalia's protracted political and humanitarian crisis. We continue to call for well-meaning actors in the region to support the Djibouti Peace process, and to reject those extremists and their supporters who seek to exploit the suffering of the Somali people.

Additionally, the United States is proactive in working with African leaders, civil society organizations, and the international community to prevent new conflicts. In January of this year, we worked closely with the governments of Burkina Faso, Morocco, and France to put in place a transitional government in Guinea-Conakry. In a few weeks, the country will hold democratic elections which we hope will begin a democratic tradition in that country.

Fifth: We will seek to deepen our cooperation with African states to address both old and new transnational challenges. The 21st century ushered in new transnational challenges for Africa and the world.

Africa's poverty puts it at a distinct disadvantage in dealing with major global and transnational problems like climate change, narco-trafficking, trafficking-in-persons and arms, and the illegal exploitation of Africa's minerals and maritime resources.

Meeting the climate and clean energy challenge is a top priority for the United States and the Obama Administration.

Climate change affects the entire globe; its potential impact on water supplies and food security can be disastrous. As President Obama said in Ghana, "while Africa gives off less greenhouse gasses than any other part of the world, it will be the most threatened by climate change." Often those who have contributed the least to the problem are the ones who are affected the most by it, and the United States is committed to working with Africans to find viable solutions to adapt to the severe consequences of climate change.

The effects of climate change are clear: the snow cap of Mount Kilimanjaro is rapidly disappearing, Lake Chad is a fraction of the size it was 35 years ago and in recent years the turbines at some of Africa's largest dams have fallen silent because of reduced water flows. With our international partners, the United States is working to build a sustainable, clean energy global economy which can drive investment and job creation around the world, including bringing energy services to the African continent.

There is no time like the present to face this issue as it carries tremendous consequences for the future of our children, grandchildren and our planet.

As President Obama emphasized during his speech in Ghana, our policies are based on the premise that "Africa's future is up to Africans." With a corresponding commitment from African leaders to enact the reforms and policies required to bring about real change, we believe we can achieve our shared goal of a more peaceful, prosperous, and free Africa.

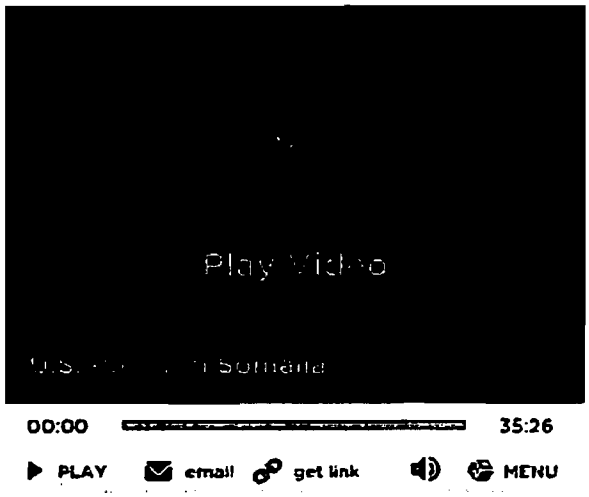
Thank you and I will be happy to take any questions.

Exhibit 2

U.S. DEPARTMENT OF STATE
DIPLOMACY IN ACTION

U.S. Policy in Somalia

Johnnie Carson
Assistant Secretary, Bureau of African Affairs
Ertharin Cousin, Ambassador to the UN Mission in Rome
Washington, DC
March 12, 2010



MR. DUGUID: Good afternoon, ladies and gentlemen. Welcome to the State Department. We are here for a special briefing by Assistant Secretary of State for African Affairs Johnnie Carson and Ambassador Ertharin Cousin, who is our ambassador to the World Food Program in Rome, who joins us from Rome. They will speak to you today about U.S. policy on Somalia.

Ambassador.

AMBASSADOR CARSON: Gordon, thank you very, very much. Thank you all for coming today. I want to take this opportunity to address a number of press reports over the past week characterizing our policy in Somalia, specifically regarding our assistance to the Transitional Federal Government. These reports have not accurately reflected or portrayed our policy position and what we are doing in that country. Today, I will take a few moments to set the record straight and to place our policy in proper context.

U.S. policy in Somalia is guided by our support for the Djibouti peace process. The Djibouti peace process is an African-led initiative which enjoys the support of IGAD, the Intergovernmental Authority on Development. It also enjoys the support of the African Union and the key states in the region. The Djibouti peace process has also been supported by the United Nations, the European Community, the Arab League, and the Organization of Islamic Conference. The Djibouti peace process recognizes the importance of trying to put together an inclusive Somali government and takes into account the importance of the history, culture, clan, and sub-clan relations that have driven the conflict in Somalia for the past 20 years.

The Transitional Federal Government, led by President Sheikh Sharif Ahmed, builds on the progress made during the establishment of the Djibouti peace process. However, extremist elements such as al-Shabaab have been – have chosen to reject the peace process and have waged a violent campaign against the TFG and the people of Somalia in order to

impose their own vision for the future in that country.

The United States and the international community, the UN, the AU, and our European allies, among others, have chosen to stand with those seeking an inclusive, peaceful Somalia. We have provided limited military support to the Transitional Federal Government. We do so in the firm belief that the TFG seeks to end the violence in Somalia that is caused by al-Shabaab and other extremist organizations.

However, the United States does not plan, does not direct, and does not coordinate the military operations of the TFG, and we have not and will not be providing direct support for any potential military offensives. Further, we are not providing nor paying for military advisors for the TFG. There is no desire to Americanize the conflict in Somalia.

We are also aware of the reporting on the Somali – of the Somalia Monitoring Group's concerns about the diversion of food and assistance in Somalia. The State Department has received the draft report and we are reviewing it carefully. I will not comment on that report because we have a representative from our Bureau of International Organizations who can answer those questions. But we are concerned about the troubling allegations that are contained in that document.

The Somali people have suffered tremendously throughout more than 20 years of conflict, and Somalia's turmoil destabilizes not only that country, but the region and also some aspects of the international community. The U.S. recognizes that any long-term solution to the crisis in Somalia must be an inclusive political solution. We continue to call upon all those who seek peace in Somalia to reject terrorism and violence, and to participate in the hard work of stabilizing the country for the benefit of Somalia's population.

I'd now like to recognize and ask Ambassador Cousin, who is in Rome, whether she would like to add her comments. Thank you.

Ambassador Cousin.

AMBASSADOR COUSIN: Thank you very much, Ambassador Carson. I'd also like to thank the members of the press for your presence and interest in covering these important issues related to Somalia. As Johnnie Carson stated, the Somali people have suffered tremendously during the more than 20 years of conflict in their country.

The Somalia Monitoring Group, more commonly known as the SMG, submitted their report to the UN Security Council Sanctions Committee this past week. This SMG report – the SMG reports directly to the Security Council on implementation of the Somalia and Eritrea sanctions regimes. We take the work of the Somalia Monitoring Group very seriously and we are studying its recommendations.

Next week, the Security Council will meet and receive the regular 120-day report from the Chair of the Somalia Sanctions Committee that will include a briefing on the committee's discussion of the SMG's final report. The Somalia Monitoring Group report contains a number of recommendations, including those regarding the work of the World Food Program in Somalia. We at the U.S. Mission to the UN agencies in Rome are active members of the executive board of the World Food Program. This board regularly examines the work of the World Food Program and the perils its dedicated staff face around the world, particularly in places like Somalia.

In December of 2009, the World Food Program presented a briefing on the – its Somalia program to the World Food Program executive board. After the December board meeting, WFP did take internal measures to address the concerns raised in this internal report. Some of the same types of allegations were raised in the Somalia Monitoring Group's report. So this morning, the executive board recognized that regardless of the process mandated by the SMG, the board has a

all practices of the WFP in – WFP team in Somalia are in line with the organization's policies and procedures.

We will continue to work to ensure that the generous contributions of the American people to support the work of the World Food Program are managed in an accountable and transparent manner. We express our gratitude to the WFP staff for their commitment to meet humanitarian needs in the most difficult of circumstances. The United States remains strongly committed to meeting the humanitarian needs of the people of Somalia. We continue to seek ways to ensure that the Somalian people receive the assistance they require.

I'll end here, Assistant Secretary, and look forward to any questions from the media. Thank you.

MR. DUGUID: Before we get to the questions, I would like to make a correction for the record. I described Ambassador Cousin's – one of her official duties rather than her official title, which is – Ambassador to U.S. Mission to the UN Agencies in Rome is her official working title.

As we call on you, please identify yourself and which ambassador you would like to speak to.

Matt.

QUESTION: Matt Lee with AP. Ambassador Carson, you mentioned at the very top – you were talking about a number of recent press reports. Can you be specific about what these reports said? I'm not asking you to identify whatever organization they were responsible. But what did they say? And what is wrong – what was wrong with them?

Secondly, you said that the Djibouti process was supported by IGAD, the AU, and all the countries of the region. But that's not entirely true, is it? I mean, there is one country that doesn't support it. Or has Eritrea changed their position? And then –those two very briefly – but then on the military aid that you talked about the several tons of weapons that have been provided to the TFG. Are there any concerns that those weapons may be leaking out in the same way that the food aid was described as leaking out to insurgents?

AMBASSADOR CARSON: Let me say, the most prominent article was one that appeared approximately a week ago in *The New York Times*, written by Jeff Gettleman, and I think co-authored by one of his colleagues, which asserted or carried the assertion that the U.S. Government had military advisors assisting and aiding the TFG, that the U.S. Government was, in fact, helping to coordinate the strategic offensive that is apparently underway now, or may be underway now, in Mogadishu, and that we were, in effect, guiding the hand and the operations of the TFG military. All of those are incorrect. All of those do not reflect the accuracy of our policy, and all of those need to be refuted very strongly. I think my statement clearly outlined what we are doing and why we are doing it.

You indicated that one state in the region has not joined in, and that is absolutely true; that is Eritrea. But Eritrea, in fact, stands alone. What my statement said was that all key states in the region, all the important states in the region – and I would include among them Kenya, Ethiopia, Uganda, and other members of IGAD –

QUESTION: You're not planning to meet up with President Isaias anytime soon, are you?

AMBASSADOR CARSON: Whenever an opportunity presents itself to engage President Isaias in a conversation that will lead to peace and a cessation of Eritrean support for spoilers in the region, I will do so.

With respect to military weapons, we try as best we possibly can to ensure through a number of mechanisms that any assistance, any assistance that we give to the TFG, directly or indirectly, is accounted for and audited through

QUESTION: Are you aware of any concerns that weapons have – may have gone to insurgents?

AMBASSADOR CARSON: There are allegations out there. But let me say that because of two decades of conflict and instability in Somalia, the country is awash with arms and, in fact, is an international arms bazaar. Weapons can be acquired very easily on the black market and they can be sold very easily on the black market. We undertake, through a number of mechanisms, including one that we have intentionally put in place to monitor any support that we give, to ensure that every possible effort is maintained over the handling of any assistance we provide.

QUESTION: Andrew Quinn from Reuters. I have one question for Ambassador Cousin. I was hoping you could talk a little bit more about what the practical results will be of this consensus you spoke of with regards to the WFP activity in Somalia and the U.S. role in providing some of the food aid there. Is that going to – if it's stopped, is it going to resume? What happens now?

And for Ambassador Carson, I was wondering – and you're talking about the inclusive – hoping for an inclusive resolution of the situation. Do you – does the U.S. foresee or encourage a sort of Afghanistan-style reintegration effort, reaching out to members of al-Shabaab and so on to bring them perhaps back on board with the TFG or other sort of more centrist elements?

And secondly, what does – does the U.S. have a position on the AU's calls for UN peacekeepers in Somalia? Where do we stand on that one?

MR. DUGUID: Ambassador Cousin first. Ambassador Cousin, please.

AMBASSADOR COUSIN: Thank you. The board will continue to work with WFP to ensure that all the policies and procedures of WFP are followed in Somalia, just as they are in other countries where WFP partners with the U.S. and other countries in the delivery of food assistance. We, the United States, as well as the board continue to be committed to supporting the food security needs of the people of Somalia.

MR. DUGUID: Ambassador.

AMBASSADOR CARSON: On the issue of inclusiveness, we believe that the long-term solution for Somalia's conflict is to be found in a political reconciliation. We believe that it is important for the TFG to reach out to broaden its base as much as possible, to bring in as many clan and sub-clan groups as possible, to include among its rank other moderate Islamist groups and Somalis who were not a part of that group. I would think that any moderate Islamists who are seeking peace, who are denouncing al-Shabaab, and who want to be a part of a peace process should, in fact, be considered for inclusion in a TFG government.

With respect to the call by the AU for a UN peacekeeping force in Somalia, I think that it is important at this point that AMISOM do the job that it has committed itself to do, that more African countries step up to participate in the AMISOM force, along with the Ugandan, Burundian, and Djiboutian troops who are already on the ground.[1] The force was – for AMISOM was originally supposed to be 8,000 men. It is only slightly over 5,000. We hope other African nations will come forward to make contributions to the effort in Somalia.

The Africans, as I've indicated, have recognized the importance of stabilizing that country. This has been recognized in IGAD, in AU resolutions, and the commitment by African countries themselves to put troops on the ground. This is essentially an African effort, an African-led effort that does deserve the support of the international community. But it is important that AMISOM do the primary work of trying to establish peace in that country.

MR. DUGUID: Thank you. We'll go back to the third row, then we'll come back to the second row. Yes, please, sir.

QUESTION: I have three small questions. The first one is: I know you stated very clearly that United States is not coordinating or involving any impending military offensive by the TFG. But has the TFG requested any military assistance, specifically aerials and military strikes, from the United States Government? And if so, what was your response or your reply to them?

And the other question is: Have there been any military advisors from the United States Government or any sort of covert military presence in Somalia, in Mogadishu during the past few months? Because in Mogadishu, the talk is that there is a very strong feeling that there are some sorts of military advisors from the United States Government in Mogadishu. So can you confirm whether there has been any visit, any sort of visit from the United States Government, military advisors to Somalia?

And the third and final question: As you said, you do not want to Americanize the Somali TFG military operations. But in September 2009, we know that an operation by the United States Government killed one of the al-Qaida leaders in East Africa in Somalia. So how does these two arguments go along?

AMBASSADOR CARSON: Let me respond to all three questions. I have not, in my office, received any formal or informal request from the TFG for airstrikes or operations in support of the offensive that may be underway right now. I have seen newspaper comments of TFG leaders responding to questions that have been posed to them about whether they would be willing to accept outside support. But we have not received any, I have not received any, my office has not received any requests for airstrikes or air support or people on the ground to assist the TFG in its operations. The TFG military operations are the responsibilities of the TFG government.

I will reiterate what I said in my statement: We do not have any American U.S. military advisors on the ground assisting the TFG in its operations. It should be very clear: We do not have any American U.S. military advisors on the ground. We are not planning, coordinating any of the TFG's military operations. It is for the TFG leadership to determine how its military operates on the ground.

Finally, the issue of Americanization of this. This is not an American conflict. This is a conflict among Somalis that Africans and members of the international community recognize as being extremely important for Somalia, for the region, and for the international community. It will be up to the Somalis to ultimately resolve this conflict. The U.S., along with others in the international community, can contribute in a supporting role, which we do and acknowledge, but not to become directly engaged in any of the conflict on the ground there.

QUESTION: Just to follow up on that, the Somali Government itself is saying that the conflict is not a Somali conflict anymore; there is the clear affiliation by al-Shabaab with al-Qaida on the other and U.S. military operation last year in the south of Somalia. And in 2000, there were at least three other airstrikes. So it's not a Somali conflict anymore. Your take on that?

AMBASSADOR CARSON: That is a misreading of Somalia's history, its culture, and its long period of internecine conflict inside the country, as well as in the region itself. Somalia has been torn apart by internal strife for more than two decades. That two decades supersedes many of the terrorist activities and events that you would like to associate with Somalia.

Somalia's problems are the result and absence of a central government, constant tensions between various regions among the five major clans and many sub-clans that exist. There are indeed individuals who have more recently come in from outside of the country to take advantage of some of the chaos and disorganization that exists there, but Somalia's

problems are to be resolved by Somalis by recognizing the reasons and causes of the conflict in their own country. Somalia's people have to work together to bring peace to their country.

MR. DUGUID: Thank you. As our time is limited, let's try and limit the follow-ons, please. Yes.

QUESTION: Catherine Herridge of Fox News. How would – Ambassador, how would you characterize the relationship between al-Shabaab, which appears to be growing bolder every day, and al-Qaida in Yemen, and what that will mean for the United States?

AMBASSADOR CARSON: There is no question that some individuals, mostly in the senior leadership of al-Shabaab, are affiliated either directly or indirectly with international terrorist groups. Some would like to be even more affiliated. But it is important to recognize that al-Shabaab, which no doubt is carrying out many terrorist activities in that country, is not a homogeneous, monolithic, or – group that is comprised of individuals who completely share the same political philosophy from top to bottom.

QUESTION: But just to follow up on that, because certainly, what the – it's not an American problem. I understand what you're saying there. But certainly, there are very significant American interests involved, given that al-Shabaab is actively recruiting Americans of Somali descent in this country to train in the camps there. And just this week, al-Shabaab has said that it's not afraid of any American intervention in that country.

AMBASSADOR CARSON: The young Somalis who were recruited in this country to go back to Somalia to fight went back to fight against the Ethiopian incursion that occurred in that country. They did not go back to protest or to fight against the – any kind of a U.S. policy in that country. And it's very clear that they went back for Somali nationalistic reasons. They went back to fight Ethiopians who –

QUESTION: But we were backing the Ethiopians. Was the U.S. not backing the –

AMBASSADOR CARSON: They went back to fight against Ethiopians. The United States was not in Somalia.

MR. DUGUID: Charlie.

QUESTION: Ambassador Carson, Charlie Wolfson from CBS. Can you just give us a dollar figure here of how much aid? And maybe to the ambassador in Rome, Cousin – Ambassador Cousin, how much money is the U.S. giving for this effort either on the food side or totally?

AMBASSADOR CARSON: I'll let Ambassador Cousin speak to the food issue. But with respect to U.S. support for AMISOM, the United States, as a member of the Contact Group and as a member of the international community, has provided something in the neighborhood of $185 million over the last 18 or 19 months.[2] And that is in support of the AMISOM peacekeeping effort – Uganda, primarily, but Burundi and Djibouti as well. Funding going to the TFG from the United States has been substantially smaller, and that number is approximately $12 million over the last fiscal year.[3] So the amounts of money that we are talking about are really relatively small.

I'll let Ambassador Cousin speak to the food issue.

AMBASSADOR COUSIN: Thank you. Our food aid, our food assistance budget for Somalia is approximately $150 million. But at this time, the WFP is not operating in the southern region of Somalia, and our operational and food aid support to Somalia is limited to the northern region of Somalia only.

MR. DUGUID: Charley, then David. And I think that's about all we'll have time for. Charley.

QUESTION: Please, sir. Charley Keyes of CNN. You've spoken several times about what U.S. military assistance is not, but can you be any more specific about what U.S. military assistance to Somalia is?

AMBASSADOR CARSON: Well, let me just say the United States Government in support of AMISOM, largely through programs run by the Department of State, has, in fact, provided assistance to AMISOM. We have supported the acquisition of non-lethal equipment to the Governments of Burundi and to Uganda, in particular. We have provided them with military equipment, and this ranges every – from everything from communications gear to uniforms.

We have supported the training of TFG forces outside of Somalia, mostly in Uganda but also in Djibouti. We have paid for the transportation of the troops back from their training places abroad into the country. We have also paid for specialized training given by Ugandans to the Djiboutians to deal with such things as improvised explosive devices, training for the protection of ports and airports. But this has been done by the Ugandans, not by any U.S. Government military officials.

So those are some of the things. And everything that we have done, we have reported, as required, to the UN Sanctions Committee.

MR. DUGUID: Thank you. David, final question.

QUESTION: Dave Gollust from Voice of America. You keep reading that the transitional government, like, controls a matter of blocks in Mogadishu, that it's very weak, it's very threatened. What is your take on its survivability?

AMBASSADOR CARSON: I think the TFG has demonstrated in an enormous capacity to survive. When Sheikh Sharif took office as the head of the TFG approximately 16 months ago, there were individuals who predicted that his government would fall within a matter of months

and that he would not be able to reside and govern from Mogadishu. That has not been true. Almost a year ago, in May of last year, al-Shabaab mounted an enormously large offensive designed to break the back of the TFG and the will of AMISOM. They failed to do so. The fact that the TFG remains standing is a reflection of its resolve and the commitment of its leaders to stand up against al-Shabaab. And they are demonstrating their capacity to do so on a daily basis.

There is no doubt that the TFG is still fighting very hard to regain control over most of Mogadishu. Reports that it controls only three, four, or five city blocks are erroneous. What the TFG does control is the main port of Mogadishu, the two main airports, and all of the central government buildings. It has clear control over a third of the city. And probably two-thirds of the city, some of which is controlled by al-Shabaab, remains largely contested territory. We hope that as the TFG builds up its military forces, that it will be able to provide more security, exert more control over the city, and demonstrate its capacity to protect the citizens of the country. We also hope that it will also be more inclusive, reach out to other clans and sub-clans, and to expand its political influence, and also to be able deliver services.

But again, I want to emphasize, these are the responsibilities of the TFG. This is a Somali problem primarily that has affected the region and, to a certain extent, the international community. The United States believes that the Somalis and Africans should not – should, in fact, remain in the lead. This is not an American problem and we do not seek to Americanize the conflict there.

MR. DUGUID: Assistant Secretary Carson, thank you. Ambassador Cousin, thank you very much for appearing with us today.

Thank you, ladies and gentlemen. That concludes today's briefing. Please stand by for the regular daily press briefing, which should begin shortly.

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[1] Djiboutian troops are not on the ground in Mogadishu as of yet. They have not deployed, and may not until January 2011. AMISOM still consists entirely of Ugandan and Burundian troops.

[2] $185M is our cumulative support since 2007.

[3] $12M in in-kind support and $2M in direct cash support to the TFG.

PRN: 2010/296

Back to Top

Exhibit 3

Jamhuuriyadda Soomaaliya
Xukuumadda Federaaliga KMG ee Soomaaliya
Xafiiska Ra'iisul Wasaaraha

جمهورية الصومال
الحكومة الانتقالية الفيدرالية
مكتب رئيس الوزراء

The Transitional Federal Government of the Somali Republic
Office of the Prime Minister

Ref: XRW/0000.656 /11/10 **Date: 28.11.2010**

Dear Madam Secretary:

On behalf of the Transitional Federal Government of Somalia, I write to convey my appreciation to the Government of the United States for its continuing support to stabilize the situation in our beloved country and thereby, restore the long sought after peace and prosperity for all Somalis, once again. Your Government's efforts including the encouragement and strong, tangible support given both directly to our government and indirectly by continuing to endorse the good work of the African Union and its peacekeeping force in our nation, has been indispensable to the process of securing and rebuilding our country.

I write also to request, respectfully, that the Department of State initiate the filing of a suggestion of immunity and/or align itself with the defendant, former Prime Minister Mohamed Ali Samantar, in the matter of *Bashe Abdi Yousef, et alii, v. Mohamed Ali Samantar, Civil Action No. 04-1360*, before the United States District Court for the Eastern District of Virginia. Mr. Samantar was, as relevant to the lawsuit, the Prime Minister and head of government of Somalia from 1987 to 1990 and the First Vice President and Defense Minister of Somalia from 1982 to 1986.

The prosecution of this lawsuit against Mr. Samantar would, we feel, violate the principles of immunity available under international law to former heads of government and senior officials of sovereign states.

It would also, we feel, hinder our efforts "in forming a viable central government and in working together to improve the quality of life for all Somalis". Mr. Samantar, as you are intimately aware, has played a key role in the process to rebuild our national armed forces.

We also have concerns that the selective nature of the allegations in the lawsuit against Mr. Samantar will exacerbate the inter-clan tensions that have been at the root of so many of the difficulties that our country has faced and will face in the challenging process ahead.

Let me thank you again for the great consideration that your Government and you have shown in your past support for our efforts. I hope that we can look forward to continuing support and that our work will justify your confidence.

Sincerely,

Mohamed Abdullahi Mohamed
Prime Minister of Somalia

The Honorable Hillary R. Clinton
Secretary of State
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