THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ABUKAR H. AHMED,	:	**Case No. 2:10-cv-342**
Plaintiff	:	**District Judge: George C. Smith**
	:	**Magistrate Judge: Mark R. Abel**
vs.	:	
	:	
	:	**PLAINTIFF'S OPPOSITION TO**
	:	**DEFENDANT'S MOTION TO DISMISS**
ABDI ADEN MAGAN,	:	
Defendant	:	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Plaintiff Abukar Hassan Ahmed filed his complaint under both the Torture Victim Protection Act ("TVPA") 28 U.S.C. § 1350 (note) and the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, seeking to hold Abdi Aden Magan, former Chief of the Somali National Security Service ("NSS"), accountable for human rights abuses, namely ordering the brutal torture and unlawful detention of Plaintiff. Defendant responds by arguing that he is entitled to "official act" immunity under the common law; and that, based on affidavits filed six years ago – in another case involving completely different facts and an entirely different country (Somaliland not Somalia) – Plaintiff has failed to exhaust remedies and his claims are time-barred. Each of Defendant's bases for dismissal is without merit.

First, Defendant's claim of "official act" immunity under the common law (Motion to Dismiss at 4-9 ("Mot.")) must be rejected because there is no blanket immunity that allows Defendant to torture and abuse others with impunity. Second, Defendant has failed to meet his burden of proof as to exhaustion of domestic remedies, because he has not shown that there was an "adequate and available" remedy in "the place in which the conduct giving rise to the claim occurred." TVPA § 2(b) (exhaustion requirement for TVPA). Here, all of the allegations occurred in *Somalia*, not *Somaliland.* Yet all of

Defendant's "evidence" goes to whether Somaliland – not Somalia – would have entertained this lawsuit. None of the allegations has any connection to Somaliland and, as even the Affidavit submitted by Defendant concedes, Somaliland had no jurisdiction over this case. Campo Aff. ¶ 9.[1] Finally, Defendant's claim that the statute of limitations precludes Plaintiff from seeking redress from his torturer is simply wrong. Mot. at 12-14. The TVPA legislative history and case law require tolling of the statute of limitations while Defendant was in Kenya and before he became subject to jurisdiction in the courts of the United States. For these reasons and those set forth in more detail below, Defendant's Motion should be denied.

STATEMENT OF RELEVANT FACTS

Plaintiff was a practicing attorney and law professor at the Somali National University in Mogadishu in 1988. Ahmed Aff. ¶ 3. On or around November 1988, Defendant, who admittedly held the rank of Colonel and served as Chief of the NSS Department of Investigations, Mot. at 2, ordered that Plaintiff be detained at the NSS Prison in Mogadishu. Ahmed Aff. ¶ 7. Plaintiff was detained in prisons in Mogadishu – the capital of Somalia – for more than three months. Id. ¶¶ 7-10.

On or around the night of February 7, 1989, Defendant ordered that Plaintiff be brought to Defendant's office at NSS headquarters in Mogadishu, where the Defendant accused Plaintiff of being a member of the United Somali Congress ("USC"). Id. ¶ 10. Defendant told Plaintiff that if he did not

[1] Plaintiff separately moves to strike the affidavits of Messrs. Campo, Nur, and Abdirizak under Fed. R. Evid. 702 and 401 as they are irrelevant and not based upon facts or information upon which an expert would typically rely to reach an opinion in this case. Indeed, these affidavits were filed six years ago in a different case and have been taken from the public record there, Yousuf v. Samantar, Civ. Action No. 1:04W1360. The affidavits address conditions in *Somaliland* and not in Somalia, which is the subject of this lawsuit. Defendant has not offered any expert testimony that addresses the facts presented in this case. Because the Defendant has not refuted any of the allegations in the complaint, those allegations should be taken as true in considering this Motion. Plaintiff nevertheless submits the Plaintiff's affidavit setting forth the applicable facts in the complaint and the affidavits of Martin R. Ganzglass and Makau Mutua addressing the fact that there were no available alternative jurisdictions in which Plaintiff could have brought this complaint. Should the Court not strike the Defendant's affidavits, Plaintiff respectfully requests time in which to conduct discovery of the affiants and requests that the Court order Defendant to provide these witnesses for deposition.

confess to being a member of the USC, the NSS would obtain his confession through torture. Id. The next night, Plaintiff was brutally tortured by two men who were acting on Defendant's orders. They tied and handcuffed Plaintiff's hands and feet. Id. ¶ 11. Next, they forced him to sit down and pushed his legs back over his head, exposing his genitals. Id. Then, they squeezed Plaintiff's testicles with iron instruments, causing him excruciating pain. In addition, they forced a five-liter container of water, sand and small stones into his mouth, cutting off his air supply. Plaintiff fainted. Id. All of these acts occurred in prison in Mogadishu. Id. As a result of the torture, Plaintiff still suffers a hipbone distortion, bladder problems, and other physical and emotional difficulties. Id. ¶ 13.

Two years after Plaintiff fled from Somalia, the Siad Barre regime fell and Somalia as a unified nation ceased to exist. Id. ¶ 20; Ganzglass Aff. ¶ 9. Since then, Somalia has divided into three parts; the Northwest region is now known as the autonomous republic of Somaliland, the Northeast region is now referred to as Puntland, and the remainder of the country, primarily the south, and including the capital city of Mogadishu, is Somalia. Ganzglass Aff. ¶¶ 9, 11–12. Any actions that occurred in Mogadishu would fall under the jurisdiction of Somalia and would have to be tried there. Id. ¶ 13. Following the decline of the Siad Barre regime, Mogadishu fell into chaos and has since been marred by clan warfare. Id. ¶ 14. To this day, Somalia has yet to establish a functioning central government able to control the territory of Somalia. Id. Somalia did not have a functioning judicial system between 1989 and 2000. Id. ¶ 15. The United States does not recognize any government in Somalia. Id. ¶ 17.

ARGUMENT

I. Defendant Is Not Immune from Suit in this Action.

Defendant's contention that his position as a former foreign government official automatically cloaks him in immunity was just unanimously rejected by the Supreme Court in the very case from

which Defendant borrows the expert affidavits he submits here. See Samantar v. Yousuf, 130 S.Ct. 2278 (2010). Although the Court in Samantar recognized that *some* foreign officials might be entitled to "official act" immunity under the common law, the Court's discussion and prior cases addressing the immunity of foreign officials make clear that Defendant is not such an official and that such immunity would not extend to the acts of torture and other abuses alleged in this case. Moreover, Defendant does not claim immunity under any of the specialized immunities recognized by U.S. law, nor can he make such a claim as he is not a diplomat, consul or head of state. Id. at 6 n.6. Thus, there is no plausible basis for concluding that Defendant can invoke immunity as a shield to this lawsuit.[2]

A. The Supreme Court in *Samantar v. Yousuf* Made Clear That Not All "Official Acts" Are Immunized.

Samantar v. Yousuf rejected Defendant sole contention regarding immunity – that he was "an official acting in an official capacity [and thus] is a manifestation of the state, and [that his] acts are attributable to the state rather than to [him] personally." Mot. at 8 (citations omitted). There, the Supreme Court held that foreign officials are *not* presumptively entitled to immunity for their so-called "official acts." Samantar, 130 S.Ct. at 2290.

While the Samantar decision was based on an interpretation of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604 et. seq., which is not at issue here, the Court's analysis of the "complicated" relationship between foreign state immunity and foreign official immunity provides guidance as to the applicability of the "official act" immunity sought in this case. Samantar, 130 S.Ct. at 2290. Significantly, the Court highlighted that the state's immunity applies to the individual only in

[2] Defendant's Motion is styled as a 12(b)(6) motion for failure to state a claim, but Defendant also argues that he is moving to dismiss under 12(b)(1) (lack of subject matter jurisdiction) on this issue. See Mot. at 3. Courts consider assertion of immunity either as a personal jurisdiction issue or an affirmative defense and thus, Defendant should have brought his claim as a motion to dismiss for lack of personal jurisdiction under 12(b)(2) or as a motion to dismiss for failure to state a claim under 12(b)(6). See Lafontant v. Aristide, 844 F. Supp.128, 131–32 (E.D.N.Y. 1994) ("a head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts").

certain limited circumstances. For example, the Court noted that the immunity of a state extends to individual foreign officials "*if the effect of exercising jurisdiction would be to enforce a rule of law against the state*." and where the lawsuit would directly affect an interest of the foreign state or compel the state to act. Id. at 2290–92. The Court noted that when the state is the real party in interest, a case against an individual official could be treated as a case against the state, and thus it is the immunity of the state, not the individual, that would govern the case. Id. (citing Kentucky v. Graham, 473 U.S. 159, 166 (1985)). Similarly, lawsuits against individual officials could be dismissed where the state is a necessary party that could not be joined because of immunity pursuant to Fed.R.Civ.P. 19(a)(1)(b). Id. (citing Republic of Philippines v. Pimentel, 553 U.S. 851, 867 (2008)). In all of these examples, the state itself would be bound in some way by a judgment issued against the individual official, which is not the case here.

Courts considering immunity for domestic officials apply the same analysis and find that the critical factor in determining when a suit against an official can be equated with a suit against a state is the capacity in which the official is sued, not the capacity in which the official acted. Hafer v. Melo, 502 U.S. 21, 26–27 (1991) (suits seeking "the payment of damages by the individual defendant" do not trigger sovereign immunity because "[t]he [money] judgment sought will not require action by the sovereign or disturb the sovereign's property"); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687–88 (U.S. 1949) (suit against official for "compensation for an alleged wrong" is not against the state, but suit seeking injunctive relief is against the state if it results in "compulsion against the sovereign); see also Alden v. Maine, 527 U.S. 706, 757 (1999) ("[A] suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct * * * so long as the relief is sought not from the state treasury but from the officer personally"). Thus, it is

the operative "effect of the judgment" in "restrain[ing] the Government from acting, or compel[ling] it to act" that determines whether the state is the real party in interest and thus triggers sovereign immunity. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101 n.11 (1983).

Here, as in Samantar, the Plaintiff has sued only the Defendant for money damages out of Defendant's own pocket. Plaintiff makes no claim for damages from the treasury of Somalia, nor does he seek any other relief against Somalia. Therefore, a judgment against Defendant would not "enforce any rule against the state" of Somalia.[3] Somalia is neither an indispensible nor necessary party to this litigation and thus Defendant does not reap the benefit of any immunity that Somalia could conceivably enjoy. Moreover, Defendant unconditionally denies that he engaged in the conduct at issue, Magan Aff. ¶¶ 4–5, and posits that he did not even have the authority to commit the acts alleged in the complaint. Id. ¶ 13. Accordingly, it is disingenuous for Defendant to claim immunity of the state for conduct he claims was beyond his authority.

B. "Official Act" Immunity Cannot Bar Plaintiff's Claims Under the Torture Victim Protection Act.

The text and legislative history of the TVPA conclusively establish that Congress intended to create a cause of action against government officials acting within their official capacity and that an "official act" immunity defense would not serve as a bar to TVPA lawsuits. Indeed, the text of the statute could not be more clear, as it provides a cause of action against anyone who commits torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. §1350 note.[4] Defendant turns this statutory language on its head by arguing that because he

[3] Indeed, the United States does not even recognize any government or entity as the lawful government in Somalia. See State Dep't Note, State Dep't Background Briefing on U.S. Assistance to the Somalia Transitional Fed. Gov't (June 26, 2009).

[4] In sessions leading up to the passage of the TVPA, Congress explicitly referred to the violence perpetrated by officials under the Siad Barre regimes as proof for the need of the TVPA. See U.S. Dep't of State Country Reports on

acted under "actual or apparent authority or color of law," he must have acted in his "official capacity" and therefore enjoys immunity. Mot. at 7. Defendant's theory must be rejected as it would effectively gut the TVPA. See Hafer, 502 U.S. at 27–28 (rejecting claim of official immunity and refusing to accept the "novel proposition" that a color of state law requirement "insulates" the defendant from a personal capacity suit). Statutes should not be interpreted in a way that would render them meaningless. Butz v. Economou, 438 U.S. 478, 501 (1978).

Moreover, in setting forth who would be liable under the TVPA, Congress carefully distinguished between the individual officials amenable to suit under the TVPA and the foreign states entitled to immunity. The Senate Report states that "[t]he legislation uses the term "individual" to make *crystal clear* that foreign states or their entities cannot be sued under this bill under any circumstances: *only individuals may be sued*." S. Rep. No. 102–249, at 7 (emphasis added). Likewise, the House Report stressed that "[o]nly 'individuals,' not foreign states, can be sued under the bill." H.R. Rep. No. 102–367, at 4. The explicit purpose of the TVPA was to create a cause of action for foreign officials such as the Defendant, who commit torture and extrajudicial execution under color of law. In fact, in passing the TVPA, Congress specifically intended to codify the decisions in Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (former official was found liable for torture) and Forti v. Suárez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) (former high-ranking Argentine official was found civilly liable for acts committed by officers under his command); S. Rep. No. 102–249, at 4, 8. Congress also explicitly determined that the TVPA was intended to apply to high-ranking officials, stating that "anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them." S. Rep.

Human Rights Practices, submitted to the House Committee on Foreign Affairs and Senate Committee on Foreign Relations, 102nd Cong., 1st Sess, at 344–45 (Joint Comm. Print 1991) (recounting the extrajudicial killing of sixty to one hundred civilians and the torture of prisoners held by security forces).

No. 102–249, at 8. Thus, Defendant's contention that immunity should "operate with particular force" where the official "serv[ed] in the most senior positions of government," Mot. at 4, is belied by the legislative history of the statute.

Finally, Congress made clear that former officials would never be able to invoke immunity as a defense to a TVPA suit. Congress was clear that it did not "intend these immunities to provide *former* officials with a defense to a lawsuit brought under this legislation." S. Rep No. 102–249, at 8 (emphasis added). See also H.R. Rep. No. 102–367, at 5. The only foreign officials who might benefit from immunity in TVPA cases are *current* diplomats and heads of state, S. Rep No. 102–249, at 7–8, – and Defendant falls within neither category. Allowing former officials such as Defendant to receive blanket immunity for their acts would contravene the principles under which the TVPA was enacted and render it effectively void. In keeping with the well-settled rule that later-in-time statutes override common law principles, this Court should not allow an unsubstantiated claim of common law immunity to override a statutorily enacted cause of action explicitly intended to cover the allegations contained in this complaint. See Butz, 438 U.S. at 501 (common law immunity principles cannot leave an Act of Congress "drained of meaning"). Accordingly, Defendant's Motion must be denied.

C. Defendant Does Not Qualify For Any "Specialized" Immunity Under the Common Law.

The United States has long recognized a limited set of "specialized" immunities, codified in widely ratified treaties, such as diplomatic immunity and consular immunity. Samantar, 130 S.Ct. at 2285, n.6. U.S. courts have also recognized a common law, status-based immunity for sitting heads of state. See, e.g., Ye v. Zemin, 383 F.3d 620 (7th Cir. 2004); Lafontant, 844 F.Supp. 128. Additionally, other doctrines such as the act of state doctrine may shield officials from suit. See Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976). Rather than establish immunity for Defendant,

the cases upon which he relies merely reiterate the existence of these well-established principles. See Underhill v. Hernandez, 168 U.S. 250 (1897) (discussing act of state doctrine); U.S. v. Noriega, 117 F.3d 1206 (11th Cir. 1997) (discussing head-of-state immunity); Heaney v. Spain, 445 F.2d 501 (2d Cir. 1971) (discussing consular immunity). Mot. at 5–6. Defendant has not argued, nor could he, that he qualifies for any of these immunities.[5]

D. Defendant's Torture and Detention of Plaintiff Cannot be "Official Acts" Because They Were Outside Defendant's Official Authority.

Acts such as torture and arbitrary detention are inherently beyond the scope of an official's lawful authority and thus cannot qualify as "official acts" for purposes of immunity. See S. Rep. No. 102–249, at 7 ("[B]ecause no state officially condones torture or extrajudicial killings, few such acts, if any, would fall under the rubric of 'official actions' taken in the course of an official's duties"). Courts have recognized this point in considering official capacity immunity in the domestic context as well as for foreign sovereigns under the FSIA. See, e.g., Larson, 337 U.S. at 689 ("where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden."); Kadic v. Karadžić, 70 F.3d 232 (2nd Cir. 1995) ("we doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state");

[5] Defendant also relies upon case law applying a FSIA analysis to individuals. These cases have now been discredited by the Supreme Court in Samantar. See Herbage v. Meese, 747 F. Supp. 60, 67 (D.D.C. 1990); Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (Mot. at 7–8). Moreover, several of the cases cited by Defendant actually contradict his position. For example, in Lyders v. Lund, 32 F.2d 308 (N.D. Cal. 1929), the court rejected the defendant's claim for immunity, stating that he was "not authorized, merely on account of his official status or his being named as defendant in the suit, to claim immunity from suit on behalf of the kingdom of Denmark." Id. at 310; see Waltier v. Thomson, 189 F.Supp. 319, 320 (D.C.N.Y. 1960) (citing Lyders as establishing only when a consular official is immune); Arcaya v. Paez, 145 F.Supp. 464, 466-67 (D.C.N.Y. 1956) (same).

Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir.1992), cert. denied, 507 U.S. 1017 (1993), ("[t]hat states engage in official torture cannot be doubted, but all states believe it is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens"). As the Ninth Circuit said in In re Estate of Ferdinand Marcos, Human Rights Litig. (Hilao v. Marcos), 25 F.3d at 1467, 1472 (9th Cir. 1994), "acts of torture, execution, and disappearance were clearly acts outside of [the defendant's] authority as President… were not taken within any official mandate and were therefore not the acts of… a foreign state."

This well-recognized restriction on the scope of lawful authority is not a "vague 'unlawfulness'" exception, as Defendant asserts. Mot. at 8. To the contrary, these human rights abuses violate international law, domestic Somali law, and U.S. law. Thus, they are entirely distinct from the cases cited by Defendant, which involve much lesser infractions by government officials. See Waltier, 189 F. Supp. at 321 n.6 (making false statements justifiable); see also Kline v. Kaneko, 685 F. Supp. 386, 389 (S.D.N.Y. 1988) (court refused to question the potentially unlawful internal administration of Mexico's immigration laws without evidence from the plaintiff that defendant was acting outside of his official duties). Although making false statements was justifiable as part of defendant Thompson's official power in Waltier, torturing and detaining Plaintiff in this case was beyond anything that could have been justified in the exercise of Defendant's duties.

Refusing to extend immunity to officials such as Defendant who violate customary international law will not, as Defendant asserts, result in an "end-run around the immunity of the state," Mot. at 8, because the officials would have acted outside of the power conferred upon them by the state.[6] Indeed,

[6] The Samantar Court expressly rejected the notion that providing individual officials with less immunity than foreign states would invite an end run around the FSIA. Samantar, 130 S.Ct. at 2292 ("Finally, our reading of the FSIA will not 'in effect make the statute optional,' as some Courts of Appeal have feared, by allowing litigants through "artful

Article 27.1 of the Somali Constitution prohibited the use of torture. Constitution of the Somali Democratic Republic, § 27.1. Articles 26.2 and 26.3 prohibited arbitrary detention, and Article 19 required Somalia to follow customary international law. Id. at §§ 26.2, 26.3, 19. Thus, the abuses alleged in the Complaint were not authorized by the State of Somalia. Finally, even Defendant acknowledges that he did not have the authority to detain Plaintiff. Defendant asserts that "[i]f the Plaintiff was detained for three months in 1988 and 1989, Mr. Magan would not have had authority to detain him." Mot. at 2. Because the alleged actions were outside the scope of Defendant's authority, he cannot claim any "official act" immunity as an excuse for his behavior.

II. DEFENDANT HAS NOT CARRIED HIS BURDEN OF PROVING THAT PLAINTIFF FAILED TO EXHAUST REMEDIES IN SOMALIA

A. Defendant Has Proffered No Evidence that Somalia Provides an Alternative and Adequate Remedy for Plaintiff's TVPA Claim.

To succeed on his motion to dismiss, Defendant has the substantial burden of establishing that *Somalia* – "the place in which the conduct giving rise to the claim occurred," provided an "adequate and alternative" forum in which to bring this action. See S. Rep. No. 102–249, at 10 (1991) (exhaustion of remedies is an affirmative defense that requires the defendant to show that "domestic remedies exist that the claimant did not use"); Jean v. Dorelien, 431 F.3d 776, 781 (11th Cir. 2005) ("[T]he exhaustion requirement pursuant to the TVPA is an affirmative defense, requiring the defendant to bear the burden of proof. This burden of proof is substantial."); Chavez v. Carranza, 407 F.Supp.2d 925, 930 (W.D. Tenn. 2004) (quoting S.Rep. No. 102-249, at 9–10) ("Nonexhaustion of remedies is an affirmative defense, however, and '[t]he ultimate burden of proof and persuasion on the issue of exhaustion of remedies ... lies with the defendant.'"), aff'd , 559 F.3d 486 (6th Cir. 2009); Sinaltrainal v. Coca-Cola,

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pleading….to take advantage of the Act's provisions or, alternatively, choose to proceed under the old common law.") (citations omitted).

256 F.Supp.2d 1345, 1358 (S.D. Fla 2003); Wiwa v. Royal Dutch Petroleum, 2002 WL 319887 at 17 (S.D.N.Y. Feb. 28, 2002) (the defendant must prove that an alternative and adequate remedy is available in the country where the action underlying the claim occurred) (emphasis added). To be adequate, the remedy must include "certain rights such as the right to a speedy and fair trial and the remedy must be available in the forum in which the action underlying the claim occurred." Sinaltrainal, 256 F.Supp.2d at 1358.

In allocating the burden of proof on this issue, the Senate recognized that it is often impossible for a victim of human rights violations to bring suit in the country where the violation occurred and that courts should assume that plaintiffs have exhausted local remedies when filing a claim in the United States under the TVPA.

> [T]orture victims bring suits in the United States against the alleged torturer only as a last resort… Therefore, as a general matter, the committee recognizes that in most instances the initiation of litigation under [the TVPA] will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred. The committee believes that courts should approach cases brought under the proposed legislation with this assumption.

S. Rep. No. 102–249, at 9–10. In keeping with this presumption and the heavy burden placed on defendants, courts considering the failure to exhaust domestic remedies defense to TVPA claims resolve questions in favor of the plaintiff. See Enahoro v. Abubakar, 408 F.3d 877, 892 (7th Cir. 2005) ("[T]o the extent that there is any doubt…both Congress and international tribunals have mandated that….doubts [concerning exhaustion are to] be resolved in favor of the plaintiffs").

Defendant does not provide any evidence about the availability of remedies in *Somalia.* Instead, Defendant proffers evidence from another case, which is not subject to cross-examination here, regarding the viability of remedies in the region of *Somaliland*, a self-declared state that has not been

recognized by the United States. Ganzglass Aff. ¶ 10. However, all of the alleged facts in the Complaint took place in Mogadishu, the capital of Somalia. Ahmed Aff. ¶¶ 7, 14. Somaliland declared its independence from Somalia in 1991 and has a completely separate and distinct judiciary from Somalia. Ganzglass Aff. ¶¶ 10, 13. Even if Somaliland were considered a state for the purposes of the exhaustion analysis, it is most definitely not "the place in which the conduct giving rise to the claim occurred," and thus, the TVPA does not require exhaustion of remedies there. Moreover, as even Defendant's own affiant states, the judicial system of Somaliland would not entertain claims arising out of Somalia. Ganzglass Aff. ¶ 10; Campo Aff. ¶ 8. Therefore, Defendant's reliance on evidence about *Somaliland's* court system tells the Court nothing about the relevant court system in Somalia and is not sufficient to overcome the presumption that Plaintiff did exhaust his remedies.[7]

B. There is No Exhaustion of Remedies Requirement Under the ATS.

Each of Plaintiff's claims is brought under both the TVPA and ATS. While the TVPA has an exhaustion of remedies requirement, courts have generally concluded that the ATS does not. See, e.g., Jean, 431 F.3d at 781; Doe v. Saravia, 348 F. Supp. 2d 1112, 1157–58 (E.D. Cal. 2004); Jama v. I.N.S., 22 F.Supp.2d 353, 364 (D.N.J. 1998); Abiola v. Abubakar, 267 F. Supp. 2d 907, 910 (N.D. Ill. 2003) (TVPA's exhaustion requirement does not apply to ATS claims).[8] Thus, the exhaustion requirement should not apply to Plaintiff's ATS claims.

[7] Defendant also cites to a U.S. State Department Report for the proposition that Somaliland has a functioning judiciary. Mot. at 11. While the report acknowledges that a judiciary exists, it goes on to conclude that: (1) "the judiciary is not independent in practice;" (2) "[t]here is a serious lack of trained judges and of legal documentation in Somaliland, which caused problems in the administration of justice; and (3) "Untrained police and other persons reportedly served as judges." In addition, the report concludes that *Somalia* has no national judicial system. Id. United States Department of State, *U.S. Department of State Country Report on Human Rights Practices 2003 - Somalia* , 25 Feb. 2004 at section 1(e).

[8] But see Sarei v. Rio Tinto, 550 F.3d 822 (9th Cir. 2008) (en banc) (plurality opinion) (Court found that exhaustion may be applied as a prudential matter where the claims have a weak nexus to the United States and do not involve matters of "universal" concern, adding that exhaustion is not a prerequisite to jurisdiction for ATS claims and is instead an affirmative defense upon which defendant bears the burden of proof.), on remand, 650 F.Supp.2d 1004 (C.D.Cal. 2009) (finding that

III. PLAINTIFF'S CLAIMS ARE WITHIN THE STATUTE OF LIMITATIONS

A. The Statute of Limitations was Tolled During Defendant's Absence from the United States.

"[T]he basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one 'of legislative intent whether the right shall be enforceable ... after the prescribed time.'" Burnett v. New York Cent. R. Co., 380 U.S.424, 426 (alteration in original) (quoting Midstate Horticultural Co. v. Penn. R.R. Co., 320 U.S. 356, 360 (1943)). The Senate Report on the TVPA explicitly "calls for consideration of all equitable tolling principles in calculating this [statute of limitations] period with a view towards giving justice to plaintiff's rights." S. Rep. No. 102–249, at 10–11.

> Illustrative, but not exhaustive, of the types of tolling principles which may be applicable include the following. The statute of limitation[s] 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.

(footnotes omitted) (emphasis added). In TVPA and ATS cases, courts consistently toll the statute of limitations until the defendant becomes subject to the jurisdiction of United States. See Arce v. Garcia, 434 F. 3d 1254, 1262 (11th Cir. 2006) ("Congress clearly intends that courts toll the statute of limitations so long as the defendants remain outside the reach of the United States courts or the courts of other, similarly fair legal systems."); see also Jean, 431 F.3d at 779 (reversing a statute of limitations dismissal and finding that "the statute of limitations must be tolled at least until Dorélien entered the United States and personal jurisdiction was obtained over him"); Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir. 1996) (citing the Senate report for the proposition that the statute of limitations is

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some, but not all, of plaintiffs' claims were sufficiently universal and therefore did not warrant a prudential exhaustion requirement).

subject to tolling for periods in which the defendant is absent from the jurisdiction). Thus, the statute of limitations in this case must be tolled until May 2000 when Defendant, by his own admission, entered the United States. (Def.'s Aff. ¶ 15; Mot. at 3). This suit was filed in April 2010, within ten years of Defendant's arrival in the United States, and is therefore timely.

B. Plaintiff Did Not Have an Adequate Remedy in Kenya and Therefore Defendant's Time in Kenya Must be Excluded from the Statue of Limitations Calculation.

Defendant argues that Plaintiff could have filed this suit in Kenya while Defendant lived there from 1991 to 2000. However, Defendant has not shown, and cannot show, that Kenya provided an adequate and available remedy to the Plaintiff. Defendant states, without supporting evidence or citation to legal authority, that Kenya's legal system is similar to that found in western or European Countries. Mot. at 13. This bald conclusion does not inform the court whether Kenya has a fair system of justice that would provide a remedy for torts in violation of international law committed outside of Kenya and inflicted upon a plaintiff with no connection to that country.

Indeed, neither the penal code nor civil code of Kenya provides a cause of action for torture, cruel, inhuman or degrading treatment, or arbitrary detention committed outside of Kenya. Kenya ratified the United Nations Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") in 1997, which required Kenya to enact implementing legislation to criminalize torture.[9] Kenya did so, but elected only to apply the prohibition against torture to police officers in Kenya. The 1997 amendment to the Police Act of the Laws of Kenya, prohibits acts of torture and cruel, inhuman or degrading treatment only by police officers in Kenya.[10] Moreover, the CAT does not cover

[9] Article 2(1) states: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment art 2(1), 10 Dec. 1984, 1465 U.N.T.S. 85.

[10] Article 14A of the police act states: "2) No police officer shall subject any person to torture or to any other cruel, inhuman or degrading treatment; 3) Any police officer who contravenes the provisions of this Article shall be guilty of a

Plaintiff's claim of arbitrary detention. Comp. ¶¶ 88–94; P's Aff. ¶¶ 7–8. Finally, Defendant has not met his burden of showing that Plaintiff could have brought an action in Kenya between 1991 and 2000 for violations of international law committed by a Somalian in Somalia. Accordingly, the statute of limitations must be tolled during the years that Defendant lived in Kenya.[11]

C. Extraordinary Circumstances Justify Equitable Tolling of This Complaint.

The Sixth Circuit and other courts have also recognized that "the existence of extraordinary circumstances justifies application of the equitable tolling" for ATS and TVPA claims. Chavez, 559 F.3d at 492; see also Hilao, 103 F.3d at 773 (tolling the statute of limitations for TVPA and ATS claims against former Philippine dictator Ferdinand Marcos until the Marcos regime was overthrown); see Arce, 434 F.3d at 1262-63 (tolling the statute of limitations under the TVPA and ATS until the signing of the Peace Accord in 1992 because the fear of reprisals against plaintiffs' relatives orchestrated by people aligned with the defendants excused the plaintiffs' delay); Cabello v. Fernandez-Larios, 402 F.3d 1148, 1155 (11th Cir. 2005) (tolling the statute of limitations under the TVPA and ATS "[u]ntil the first post- *junta* civilian president was elected in 1990" for claims brought against a Chilean military officer).

War and widespread violence in the country in which the cause of action accrued and fear of reprisals against plaintiffs and potential witnesses have specifically been recognized as "extraordinary circumstance[s]" that will toll the statute of limitations. See Carranza, 559 F.3d at 494 (holding that the violence in El Salvador and fear of reprisals was an extraordinary circumstance that justified equitable

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felony." Police Act, (1997), The Laws of Kenya Chapter 84 §14A, *available at* www.kenyalaw.org. The Police Act was put into force "to provide for the functions, organization and discipline of the Kenya Police Force and the Kenya Police Reserve." Police Act, preamble.

[11] Defendant also argues that Plaintiff could have sued him in Somaliland as early as 1991. For the reasons stated in section II(A), *supra*, Defendant has not shown that Plaintiff could have maintained a suit against him in Somaliland. Namely, the judicial system of Somaliland would not entertain claims arising out of Somalia, Ganzglass Aff. ¶ 10; Campo Aff. ¶ 8, and Somaliland is not recognized as an independent State. Ganzglass Aff. ¶ 10.

tolling of the statute of limitations for plaintiff's TVPA and ATS claims). The Sixth Circuit has held that:

> [W]here plaintiffs legitimately fear reprisals against themselves or family members from the regime in power, justice may require tolling. These circumstances, outside plaintiffs' control, make it impossible for plaintiffs to assert their TVPA and ATS claims in a timely manner. In such extraordinary circumstances, equitable tolling of TVPA and ATS claims is appropriate.

Id. at 493.[12]

After Plaintiff was released him from jail, Plaintiff was still under surveillance by Defendant's officers and was forced to go into hiding and flee Somalia on August 21, 1989. Ahmed Aff. ¶¶ 17, 19–20. Even after the fall of the Siad Barre regime in 1991, the situation in Somalia remained too dangerous for Plaintiff to file a case, for witnesses to testify, or for lawyers to investigate the case. Ganzglass Aff. ¶¶ 10, 15, 17; U.S. Dep't of State, *2009 Country Reports on Human Rights Practices - Somalia*, 11 Mar. 2010 at 1(e) Denial of Fair Public Trial, *available at* www.unhcr.org/refworld/docid/4b9e52bdc.html; U.S. Dep't of State, *U.S. Dep't of State Country Report on Human Rights Practices 1993 - Somalia*, 30 Jan. 1994, *available at* www.unhcr.org/refworld/docid/3ae6aa534.html. Furthermore, during the time period alleged in the Complaint and up until the present, Plaintiff's immediate family members resided in Somalia. Ahmed Aff. ¶ 21. Therefore, it would not have been safe or practicable to pursue human rights claims in Somalia.[13] These facts at the very least raise a genuine issue of material fact for trial.

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[12] See also Hilao, 103 F. 3d at 773 (citing "intimidation and fear of reprisals" as factors supporting equitable tolling); Doe v. Saravia, 348 F. Supp. 2d at 1147–48 (tolling the statute of limitations for twenty-three years, based in part upon the fear of reprisal which lasted well after the El Salvadoran security forces were disbanded); Jean, 431 F.3d at 779–80; Cabello, 402 F.3d at 1155.

[13] Defendant claims that Plaintiff should not have feared reprisal after the Barre regime fell because members of Plaintiff's clan assumed power. Yet even Defendant's own affiant states that while some regions have experienced stability, Mogadishu has not, instead experiencing "clan warfare." See Abdirizak Aff. at ¶ 9. Clan warfare has led to extreme violence in and around Mogadishu. It is simply not possible to safely bring a human rights claim in Somalia.

CONCLUSION

For the foregoing reasons, the Court should deny Defendant's motion to dismiss in its entirety.

Dated: July 6, 2010

ABUKAR HASSAN AHMED,

By: s/ Tiffany T. Smith

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2010, I electronically transmitted the foregoing Plaintiff's Opposition to Defendant's Motion to Dismiss to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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IN THE UNITED STATES DISTRICT COURT
SOUTHEN DISTRICT OF OHIO
EASTERN DIVISION

ABUKAR HASSAN AHMED	:	**Case No. 2:10-cv-342**
Plaintiff,	:	**Judge Robert C. Smith**
	:	**Magistrate Judge Abel**
v.	:	
ABDI ADEN MAGAN	:	

DECLARATION OF ABUKAR HASSAN AHMED

I, Abukar Ahmed, declare as follows:

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

2. I was born in Mogadishu, Somalia. I am a member of the Abgaal sub-clan of the Hawiye clan and my mother is the Shaanshiye sub-clan of the Reer Hamar clan.

3. I was a practicing attorney in Mogadishu and constitutional and international law professor at Somali National University from January 1973 to July 1989.

4. On or about January 21, 1981, armed officers from the ruling Somali Revolutionary Socialist Party (SRSP) entered my home and took me to the SRSP Prison near Villa Somalia, the presidential palace in Mogadishu. The next morning, I was transferred to the NSS Prison in north Mogadishu. I

Amnesty. They continually threatened that if I did not confess they would kill me and no one would know where my body was.

10. On or about February 7, 1989, I was taken to Defendant's office at NSS Investigations. Defendant accused me falsely of being a member of the newly established United Somali Congress ("USC"). I denied being a member of the USC. I was actually in prison when the USC was established in Rome, Italy. Defendant told me that if I did not confess, they would torture me to get my confession.

11. On or about February 8, 1989, two officers came to my cell on Defendant's orders. They blindfolded me, took me from my cell to the interrogators. I was tortured that night. They tied my hands together with cloths and then handcuffed me. My feet were also tied together with cloths and then handcuffed. They forced me to sit down, then they pushed my legs back over my head, exposing my genitals. They squeezed my testicles with iron instruments, causing me excruciating pain. They forced a five-liter container of water, sand and small stones into my mouth, cutting off my air supply. I fainted. When I regained consciousness, I was beaten.

12. While they were torturing me, they asked me about the USC.

13. Because of my torture, I suffer from a hipbone distortion, which makes it painful for me to sit for extended periods of time. I also suffered an injury to my bladder and I am now incontinent. At night, I feel pain all over my body and I regularly have nightmares.

remained imprisoned, without charge, including solitary confinement for a year and three months in the NSS prison known as "Godka" or "the Hole." This prison was under the responsibility of the NSS Benadir Region.

5. While in prison, I became an Amnesty International Prisoner of Conscience and Amnesty campaigned for my release from prison.

6. I was released without explanation in March 1986. After my release, I returned to practicing law and teaching at the Somali National University in Mogadishu.

7. On or about November 20, 1998, three National Security Service ("NSS") officers approached me in the center of Mogadishu and confiscated a copy of an Amnesty International report that I was carrying. The NSS officers handcuffed me and took me to the NSS prison located in the unventilated cell of the NSS Headquarters in Mogadishu.

8. I was placed in solitary confinement, a small windowless cell, with continuous artificial lighting. My left wrist was tightly handcuffed to my right leg twenty-four hours a day, except during interrogations. I was placed on a diet of rancid bread and butter and tea once a day. I was forced to sleep on cold or wet floors without a mat or blanket. There was no toilet in my cell. I had to discharge my urine in empty milk cans.

9. I was interrogated day and night by two NSS officers under the command of Abdi Aden Magan. The officers accused me of being a contributing writer to

14. At the end of February 1989, I was transferred from the NSS Prison to the Central Prison, also in Mogadishu. After my transfer, I was advised that I was being charged with authoring subversive material, a violation of Article 19 (Law N. 54, 1970). That charge carried the death penalty. This was the first time that I learned the nature of the charge against me.

15. The day before my trial, I received notice that the charges had been reduced to Possession of Subversive Material, a violation of Article 18 (Law N. 54, 1970), which carried a five to fifteen year sentence or a fine of 5,000 to 15,000 Somali shillings.

16. On or about March 8, 1989, I was taken to the National Security Court. During the trial, I told the Judges and others present that I had been tortured on Defendant's orders. The trial lasted less than one hour. I was convicted of a violation of Article 18 (Law N. 54, 1970). A friend of mine paid the fine of 15,000 Somali shillings and I was released.

17. After my release, I returned to law practice and teaching. NSS officers routinely followed me and questioned my students about my activities. They also went to my mother's house looking for me.

18. A few months after my release, I ran into Defendant at the office of the Attorney General of the National Security Court. During that meeting, the Defendant told me that he was above the law.

19. On or about July 14, 1989, the NSS arrested several prominent figures and critics of the government, including a prominent human rights lawyer, Dr. Ismail Jimale Ossoble and the son of the First Somali President, Eng. Abdulkadir Aden Abdulle. Several NSS officers went to my home, but I was away on business. When I returned home the next day, my mother advised me that the NSS officers had come to our home and urged me to hide.

20. On or about July 14, 1989, I went into hiding at a friend's home. I remained in hiding until on or about August 20, 1989, when I fled Somalia to Kenya.

21. I have had family residing in Somalia since I fled in 1989. One of my brothers was killed by extremists in Somalia in 2007. My mother, who lived in Somalia her entire life, recently passed away in October 2009.

22. On my only return trip to Somalia in 2002, I was shot in North Mogadishu by members of a group who call themselves the Militia of Islamic Court.

23. I have feared reprisal not only because of my clan affiliation but because I was a prominent and outspoken critic of efforts to take away the human and constitutional rights provided in the Somali constitution.

Executed on 05 July 2010

ABUKAR HASSAN AHMED

IN THE UNITED STATES DISTRICT COURT
SOUTHEN DISTRICT OF OHIO
EASTERN DIVISION

ABUKAR HASSAN AHMED	:	**Case No. 2:10-cv-342**
Plaintiff,	:	**Judge Robert C. Smith**
	:	**Magistrate Judge Abel**
v.	:	
ABDI ADEN MAGAN	:	
	:	

DECLARATION OF MARTIN R. GANZGLASS

I, Martin R. Ganzglass, declare as follows:

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

BACKGROUND

2. I graduated from Harvard Law School in 1964 with a LLB degree. I am admitted to the Bars of the State of New York and the District of Columbia. I was a principal in the firm of O'Donnell, Schwartz, and Anderson, P.C., from 1998 until 2008, when I retired, and am now

Of Counsel to that firm. From 1972 to 1988, I was a principal in the firm of Delson & Gordon.

3. As set forth below, I have extensive experience in countries in the Horn of Africa, including Somalia. As a result of this involvement, I am very familiar with current conditions and the legal systems in the regions of the former country of Somalia.

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

5. I also was a Contributor to Constitutions of the Countries of the World, Oceans Publications, Blaustein & Fantz editors, for the portion on Somalia in 1971, 1979, and 1981.

6. From 1972 to 1988, while I was with the firm of Delson & Gordon, I represented the Embassy of the Somali Democratic Republic in the United States and the Somali Ministry of Mineral and Water

Resources. During this time, I also did occasional work for Somali Airlines. While I was with the firm of Delson & Gordon, I made at least four visits to Somalia between 1979 and 1986.

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

8. I have continued to remain in contact with Somali friends and colleagues in the United States and Canada and to read about developments in Somalia.

SOMALIA COUNTRY CONDITIONS AND JUDICIAL SYSTEM

9. From 1969 to 1991, Siad Barre was President of Somalia. In 1991, the government of Siad Barre was ousted from power. Following

the overthrow of the regime, Somalia ceased to exist as a nation. It disintegrated into regions or districts, controlled by warlords using clan-based militias to practice extortion, murder, rape, and mayhem.

10. In 1991, Somaliland declared its independence from Somalia. Since then, Somaliland has been a self-declared autonomous country, though it has yet to be recognized by the United States or the United Nations.

11. Somaliland occupies the Northwest territory of what was formerly known as Somalia. The capital of Somaliland is Hargeisa.

12. In the Northeast corner of the country sits another autonomous region called Puntland.

13. Somaliland has its own independent judicial system, separate and apart from the system in Somalia.

14. Between 1991 (when it gained independence) and up until the present time, Somaliland courts have not had jurisdiction to hear cases in which the allegations giving rise to the complaint stemmed from conduct in Somalia or Puntland. Since independence, Somaliland courts have heard only those cases where the underlying

facts or cause of action occurred in Somaliland. In this regard, I agree with paragraph 8 of the Affidavit of Alessandro Campo.

15. The capital of Somalia is Mogadishu. There has not been a central functioning government in control of Somalia since the collapse of the Siad Barre regime in 1991. Since 1991, there have been at least fourteen attempts to form a central government. Presently, Mogadishu is still beset by clan warfare and clan-based violence.

16. From 1960 until 1969 when Siad Barre seized power, Somalia had an independent judiciary. During the Siad Barre regime, however, Siad Barre and his political establishment controlled the courts. Thus, during most of the Siad Barre regime, Somalia lacked an independent, impartial, and functioning judiciary. No human rights case (or any other type of case) was brought against the NSS during the Siad Barre regime.

17. Since the collapse of the Siad Barre regime in 1991, there has been no functioning government in Somalia and thus no functioning and independent judiciary, and it has not been possible to litigate a human rights claim alleging torture and arbitrary detention in Somalia. Also, Somalia has been beset with rampant violence and mayhem, there by making it dangerous to try to investigate a

human rights claim against a former member of the Siad Barre regime.

18. **Somali law did not authorize torture or other human rights abuses. In fact, Article 27.1 of the Somali Constitution prohibited torture ("A detained person shall not be subject to physical or mental torture."); and Article 26 prohibited arbitrary detention. Article 26, §2 provided,** "No person shall be liable to any form of detention or other restrictions of personal liberty, except when apprehended in flagrante delicto or pursuant to an act of the competent judicial authority in the cases and in the manner prescribed by the law." Article 26, §3 provided "Any person who shall be detained on grounds of security shall without delay be brought before the judicial authority which has competence over the offence for which he is detained within the time limit prescribed by law."

19. **The U.S. government provides support to the Transitional Federal Government of Somalia, that is the Government currently attempting to assert control over Mogadishu and the southern regions of the country. The U.S. government does not recognize any government in Somalia.**

20. **The U.S. government does not recognize the government of the Somaliland Republic. I am aware of two cases in which the U.S. and Canada attempted to deport Somalis from their countries to Somaliland. The Somaliland Government refused to accept the deportees on the grounds that they had**

never lived in Somaliland, had no family or tribal affiliations in Somaliland and that Somaliland as a sovereign country was not obligated to accept any Somali from any other country merely because they were Somali.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct. Executed on July 5th 2010.

Martin R. Ganzglass

MARTIN R. GANZGLASS

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ABUKAR H. AHMED,	:	**Case No. 2:10-cv-342**
Plaintiff	:	**District Judge: George C. Smith**
	:	**Magistrate Judge: Mark R. Abel**
vs.	:	
	:	
	:	
ABDI ADEN MAGAN,	:	
Defendant(s)	:	

DECLARATION OF DR. MAKAU W. MUTUA

I, Makau W. Mutua, hereby declare the following information to be true:

BACKGROUND

1. I am a graduate of the University of Nairobi in Kenya and hold a LL.B. and LL.M. degree in law from the University of Dar es Salaam in Tanzania. I also hold a Masters of Law (L.L.M) and Doctorate of Juridical Science (S.J.D) from Harvard Law School in Cambridge, Massachusetts.

2. I am currently the Dean and State University of New York Distinguished Professor of Law at the University at Buffalo Law School. I am also the Chairman of the Kenya Human Rights Commission and have held this position since 1992.

3. My experience in Kenya is extensive. From 2002 to 2003, I served as the Scholar-in-Residence at the Kenya Human Rights Commission in Nairobi and was appointed by the Government of Kenya as Chairman of the Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission. I also served as a delegate to the National Constitutional Conference in Kenya and produced a draft constitution for Kenya.

4. In 1997, I served as the human rights expert for the Kenya Human Rights Commission in Nairobi.

5. From 1992 and 1993, I served as a legal expert in a mission to Kenya hosted by the International Center for Human Rights and Democratic Development.

6. I have written extensively about international human rights law, Kenyan law and Kenyan human rights, including: Human Rights: A Political and Cultural Critique (2002); The Ideology of Human Rights, 36 VIRGINIA JOURNAL OF INTERNATIONAL LAW 589-857 (1996) [SSRN]; Kenya's Quest for Democracy: Taming Leviathian (Boulder:

Lynne Rienner Publishers, 2008); Human Rights in Africa: the Limited Promise of Liberalism, 51 African Studies Review 17-39 (2008) [SSRN].

KENYAN LAW

7. It is my opinion that from 1991 up until the end of the year 2000, Kenyan law did not provide a remedy for victims of crimes or torts in violation of international law committed outside of Kenya.

8. It is my opinion that during 1991 to 2000, Kenyan courts did not have jurisdiction to hear allegations of torture, cruel, inhuman or degrading treatment or punishment, or arbitrary detention committed outside of Kenya.

9. Kenya ratified the United Nations Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment ("Convention against Torture") in 1997. Following the ratification of this treaty, the government of Kenya has not enacted implementing legislation providing a cause of action for victims of torture or cruel, inhuman or degrading treatment or punishment committed outside of Kenya. Nor did the Convention against Torture provide a remedy, in and of itself, for victims of torture or cruel, inhuman, or degrading treatment or punishment within the national courts of Kenya during the period between 1991 and 2000. Furthermore, the Convention against Torture does not provide a remedy in Kenya for victims of arbitrary detention.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 2, 2010.

Dr. Makau W. Mutua