

Explainer on *Warfaa v. Ali*

On May 13, 2019, the case of *Farhan Mohamoud Tani Warfaa v. Yusuf Abdi Ali* (a.k.a. “Tukeh”) will go to trial in the Eastern District of Virginia. The trial, which will adjudicate Mr. Warfaa’s claims under the Torture Victims Protection Act (TVPA),¹ is the third of such cases brought in the United States against figures from the regime of former Somali dictator Siad Barre. The Stanford International Human Rights and Conflict Resolution Clinic will conduct legal monitoring of the trial to inform Americans and Somalis of the proceedings as they unfold.

I. Historical Background

Siad Barre rose to power through a 1969 military coup against the then-President of Somalia, Ali Shiermarhé.² Barre went on to institute a system of government he called “scientific socialism,” putatively to replace the existing clan structure of the country.³ But his rule soon degenerated into clan warfare.⁴ Although people of all ethnic groups were affected by the conflict, it is particularly relevant here that the Barre regime waged a campaign of bloody retribution against the Isaaq clan, closely associated with the Somali National Movement, a group seeking to establish an independent Somaliland.⁵ Barre was eventually chased from power in 1991 as violence moved into Mogadishu.⁶ It is from the actions of the Barre regime against the Isaaq clan in Somaliland that this suite of cases emerged. The cases described below, as important as they are, capture only one aspect of the injustices faced by Somalis during the Barre regime.

It is appropriate, then, to give notice to the full scope of clan violence under the Siad Barre regime and since. Upon his ascent to power, Barre designated certain clans as enemies, including the Isaaq, Hawiye, and those members of the Darood clan outside of Barre’s own sub-clan, the Marreehaan.⁷ But the violence was not uni-directional; the incursion of the state into

¹ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)).

² Jean-Christophe Mabire, *Somalie, l’interminable crise*, 2003(4) HÉRODOTE 57, 58 (2003).

³ Jeffrey Clark, *Debauchery in Somalia*, 1992/93(1) FOREIGN AFF. 109, 110 (1992).

⁴ *Id.* at 111.

⁵ *See id.*; Mabire, *supra* note 2, at 58-59. Somaliland now claims to be an independent nation, although it has received no international recognition, and is widely perceived elsewhere in Somalia to still be a region of Somalia, albeit one that is governed relatively autonomously by the Somaliland Authority. *See, Africa : Somalia*, CIA: THE WORLD FACTBOOK (last updated Apr. 19, 2019), <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html>.

⁶ Clark, *supra* note 3, at 112.

⁷ Mohamed Haji Ingiriis, *State and Clan Violence in Somalia*, 8 AFRICAN CONFLICT & PEACEBUILDING REV. 73, 79-80 (2018).

clan relations heightened inter-clan rivalry, and made violence between all clans more likely.⁸ In the time since the fall of the Barre regime, suspicion both between and within clans has only deepened.⁹ In the South of country, where violence has been most intense from the 1990's on, conflict has largely been between various sub-clans of the Hawiye and Darood.¹⁰ Thus, all of the regions, and all of the clans, of Somalia have been affected by the violence engendered by Siad Barre.

II. CJA's Somali Cases

The Center for Justice and Accountability (CJA) is a non-profit organization whose mission is to deter torture, war crimes, crimes against humanity, and other severe human rights abuses around the world through innovative litigation, policy, and transitional justice strategies.¹¹ As part of this work, CJA has brought the following three cases in federal court on behalf of victims and survivors of the Siad Barre regime.

a. Yousuf v. Samantar

The first case in the trilogy, *Yousuf v. Samantar*, dealt with four plaintiffs' claims against Mohammed Ali Samantar, the former Prime Minister and Minister of Defense under Barre.¹² Samantar was forced to admit in open court, in front of the plaintiffs, that he was responsible for the arbitrary detention, torture, and attempted extrajudicial killings to which they had been subject.¹³

The case also created important Supreme Court and Fourth Circuit precedent. First, the Supreme Court held that individual foreign officials are not foreign "agencies or instrumentalities" within the meaning of the Foreign Sovereign Immunity Act (FSIA) and cannot claim to be immune to suit under the FSIA.¹⁴ The Fourth Circuit Court of Appeals subsequently ruled that there was no common law conduct-based official acts immunity for violations of *jus cogens* norms, even when those actions were undertaken in an official capacity.¹⁵ Practically, this

⁸ *Id.* at 82-83.

⁹ *Id.* at 83.

¹⁰ Gitau Muthuma, *Clans and crisis in Somalia*, GUARDIAN (May 6, 2007), <https://www.theguardian.com/commentisfree/2007/may/06/clansandcrisisinsomalia>.

¹¹ The Center for Justice and Accountability, *Mission & History* (2019), available at <https://cja.org/who-we-are/mission-and-history/>. CJA is working with pro bono co-counsel DLA PIPER on the *Warfaa* case.

¹² *Yousouf v. Samantar*, CJA (last visited Apr. 11, 2019), <https://cja.org/what-we-do/litigation/yousuf-v-samantar/>.

¹³ *Id.*

¹⁴ *Samantar v. Yousof*, 560 U.S. 305, 315-16 (2010).

¹⁵ *Yousouf v. Samantar*, 699 F.3d 763, 776-777; see RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW, § 451, note 1 (AM. LAW INST. 2018).

means that foreign officials who commit crimes against humanity, engage in human trafficking, or effect genocide—commonly recognized *jus cogens* violations in international law—can be subject to suit.¹⁶

b. Ahmed v. Magan

In the second case of the trilogy, *Ahmed v. Magan*, Professor Abukar Hassan Ahmed won a suit against the former head of investigations of the Somali National Security Service (NSS), Abdi Aden Magan.¹⁷ Professor Ahmed was detained in solitary confinement and subject to starvation and torture at Magan’s direction.¹⁸ Decades later, Professor Ahmed found Magan living freely in Columbus, Ohio by searching for him online.¹⁹ Through a suit brought on his behalf by CJA, Professor Ahmed was able to bring Magan to justice and win a verdict for \$15 million in damages to account for the physical and emotional trauma he suffered.²⁰ Professor Ahmed would go on to win the International Bar Association’s Human Rights Award and is now an advisor to the current President of Somalia.²¹

c. Warfaa v. Ali

In *Warfaa v. Ali*, the complaint alleges that Colonel Ali (aka “Tukeh”) commanded the Fifth Brigade of the Somali National Army, which detained plaintiff Farhan Warfaa for months and brutally tortured him.²² These are the facts as Mr. Warfaa alleges them: Col. Tukeh personally interrogated Warfaa on several occasions.²³ One night, when Col. Tukeh was interrogating Warfaa in his office, the Somali National Movement (SNM)’s forces attacked the Fifth Brigade.²⁴ After telling his men to either capture or kill the SNM forces, Tukeh shot Warfaa five times and left him for dead.²⁵ The group of the Colonel’s bodyguards that removed Warfaa from the office discovered that he was not dead and ransomed him back to his family.²⁶

¹⁶ See Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT’L L. 491, 495 (2008) (discussing the elaboration of *jus cogens* norms in human rights law).

¹⁷ *Ahmed v. Magan*, CJA (last visited Apr. 11, 2019), <https://cja.org/what-we-do/litigation/ahmed-v-magan/>.

¹⁸ *Ahmed v. Magan*, No. 2:10-cv-00342, 2012 WL 12929560, at *1 (S.D. Ohio, Nov. 20, 2012).

¹⁹ CJA, *supra* note 18.

²⁰ *Id.*

²¹ *Id.*

²² Second Amended Complaint at 6, *Warfaa v. Ali*, No. 1:05-cv-00701-LMB-JFA.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

The case has taken a long time to get to this point, since the first complaint was filed in 2004. It spent long periods of time in abeyance, waiting for the Supreme Court to render its decisions in *Samantar* and for the U.S. government to give its opinion on whether Col. Tukeh could claim foreign official immunity.²⁷ But the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum, Co.*, holding that the Alien Tort Statute (ATS) presumptively does not apply extraterritorially unless the claims at issue "touch and concern" the United States with sufficient force, also impacted the case.²⁸ Since the events at issue in *Warfaa v. Ali* took place between foreign nationals abroad, the presumption against extraterritoriality was not displaced, and a lower court dismissed Warfaa's ATS claims for war crimes and systematic and widespread attack on civilians.²⁹ As a result, the trial will cover only claims of torture and attempted extrajudicial killing brought under the TVPA, a statute that explicitly applies extraterritorially.³⁰

As the trial proceeds in the Eastern District of Virginia, the Clinic will provide daily updates on its developments. The Clinic's legal monitoring work will help to make the complex world of federal litigation accessible to stakeholders in the U.S. and in Somalia. One of the key functions of litigation in promoting justice is communicative; those affected must see justice being done. The Clinic's monitoring will portray both what the trial is and what it isn't. *Warfaa v. Ali* is the story of one man seeking justice against his would-be murderer. It is not an attempt to adjudicate every event that took place under the Barre regime, nor to highlight any particular clan experience. Getting justice here is a step towards getting justice for all of those who suffered under the Barre regime.

²⁷ *Warfaa v. Ali*, 33 F. Supp. 3d 653, 657 (2014).

²⁸ 569 U.S. 108, 124-25 (2013); *see id.* at 658.

²⁹ *Warfaa*, 33 F. Supp. 3d at 658.

³⁰ TVPA § 2(a); *id.* at 665.