

Warfaa v. Ali Legal Monitoring, Day 3

Wednesday, May 14, 2019

Stanford Law School International Human Rights & Conflict Resolution Clinic

This account summarizes what occurred on the third day of trial in the case of *Farhan Mohamoud Tani Warfaa v. Yusuf Abdi Ali*, No. 1:05cv701 (LMB/JFA). The trial has concluded and the jury is set to deliberate, continuing tomorrow, in the Federal Courthouse in Alexandria, Virginia. The Center for Justice & Accountability invited the Stanford Law Human Rights & Conflict Resolution Clinic to conduct neutral trial observation and produce daily reports of the proceedings for interested parties, including the Somali diaspora.¹

Court was called to order at 9:31 a.m., when Judge Brinkema settled several procedural matters and advised the Plaintiff's counsel regarding their final witness, Dr. Daryn Reicherter of Stanford Medical School. She instructed that his testimony be limited to portions of two sections of his expert report, and suggested the Plaintiff's attorneys reconsider whether they would seek his testimony on intergenerational trauma. The jury then entered and confirmed they had not been exposed to media coverage of the case.

Benjamin Klein (DLA Piper) resumed his direct examination of the Plaintiff's second expert witness, Dr. Allen S. Keller, at 9:40 a.m. Klein began by reviewing several exhibits Dr. Keller described yesterday, consisting of photographs and X-Rays of the Plaintiff's scars. Dr. Keller's evaluation found that **"[the Plaintiff] had significant weakness in his right leg compared to his left,"** and that the Plaintiff's gait favored his left side. These symptoms are

¹ This report is the product of the students of the Human Rights & Conflict Resolution Clinic and is not attributable to the Center for Justice & Accountability or Stanford Law School.

“highly consistent with the injuries and the disability” that resulted from them, said Dr. Keller. **“There’s not a day that goes by that he’s not aware of the weakness in his arm, his hand, and his leg,”** Dr. Keller testified, paraphrasing an interview with the Plaintiff. **“In total, I believe I identified five gunshot injuries,”** said the witness: three to the Plaintiff’s right leg, one to his right arm, and one where a bullet grazed his right hip. These injuries matched the Plaintiff’s description of the position he was bound in when the Defendant allegedly shot him. The Plaintiff’s scars are **“highly consistent with what [the Plaintiff] reported, arguably to the point of being diagnostic.”**

Dr. Keller was then asked to discuss several of the other lasting injuries the Plaintiff sustained. The scars on the Plaintiff’s head, Dr. Keller testified, were the result of repeated trauma. Dr. Keller then testified to the Plaintiff’s frequent headaches, some of which he determined to be stress-induced. When he looks into the sunlight, the Plaintiff is reminded of the blindness in his right eye and develops a headache from the stressful and painful reminder of his injury. Dr. Keller determined Mr. Warfaa’s **“blindness in his right eye [to be] a direct result of repeated beatings and head trauma he suffered when imprisoned at Gebiley.”** Lastly, the witness described the Plaintiff’s musculoskeletal pain; ever since the injury, he reports being generally weaker and tiring easily. He reminded the Court that this is a man who sleeps four hours each night; **“he basically has had few or no good nights’ sleeps in decades.”** The sum of his injuries is **“a recipe for fatigue and musculoskeletal disaster.”**

On cross-examination, Drennan emphasized that Dr. Keller recounted several statements by the Plaintiff apparently contrary to details in the Plaintiff’s testimony at trial, specifically where he was when he regained consciousness after being shot.

The Plaintiff's final witness, **Dr. Daryn Reicherter** of Stanford University and the Center for Survivors of Torture, was sworn in at 10:25 a.m. to testify as an expert in cross-cultural trauma psychology and the long-term effects of torture. Dr. Reicherter described the serious–sometimes permanent–biological changes in the brain which often follow events sufficiently significant to cause post-traumatic stress disorder (PTSD). These changes, through which certain areas of the brain atrophy and others activate, are linked to fight-or-flight responses, sleep disturbances, and heightened memory loops experienced by trauma survivors. These survivors often experience elevated levels of cortisol, the stress hormone that regulates one's capacity for relaxation and excitement, said the witness.

Dr. Reicherter was unable to answer a question from Nushin Sarkarati (Center for Justice & Accountability) regarding the social effects of torture. After an objection from Drennan and lengthy bench conference, Sarkarati ended her direct examination of Dr. Keller. On cross-examination, Drennan clarified only that Dr. Reicherter had not personally examined the Plaintiff. At 10:46 a.m., the Plaintiff rested his case.

The Defendant was sworn in to testify at 10:47. The Plaintiff, who had been leaning toward his interpreter beside him, turned in his seat to face the witness stand. The Defendant began his testimony with his personal history. He said that he started in the Somali National Army (SNA) as a cadet officer in 1973 after graduating high school. He described various trainings over the early part of his career, notably including two stints at military bases in the United States, where he studied the Geneva Conventions and received other training. After returning to Somalia from the second of these training trips to the United States, he took control of the Fifth Brigade in Gebiley in 1987 as a Colonel.

His United States training in low-intensity combat was important, the Defendant said, because his major assignment was to counter the Somali National Movement (SNM) insurgency in the area. Drennan, in his questions, emphasized the fact that the SNM had received training and munitions from Ethiopia, a client state of the Soviet Union. The Defendant also took issue with Ambassador Gosende's characterization of the SNM as "ragtag," asserting that they were very well organized and well trained, and that they had their headquarters in London and that they received training in communist Ethiopia. The Defendant said that the **"SNM destroyed our country and made it like that—without a government—for twenty-five years"** and was backed by communist Russia and Cuba. He also claimed that one major function of his Brigade was to dig up the Soviet-sourced mines that the SNM was planting in the region. He was successful in this and other operations against the SNM, he said, because he had informants within the organization.

His testimony then turned to the Fifth Brigade and its facilities in Gebiley. He testified that his headquarters on the base was much larger than the building depicted in the photos tendered by the Plaintiff. The Defendant claimed to have never seen the buildings in those pictures before. He further testified that there was no jail on the base; the only people who were detained there were insubordinate soldiers, who would only be detained for a couple of days before being transferred to Hargeisa for court martial. He said the soldiers the Plaintiff described could not have been his; he never ordered his soldiers to detain civilians. He stated that his soldiers did not detain civilians and that they did not detain the Plaintiff. Further, he stated that the SNM frequently crossed back and forth from Ethiopia into Somalia, and attacked Isaaq villagers.

The Defendant further testified about the disappearance of the water truck. He said his SNM informants told him it was located across the border in Ethiopia. He claimed, **"[m]y soldiers did not question people in hamlets about the truck, it is against the law."** Moreover, he

clarified that he could not target Isaaqs in his ranks because it was illegal to inquire about clan identities within the army. He also noted that the Isaaq were not the only clan in the ranks. There were also, he said, members of the Gadabuursi and Akisho clans, among others. There were also other clans in the area, including Ogdani refugees who had fled across the border from Ethiopia to escape the Mengistu regime. Drennan then asked if there had been a tank battalion in Gebiley at that time, as one of the Plaintiff's fact witnesses had testified. The Defendant said that he never commanded a tank battalion. Asked about the discrepancy between his testimony and that of the Plaintiff's fact witnesses, the Defendant said, **"They're all lying."**

Questioning then turned to the legal system in Somalia at the time. He testified that other parts of the Somali government, including the National Security Service, would be concerned with investigations into civilians. And he said that there were courts, both military and civilian, to try defendants. The NSS, the military intelligence agency, and the Criminal Investigation Department would handle the investigations and detain suspects before they were tried in the federal court system, the Defendant reported. Drennan asked if the Defendant, as a combat officer, could deal with civilians in this way, and the Defendant responded that he dealt with defending the country and the civilians.

Drennan's questioning then turned to the human rights situation in Somalia, generally, and in Gebiley in particular. The Defendant insisted that while Somalia generally had human rights problems, there were none in Gebiley; there was nothing remarkable about the human rights situation there at the time. He claimed that he has never seen anyone in the MiG position, but that he heard that the SNM used it on their captives, and that there were no human rights abuses in Gebiley from December 1987 to March 1988. The Defendant testified that the situation became dire when the SNM took Burao and Hargeisa. He claimed that the SNM were the ones killing

civilians. He reported that the SNM had only been able to capture civilian portions of the cities while the government areas never fell, and that the SNM had fired indiscriminately at civilians there. The Defendant said that there were no reprisals from the government. He said that any civilians who died were merely caught in the crossfire between the “**very, very strong**” SNM and the government.

The Defendant asserted that he was relieved of his command in Gebiley because he is from the north and his mother is Isaaq; that the government doubted his loyalty and suspected him of helping the SNM. Asked if he witnessed any human rights abuses he said, no, the war was over in the north, although violence continued elsewhere as other armed groups sought to topple the Barre regime. He said that he went briefly to a town east of Burao, for two months, before being assigned as a Second Division commander in a minefield east of Hargeisa. He then went to Mogadishu, he said. After that, the Defendant reported, he was sent to the United States for further training at Keesler Air Force Base in Biloxi, Mississippi.

He said that he was not able to finish his assigned course of study there because the Gulf War mobilization led to a shortage of instructors on the base. He further claimed that he no longer received orders from the Secretary of Defense. He then reportedly heard that the government collapsed and thought it was unwise to return to Somalia. And so, he said, he decided to go to Canada with his wife to seek asylum.

He reported that he lived there for six to eight months, working in security for Burns International. He was later deported because of “**false complaints**” by the Isaaq community in Toronto to the Canadian government that he was a human rights violator. He said that he was kicked out without being given a chance to respond to the allegations. At this point he decided to live in northern Virginia because his wife used to live there and they had friends there. The

Defendant stated that, despite initially being received with open arms, moving to Virginia with his wife, and receiving a work permit, he **“wound up in removal proceedings.”** In 1994, he left the United States for Ethiopia, he said, to attend a conference about the potential formation of a new Somali government. He returned to the United States after two years in Ethiopia, and has been living in Virginia ever since. He noted that he was again put in removal proceedings in 1998, but that these were resolved in his favor. Throughout this time, he stated, he never took public assistance and remained employed. He claimed the first time he ever saw the Plaintiff was at the deposition in Alexandria in 2018. Looking at the Plaintiff, the Defendant said, **“I feel pity for him, but as commander of the Fifth Brigade I never did anything to him. I am innocent.”**



Courtroom Sketch of Yusuf Abdi Ali

At 12:02 p.m., Louis Ramos (DLA Piper) began cross-examining the defendant. During his direct examination, the Defendant had mentioned that he was given several certifications and commendations from his training in the United States. Ramos asked if he would be surprised that there was a Department of Defense document noting he lacked professionalism and motivation.

The Defendant responded that was untrue. Ramos asked if the Defendant recalled his testimony that he was relieved of his command because his mother was Isaaq, and the defendant said he did. Asked if he had brought this detail up in his deposition or either of the sets of pre-trial interrogatories, the Defendant admitted that he hadn't. He said that he was saying it now.

Ramos then turned his questions to the Defendant's actions against the SNM in Gebiley. The Defendant said that the SNM was made up of Isaaqs. Ramos asked if Isaaqs were the predominant clan in the Gebiley district, and the Defendant responded that there was also a "friendly" clan, the Gadabuursi. Ramos asked if he used the word "friendly" to distinguish the Gadabuursi from the Isaaq. The Defendant replied that he meant to distinguish the Gadabuursi from the SNM.

Ramos asked if the SNM was recruiting from villages, including those in Gebiley. The Defendant said it was. Ramos asked if it was the Defendant's mission to make sure that the SNM's efforts were not successful. The Defendant said it was. Ramos then asked if it was important for the success of the Defendant's military mission to prevent men of the district from joining the SNM. The Defendant responded that although he was not pleased that men would join the SNM, he could not prevent it, he could only fight them when they returned.

Questioning turned to the human rights situation in northern Somalia. Ramos asked if Ambassador Gosende was incorrect that the SNA attacked Isaaq civilians and committed other human rights abuses. The Defendant said, "[i]ncorrect, yes. I was there, he was not there." Ramos then asked if all of the reports on the subject that said there were abuses, by the United States government, the GAO, and Amnesty International, were wrong. The Defendant insisted that these organizations had not come to Gebiley. "If they were in Gebiley personally, fine. But if they write reports—how did they get their reports?" At this point, Ramos asked if the Defendant

had used informants to get intelligence on the SNM from over the border in Ethiopia. The Defendant admitted he had.

When asked about the last time he left Somalia, the Defendant responded he left in 1990. Ramos then asked if the Defendant had been deported from Canada for reported human rights violations, and the Defendant said that it was part of the Somaliland plot against him: **“They were all lying . . . all this is conspiracy.”** Ramos then asked about the forms that the Defendant had filed to immigrate to the United States. The form asks for the last five years of residences. The Defendant’s form didn’t list that he had lived in Canada in that period. Asked about this, the Defendant said that his wife had filled out the form after he signed it. Ramos asked if he signed with a pen. The Defendant assented. Ramos asked why he didn’t fill out the rest of the form. **“The reality is I just signed.”**

Ramos asked if the Defendant’s theory of the case amounted to a conspiracy theory between the United Nations, NGOs, the Plaintiff, the Plaintiff’s witnesses, and the United States Government. The Defendant agreed with this characterization. Similarly, Ramos pointed out how the Defendant’s claims that Gebiley was peaceful while Hargeisa, only fifty-three kilometers away, was engulfed in violence. **“Nothing happened. Nothing. . . . I took care of it.”** The Defendant characterized the SNA and SNM as **“two war machines”** both guilty of abuses: **“when two elephants fight, the grass will suffer. That’s what happened in Hargeisa.”**

The Defendant contradicted a portion of his earlier testimony, conceding that the Somali government committed abuses under the Barre regime. But, he insisted, **“one thing is for fact: I have never seen anybody in MiG position, period.”** Ramos confirmed with the Defendant that the allegations against him are serious. Drennan offered no redirect examination.

After 12:55 to 1:55 p.m.; before the jury was called in, the Plaintiff's attorneys said they would offer no rebuttal to the Defendant's case. **"You've got, in my view, a very strong case of direct liability,"** the judge said to the Plaintiff's team, asking whether they were certain they should present various alternative theories of liability. Drennan reflected that the case could be reduced to **"one person's word over the other."** The parties then began closing arguments.

Presenting for the Plaintiff, Kathy Roberts (Center for Justice & Accountability) opened by reminding the jury that, when the Defendant first came to Jifo Uray, the Plaintiff wasn't worried. Roberts stated that, despite thinking he had nothing to fear, the Plaintiff was arrested, subjected to brutal torture, and **"shot almost carelessly, like it was nothing."** Roberts then addressed the elements of the torture claim before the jury, arguing that the Plaintiff had alleged by a preponderance of the evidence that he suffered severe mental and physical pain, that was inflicted with a sufficient prohibited purpose, and that the Defendant was responsible. Stating that each witness the Plaintiff brought forward corroborated the Defendant's responsibility, Roberts explained how any one of five different forms of liability (direct, ordering, joint criminal enterprise, "command and control"/command responsibility, aiding and abetting) would be sufficient for a finding of liability. For command and control liability, Roberts emphasized that Abdi Abdilahi Ahmed and Mohamed Areye Ali Sugale both testified that the Defendant promoted a "command culture" of excessive violence against civilians. Raising the testimony of Ahmed Muse Madar, Roberts contended the Plaintiff's torture was part of a common plan to treat **"the civilian population as the enemy,"** and to **"control, repress, or eliminate the Isaaq"** that culminated in the strafing of civilian areas by aircraft.

Roberts closed by contending that Dr. Keller's testimony about the Plaintiff's wounds and **"debilitating and severe"** PTSD corroborated the Plaintiff's own account. Roberts then turned to

the subject of damages, and proffered that she might value 31 years or about 11,000 sleepless nights and chronic pain at \$1 million per year. Roberts then reminded the jury that the Defendant violated his duty to protect the people entrusted to his security as a military officer. Roberts concluded, “[h]e **thought he could get away with it. Please don’t let him.**”

Drennan began his closing argument by agreeing that the Somali government’s primary objective was to protect the government and people. “**You heard a professional soldier defend himself,**” Drennan argued, reminding the jury that the Defendant had been confronted by these claims for over fourteen years. “**This is a case about clan vengeance,**” Drennan contended. Rather than commit the alleged acts, the Defendant served his country and cleared SNM landmines, keeping Gebiley safe while Hargeisa was besieged.

Drennan proceeded to characterize the Plaintiff and Plaintiff’s witnesses as unbelievable and “**hellbent**” on achieving international recognition for Somaliland. Drennan noted several inconsistencies in the Plaintiff’s prior interrogatories, depositions, and trial testimony about the number of arrestees, the number of times the Plaintiff was tortured, and the amount of the ransom paid by the Plaintiff’s father. Drennan claimed the jury should follow the logic of “*falso unius, falso omnibus* [sic]” (false in one respect, false in every respect) and reject all the Plaintiff’s testimony. Drennan concluded by arguing that there is a larger agenda at play, as the Isaaq community cares about the trial, and that the Plaintiff’s role as an elder who adjudicates disputes is inconsistent with Dr. Keller’s testimony that he shies away from social situations.

Given six minutes to rebut the Defendant’s closing, Ramos spoke for the Plaintiff, contending that the Defense’s closing argument was a “classic attempt to distract.” He referenced the Defendant’s willingness to falsify information on his immigration paperwork as an example of

how the Defendant was willing to say anything—even under oath—**“to paint himself as a victim when in fact, he is a perpetrator.”**

With the closing arguments presented, the case was placed in the hands of the jury. The Honorable Judge Leonie Brinkema instructed the jury on the relevant laws and legal standards to apply during their deliberation. The jurors were told to maintain their impartiality, remember that they were co-equal in their decision, and to use their good judgement to evaluate all of the evidence that was presented.

The jury will be determining first whether the defendant suffered the harms of torture and attempted extrajudicial killing, and second whether the defendant was either directly or indirectly responsible for this harm. If they find in the affirmative for both, they then move to the question of compensatory and punitive damages. If the jury finds neither charge to be true, the Defendant prevails. Trial will reconvene once the jury of eight has reached its final decision.