

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

Abukar Hassan Ahmed,	:	
	:	
Plaintiff	:	Civil Action 2:10-cv-00342
	:	Judge Smith
v.	:	Magistrate Judge Abel
	:	
Abdi Aden Magan,	:	
	:	
Defendant	:	

ORDER

Plaintiff Abukar Hassan Ahmed brings this action against Defendant Abdi Aden Magan pursuant to the Alien Torture Statute (“ATS”), 28 U.S.C. § 1350 and the Torture Victim Protection Act (“TVPA”), 28 U.S.C. § 1350. This matter is before the Court on Plaintiff Abukar Hassan Ahmed’s August 9, 2012 unopposed motion for partial summary judgment or, in the alternative, for default judgment (Doc. 97).

Plaintiff moves for partial summary judgment that Defendant Abdi Aden Magan is liable for Plaintiff’s arbitrary detention, torture, and cruel, inhuman and degrading treatment or punishment because he exercised command responsibility over, aided and abetted, and conspired with subordinates in the National Security Service in accordance with a common plan to abuse the rights of perceived political opponents of the government of Somalia, and that Plaintiff was arbitrarily detained, tortured, and subjected to cruel, inhuman or degrading treatment by subordinates of Defendant or others acting in accordance with this common plan. Specifically, Plaintiff seeks summary judgment on his claims: (1) that Plaintiff was arbitrarily

detained pursuant to his claims under the ATS; (2) that Plaintiff suffered torture pursuant to his claim under the ATS and TVPA; (3) that Plaintiff suffered cruel, inhuman or degrading treatment or punishment pursuant to his claim under the ATS; and (4) that Defendant is liable for Plaintiff's arbitrary detention, torture, and cruel, inhuman or degrading treatment or punishment.

In the alternative, Plaintiff moves for the entry of default judgment under Rule 37(b)(2)(A)(vi) against Defendant based on his willful failure to comply with the Court's orders.

I. Allegations in the Complaint

The complaint makes the following allegations. On November 20, 1988, Plaintiff Abukar Hassan Ahmed, a human rights attorney and law professor at Somali National University, was taken into detention at the National Security Service of Somalia ("NSS") Department of Investigations Prison, interrogated and tortured for approximately three months. He suffered severe physical and psychological injuries as a result of his detention and torture.

Defendant Colonel Abdi Aden Magan, who now resides in Columbus, Ohio, ordered, conspired with, aided and abetted, or exercised command responsibility over subordinates in the NSS, or persons or groups acting in coordination with the NSS or under their control, to carry out the torture, arbitrary detention and cruel, inhuman or degrading treatment or punishment of Ahmed. Further, Magan failed to prevent or punish the violations of international law committed by his subordinates.

Defendant Magan is a member of the Marehan sub-clan of the Darod clan, the same sub-clan as Major General Mohamed Siad Barre, who ruled Somalia from 1969 until 1991. As a member of the favored Marehan sub-clan, Magan was appointed to top positions in the NSS. From 1988 to 1990, he held the rank of Colonel and served as Chief of the NSS Department of

Investigations - National Level at NSS Headquarters in Mogadishu, Somalia. As Chief of NSS Investigations, Magan directed and participated in the interrogation and torture of Ahmed and other civilians seen as opponents of the Barre regime.

II. Arguments of the Parties

A. Plaintiff Abukar Hassan Ahmed

Plaintiff argues that this Court should grant his motion for summary judgment on his claim for arbitrary detention. Plaintiff maintains that he has demonstrated that the persons who detained him did so while acting under the actual or apparent authority or color of a foreign nation and that the detention violated principles of justice or dignity of the person. Plaintiff maintains that he was arbitrarily detained. On or about November 19, 1988, Plaintiff was taken by NSS officers to the detention facility at NSS Headquarters. He was detained by the NSS, which was the official Somali security force, making his detention under color of law. His detention violated principles of justice and dignity of the person because he was arrested and detained without a warrant. He was not given the opportunity to communicate with his family. While detained, Plaintiff was tortured, and his detention was incompatible with the principles of justice and dignity.

Plaintiff argues that he is entitled to summary judgment on his torture claim because the evidence is undisputed that he was tortured. Plaintiff endured severe pain and suffering that was intentionally inflicted upon him for the purpose of eliciting a confession. Defendant acted under color of law, and Plaintiff was under the custody or control of Defendant. Plaintiff also maintains that he is entitled to summary judgment on his claim for cruel, inhuman, or degrading treatment or punishment because there is no genuine factual dispute. Plaintiff was restricted to a starvation

diet of rancid food, confined in close proximity to his own urine and excrement, and deprived of sleep under bright lights. Plaintiff was threatened with torture and imprisoned in solitary confinement for over three months.

Plaintiff argues that Defendant is responsible for the conduct of the NSS officers, exercised control over the NSS officers, and directed them to perpetrate the harms suffered by Plaintiff. Defendant directed his subordinates to commit the acts, aided and abetted them, and conspired with them to commit the harms. Plaintiff argues that a commanding officer can be held responsible for the acts of his subordinates even if the commanding officer did not directly participate in the commission of the acts himself. Responsibility for the acts extends to anyone with higher authority who authorized, tolerated, or knowingly ignored those acts. Defendant Magan was the Chief of the Department of Criminal Investigations at the NSS from 1988-1990. As the Chief, Defendant had authority over Colonel Agojiid, Officer Egal, and the other NSS officers who detained and tortured Ahmed. Plaintiff maintains that it was undisputed that Defendant knew his subordinates were torturing detainees and that he failed to take action to prevent the offenses or punish his subordinates for the actions.

B. Defendant Abdi Aden Magan

Defendant has failed to file any response to Plaintiff's motion for summary judgment.

III. Summary Judgment

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party asserting the absence or presence of a genuine dispute must support that assertion by either "(A) citing to particular parts of materials in the record, including depositions,

documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials”; or “(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1).

A party may object that the cited material “cannot be presented in a form that would be admissible in evidence,” and “[t]he burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated.” Fed. R. Civ. P. 56(c)(2); Fed. R. Civ. P. 56 advisory committee’s note. If a party uses an affidavit or declaration to support or oppose a motion, such affidavit or declaration “must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” Fed. R. Civ. P. 56(c)(4).

While the court must consider the cited materials, it may also consider other materials in the record. Fed. R. Civ. P. 56(c)(3). However, “[i]n considering a motion for summary judgment, the district court must construe the evidence and draw all reasonable inferences in favor of the nonmoving party.” *Revis v. Meldrum*, 489 F.3d 273, 279 (6th Cir. 2007) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). “The central issue is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Id.*, 489 F.3d at 279–80 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986)).

IV. Discussion

The purpose underlying the TVPA and the ATS is to protect international human rights.

The ATS, section 1350 of title 28 of the United States Code, states:

The district court shall have original 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. The TVPA grants relief to victims of torture. *Id.*

The expert report of Professor Lee Cassanelli, an Associate Professor of History and Director of the African Studies Center at the University Pennsylvania provides a history of Somalia and, in particular, the Siad Barre regime's rule over Somalia from 1969 to 1991. Doc. 97-15 at 3, ¶1. According to Professor Cassanelli, the Siad Barre regime perpetrated systemic torture, arbitrary detention, extrajudicial killing, massacres and violations of human rights, particularly from 1988 through 1990. The targets of these abuses were members of disfavored ethnic groups and individuals who were openly critical of the Siad Barre regime. Doc. 97-15 at 3, ¶2.

To maintain power, Siad Barre exploited Somalia's clan tradition and created an alliance of three sub-clans from the Darod Clan family. The leadership of the Barre regime consisted of members of the three sub-clans. As a member of Siad Barre's clan, Defendant Colonel Abdi Adem Magan was appointed to top positions in the National Security Service ("NSS"). Doc. 97-15 at 3, ¶4.

Colonel Magan, served as Chief of the NSS Department of Investigations-National Level from 1988 to 1990. According to Professor Cassanelli, Magan would have known of the common practice of torture and detention by NSS officers under his command. As commander

of the NSS, Magan had the ability to control abuses. Doc. 97-15 at 3-4, ¶5.

When the Siad Barre regime fell, Somalia ceased to exist as a functioning state. There is still no governing authority controlling the territory of the country. Doc. 97-15 at 4, ¶6.

Professor Cassanelli will testify that the NSS had virtually unlimited powers of surveillance, investigation, search, arrest, and detention and became the most important agency for suppressing and punishing perceived opposition to the regime. Doc. 97-15 at 10, ¶ 23. The NSS was authorized to arrest without warrant anyone suspected of a crime against national security. Crimes against national security were exempted from time limits and rules of judicial procedure. According to Professor Cassanelli, the NSS arrested, executed, and imprisoned hundreds, and possibly thousands, of perceived opponents, often without trial or charge. Doc. 97-15 at 11, ¶ 26. Professor Cassanelli will testify that Colonel Magan, while serving as Chief of the NSS Department of Investigations, knew or should have known of the common practice of torture and arbitrary detention by NSS officers under his command and that he had the ability to control these abuses in his position. Doc. 97-15 at 11, ¶ 27. According to Professor Cassanelli, victims of the Siad Barre regime had no legal recourse for abuses. Doc. 97-15 at 13, ¶ 30.

Throughout the 1980s, the Siad Barre regime, facing a number of opposition movements, escalated its human rights abuses. Doc. 97-15 at 15, ¶ 34, 36. Prominent professionals living in Mogadishu who criticized the government were harassed or detained. Doc. 97-15 at 16, ¶ 37. Dissidents were systematically arrested, detained, tortured, and executed. Lawyers who sought to defend purported dissidents were also targeted, harassed and detained. Doc. 97-15 at 16, ¶ 38.

Plaintiff Ahmed provided a declaration in support of his motion for summary judgment. Doc. 97-9. Ahmed was born in Mogadishi, Somalia in 1946 and is a member of the Abgaal sub-clan of the Hawiye clan. Doc. 97-9 at ¶ 2. He was a practicing attorney and law professor from 1973 to 1990. He was a prominent and outspoken critic of the government. Doc. 97-9 at ¶ 3. In the course of his legal practice, Ahmed defended a number of people who were accused of violating a law criminalizing dissent. Doc. 97-9 at ¶ 4. From January 1981 until March 1986, Ahmed was imprisoned without charge at the NSS detention facility in Mogadishu. Doc. 97-9 at ¶ 5. After his release, Ahmed returned to practicing law and teaching law. Doc. 97-9 at ¶ 7.

Late at night on November 19 or in the early hours of November 20, 1988, three NSS officers detained Plaintiff and confiscated an Amnesty International Report that he was carrying. Doc. 97-9 at ¶ 8. Plaintiff was taken to a NSS detention facility located in the basement of the NSS headquarters in Mogadishu. *Id.* Ahmed was placed in solitary confinement in a small, windowless cell, with continuous artificial lighting and no ventilation. He was not permitted contact with an attorney or family and friends. His right hand was tightly shackled to his left ankle. He was only unshackled during interrogations and when he was permitted to use the toilet, once a day. There was no toilet in his cell and he had to urinate in empty milk cans. Doc. 97-9 at ¶ 9. Once a day, Ahmed was given rancid bread and butter with tea. He had to sleep on cold or wet floors without a mat or a blanket. Doc. 97-9 at ¶ 10.

Ahmed states that NSS officers Captain Dherow and Lieutenant Mohammoud Farah Igal accused him of being a contributing writer to Amnesty International reports. Dherow and Igal repeatedly threatened him that if he did not confess he would be killed. Doc. 97-9 at ¶ 11. On or about February 7, 1989, Captain Dherow brought him to Defendant Magan's office. Defendant

Magan accused Plaintiff of being a member of the newly established United Somali Congress, a political group that opposed the Siad Barre regime, and the Patriotic Front of Somali Unity.

Ahmed denied being a member of these groups. Doc. 97-9 at ¶ 12.

Defendant Magan threatened Ahmed that if he did not confess, he would be tortured and killed. Magan ordered Captain Dherow to “do his job” if Ahmed did not confess. Ahmed understood this to be a direct order to torture him. Doc. 97-9 at ¶ 13. A few hours later, Captain Dherow, Officer Hussein, Officer Ga'al, and a few other officers came to Ahmed's cell. Ahmed was handcuffed and blindfolded and brought to the interrogators. Officer Ga'al stated that he was acting under orders from Colonel Magen, but he would tie the blindfold loosely so that Ahmed would see who was going to torture him. Doc. 97-9 at ¶ 14.

Plaintiff states that he was tortured by Captain Hussein, Sufi Dherow, Mohammoud Farah Igal, Lieutenant Mohamed Abdi and two officers, Antar and Deeq. Plaintiff's hands and feet were tied together with cloths and then handcuffed. A cord was used to tie his big toes together, which was very painful. Ahmed was forced to sit down and they pushed his legs back over his head, exposing his genitals. Doc. 97-9 at ¶ 15. The NSS officers squeezed his testicles with iron instruments. Ahmed fainted from the excruciating pain. When he regained consciousness, the guards forced a five liter container of water, sand and small stones into his mouth to cut of his air supply. Ahmed believed that he would suffocate and die. The officers beat him with wooden sticks on his body and with an AK-47 to his head. Throughout this, the officers questioned Ahmed about his involvement with United Somali Congress and Amnesty International. Doc. 97-9 at ¶ 16.

As a result of his treatment, Plaintiff suffers from hipbone distortion, which makes it painful for him to sit for extended periods of time. He developed a deep sore on his left ankle due to being shackled. He still has a scar on his head from being beaten with the AK-47. He has problems with his bladder and incontinence. He continues to suffer from pain in his neck, shoulders, and back. He continues to have nightmares. Doc. 97-9 at ¶ 17.

At the end of February 1989, Ahmed was transferred to the Central Prison in Mogadishu. He was charged with authoring subversive material. Doc. 97-9 at ¶ 18. The day before his trial, he was informed that the charge was reduced to possession of subversive material, which carried a five to fifteen year sentence or a fine of 5,000 to 15,000 Somali shillings or both. Doc. 97-9 at ¶ 19.

At his trial, for which he had no representation, Plaintiff told the judges that he had been tortured based on orders from Defendant. The court did not order any investigation into Ahmed's allegations. Ahmed was convicted of possessing subversive material. His friend paid the fine, and Ahmed was released. Doc. 97-9 at ¶ 20.

A few months after his release, Plaintiff encountered Defendant Magan. Ahmed told Magan that he knew he was responsible for sending agents to harass him. Magan allegedly stated that he was not simply above the law he was the law. Doc. 97-9 at ¶ 24.

On July 14, 1989, Ahmed's mother told him that NSS officers had come to their home threatening to detain him. Ahmed went into hiding and left Somalia in August 1989. Doc. 97-9 at ¶ 26.

Defendant Magan has not come forth with any evidence to raise a question of material fact.

Arbitrary Detention. Arbitrary detention, a violation of customary international law, is actionable under the ATS. *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1349 (N.D. Ga. 2002). To establish a claim of arbitrary detention, Plaintiff must demonstrate that he was detained, that the person(s) detaining him did so while acting under the actual or apparent authority or color of law of a foreign nation, and that the detention violated principles of justice of the dignity of the person. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 (1987).

A violation of the principles of justice or dignity of the person applicable in the context of detention may be shown by demonstrating that (1) the detention was not accompanied by notice of the charges brought against the detainee; (2) the detainee did not have an early opportunity to communicate with family or consult counsel; (3) the detainee was not brought to trial within a reasonable time; (4) the detainee was tortured while in detention; or (5) the detention was otherwise incompatible with principles of justice or with the dignity of the person.

There is no genuine factual dispute that Plaintiff was detained or that his detention was under color of law. Plaintiff's declaration also provides evidence that his detention violated principles of justice and dignity of the person. He was detained without notice of charges, and he was not permitted to communicate with his family and friends. Furthermore, Plaintiff has stated that he was tortured while detained and that he was brutally treated and subjected to inhumane conditions. Plaintiff's declaration states that he was detained for months before being advised of the charges against him. Plaintiff was brought before Defendant Magan, who authorized his continued detention and implicitly directed his subordinates to engage in torture. Because Defendant has failed to come forth with any evidence demonstrating an issue of material fact, Plaintiff is entitled to summary judgment on his claim for arbitrary detention.

Torture. Under the TVPA and the ATS, a claim for torture has five elements: (1) the victim experienced severe pain or suffering either physical or mental; (2) the severe pain or suffering was intentionally inflicted on the victim; (3) the acts were committed for a prohibited purpose, including extracting a confession or punishment or to intimidate or coerce the victim; (4) the acts were inflicted under the actual or apparent authority or color of law of a foreign nation, including by or with the acquiescence of a public official or other person acting in an official capacity; and (5) the victim was in the offender's custody or physical control.

The NSS officers' treatment of Ahmed constitutes torture, and Plaintiff's declaration is evidence that Defendant Magan was responsible for the torture inflicted on Ahmed. Plaintiff experienced severe physical and mental pain and suffering, which was intentionally inflicted upon him. The uncontroverted evidence demonstrates that NSS officers squeezed his testicles with iron instruments and forced a five liter container of water, sand and small stones into his mouth to cut off his air supply. Plaintiff's declaration is evidence that Magan directed that the officers torture Plaintiff and that he was in the custody and physical control of Magan.

Cruel, Inhuman, or Degrading Treatment or Punishment. Cruel, inhuman, or degrading treatment includes acts that inflict mental or physical suffering, anguish, humiliation, fear, and debasement, which do not rise to the level of torture or do not serve the same purposes of torture. *Mehinovic v. Vuckovic*, 198 F. Supp.2d 1322, 1348 (N.D. Ga. 2002). There is no genuine factual dispute that Plaintiff was confined in wretched conditions and shackled in painful positions. He was given a starvation diet and deprived of sleep. He was only permitted to use the toilet once per day. He was confined in close proximity to his own urine and excrement.

Defendant's Culpability. Plaintiff argues that Defendant Magan exercised command responsibility over the NSS officers who perpetrated the offenses against him. To hold a commanding officer liable under the doctrine of command responsibility, a plaintiff must establish that (1) a superior-subordinate relationship between the defendant/military commander and the person or persons who committed human rights abuses; (2) the defendant/military commander knew, or should have known, in light of the circumstances at the time, that subordinates had committed, were committing, or were about to commit human rights abuses; and (3) the defendant/military commander failed to take all necessary and reasonable measures to prevent human rights abuses and punish human rights abuses. *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009).

Here, a superior-subordinate relationship existed between Colonel Magan and the NSS officers who detained and tortured Plaintiff. Colonel Magan, served as Chief of the NSS Department of Investigations-National Level from 1988 to 1990. There is no evidence disputing Plaintiff's assertion that Magan knew his subordinates were torturing detainees. According to Professor Cassanelli, Magan would have known of the common practice of torture and detention by NSS officers under his command and that he had the ability to control abuses. Plaintiff's declaration indicates that Magan implicitly ordered the NSS officers to torture Ahmed. Defendant has not come forth with any evidence demonstrating that he took steps to prevent abuses from occurring or to punish his subordinates for engaging in human rights abuses.

V. Conclusion

For the reasons stated above, Abukar Hassan Ahmed's August 9, 2012 unopposed motion for partial summary judgment (Doc. 97) is **GRANTED**.

The Clerk shall remove Document 97 from the Court's pending motions list.

IT IS SO ORDERED.

s/ George C. Smith

GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT