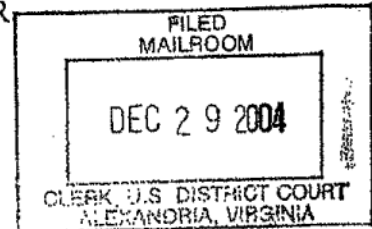


Exhibit 3

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION



BASHE ABDI YOUSUF, *et al.*,

Plaintiffs,

v.

MOHAMED ALI SAMANTAR

Defendant.

)
)
)
)
) Civil Action No. 1:04 CV 1360 (LMB/BRP)
)
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)
)

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR LEAVE TO PROCEED ANONYMOUSLY AND IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS CLAIMS OF ANONYMOUS PLAINTIFFS**

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INTRODUCTION

Plaintiffs Jane Doe I, John Doe I, John Doe II, John Doe III and John Doe IV ("Doe Plaintiffs") submit this Memorandum of Law in support of their Motion for Leave to Proceed Anonymously and in opposition to Defendant Mohamed Ali Samantar's Motion to Dismiss Claims of Anonymous Plaintiffs. Through the Complaint in this case, Doe Plaintiffs – all members of the Isaaq clan – accuse Samantar of responsibility for torture, extra-judicial killing, war crimes, crimes against humanity and other serious human rights abuses committed against them and their families. In light of the serious nature of these allegations, and the clan-based violence that continues in Somalia today, Doe Plaintiffs justifiably are concerned about the possibility of acts of reprisal that could inflict severe harm, and even death, upon them or their families.

In his effort to bolster his motion to dismiss the claims of Doe Plaintiffs, Samantar paints a highly misleading picture of life in Somalia today. Memorandum of Law in Support of Defendant's Motion to Dismiss Claims of Anonymous Plaintiffs ("Opening Br.") at 3-5. Samantar's assertion that reprisals against Doe Plaintiffs are unlikely is based solely on conclusory affidavits and arguments, and is directly contradicted by the objective evidence of the current conditions in former Somalia from several sources – including the United States State Department, the United Nations, and human rights organizations – all of whom recognize that clan-based revenge killings remain the norm in present-day Somalia, including Somaliland. Accordingly, Doe Plaintiffs' application for leave to proceed anonymously should be granted and Samantar's Motion to Dismiss Claims of Anonymous Plaintiffs should be denied.

FACTUAL BACKGROUND

Doe Plaintiffs either currently reside in Somalia or have close family members living in Somalia.¹ The accusations that they have made against defendant Samantar are serious, and Doe Plaintiffs seek to hold Samantar responsible for the horrendous human rights abuses committed against them and their families, including torture, extra-judicial killing, war crimes and crimes against humanity. Compl. at ¶¶ 8-13. If Doe Plaintiffs' identities were revealed, these very serious allegations will make them vulnerable to severe acts of reprisal from at least two groups.

First, Doe Plaintiffs reasonably can expect acts of reprisals from persons who directly, or indirectly, participated in the human rights abuses committed against Doe Plaintiffs, their families, and other members of the Isaaq clan. These participants, who are former subordinates of Samantar in the Somali Armed Forces and security services, continue to live freely in Somalia. There have been no investigations, commissions or criminal tribunals – in Somalia or elsewhere – established to hold the perpetrators accountable for their actions. *See* Mona Rishmawi, SITUATION OF HUMAN RIGHTS IN SOMALIA at 12, U.N. Doc. E/CN.4/2000/110 (2000) (United Nations independent expert on Somalia urging “national courts, in countries where such suspect[ed perpetrators] are said to live or frequently to travel to . . . [to] bring them to justice.”), attached hereto as Exhibit (“Exh.”) 1; *see also* Department of State 2003 Country Report on Human Rights Practices in Somalia (“Country Report”) at 2-6 (Feb. 25, 2004) (stating that no action has been taken against members of the security forces responsible for abuses committed in the past few years), attached hereto as Exh. 2.

¹ In his brief in support of his motion to dismiss, Samantar incorrectly speculates about the location of the families of the Doe plaintiffs. With the exception of John Doe III, who currently resides in Kuwait, the Doe Plaintiffs and their families currently live in Somalia. John Doe III's immediate family members also reside in Somalia. The remaining plaintiff, Bashe Abdi Yousuf, resides in the state of Georgia. Compl. at ¶ 8.

Not only do some of the perpetrators of human rights abuses against Doe Plaintiffs live openly in Somalia, some of their former leaders are in positions of power and have control over their own militia. The most notorious example is General Muhammad Sa'id Hirsi "Morgan," the then-northern commander of the Somali Armed Forces that attempted to execute John Doe III, who continues to live openly in southern Somalia and who served as a member of Somalia's Transitional National Assembly. Fiona Lortan, *Africa Watch: Rebuilding the Somali State* at 6, at <http://www.iss.co.za/pubs/ASR/9No5And6/Lortan.html>, attached hereto as Exh. 3. Another example is General Muhammad Hashi Gani, the northern military commander in the early 1980s during the period abuses were committed against John Doe I and Jane Doe I, who also served as a member of the Transitional National Assembly for some years. *Id.*

Second, Doe Plaintiffs reasonably fear reprisals from members of clans and subclans that supported the Barre regime, regardless whether these clan members personally served in the military or personally participated in human rights abuses. The clan system always has served as a fundamental building block of Somali society. Compl. at ¶ 16. Indeed, the clan enmity runs deep between the Isaacs – the clan of Doe Plaintiffs – and the subclans of the Darod clan that fervently supported the Barre regime, and was rewarded for that support, during the time that Samantar was the Minister of Defense and Prime Minister. During his reign, Siad Barre elevated the status of the Marehans and members of other Darod subclans throughout the government, placing them in the most important and powerful positions in government. I.M. Lewis, *A MODERN HISTORY OF THE SOMALIS: NATION AND STATE IN THE HORN OF AFRICA* 222-23 (4th ed., Ohio University Press 2002), attached hereto as Exh. 7. Thus, not only did the Darod clan and its subclans dominate the Somali intelligence and military organizations – the Red Berets, the National Security Service ("NSS") and the Somali Armed Forces – alleged in the Complaint to

have committed human rights abuses against Doe Plaintiffs,² but they also were the beneficiaries of Barre's patronage on many levels. Significantly, the Darod clan was – and still is – the largest and most widely distributed of all the Somali clans. *The Last War and the Next: Is Somalia Next? Part I*, The Estimate (Jan. 11, 2002), at <http://www.theestimate.com/public/011102a.html>, attached hereto as Exh. 6.

Perhaps it is not surprising, therefore, that even today, and even in relatively “peaceful” Somaliland, clan conflicts are prevalent between the Isaacs and subclans of the Darod clan. As recently as December 7, 2004, the Department of State warned against all travel “to Somalia, including the self proclaimed ‘independent Republic of Somaliland,’” because “[i]nter-clan and inter-factional fighting can flare up with little warning, and kidnapping, murder, and other threats . . . occur unpredictably.” United States Department of State, Bureau of Consular Affairs, *Travel Warning: Somalia* (Dec. 7, 2004), at http://travel.state.gov/travel/somalia_warning.html, attached hereto as Exh. 8. Similarly, in July 2004, the U.S. Department of Homeland Security (“DHS”) renewed Temporary Protected Status (“TPS”) for Somalis in the United States based in part on the determination that “[i]nter-clan fighting throughout the country continues to increase.” *Extension of the Designation of Temporary Protected Status for Somalia*, (July 19, 2004), 69 Fed. Reg. at 47,938, attached hereto as Exh. 9. Notably, while DHS has authority to limit a TPS designation to part of a foreign state, the designation for Somalia covers the entire country. *Id.* Both the State Department and DHS cite inter-clan fighting in the Sanaag and Sool

² See Compl. at ¶¶ 26-30, 37-53, 56-58, 60-63, 66-69; SOMALIA, A COUNTRY STUDY (“LOC Country Stud.”), ch. 1, *Siad Barre's Repressive Measures*, and ch. 5, *National Security Service* (Helen C. Metz, ed., Library of Congress 1992), at <http://lcweb2.loc.gov/frd/cs/sotoc.html>, attached hereto as Exh. 4; Declaration of Martin R. Ganzglass (“Ganzglass Decl.”) at ¶ 13, attached hereto as Exh. 5. For example, the Red Berets was an elite unit recruited from among Siad Barre's Marehan clan, a subclan of the greater Darod clan. LOC Country Stud. at ch. 1, *Siad Barre's Repressive Measures* and ch. 5, *Internal Security Concerns* (Exh. 4). Similarly, the NSS, Somalia's former intelligence agency, also was staffed largely by members of the Marehan clan deemed to be loyal to Somalia's military government. *Id.* at ch. 5, *National Security Service*.

Regions in eastern Somaliland between the Isaacs and the Mijertain, a subclan of the Darod clan. Exhs. 8 and 9. These clan loyalties and resultant clan warfare present a formidable risk of clan-based reprisals in the event Doe Plaintiffs' identities become known to members of the Darod clan and its subclans.

The Somaliland government's own association with Barre-era war crimes, as well as its poor human rights record, further underscores Doe Plaintiffs' reasonable fear of reprisal for their participation in this lawsuit. It is widely known that the current president of Somaliland, Dahir Riyale Kahin, a former head of the NSS in the 1980s, himself stands accused by prominent human rights activists of having committed war crimes and crimes against humanity. The Africa Watch Committee, SOMALIA, A GOVERNMENT AT WAR WITH ITS OWN PEOPLE 151 (Jan. 1990), attached hereto as Exh. 11. Somaliland human rights activists, who have criticized arbitrary detentions, unfair trials, poor prison conditions and cases of torture and unlawful killings by police, are themselves at great risk of harm. See Amnesty International, "Somaliland: Amnesty International Concerned about 16-Year Old Girl's Trial and Rape Allegations, and Summary Imprisonment Of Her Defense Lawyers," ("[h]uman rights defenders in Somaliland are themselves at risk of human rights violations on account of their criticisms of this [Somaliland court] case"). Amnesty International Public Statement, AFR 52/004/2004, Nov. 30, 2004, attached hereto as Exh. 10. In these circumstances, Doe Plaintiffs' fear of reprisal -- even though they and their families reside in Somaliland -- is more than reasonable.

In light of the relationship between Samantar and persons who allegedly participated in the human rights abuses alleged in the Complaint, and the continuing clan-based violence throughout all of former Somalia, these Isaaq plaintiffs face a very real possibility of violent reprisals against themselves or their family members at the hands of former members of the

Barre government and its military organizations, or members of the Darod clan and its subclans that supported the Barre regime. Doe Plaintiffs should be permitted to prosecute this case under pseudonyms for safety reasons.³

ARGUMENT

While Federal Rule of Civil Procedure 10(a) requires that all pleadings contain a caption, “many federal courts ... have permitted parties to proceed anonymously when special circumstances justify secrecy.” *Does I through XXIII v. Advanced Textile Corporation*, 214 F.3d 1058, 1068 (9th Cir. 2000) (citing *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 872 (7th Cir. 1997)); *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993); *Doe v. INS*, 867 F.2d 285, 286 n.1 (6th Cir. 1989); *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981); *Moe v. Dinkins*, 533 F.Supp. 623, 627 (S.D.N.Y. 1981), *aff’d*, 669 F.2d 67 (2nd Cir. 1982). Indeed, the Supreme Court has implicitly endorsed the use of pseudonyms when necessary to protect plaintiffs. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

In the Fourth Circuit, courts allow the use of pseudonyms “under appropriate circumstances,” taking into account the following five factors:

(1) whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non-parties;

(2) whether the justification asserted by the requesting party to proceed anonymously is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature;

(3) whether the action is against a governmental or private party; and relatedly;

³ Doe Plaintiffs acknowledge that Samantar should be permitted to take discovery of the events alleged in the Complaint, and Doe Plaintiffs therefore are willing to disclose their identities to Samantar and his counsel and experts so long as further disclosure of their identities is prohibited by the Court.

(4) the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously; and

(5) the ages of the persons whose privacy interests are sought to be protected;

James, 6 F.3d at 238; *see also Doe v. Merten*, 219 F.R.D. 387, 391-392 (E.D. Va. 2004)

(applying factors).

Here, factor number one (fear of retaliatory harm) dominates the analysis before the Court, and consideration of the remaining factors also strongly counsels for anonymity.

I. IDENTIFICATION POSES A SEVERE RISK OF RETALIATORY PHYSICAL OR MENTAL HARM TO DOE PLAINTIFFS AND THEIR FAMILY MEMBERS.

Doe Plaintiffs' legitimate fear of retaliation cries out for permission to proceed anonymously. Several courts have allowed plaintiffs to proceed anonymously based solely on their fear that disclosure of their identity would lead to retaliation and/or physical harm against them and their family members. *See, e.g., Advanced Textile Corp.*, 214 F.3d at 1069 ("We ... conclude ... that plaintiffs reasonably fear severe retaliation, and that this fear outweighs the interests in favor of open judicial proceedings."); *Doe v. INS*, 867 F.2d 285, 286 n.1 (6th Cir. 1989) (holding that the petitioner's fear of retaliation against him and his family members is sufficient to allow the use of pseudonyms); *Javier v. Garcia-Botello*, 211 F.R.D. 194, 196 (W.D.N.Y. 2002) (holding that plaintiffs' fear of retaliation by defendants was sufficiently well-founded to warrant allowing them to proceed anonymously by means of pseudonyms); *John Doe v. Barrow County, Georgia*, 219 F.R.D. 189, 193-94 (N.D.Ga. 2003) (allowing plaintiff to proceed anonymously based on her fear for her safety). *Cf. Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004) ("The danger of retaliation is often a compelling ground for allowing a party to litigate anonymously....").

For example, in *Doe v. INS*, 867 F.2d 285 (6th Cir. 1989), the court allowed a student from the People's Republic of China to use a pseudonym in his asylum proceedings. The petitioner alleged that his conversion to Christianity and involvement in political activities during his stay in the United States would subject him and his family members to torture and arrest in China. The Sixth Circuit stated, "Although the use of pseudonyms is not favored, we have resorted to it here to protect the petitioner's family, who remain in China, from possible reprisals." *Id.* at 286, n.1; *see also Advanced Textile*, 210 F.3d at 1063 (potential retaliation against Chinese plaintiffs and their families, including possible deportation, arrest and imprisonment, was sufficient to allow plaintiffs to proceed under pseudonyms).

Indeed, courts have recognized that Doe status is particularly appropriate in cases concerning alleged human rights violations. Although reported decisions have not addressed the pseudonym issue directly, it is clear that the plaintiffs in human rights cases often have been permitted to proceed using pseudonyms. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (two Jane Doe plaintiffs); *Xuncax v. Gramajo*, 886 F. Supp. 162, 170 (D. Mass. 1995) (one Juan Doe plaintiff); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998) (all plaintiffs proceeding as Does).

As in those cases, the Court should allow Doe Plaintiffs to employ pseudonyms in this case. The crimes that they have alleged against Samantar are serious. The Complaint alleges that Samantar is responsible for human rights abuses, including attempted extrajudicial killings, torture, rape and crimes against humanity. The Complaint further alleges that the direct perpetrators of these heinous crimes are former members of the Red Berets, the NSS and the Somali Armed Forces, many of whom belong to the Darod clan. None of the military figures responsible for these acts, whether they be the front-line perpetrators or their commanding

officers, have been brought to justice. Many of them continue to live freely in Somalia. Moreover, after the collapse of Somalia's central government, clan-based enmity and violent hostilities have plagued Somalia for the past thirteen-plus years. Sadly, these hostilities do not appear to have significantly receded and, indeed, political figures in Somalia today include alleged former human rights violators. Under these chaotic circumstances, exposure of Doe Plaintiffs' involvement in this lawsuit, which will bring attention to Barre-era atrocities and will bring accountability to one of the commanders responsible for them, creates a grave risk of retaliatory harm, perhaps even death, to Doe Plaintiffs and their immediate family members by the perpetrators and their former commanders.

Moreover, clan conflicts, which continue to plague Somalia *and* Somaliland, place these Doe Plaintiffs at risk of clan reprisals for exposing the role that prominent Darod clan members played in committing the human rights abuses that was the hallmark of the Barre regime. Indeed, contrary to Samantar's rosy picture of Somaliland, recent assessments by both the U.S. Department of Homeland Security and the U.S. State Department emphasize renewed fighting in the Sanaag and Sool Regions in eastern Somaliland between the Isaaq and the Mijertain, a subclan of the Darod clan. *Department of State Travel Warning: Somalia*, Exh. 8.⁴ It requires little imagination to suspect that this clan violence might be extended to Doe Plaintiffs or their families if their involvement in this suit were to become known.

These are the grim realities of life in Somalia today. In response Samantar offers a confusing argument that the act of filing this lawsuit in and of itself shows that the Doe Plaintiffs feel "reasonably safe from reprisal by Defendant." Opening Br. at 3. That the Doe Plaintiffs

⁴ Doe Plaintiffs submit that the reports by the State Department, as well as those authored by other independent groups, should be entitled to more weight than the conclusory affidavits upon which Samantar relies for his claim that Doe Plaintiffs run no risk at all of retaliation (Opening Br. at 5).

have proceeded pseudonymously, however, is evidence that they *do* fear that by filing this lawsuit, Samantar's former subordinates or sympathizers may initiate retaliatory measures against them and their family members. Samantar also misinterprets the Complaint to speculate that, since 1997, the plaintiffs have felt safe from all reprisals. Opening Br. at 3-4. To be sure, conditions in Somaliland have improved since 1997, and the prospect of prosecuting any suit before then, even anonymously, would have been almost unimaginable. For the reasons stated above, however, Doe Plaintiffs possess legitimate, well-founded fears of reprisals, here and now, if their identities were to become known in connection with the prosecution of this human rights lawsuit that strikes at the core of abuses perpetrated during the Barre regime.

Thus, Doe Plaintiffs' legitimate fear of reprisals alone justifies their decision to proceed anonymously in this case. And, as shown below, other relevant considerations provide further support for permitting anonymous treatment.

II. OTHER FACTORS STRONGLY MILITATE IN FAVOR OF PERMITTING DOE PLAINTIFFS TO PROCEED ANONYMOUSLY

Consideration of the other relevant factors identified by the courts leads to the conclusion that Doe Plaintiffs should be permitted to proceed anonymously.⁵ Under the Fourth Circuit's test, the court must consider whether the asserted justification to proceed anonymously is "merely to avoid the annoyance and criticism that may attend any litigation," or is to preserve privacy in a sensitive and highly personal matter. *James*, 6 F.3d at 238. This factor strongly supports anonymity in this case. None of the Doe Plaintiffs seek anonymity to avoid any "annoyance" or "criticism" that is attendant to litigation. Quite the contrary, these plaintiffs fear for their personal safety and for the safety of their family members. Moreover, a portion of the

⁵ Doe Plaintiffs all are adults, so the age of the Doe Plaintiffs is not an issue that compels anonymity.

events at issue in this litigation is of a highly sensitive and personal nature, including the abduction and rape (multiple times) of plaintiff Jane Doe I. Compl. at ¶ 49. Other plaintiffs seek justice for torture, for prolonged and arbitrary detention, and for murders of family members. These are significant and degrading matters of a highly personal nature that counsel for anonymity in this case.

Another prong of the *James* test calls for the Court to consider whether the defendant is a governmental actor, a factor that militates in favor of permitting anonymity. *Doe v. Merten*, 219 F.R.D. at 394. Here, the plaintiffs request the Court to find Samantar legally responsible for the acts of human rights abuses committed by his subordinates under his direction while he served either as Prime Minister or Defense Minister at all relevant times. Therefore, this factor weighs heavily in favor of permitting Doe Plaintiffs to proceed anonymously.

Finally, allowing Doe Plaintiffs to proceed anonymously will not subject Samantar to any prejudice. Indeed, Doe Plaintiffs are willing to reveal their identities to the Court, to Samantar, and to Samantar's lawyers and experts, but to no others. Thus, Samantar will face absolutely no prejudice and will be completely able to defend himself. Samantar also contends that allowing Doe Plaintiffs to proceed anonymously would prejudice him by lending "judicial credence" to the suggestion that Samantar retains "sufficient control over the military and judicial machineries in Somalia so as to wreak vengeance on these plaintiffs for their challenge in a United States court." Opening Br. at 6. Of course, this theory misapprehends the basis of Doe Plaintiffs' fears of reprisals. Doe Plaintiffs do not contend that Samantar will "order" military or governmental institutions to exact revenge on Doe Plaintiffs or their families. Instead, as shown above, the source of Doe Plaintiffs' fear of retaliation is the continued presence in Somalia of former Barre regime perpetrators, as well as the clan-based allegiances and enmity that accounts for enormous

levels of violence in all of former Somalia today. Allowing Doe Plaintiffs to proceed anonymously will not prejudice or stigmatize Samantar, and any misconception easily may be cured by a clarifying jury instruction. Thus, Samantar has no genuine claim of prejudice resulting from the anonymous prosecution of this case.

In summary, consideration of the relevant factors tips the scales strongly in favor of permitting the Plaintiffs to proceed anonymously.

CONCLUSION

For the foregoing reasons, Doe Plaintiffs request that the Court grant their Motion for Leave to Proceed Anonymously and deny Samantar's Motion to Dismiss.

Dated: December 28, 2004

BASHE ABDI YOUSUF
JOHN DOE I
JANE DOE I
JOHN DOE II
JOHN DOE III and
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CERTIFICATE OF SERVICE

I hereby certify, this 28th day of December, 2004, that a true copy of the foregoing was sent by UPS Overnight to the following counsel of record:

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