

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

BASHE ABDI YOUSUF, et al.,	.	Civil Action No. 1:04cv1360
	.	
Plaintiffs,	.	
	.	
vs.	.	Alexandria, Virginia
	.	January 7, 2005
MOHAMED ALI SAMANTAR,	.	10:00 a.m.
	.	
Defendant.	.	
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TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE LEONIE M. BRINKEMA  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	ROBERT R. VIETH, ESQ. Cooley Godward LLP One Freedom Square 11951 Freedom Drive Reston, VA 20190-5656 and HELENE SILVERBERG, ESQ. Center for Justice & Accountability 870 Market Street, Suite 684 San Francisco, CA 94102
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FOR THE DEFENDANT:	HARVEY J. VOLZER, ESQ. Shaughnessy, Volzer & Gagner, P.C. 1101 15th Street, N.W., Suite 202 Washington, D.C. 20005 and FRED B. GOLDBERG, ESQ. Spirer & Goldberg, P.C. 7101 Wisconsin Avenue, Suite 1201 Bethesda, MD 20814
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OFFICIAL COURT REPORTER:

ANNELIESE J. THOMSON, RDR, CRR  
U.S. District Court, Fifth Floor  
401 Courthouse Square  
Alexandria, VA 22314  
(703)299-8595

## 1 P R O C E E D I N G S

2 THE CLERK: Civil Action 2004-1360, Bashe Abdi Yousuf,  
3 et al. v. Mohamed Ali Samantar. Will counsel please note their  
4 appearance for the record.

5 THE COURT: Counsel, put your names on the record,  
6 please.

7 MR. VIETH: Good morning, Your Honor. Robert Vieth of  
8 Cooley Godward for the plaintiffs, and, Your Honor, I would like  
9 to introduce to the Court my co-counsel, Helene Silverberg, from  
10 the Center for Justice & Accountability. Ms. Silverberg is  
11 admitted in the State of California, and I do believe Your Honor  
12 has granted her pro hac vice paper.

13 THE COURT: As I said, I think half the California Bar  
14 has been admitted to this case. Good morning. Nice to meet you.

15 MS. SILVERBERG: Good morning, Your Honor.

16 MR. VIETH: Your Honor, with the Court's permission, I  
17 would -- I am prepared to handle argument on the first filed  
18 motion to dismiss today while Ms. Silverberg will handle the what  
19 I would call the cross-motions regarding the ability of the  
20 plaintiffs to proceed anonymously.

21 THE COURT: All right. You know how this Court  
22 operates. I've already made up my mind on some issues.

23 MR. VIETH: I do, Your Honor. Thank you.

24 THE COURT: All right. And for the defendant?

25 MR. VOLZER: Good morning, Judge Brinkema. Harvey

1 Volzer for the defendant, and this is Fred Goldberg, who's been  
2 admitted previously pro hac vice, and he will handle the arguments  
3 today.

4 THE COURT: All right. Well, there are before the Court  
5 this morning the defendant's motion to dismiss the complaint for  
6 lack of personal jurisdiction, the defendant's motion to dismiss  
7 the complaint for failure to state a claim, and the plaintiffs'  
8 motion for leave to proceed anonymously. Obviously, I'm going to  
9 deal with that last motion first.

10 The allegations in this case are that the various  
11 plaintiffs, who are Somalian natives, are seeking compensatory and  
12 punitive damages for alleged torture that they suffered at the  
13 hands of the defendant, and they have sued in this court under the  
14 Torture Victim Protection Act and the Alien Tort Claims Act, as I  
15 understand it.

16 The named defendant, Mr. Samantar, is a former prime  
17 minister, first vice president, and minister of defense of the  
18 Democratic Republic of Somalia; and the plaintiffs have alleged  
19 that he was responsible for acts of torture; cruel and inhumane  
20 and degrading treatment; arbitrary detention; rape; extrajudicial  
21 killing; and attempted extrajudicial killing against the  
22 plaintiffs and their family members; and plaintiffs John Does 1  
23 and 2 also allege that the defendant was responsible for war  
24 crimes against them.

25 The defendant, it is alleged is now, although a citizen

1 of Somalia, resides in Fairfax County, Virginia.

2           Obviously, the nature of the charges that have been  
3 filed in this case are very serious. My understanding is that  
4 many of the plaintiffs allegedly still reside in Somalia, and  
5 therefore, they are seeking at this point protection of their  
6 identities.

7           My understanding is that the plaintiffs' counsel is  
8 willing to reveal the names of the plaintiffs privately to counsel  
9 for the defendant but are requesting that those names not be  
10 publicly noticed at this point and that they not be shared -- and  
11 actually have agreed to let them be shared, as I understand it,  
12 with the defendant as well.

13           Is that right?

14           MS. SILVERBERG: Yes, Your Honor.

15           THE COURT: All right. Mr. Goldberg -- Mr. Volzer, I  
16 don't see why that's any problem for the defendant.

17           MR. VOLZER: I would agree with those, you know,  
18 stipulations.

19           THE COURT: Now, the further stipulation, of course, is  
20 that your client would not be permitted to reveal the names of  
21 those people to anyone without Court permission, so you can talk  
22 freely with your client, and if down the road -- if this case were  
23 to stay on the docket, if down the road you needed to conduct  
24 discovery and if for some reason the name of the individual was  
25 necessary, then, you know, we'd have to work out some parameters

1 for that. But I assume you can live with that.

2 MR. VOLZER: Your Honor, we -- Mr. Vieth and I have  
3 handled cases together before, and we get along very well, so I  
4 think if there's any problem, we can probably work it out between  
5 counsel, but we do have experts that we intend to use in this  
6 case, and I think it's important for those experts to know --  
7 these are not, you know, these are not people from Somalia, but  
8 they're being retained to talk about the law of those countries.

9 THE COURT: They wouldn't need the names of the people  
10 to do that, would they?

11 MR. VOLZER: Well, I think they might, Your Honor, and  
12 we can bring that up again.

13 THE COURT: All right. At the present time then, I'm  
14 going to grant the plaintiffs' motion for leave to proceed  
15 anonymously. There is -- the first plaintiff has permitted his  
16 name to be used --

17 MS. SILVERBERG: Yes, Your Honor.

18 THE COURT: -- Mr. Yousef, and so that name is publicly  
19 available.

20 The rest of the plaintiffs will remain John or Jane Does  
21 at this point. Counsel will have access to their names, and the  
22 defendant will have access to their names, but neither counsel nor  
23 the defendant may reveal the John or Jane Doe names to any other  
24 individual without permission from Court unless you've gotten  
25 written permission from the plaintiffs. All right?

1 MR. VOLZER: Understood, Your Honor.

2 THE COURT: And certainly that will not interfere with  
3 your ability to conduct any discovery or to consult with expert  
4 witnesses, all right?

5 MR. VOLZER: Thank you.

6 THE COURT: All right. Now, as to defendant's motions  
7 to dismiss, I am concerned before we get any further into this  
8 case as to what the positions are, if any, of the United States  
9 Department of State and the government of Somalia as to this issue  
10 of head-of-state immunity. So what I want to know, Mr. Vieth,  
11 from the plaintiffs is have you approached either or both of those  
12 governmental entities to get their views on that issue?

13 MR. VIETH: Your Honor, let me just take up Somalia  
14 first. There is no recognized government in Somalia. It is  
15 certainly no government recognized by the United States  
16 government.

17 As Your Honor may have gleaned from the papers -- and  
18 what I'm telling you today, Your Honor, I think there's a fair  
19 amount of source in the record, but it's also material that I've  
20 come to learn working on this case, frankly.

21 Somalia is almost, it's almost fair to say, is divided  
22 into two regions. There is a region of Somaliland in the  
23 northwest portion of the former Somalia. That region formerly was  
24 a British protectorate, and after the collapse of the Barre regime  
25 in 1991, Somaliland essentially declared its own independence, but

1 it is not a recognized country by any other country in the world,  
2 at least to my understanding, certainly not by the United States.

3           The remainder of Somalia is in, I would say to put it  
4 charitably, in formative stages of trying to establish a  
5 government, but there really is no -- not much going there. All  
6 of the available public record information indicates that it is in  
7 a complete state of chaos. Somaliland is a little bit better.

8           THE COURT: And that may be the case, but as you know,  
9 these issues about head-of-state immunity, etc., are very tough  
10 issues, and traditionally what the courts do is they want if it's  
11 possible -- a determination as to who qualifies as a head of state  
12 is normally made by the executive branch.

13           MR. VIETH: I --

14           THE COURT: It's not properly a factual issue that a  
15 court should be determining, and therefore, at least I would like  
16 to know whether you've approached the State Department on this  
17 issue.

18           MR. VIETH: We have not approached any Somali entity --

19           THE COURT: All right.

20           MR. VIETH: -- that's part of Your Honor's question, and  
21 no, we have not approached the State Department.

22           As I understand how this process normally works, a  
23 defendant who seeks immunity may request of the State Department a  
24 certification.

25           THE COURT: Well, we were going to get to that question,



1 but I wanted to find --

2 MR. VIETH: And I am curious to know -- we have not  
3 approached the State Department about it. We feel it, frankly, is  
4 the defendant's burden to do so, and I am curious if the defendant  
5 has done so. I don't know if he has.

6 THE COURT: All right. But again, you've answered my  
7 question about anybody in a governmental position of Somalia.  
8 Thank you.

9 MR. VIETH: Thank you, Your Honor.

10 THE COURT: All right. Now, Mr. Volzer, since you're  
11 raising the issue of immunity -- co-counsel -- have you approached  
12 the State Department on this issue?

13 MR. GOLDBERG: No, we have not approached the State  
14 Department as of yet. We do believe that there is ample case law,  
15 however, to support the notion that absent a determination by the  
16 State Department or a letter of interest from the State  
17 Department, it is up to the Court to make a determination, and  
18 that's happened in many cases. We've cited them in the brief, the  
19 Abiola case as well as the case involving Aristide.

20 The courts can make that determination absent a letter  
21 from the State Department.

22 THE COURT: But they're the fair minority of the courts  
23 that have looked at this issue. The far majority of the courts  
24 have said first that this is a matter that the executive branch  
25 ought to look at. If they choose not to invoke any immunity, then

1 obviously, we go on from there. If the government does feel that  
2 immunity -- if they give the necessary indication that this person  
3 is the head of the state and immunity would apply, then, you know,  
4 we look at that.

5 I think that's a huge piece of the puzzle that's missing  
6 in this case, and since you're moving to dismiss on the ground of  
7 immunity, without some indication, even an indication that there's  
8 not going to be any indication, I don't feel this record is  
9 adequately complete, and so what the Court is going to do is I'm  
10 going to defer ruling on the motions to dismiss subject to your  
11 promptly approaching the Department of State to get its view as to  
12 this issue, and after we've gotten whatever response they choose  
13 to give us, then the Court will advise you-all, and we'll  
14 re-docket this matter for argument on the motions to dismiss. The  
15 case will stay on the docket at this point.

16 Have you been -- you've been before a magistrate judge  
17 for the initial pretrial, or is that coming up next week?

18 MR. GOLDBERG: That's coming up next week.

19 Your Honor, I'd like to be heard on the other issues as  
20 well, however, the --

21 THE COURT: No, I'm not going to hear any other issues  
22 at this point. What I'm going to do, though, is I'm going to  
23 defer for 30 days the pretrial conference. I expect the  
24 defendants to move expeditiously on this; that is, I want a report  
25 back within 30 days as to what you've done vis-a-vis the State

1 Department, what its position is, where you are, and at that  
2 point, we will decide how we want to proceed.

3 Thank you.

4 MR. VOLZER: Your Honor, if I may, just one point of  
5 clarification?

6 THE COURT: Yes, Mr. Volzer.

7 MR. VOLZER: Do you want us to continue the conference  
8 next week with Judge Poretz?

9 THE COURT: No, I'm going to take that off. The case is  
10 not going to linger on the docket, but I'm giving you 30 days to  
11 get this addressed, and then you'll report back to the Court.  
12 I'll determine at that point whether we're going to go ahead with  
13 the motions to dismiss and/or get this initial pretrial --

14 MR. VOLZER: Your Honor, is discovery stayed during that  
15 period?

16 THE COURT: Yes, I'm staying discovery for 30 days.

17 MR. VOLZER: Thank you.

18 THE COURT: We'll move fast enough, it's not going to be  
19 a problem.

20 MR. VOLZER: I understand. Believe me, I understand.

21 MR. VIETH: Your Honor, one further point of  
22 clarification in light of Your Honor's stay of discovery. We have  
23 issued some third-party discovery already to agencies of the  
24 government by 2(a) requests and subpoenas. Your Honor --

25 THE COURT: Those take so long.

1           MR. VIETH: -- given the turnaround time, I would prefer  
2 that that not be stayed.

3           THE COURT: I'll make that for both sides. Either side  
4 who feels it's going to need discovery from governmental agencies  
5 may continue with that discovery because the process does take so  
6 long. I don't want to slow this case down unnecessarily. All  
7 right?

8           MR. VIETH: Thank you, Your Honor.

9           THE COURT: Thank you.

10                                 (Which were all the proceedings had  
11                                 at this time.)

12

13                                 CERTIFICATE OF THE REPORTER

14           I certify that the foregoing is a correct transcript of the  
15 record of proceedings in the above-entitled matter.

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Anneliese J. Thomson