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Lawsuit could establish end to prosecution of war criminals living in US

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Ruling due to be made in Virginia on Wednesday could render impotent the Alien Tort Statute, legislation widely used to prosecute human rights abuses



Farhan Warfaa with his attorneys. Warfaa is bringing a case against Yusuf Abdi Ali, who committed various crimes in Somaliland in the 1980s and currently resides in the US. Photograph: Center for Justice and Accountability

Almost three decades after he was imprisoned and tortured by henchmen of brutal Somali dictator Mohamed Siad Barre, Farhan Warfaa is still haunted by the moment the army officer interrogating him drew out a pistol and shot him five times at close range.

Assuming he had killed the man he was questioning about a crime no more serious than the theft of a water tanker, the officer ordered soldiers to take away and bury the body.

But Warfaa survived and escaped the prison compound with the aid of sympathetic jailers who smuggled him to safety, leaving him to deal with years of nightmares and the mental anguish of his brush with death.

The officer alleged to have shot him, meanwhile, went on to become one of the most feared and ruthless commanders of the 20-year Siad Barre dictatorship, according to the California-based human rights group [The Centre for Justice and Accountability](#) (CJA).

As the head of the Somali army's Fifth Brigade in the 1980s, Colonel Yusuf Abdi Ali terrorised the Isaaq clans of the separatist province of [Somaliland](#), ordering and often participating in the mass detention, torture and summary execution of countless individuals and supervising the destruction of numerous villages, the group says.

When Siad Barre was overthrown in 1991, Ali fled to [Canada](#) and later became a permanent resident of the United States.

Efforts to bring him to justice will continue in an appeals court in [Virginia](#) on Wednesday in a hearing that could have huge implications for the future prosecution of other alleged war criminals living in the US.

Ali's attorneys are demanding that Warfaa's long-running lawsuit, originally brought in 2004 and much delayed since, is thrown out on the grounds that a recent US supreme court ruling in a separate case gives him immunity from prosecution.

But lawyers for the CJA, who are representing Warfaa alongside a pro-bono team of attorneys from international law firm DLA Piper, will argue before the fourth circuit court of appeals that the ruling in that corporate case should not benefit an individual torturer residing on US soil.

A decision in Ali's favour, they believe, would effectively render impotent the Alien Tort Statute (ATS), the centuries-old legislation widely used by human rights groups in recent years, which allows foreign nationals to gain relief in US courtrooms for wrongs committed against them in other countries.

"This is the first time an appellate court will apply the supreme court decision to a case involving an individual perpetrator seeking refuge in the United States, and thus the first to decide whether the US will legally provide such safe harbour for those who commit mass atrocity crimes," said CJA lawyer Kathy Roberts.

“The defendant is trying to reverse more than three decades of legal precedent that has allowed victims of human rights abuses to bring lawsuits under the ATS in US courts against their tormentors.

“The court has the chance to send a clear message that the US is not a safe harbour and that those who commit crimes against humanity will not be able to evade justice, and they will be held accountable.”

The supreme court case upon which Ali is relying is the 2013 decision in [Kiobel v Royal Dutch Shell Petroleum](#), in which the panel ruled that a group of Nigerian refugees living in the US had no claim against the British-Dutch multinational they accused of colluding with the Nigerian military to torture and murder environmental protestors in the 1990s.

In a split decision, the justices ruled that the ATS did not apply to human rights abuses committed in other countries unless there was a strong connection to the US. Branding the decision “disappointing”, the CJA said it “significantly weakened human rights legislation as we knew it”.

The ATS, part of the 1789 Judiciary Act, is one of the oldest pieces of the country’s legislation, offering a path to relief in federal civil courts to victims of piracy and believed to have been designed in part to protect the rights of ambassadors in foreign nations.

In practice, however, it went almost unused for two centuries until groups such as the Center for Constitutional Rights and Human Rights USA began to utilise it as a tool for domestic civil litigation against foreign nationals and corporations in war crimes cases.

Many claims and settlements under ATS have been against companies, but [one notable individual success was against Charles “Chucky” Taylor](#), the violent, American-born son of the notorious Liberian warlord of the same name. He was ordered to pay more than \$22m to five plaintiffs by a Florida court in 2010.

At a hearing in Virginia last July, district court judge Leonie Brinkema announced her intention to dismiss Warfaa’s suit against Ali, citing the Kiobel ruling and its perceived effect on the ATS. She later agreed to stay the decision pending the outcome of the CJA appeal.

The three-judge panel will consider two key questions, if the claims against Ali “touch and concern” the US sufficiently to overcome the Kiobel ruling and whether Ali is entitled to immunity under common law.

Roberts said Ali’s mere presence in the US since 1996, when he became a lawful permanent resident through marriage and moved to Virginia, should be enough for the appeal judges.

“The fact that he is a US national deeply touches and concerns the US, a country that has led the way to give victims access to its courts through the ATS and other legislation such as the [Torture Victim Protection Act](#),” she said.

Joseph Drennan, Ali's lawyer, did not return a call from the Guardian seeking comment, but has already argued that his client's residence is irrelevant. "The supreme court in Kiobel determined that a defendant's location in the US was not pertinent ... for purposes of establishing ATS jurisdiction," he wrote in a briefing document to the court in March.

Following Wednesday's short hearing, the appeals court is expected to make its ruling within 90 days. Warfaa, a respected village elder of his Isaaq sub-clan near the Somaliland town of Gabiley, will not attend but said he wants his story to be told.

"This is not just a case to me, it's a part of my life I will never forget and I want to see those responsible realise what they have done," he told the Guardian.

"They may have forgotten but myself and others like me will never be able to. I want to see justice and I want my kids to learn that nobody is above the law and every action has a consequence, whether in this life or the afterlife."

<http://www.theguardian.com/law/2015/sep/15/lawsuit-war-criminals-living-in-us-yusuf-abdi-ali#img-1>