

No. 08-1555

IN THE
Supreme Court of the United States

MOHAMED ALI SAMANTAR,
Petitioner,

v.

BASHE ABDI YOUSUF, *ET AL.*,
Respondents,

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

Brief of *Amici Curiae*
Academic Experts in Somali History and Current
Affairs in Support of Respondents

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Brief of *Amici Curiae*
Academic Experts in Somali History and Current
Affairs in Support of Respondents

Professors Lee Cassanelli, J. Peter Pham, Ioan M. Lewis, Gerard Prunier, and Hussein Bulhan, academic experts in the history and current affairs of Somalia, respectfully submit the following Brief as *Amici Curiae* in support of Respondents herein, urging the Court to affirm the decision of the U.S. Court of Appeals for the Fourth Circuit. Counsel for Petitioner and Respondents have both consented to the filing of this Brief.¹

Interest of *Amici*

Amici are professors whose academic specialties include the history and current affairs, including the politics and legal systems, of the Horn of Africa, and of Somalia in particular.

Dr. Lee Cassanelli is Associate Professor of African history, oral history, and comparative world history at the University of Pennsylvania in Philadelphia. His research interests focus on Ethiopia and Somalia from the 18th to the 20th century. He has co-edited a book on some of the social and economic forces behind the Somali civil war (Catherine Besteman and Lee V. Cassanelli, eds., *The Struggle for Land in Southern Somalia: The War Behind the War*, Westview Press, 1996),

¹ Undersigned counsel of record, in collaboration with the named *Amici*, is the sole author of this Brief. The law firm of which counsel is a shareholder paid for its printing and submission. Neither party, nor any law firm representing a party, made any monetary contribution to it.

and is author of *The Shaping of Somali Society* (Univ. of Penn. Press, 1982) and *Victims and Vulnerable Groups in Southern Somalia*, for the Canadian Immigration and Refugee Board, Ottawa, 1995.

Dr. J. Peter Pham is Senior Fellow and Director of the Africa Project at the National Committee on American Foreign Policy in New York City. He also holds academic appointments as Associate Professor of Justice Studies, Political Science, and African Studies at James Madison University in Harrisonburg, Virginia, and as nonresident Senior Fellow in Africa Policy Studies at the Foundation for the Defense of Democracies in Washington, D.C. He writes “Strategic Interests,” a weekly column on African security issues distributed by the World Defense Review, including the article “Somalia: Strategic Realities and Realistic Stratagems,”² and has authored more than fifty chapters in edited volumes, articles in refereed journals, and other commentaries on political and security developments in Somalia. Dr. Pham has testified before the U.S. Congress on numerous occasions and conducted briefings for or consulted with the U.S. and foreign governments as well as private firms about his area of specialty. Dr. Pham is Vice President of the Association for the Study of the Middle East and Africa (ASMEA), and is Editor-in-Chief of its new flagship publication, The Journal of the Middle East and Africa.

² This article is available at <http://worlddefensereview.com/pham070209.shtml>.

Dr. Ioan M. Lewis is Professor Emeritus of Anthropology at the London School of Economics, and has studied Somali culture and politics since the 1950s. He is the author of numerous works on Somalia, including: *Understanding Somalia and Somaliland: Culture, History, Society* (Columbia University Press 2008), *Modern History of the Somali: Nation and State in the Horn of Africa* (Ohio University Press 2003), and *Making History of Somalia: Humanitarian Intervention in a Stateless Society* (Centre for the Study of Global Governance, London School of Economics 1995), among others.

Dr. Gerard Prunier is Research Professor Emeritus at the University of Paris, specializing in the Horn of Africa as well as Central and East Africa. In 1984, he joined the Centre National de la Recherche Scientifique (CNRS) in Paris, where he continues to serve as Senior Researcher. Dr. Prunier has done extensive research on Eastern Africa and the Horn of Africa, publishing approximately 120 articles and five books over the past 18 years. He is the author of, among many other works, “The Experience of European Armies in Operation Restore Hope,” in Clarke and Herbst, *Learning From Somalia* (Westview Press 1997), and “Somalia: Civil War, Intervention and Withdrawal 1990-1995,” 15 *UNHCR Refugee Survey Quarterly* (1996).

Dr. Hussein Bulhan is President of the University of Hargeisa in Somaliland, and is the former head of the Somaliland Academy for Peace and Development. Dr. Bulhan served as a tenured professor at Boston University and as Director of the Family Therapy Program at Boston University

Medical Centre. He returned to Somaliland to mediate conflict in 1994 to 1996, thereafter remaining in the country to help in socio-economic rebuilding and trauma treatment. He is the author of, inter alia, *Politics of Cain: One Hundred Years of Crises in Somali Politics and Society* (Tayosan International Publishing 2008).

Amici note that, in the case at Bar, Petitioner has made certain representations concerning the recent history and current status of Somalia that are inconsistent with their own observations and understanding of the facts on the ground in that country.³ In particular, Petitioner suggests: (1) that atrocities against civilians, including the widespread and systematic use of torture and extrajudicial killing of which Petitioner is accused, were taken within his official authority under Somali law at the time of the events giving rise to this case (*see, e.g.*, Petitioner’s Brief at 17), and (2) that the Transitional Federal Government of Somalia (“TFG”) is currently a functioning government that administers the territory of Somalia, provides services to its citizens, and has received the official recognition of the United States (*id.* at 43-45).

These contentions are entirely at odds with the views of *Amici*, with the academic research with which they are familiar, and with their own experience, observations, and field studies. *Amici* respectfully submit that the Court’s deliberations

³ The facts set out in this Brief are supported by reference to academic literature and other sources. Facts stated without citation to authority are based on *Amici*’s own experience, personal observations, and field research.

may be aided by their disinterested perspective on conditions in Somalia at the time periods relevant to this case.

Summary of the Argument

The Siad Barre regime in Somalia – in power from 1969 through 1991 – was a brutal dictatorship, which preserved its hold on power through nepotism, the repression of disfavored ethnic groups, and systematic violations of the rights of those who opposed its excesses. Although the regime's constitution pledged respect for internationally-recognized human rights, that commitment was never honored, and there was no independent judiciary to which the victims of these abuses could turn for recourse. The failure of the Siad Barre regime to honor its international obligations earned it condemnation from countries around the globe, including the United States.

Petitioner Mohamed Ali Samantar was Defense Minister and then Prime Minister under that regime, and in that capacity was instrumental in implementing its policies of torture, summary executions, disappearances, and the rampant denial of fundamental principles of the due process of law. The military and national security forces were the instruments of these policies, and were employed for political ends.

When the Siad Barre regime fell, Somalia ceased to exist as a functioning state. To this day, no governing authority has been able to acquire either de jure or de facto control over the territory of the country. The so-called "Transitional Federal

Government,” currently claiming to be the government of Somalia is not in fact a functioning government at all, does not control substantial territory, and is not recognized by the United States. Indeed, the existence of at least two substantial separatist entities that have created some of the institutions of governments suggests that the territorial integrity of the former Republic of Somalia is by no means assured.

Argument

I. The Siad Barre Regime, in Power in Somalia at the Time of the Events Giving Rise to This Case, Was a Military Dictatorship, Responsible for Widespread and Systematic Atrocities against Civilians, Including Torture and Extrajudicial Killing.

A. Background to the Siad Barre Regime

The Somali Republic was formed as a union between the former British Somaliland Protectorate, which became independent on June 26, 1960, as the “State of Somaliland,” and the Italian Trust Territory of Somalia, which achieved independence five days later. The referendum to establish the union was boycotted by several political parties (predominantly representing the Isaaq clan), who feared that politicians from the southern part of the country would dominate the new government. In December 1961, some Sandhurst-trained officers in the recently integrated National Army, hailing from the north, attempted a coup. While the rebellion was quickly put down, many northerners continued

to feel economically and politically marginalized by the government in Mogadishu. An Isaaq (Mohamed Ibrahim Egal) ultimately became Prime Minister in 1967, but he did not remain in office long: he was detained following the military coup of 1969 and remained in custody until 1975.

During the 1960s, the Somali police force was trained by U.S. and European advisers, while the National Army was trained and equipped by the Soviet Union. Both forces at that time enjoyed relatively strong reputations for discipline and integrity. The 1961 Constitution provided for an independent judiciary, incorporating elements of British, Italian, and Shari'a legal codes, with a Supreme Court to decide on matters which overlapped customary, statutory, and Islamic law.

B. The Military Coup d'État and Siad Barre's Consolidation of Power

The assassination of President Shermarke in September 1969, purportedly in retaliation for local clan killings during the national elections earlier that year, was followed by a military coup d'état a month later. A ruling Supreme Revolutionary Council (SRC) suspended the Constitution, banned all political parties, and selected Mohamed Siad Barre as its titular president and spokesman. Siad Barre soon emerged as a strongman, and in 1970 proclaimed "scientific socialism" to be the guiding ideology of the country, which he renamed "the Somali Democratic Republic." Relations with the West deteriorated as the Soviet Union and its

Eastern European allies became the major backers of the new regime.

In 1972 Somali became a written language (using Latin script) and thus the official national language, and self-help and literacy campaigns were launched throughout the country. At the same time, Siad Barre began to strengthen his regime's power while steadily undermining potential sources of opposition. In addition to building an elaborate intelligence and security apparatus (which is discussed further below), he also promulgated laws which increased the state's control over property rights, the court system, and local governance. The effect was to weaken the public authority of clan elders, Islamic clerics, and civil service bureaucrats.

The regime overhauled local government, as part of a long-range decentralization program intended to destroy the influence of the traditional clan assemblies and, in the government's words, to bring government "closer to the people." It broke up the old geographic regions into smaller units: local councils, composed of military administrators and representatives appointed by the SRC, were established under the Ministry of Interior at the regional, district, and village levels to advise the government on local conditions and to expedite implementation of its directives.

The early 1970s also witnessed the establishment (under Soviet direction) of the National Security Service (NSS).⁴ Its initial aims

⁴ National Academy of Science, Human Rights Committee, Scientists and Human Rights in Somalia (1988) ("NAS

were to halt the flow of professionals and dissidents out of the country and to counteract the settlement of disputes among the clans by traditional means. The newly-formed Ministry of Information and National Guidance set up local political education bureaus to carry the government's message to the people, sent civil servants for retraining sessions at "reorientation centers" like "Halane," and used Somalia's print and broadcast media to promote "scientific socialism." A censorship board, appointed by the ministry, tailored information to SRC guidelines. In addition to targeting nepotism and tribalism, the system also harassed and incarcerated individuals for "lack of revolutionary zeal," utilized arbitrary powers of arrest, and exercised surveillance over public servants.

In its 1989 report on Somalia, Africa Watch asserted that "extreme and systematic oppression" of political opponents had dated from the start of the Siad Barre years,⁵ although I.M. Lewis writes that in these early years "few political prisoners were brutally tortured or died in custody."⁶ As early as 1973, however, some Western-educated intellectuals had begun to flee the country. Several high-profile public executions also occurred: Army Generals Mohamed Ainarshe and Salal Gavere in 1972, and ten local sheikhs in January 1975. The latter event was a response to Islamic clerical criticism of the

Report"), p. 16, describing the NSS as "an intelligence agency with virtually unlimited powers of surveillance, investigation, search, arrest, and detention."

⁵ Africa Watch, *Somalia: A Government at War with Its Own People* (1989) (hereinafter "Africa Watch"), p. 7.

⁶ I.M. Lewis, *A Modern History of Somalia*, p. 212.

regime's 1974 Family Law, which took decisions on inheritance and divorce out of the traditional Islamic courts and made the state the ultimate arbiter of such matters. The 1975 executions marked the start of a major rift between Somali religious scholars and the state. Many experts locate the origins of the modern Islamist movement in Somalia in this period.

With Soviet encouragement, a Somali Revolutionary Socialist Party (SRSP, or XHKS in the Somali language) was established in 1976, headed by a Supreme Council which included civilians. In theory the creation of the SRSP marked the end of military rule, but in practice, real power over the party and the government remained with the small group of military officers who had been most influential in the SRC. Decision-making power resided with the new party's politburo, which was a select committee of the Supreme Council made up of five former SRC members, including Siad Barre, NSS chief Ahmad Suleiman Abdullah (the President's son-in-law), and Defense Minister Mohamed Ali Samantar (Petitioner in the case now before the Court). Military influence in the new government increased with the assignment of former SRC members to additional ministerial posts, and with the appointments of military officials to district and regional governments.

In August 1977, the Soviet Union suspended arms shipments to Somalia and accelerated military deliveries to the emerging Marxist government in Ethiopia, which was combating Somali troops seeking to liberate the Ogaden region. Somalia, in turn, renounced its Treaty of Friendship and Cooperation with the USSR, and expelled all Soviet

advisers. For the next decade, Somalia received most of its foreign military and economic assistance from the United States and its Western allies.

C. Increasing Repression after 1975

The regime's repressive policies and practices continued after Somalia broke its ties with the Soviet Union in 1977 and became a major recipient of Western military and economic assistance. The disastrous Ogaden War of 1977-78 produced widespread dissent within the ranks of the Somali National Army. Officers from the Majerteen (Darod) and Isaaq clans in particular felt that their troops had borne the brunt of the conflict and suffered the greatest casualties while the President's clansmen (the Marehan) had stood on the sidelines. Their opposition to the handling of the war threatened the stability of the regime, which retaliated immediately. Africa Watch reported that in 1978, "about 80 officers were executed in Hargeisa," and a coup led largely by Majerteen officers in April of that year was crushed by the government.⁷

Through the 1980s, the Siad Barre regime increasingly used arrests, detentions, and executions of dissidents from all clans to suppress political opposition, as annual U.S. State Department reports on Somalia country conditions regularly noted. The regime also faced a number of clan-based opposition movements, which operated from base camps in Ethiopia and launched periodic raids against government installations in Somalia. The major opposition organizations were the Somali Salvation

⁷ Africa Watch, pp. 28-29.

Democratic Front (SSDF), made up primarily of Majerteen clansmen from the northeast, and the Isaaq-dominated Somali National Movement (SNM), which targeted government officials and their agents in the northwest. The regime retaliated with punitive raids against civilian communities in those two parts of the country, a form of “collective punishment” which would be later employed in the regime’s 1988 bombing of Hargeisa and other northern towns.⁸ During the 1980s, other practices reflecting the regime’s arbitrary and systematic repression of opponents became routine. The National Security Service’s headquarters at “*Godka Muqdisho*” (“the hole”), and maximum security prisons at Lanta Bur and Labaatan-Jirow (built by the East Germans, and featuring underground solitary confinement cells), became known as centers of abuse and torture of political opponents.

After 1975, critical ministries and security posts were almost exclusively entrusted to close relatives or in-laws of Siad Barre. From 1969 to 1981, the head of the National Security Service was his son-in-law Gen Ahmed Suleiman Abdulle. Another son-in-law, Abdirahman “Gulwade,” headed “the Victory Pioneers,” a paramilitary group which reported directly to the President and had powers of arrest and detention. The regime also employed individuals from low-status “minority” groups whose power came not from their clan affiliation but solely from their loyalty to the President. Petitioner Mohamed Ali Samantar, Defense Minister from 1980 to 1987 and Prime Minister from 1987 to 1990, was

⁸ *Id.*, pp. 29-34; Bradbury, *Becoming Somaliland* (Oxford: James Curry, 2008), pp. 43-44

the highest-ranking member of the Siad Barre government to come from one of the minority groups.

Through the 1980s, political and military power was concentrated in the hands of three clans – the Marehan, Ogaden, and Dulbahante – popularly known as “the MOD coalition.” Representatives of other clans were not totally excluded from the government, but they tended to hold less sensitive portfolios and were watched carefully by the NSS and other intelligence networks. Members of clans with armed opposition movements based in Ethiopia or the Middle East (such as the Isaaq) were kept under constant surveillance by the security apparatus in Mogadishu and elsewhere in the country.

Following the Ogaden War, the government systematically resettled Ogaden refugees in camps and settlements in the northwest (Isaaq-dominated) region and supplied them with weapons – in contravention of international refugee law⁹ – to help suppress the Isaaq and seize their economic assets. When the Isaaq retaliated, government security forces arrested, detained, and frequently tortured Isaaq civilians. The “*tabaleh*” system, applied only in the Northwest region, employed informants to track the travels of Isaaq businessmen and educators and to monitor visitors to Isaaq households. Africa Watch documents house-to-house searches, extrajudicial executions, and killings of Isaaq civilians in the 1980s.¹⁰ Prominent Isaaq

⁹ Somalia became a party to the 1951 Convention Relating to the Status of Refugees and its 1967 in 1978.

¹⁰ Africa Watch, pp. 49-81.

professionals in Mogadishu and elsewhere were also harassed or detained.¹¹

Responsibility for maintaining security in the northwest region was in the hands of military governors throughout the 1980s, the best-known being Mohamed Hashi Gani (a cousin of Siad Barre) and Mohamed Siad Hirsi “Morgan” (the President’s son-in-law). The region was put under a “state of emergency” in 1982, and Mobile Military Courts (MMCs) were established to provide summary justice. The HANGASH, a military police force operating independently of the NSS, provided evidence to help the MMC prosecutor prepare charges against suspected dissidents. Suspects were often imprisoned at *Qaybta*, the headquarters of the military command for the northwest region, where torture and the threat of torture were used not only to extract information about the SNM or potential defectors from the NSS, but also to extort money from prisoners or their families. In the rural areas, a mechanized unit of the army made up exclusively of non-Isaaqs and popularly known as *dabar-goynta Isaaqa* (“the Isaaq exterminators”) terrorized the nomadic populations for their reputed support of the SNM.¹²

By 1987, disaffection with the regime had become widespread in Somalia, and rifts were apparent even within the ruling clique. When a segment of the Ogaden clan broke from the

¹¹ Jama Mohamed Ghalib, *The Cost of Dictatorship: The Somali Experience* (New York: Lilian Barber Press, 1995), pp. 159-181.

¹²Africa Watch, p. 89.

government to launch its own opposition group (the Somali Patriotic Movement, or SPM), and leaders of the previously quiescent Hawiye clan formed the Somali National Alliance (SNA), the regime had lost control of most of the country.

The anticipated loss of sanctuaries in Ethiopia following the Ethiopia-Somalia peace agreement in May 1988 prompted the SNM to launch attacks against government installations in Hargeisa and Bura'ō, the northwest region's two largest cities. The Somali Armed Forces in June and July 1988 retaliated in a massive campaign of aerial and ground assaults on cities and towns in northwest Somalia. The aerial bombing of Hargeisa were one of the most bizarre war crimes in the annals of armed conflict: taking off from that city's own airport, the aircraft destroyed public buildings, the marketplace, and several residential areas, with no effort to distinguish between civilians and armed combatants. Livestock was confiscated and wells were poisoned. Africa Watch estimated that fifty to sixty thousand civilians were killed between May 1988 and March 1989, and some 400,000 civilians (predominantly Isaaq) fled to Ethiopia as refugees.¹³ In the early 1990s, land erosion revealed the existence of mass graves on the outskirts of Hargeisa, suggesting the systematic execution of local Isaaq residents by government forces.¹⁴

¹³ *Id.*, p. 3.

¹⁴ "Forensic Report: Preliminary Assessment of Mass Graves in the Vicinity of Hargeisa, Somalia," U.N. Economic and Social Council, Commission on Human Rights, E/CN.4/1999/103/Add.1 (Nov. 1998).

In late 1990, a loose alliance of opposition militias moved to seize the capital, Mogadishu, and in January 1991 Siad Barre and his presidential guard were forced to flee. When leaders of the various opposition factions could not agree on who should be the new President, the state collapsed, and civil war ensued.

D. The Lack of Legal Recourse for Victims of Human Rights Abuses during the Siad Barre Regime

The legal system functioned after the 1969 coup, albeit not as it had before. Before 1969, the Higher Judicial Council had had responsibility for the selection, promotion, and discipline of members of the judiciary. The Council had been chaired by the president of the Supreme Court and included justices of the court, the attorney general, and three members elected by the National Assembly. After the coup, military officers assumed all positions on the Higher Judicial Council. The effect of this change was to make the judiciary accountable exclusively to the Siad Barre regime.

In addition, in 1970, special tribunals, the National Security Courts (NSC), were set up as the judicial arm of the Supreme Revolutionary Council. Using a military attorney as prosecutor, the courts operated outside the ordinary legal system to address activities considered to be counter-revolutionary.¹⁵ The first cases to come before the courts involved the Shermarke assassination, as well as charges of corruption leveled by the SRC against

¹⁵ The NAS Report correctly noted that most members of this “court” “have little or no training in legal matters.” P. 17.

members of the democratic regime (including former Prime Minister Egal). The NSC subsequently heard cases with and without political content. Judges of the NSC were appointed by President Siad Barre, and its Special Prosecutors were invariably members of the Armed Forces under the President as Commander in Chief. No appeal could be taken against their decisions.

Law No. 54, entitled “Law for Safeguarding National Security,” was enacted by the Siad Barre regime in September 1970. It defined a wide range of political offenses against the unity and security of the country. Subsequent measures authorized government officials to search homes and detain suspects without a warrant, denied the right to a lawyer to detainees upon arrest, permitted the use of forced confessions as evidence, and abolished *habeas corpus*.¹⁶

After 1973, the regime extended the death penalty and prison sentences for individual offenders. And although civil rights were nominally guaranteed in the 1979 Constitution – promulgated by the regime in an effort to secure aid from Western countries – they remained subject to the existing national security legislation, which remained in effect until the collapse of the state in 1990-91.¹⁷

¹⁶ Africa Watch, pp. 16-21; Andre Le Sage, *Stateless Justice in Somalia* (Geneva: Center for Humanitarian Dialogue, 2005) (hereinafter, *Stateless Justice*), p. 20.

¹⁷ The 1979 Constitution remained in effect until 1991. It contained many commitments to human rights, including the pronouncement in Article 19 that, “The Somali Government shall recognize the Universal Declaration of Human Rights and generally accepted rules of international law.” Article 25

During the Siad Barre years, national security laws provided victims of the regime's systematic and widespread human rights abuses no legal recourse within the country. The laws were enacted, enforced, and administered by agents of the regime, and the courts nominally responsible for interpreting those laws and offering redress for their violation were also dominated by the regime's appointees. According to a leading expert on the Somali legal system, "by 1987, the Supreme Court existed in name only; the president of the court, appointed by Siad Barre, was deemed corrupt if not incompetent; and the two courts of appeal were no longer functioning."¹⁸ There was no sense of democratic accountability in any branch of the government. It is inconceivable that, during those years, a Somali citizen could have had an opportunity to complain before any court that he had been tortured by representatives of the state, or that his property had been taken by them without due process of law. And even had it been possible to obtain an audience to level such charges, there was no possibility that a regime-installed judge would have condemned his employer, much less ordered it to offer any kind of reparation.

forbade extra-judicial killings, while Article 26 prohibited arbitrary detention and promised recognition of the due process of law. Thus the very acts of which Samantar stands accused in this action were violations not only of Somali law, but of the country's Constitution then in force. Yet there can be no doubt that torture was widespread during the regime's years in power. *See, e.g.*, NAS Report, pp. 32-37.

¹⁸ Martin R. Ganzglass, "The Restoration of the Somali Justice System," in Walter Clarke and Jeffrey Herbst, eds., *Learning from Somalia* (Boulder: Westview Press, 1997), p. 21.

The abandonment of “scientific socialism” by the regime in 1988 did little to separate judicial authority from the executive branch of government. “Corruption and repressive practices were rife. The legacies of Siad Barre’s rule remain to this day, including public perceptions that the judiciary system is a tool in the hands of governing elites and their clan patrons to promote personal interests, repress opposition leaders and groups, dispossess non-governing clans and non-elites of their land and property, and otherwise dominate other clans.”¹⁹

The Siad Barre years were a time in which there was no rule of law in Somalia, which was administered instead by a brutal and closed dictatorship. After the fall of that regime, however, Somalia experienced a transition not into another kind of government, either more benign or more abusive. The narrative of the next chapter in Somalia’s history, beginning in 1991, is the passage into near-complete anarchy.

II. Current Conditions in the Territory of Somalia Bespeak the Lack of a Functioning Government, and No Entity Is Recognized by the United States as the Government of Somalia.

A. Introduction

Somalia is often described in popular media as “the only country in the world where there is no government.”²⁰ Instead, it has been characterized by

¹⁹ *Stateless Justice*, pp. 20-21.

²⁰ BBC News, “Living in Somalia’s Anarchy,” November 18, 2004, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4017147.stm>.

“a long-running, multisided battle for control”²¹ by heavily armed fighters representing “a tangled web of clans and militias.”²² However superficially appropriate the designation “failed state” may be for what was once the Somali Democratic Republic, it does not do justice to the complex realities on the ground. In fact, what many journalists refer to as “Somalia” in their lurid accounts of the struggle for resources and power is really only the central and southern parts of the former national territory. In assessing the reality of conditions in “Somalia,” it is more accurate to consider that for all intents and purposes, that term today embraces at least three distinct political spaces – central and southern Somalia, “Puntland” in the northeast, and “Somaliland” in the northwest – as well as several smaller enclaves.

B. *The “Transitional Federal Government”*

The current “Transitional Federal Government” (TFG) of Somalia is the **fifteenth** attempt at reconstituting a central government for the country since the collapse of the Siad Barre regime in January 1991. The origins of the current TFG can be traced to its immediate predecessor, which came about through a lengthy process sponsored by the sub-regional organization, the Intergovernmental Authority on Development (IGAD). That process, known as the Mbagathi (or

²¹ Eugene Robinson, “Down the Wrong Path in Afghanistan,” *Washington Post*, December 4, 2009.

²² Abdinasir Mohamed and Sarah Childress, “Suicide Bombing Kills Somali Ministers, Students,” *Wall Street Journal*, December 4, 2009.

Nairobi) peace talks, lasted from 2002 until 2004. It resulted in the creation, in late 2004, of a five-year interim administration under Abdullahi Yusuf Ahmad, then-President of the Puntland region. While the establishment of the TFG was welcomed by parts of the international community, the regime never succeeded in gaining acceptance within the country and, in fact, did not establish a presence in Mogadishu until early 2007, when it entered in the wake of an Ethiopian military intervention.²³

Increasingly isolated even within the TFG, and facing a mounting Islamist insurgency, Yusuf resigned at the end of 2008. To replace him, the United Nations Secretary-General's Special Representative for Somalia manipulated the process, doubling the size of the TFG parliament (although there was no authority in the interim charter to do so), in order to install as president in January 2009 a supposedly "moderate" Islamist, Sheikh Sharif Sheikh Ahmed, previously chairman of the Islamic Courts Union, which had been overthrown by the Ethiopian intervention. The enlarged parliament, now numbering some 550 members, also extended its own term of office, due to expire in 2009, by two years.²⁴

Birthered in circumstances that lacked democracy, transparency, or legitimacy, the TFG not surprisingly has struggled, rather unsuccessfully, to

²³ See Ken Menkhaus, "The Crisis in Somalia: Tragedy in Five Acts," 204 *African Affairs* 357-390 (July 2007).

²⁴ See J. Peter Pham, "Somalia Stumbles along with Sharif," *World Defense Review*, February 19, 2009, <http://worlddefensereview.com/pham021209.shtml>.

gain acceptance within Somalia. Within a short time, increasingly frustrated by their lack of traction and faced with a renewed insurgency, Sharif Ahmed and members of the TFG took increasingly frequent trips abroad and essentially gave up on efforts to govern even the small enclave within Mogadishu where the African Union Mission in Somalia (AMISOM) peacekeeping force provided them with protection. The TFG's parliament, in fact, has not convened since April 2009, for want of a quorum.²⁵

As of January 2010, despite the presence of an AMISOM force of more than 5,000 troops, the TFG operates in not even half of the 16 districts of the capital city. Outside Mogadishu, most of central and southern Somalia is in the control of the Islamist insurgency led by the *Harakat al-Shabaab al-Mujahideen* ("Movement of Warrior Youth," al-Shabaab), a group named a "Specially Designated Global Terrorist" by U.S. Secretary of State Condoleezza Rice in 2008²⁶ and a "listed terrorist organization" by the Australian government the following year,²⁷ and its allies in the *Hisbul Islam* ("Islamic party") movement led by Sheikh Hassan

²⁵ See Abdiaziz Hassan, "Somali Legislators Flee Abroad, Parliament Paralysed," Reuters, June 24, 2009, <http://uk.reuters.com/article/idUKLO890231>.

²⁶ U.S. Department of State, Office of the Coordinator for Counterterrorism, "Designation of al-Shabaab as a Specially Designated Global Terrorist" (Public Notice 6137), February 26, 2008, <http://www.state.gov/s/ct/rls/other/des/102448.htm>.

²⁷ Commonwealth of Australia, Joint Media Release of Attorney-General Robert McClelland MP and Minister for Foreign Affairs Stephen Smith MP, "Listing of Al-Shabaab as a Terrorist Organisation," August 21, 2009, http://www.foreignminister.gov.au/releases/2009/fa_s090821.html.

Dahir 'Aweys, whose name appears on both U.S. and U.N. antiterrorism sanctions lists. Meanwhile, the insurgents go about their strategy of encircling the transitional regime in Mogadishu by adding dominance in the central regions of Hiraan, Galguduud, and southern Mudug to the control they have exercised since 2008 in regions south of the capital.

Furthermore, the forces outside Mogadishu that are resisting the Islamist insurgents, such as they are, are largely outside the control of the TFG. For example, the *Ahlu Sunna wal-Jama'a* (roughly, "Followers of the Traditions and Consensus of the Prophet Muhammad") militias opposing al-Shabaab in the central regions, consisting of units loosely organized on a clan basis and having roots in the Sufi brotherhoods of traditional Somali Islam, went so far as to organize their own 41-member parliament, complete with speaker and deputy speaker, in late December 2009.

In short, the TFG is not a government in any common-sense definition of the term. It effectively administers hardly any territory, and provides no services to the citizens who find themselves in the limited zones where it is even present. It has difficulty even protecting its own senior officials. In December 2009, three TFG ministers, as well as 16 other people, were killed while attending a graduation ceremony within the small enclave of Mogadishu thought to be still controlled by the beleaguered regime.²⁸ So irrelevant is the TFG that

²⁸ See Stephanie McCrummen, "Bombing Kills 19 in Somali Capital," *Washington Post*, 4 December 2009.

one of its prominent supporters has conceded that while a victory in Mogadishu by the insurgency would constitute a major political setback, it would not appreciably worsen the security threat that already exists in Somalia.²⁹

C. *“The Republic of Somaliland”*

The government of “the Republic of Somaliland” does not yet have formal *de jure* recognition from any state, but nonetheless has presided over remarkable progress in the more than a decade and a half since the northeastern region proclaimed the dissolution of its voluntary 1960 union with what was once the Somali Democratic Republic.

The modern political history of Somaliland begins with the establishment in 1884 of the British Somaliland Protectorate which, except for a brief Italian occupation during the Second World War, lasted until June 26, 1960, when the territory was granted independence.³⁰ Notification of the independence was duly communicated to the United Nations and some 35 members duly accorded the new state diplomatic recognition. Several days later, the Italian-administered UN trust territory of Somalia received its own independence. The two states then entered into a hasty union. Some legal scholars have always argued that the union fell short of the minimal standards for legal validity. In

²⁹ See Ken Menkhaus, “Somalia: What Went Wrong?” 154 *RUSI Journal* 6:12 (August 2009).

³⁰ See I.M. Lewis, *The Modern History of Somaliland: From Nation to State* (New York: Frederick A. Praeger, 1965).

any event, the Somalilanders quickly regretted it, due in no small measure to the discrimination that the predominantly Isaaq northerners suffered at the hands of the numerically superior members of clans from other regions.³¹

After the collapse of the Siad Barre regime in 1991, elders representing the various clans in Somaliland met in the ravaged city of Burao and agreed to a resolution. They determined to annul the northern territory's merger with the former Italian colony, and declared that it would revert to the sovereign status it had enjoyed upon independence from Great Britain. Unlike other parts of Somalia, conflict in the region was averted when the Somali National Movement (SNM), the principal opposition group that had led the resistance against the Siad Barre dictatorship in the region, and Isaaq clan leaders purposely reached out to representatives of other clans in Somaliland, including the Darod/Harti, Gadabuursi, and Ise. The Burao conference appointed the chairman of the SNM, Abdirahman Ahmed Ali "Tuur," to be interim president of Somaliland for a period of two years. In 1993, the Somaliland clans sent representatives to Borama for a national *guurti*, or council of elders, which elected as president of Somaliland Mohamed Haji Ibrahim Egal, who had briefly been prime minister of independent Somaliland in 1960, as well as democratically elected prime minister of Somalia between 1967 and the 1969 coup. While the apportionment of seats at the two conferences was

³¹ See Anthony J. Carroll and B. Rajagopal, "The Case for an Independent Somaliland," 8 *American University Journal of Law and Politics* 653-662 (1993).

done along clan lines in a rough attempt to reflect the demographics of the territory, the actual decision-making was by consensus.³²

Egal's tenure saw, among other things, the drafting of a permanent constitution, approved by 97 percent of the voters in Somaliland in a May 2001 referendum. This document established a government comprising an executive branch, made up of a directly-elected president and vice president and appointed ministers, a bicameral legislature consisting of an elected House of Representatives and an upper chamber of elders, and an independent judiciary.

After Egal's unexpected death in 2002, his vice president, Dahir Riyale Kahin, succeeded to the presidency, and was elected in his own right in a closely fought election in April 2003. The margin of victory for the incumbent was just 80 votes out of nearly half a million cast and, amazingly, the dispute was settled peaceably through the courts. Multiparty elections for the House of Representatives were held in September 2005, giving the president's party just 33 of the 82 seats, with the balance split between two other parties.

A 2005 African Union (AU) report concluded that "the fact that the union between Somaliland and Somalia was never ratified and also malfunctioned when it went into action from 1960 to 1990 makes Somaliland's search for recognition historically unique and self-justified in African

³² See Mark Bradbury, *Becoming Somaliland* (Oxford: James Currey, 2008), pp. 77-136.

political history.” The report recommended that “the AU should find a special method of dealing with this outstanding case.”³³ Yet despite this, no country has yet recognized Somaliland’s independence. This apparent snub, while grating to Somalilanders, has not prevented them from building a vibrant polity with a strong civil society sector. While there were recent contretemps relating to the repeated postponement of presidential and legislative elections due to technical difficulties with registration, the disputes were ultimately resolved through an internal compromise worked out by all three of the region’s political parties with encouragement from Ethiopia and the United Kingdom.

Left to their own devices, the Somalilanders found that the demobilization of former fighters, the formation of national defense and security services, and the extraordinary resettlement of over one million refugees and internally displaced persons fostered the internal consolidation of their renascent polity, while the establishment of independent newspapers, radio stations, and a host of local NGOs and other civic organizations reinforced the nation-building exercise. The stable environment thus created facilitated substantial investments by both local and diaspora businessmen who have built, among other achievements, a telecommunications infrastructure more developed and varied than what may be found in any of Somaliland’s neighbors.³⁴

³³ African Union Commission, *Report of the AU Fact-Finding Mission to Somaliland* (April 30- May 4, 2005).

³⁴ See Iqbal Jhazbhay, *Somaliland: An African Struggle for Nationhood and International Recognition* (Johannesburg:

D. “The Puntland State of Somalia”

While they do not have the unique historical, juridical, and political status that Somaliland can claim, given its colonial history as a British protectorate and its brief post-colonial independence as a separate state, the Darod territories in the northeastern promontory of Somalia have also demonstrated the success of the building-block model for the country and the wisdom of working with the deeply ingrained clan identities. In 1998, tired of being held back by constant violence, and of the overall lack of social and political progress in central and southern Somalia, traditional elders of the Darod clan-family’s Harti clan – including its Dulbahante, Majeerteen, and Warsangeli sub-groups – opted to undertake a regional state formation process of their own in the northeast. In collaboration with the SSDF, the political-military faction that had represented their clan interests, they established an autonomous administration for what they dubbed “the Puntland State of Somalia.” After extensive consultations within the Darod/Harti clans and sub-clans, an interim charter was adopted which provided for a parliament whose members were chosen on a clan basis and who, in turn, elected a regional president. The first was Abdullahi Yusuf Ahmed who, in 2004, went on to become president of the TFG,³⁵ following which Puntland legislators

South African Institute for International Affairs/Institute for Global Dialogue, 2009).

³⁵ See Kinfu Abraham, *Somalia Calling: The Crisis of Statehood and the Quest for Peace* (Addis Ababa: Ethiopian International Institute for Peace and Development 2002), 445-463.

chose General Mohamud Muse Hersi (“Muse Adde”), as the new head of the regional administration. After one four-year term of office, Muse Adde lost a bid for re-election to Abdirahman Mohamed Mohamud (“Farole”), elected in January 2009 from a field of over a dozen candidates.

Unlike Somaliland, which has opted for independence, the official position of Puntland has been to support the notion of a federal Somalia while upholding the region’s claims to be able to negotiate the terms of union with any eventual national government. Puntlanders seem to be increasingly skeptical that a viable national regime will come into being anytime in the near future, and so have concentrated on internal efforts to establish their own governance structure. The most recent version of the constitution, unveiled in June 2009, was described by one international NGO as “mostly strong on human rights, with a good mix of checks and balances to prevent executive abuses and make government more accountable.” It also “put Puntland firmly on the path towards secession.”³⁶ In fact, when the prime minister of the TFG visited the region in August 2009, Puntland officials forced him to sign the “Galkayo Protocol,” recognizing the region’s autonomy and exemption from oversight on a range of security and political issues.

While Puntlanders have their share of difficulties – many of which (including the region’s unsavory reputation as the center of maritime pirate activities as well as the burgeoning influence of the

³⁶ See International Crisis Group, *Somalia: The Trouble with Puntland* (2009), <http://www.crisisgroup.org/home/index.cfm?id=6264>.

pirate syndicates in politics) are of their own making – the region has managed to avoid the violent conflict and extremism which has devastated central and southern Somalia.

E. U.S. Policy toward the TFG and other Somali Polities

Insofar as there can be said to be a consistent United States policy towards the TFG and other Somali polities, including the governments of the Republic of Somaliland and the “Puntland State of Somalia,” it might be characterized as one of carefully balanced ambiguity.

On the one hand, Secretary of State Hillary Rodham Clinton and other senior U.S. diplomats have met with Sharif Ahmed and other TFG officials, both in the United States and abroad, publicly expressing support for the efforts of the Transitional Federal Government.³⁷ But on the other hand, while the United States never formally severed relations with Somalia after the collapse of the state in 1991, neither has it officially recognized any of the 15 transitional governments, including the current TFG. The State Department website merely recites: “The United States maintains **regular dialogue** with the TFG and other key stakeholders in

³⁷ Secretary of State Hillary Rodham Clinton, Remarks after Meeting with President of Somalia Sheik Sharif Sheik Ahmed, August 6, 2009, <http://www.state.gov/secretary/rm/2009a/08/126947.htm>.

Somalia through the U.S. Embassy in Nairobi, Kenya.”³⁸

In fact, there has been no affirmative *de jure* recognition by the U.S. for the TFG. This is reaffirmed in the introduction by the Chairman of the House of Representatives Committee on Foreign Affairs, Subcommittee on Africa and Global Health, of a Congressional Resolution, H.Res. 859, in October 2009, urging “the Obama Administration to recognize the TFG and allow the opening of an official Somali Embassy in Washington.”³⁹ This would hardly have been necessary were the TFG currently recognized as the government of Somalia.

It should be noted that the approach taken by the United States Government is in line with that taken by other nations, including some in the region that, from time to time, have voiced support for the TFG. The British Foreign and Commonwealth Office’s website states: “Since the fall of the Siad Barre regime in 1991 there have been no formal diplomatic links between the UK and Somalia.”⁴⁰ And the TFG’s former foreign minister, Ismail Hurre Buba, and its defense minister, Yusuf Mohamed

³⁸ U.S. Department of State, Background Note: Somalia, October 2009, <http://www.state.gov/r/pa/ei/bgn/2863.htm#relations> (emphasis added).

³⁹ H. Res. 859, <http://thomas.loc.gov/cgi-bin/query/z?c111:H.RES.859>: (the measure has been referred to committee for consideration).

⁴⁰ Foreign and Commonwealth Office, Country Profiles: Somalia, May 21, 2009, <http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/sub-saharan-africa/somalia?profile=intRelations>.

Siad, have been arrested in recent months in Kenya and Uganda, respectively,⁴¹ demonstrating little deference to the TFG as the government of a neighboring country.

United States policy towards the Republic of Somaliland is likewise ambiguous. Officially, the U.S. does not recognize Somaliland's claim to separate statehood. But President Dahir Riyale Kahin, accompanied by Foreign Minister Abdillahi Mohamed Duale and several other cabinet members, visited Washington for eight days in January 2008 and were hosted at the Department of State, the U.S. Agency for International Development, the Department of Defense, and the National Security Council, among other United States Government offices. The State Department spokesman declared at the time: "This cordial and constructive visit demonstrated U.S. engagement with Somaliland in furtherance of our common interests in the areas of regional peace and security, economic development, and democratic reform."⁴² Then-Assistant Secretary of State for African Affairs Jendayi Frazer then visited Hargeisa, the capital of Somaliland, in

⁴¹ See "Kenya Charges Muslim Activist over Hate-Cleric Riot," BBC News, January 19, 2010, <http://news.bbc.co.uk/2/hi/africa/8468119.stm>; also see "Somali Minister for Defense Arrested in Uganda," CBS News, October 7, 2009, <http://www.cbsnews.com/stories/2009/10/07/ap/africa/main5368225.shtml>.

⁴² U.S. Department of State, Press Statement, "Visit of the Somaliland Delegation," January 20, 2008, <http://2001-2009.state.gov/r/pa/prs/ps/2008/jan/99508.htm>.

February 2008.⁴³ And her successor, current Assistant Secretary Johnnie Carson, received the Somaliland foreign minister at the State Department in July 2009.⁴⁴ The Obama Administration even returned Guantanamo detainees to Somaliland in December 2009, rather than risk sending them to the insecure conditions presided over by the TFG in Mogadishu.⁴⁵

Likewise, President Abdirahman Mohamed Mohamud “Farole” of the “Puntland State of Somaliland” spoke to the Africa Subcommittee of the House of Representatives identified by that proper title,⁴⁶ even after unveiling a constitution that clearly put the region on a secessionist footing.⁴⁷ The United States and a number of European governments have turned over captured pirates to the Puntland government.⁴⁸

To summarize, events since 1991 corroborate the conclusion that the territory once known as the

⁴³ Hussein Ali Nur, “Top U.S. Diplomat for Africa Meets Somaliland Leader,” *Reuters*, February 3, 2008, <http://www.alertnet.org/thenews/newsdesk/L03703531.htm>.

⁴⁴ Somaliland Liaison Office, Press Release, “Ministerial Visit, July 13-24, 2009,” July 28, 2009, <http://www.awdalnews.com/wmprint.php?ArtID=11965>.

⁴⁵ Jeremy Pelofsky, “U.S. Sends 12 Guantanamo Detainees to Home Countries,” *Reuters*, December 20, 2009, <http://www.reuters.com/article/idUSTRE5BJ0YJ20091220>.

⁴⁶ *See* http://foreignaffairs.house.gov/hearing_notice.asp?id=1093.

⁴⁷ *See* J. Peter Pham, “Putting Puntland’s Potential into Play,” *World Defense Review*, September 24, 2009, <http://worlddefensereview.com/pham092409.shtml>.

⁴⁸ Oliver Hawkins, “What to do with a Captured Pirate,” *BBC News*, March 10, 2009, <http://news.bbc.co.uk/2/hi/7932205.stm>.

Somali Republic has not had and does not now have a functioning government capable (not to say deserving) of recognition by the members of the international community. At least two of the component parts of the former Republic have broken away for all practical purposes, and the TFG, the supposed governing authority, cannot control even its own capital city. The TFG performs none of the functions normally associated with governments, and maintains none of the safeguards – such as a working judiciary – designed to protect the citizenry against its own excesses.

Conclusion

For all of the foregoing reasons, *Amici* respectfully represent to the Court that (1) the human rights abuses of which Petitioner is accused cannot have been taken within the scope of his “legal authority,” since the Siad Barre regime operated entirely outside the rule of law, and (2) that the Transitional Federal Government of Somalia is not a functioning government and, notwithstanding any dealings which representatives of the United States may have with it from time to time, has never been and is not currently recognized as such by the United States as a matter of law or practice. *Amici* associate themselves with the arguments on the merits contained in Respondents’ brief herein, and join in Respondents’ request that the decision below be affirmed.

Respectfully submitted,

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