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Removals to Somalia in Light of the Convention against Torture: Recent Evidence from Somali Bantu Deportees

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ARTICLE

REMOVALS TO SOMALIA IN LIGHT OF THE CONVENTION AGAINST TORTURE: RECENT EVIDENCE FROM SOMALI BANTU DEPORTEES

DANIEL J. VAN LEHMAN AND ESTELLE M. MCKEE*

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I. INTRODUCTION

Somali Bantu refugees deported against their will from the United States are shackled in chains during their removal to Somalia. Ancestors of the Somali Bantu deportees were similarly chained on their journey to Somalia as victims of the Sultan of Zanzibar’s East African slave trade nearly 200 years ago.

In 2003, the first of 12,000 minority Somali Bantu refugees who were long-resident in Kenyan refugee camps were legally resettled in the United States under its Refugee Admissions Program Process Priority 2 as a group of “special humanitarian concern.”¹ Since 2016, dozens of Somali Bantu men have been removed from the United States to Somalia, where they rarely have relatives outside of regions controlled by the U.S. Department of State-designated terrorist group Al Shabaab.² Of those deportees interviewed, most were either born in Kenya or arrived there as infants so Somalia’s dominant culture and language are foreign to them.³ The U.S. Department of State’s 2017 country report describes Somalia’s minorities as, “. . . disproportionately subjected to killings, torture, rape, [and] kidnapping for ransom” carried out “with impunity by faction militias and Majority clan members, often with the acquiescence of federal and local authorities.”⁴ Survey results from the Somali Bantu deportees reveal that most were kidnapped and tortured for ransom by uniformed Somali police or armed groups that the Somali Government was unwilling or unable to control. Some were kidnapped and tortured for ransom upon arrival at the Mogadishu International Airport (MIA) by Somali government security personnel⁵ while others were taken within weeks of arriving in Somalia. American government analysis and survey results from Somali Bantu deportees provides evidence that permitting their removal to Somalia violates Article 3 of the United Nations Convention Against Torture.

1. Heidi H. Boas, *The New Face of America’s Refugees: African Refugee Resettlement to the United States*, 21 *GEO. IMMIGR. L. J.* 431, 446 (Spring 2007).

2. U.S. DEP’T OF STATE, BUREAU OF COUNTERTERRORISM, *Foreign Terrorist Organizations*, <https://www.state.gov/j/ct/rls/other/des/123085.htm>. (last visited Nov. 6, 2018).

3. Of the 18 deportees interviewed, only 27.3 percent of the youngest 12, who are 28 years old or younger, speak the dominant Somali Maxaa language.

4. U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., *SOMALIA 2017 HUMAN RIGHTS REPORT 36* (2018), <https://www.state.gov/documents/organization/277289.pdf>.

5. The term, “Somali government security personnel,” includes Somali police, military, airport customs officers and the regional Jubbaland State police in Kismayu.

A. *Rationale for the Study*

The survey results in this paper provide data on the torture and the fear of torture experienced by Somali Bantu deportees in East Africa. This data is intended to directly address the question of whether removing Somali Bantu refugees to Somalia puts them in danger of being subjected to torture and is, therefore, in violation of Article 3 of the Convention against Torture. The survey results highlight examples of political insecurity in Somalia as well as historical human rights abuses against the Somali Bantu. The survey data, in combination with analyses by the United States government, the United Nations, and human rights organizations, strengthen the contention that current United States law does not properly consider the reality of torture and persecution suffered by the Somali Bantu.

B. *Methodology*

Interviews were conducted with Somali Bantu deportees who were removed to Somalia after arriving legally in the United States as refugees over ten years ago. The interviews took 30 to 90 minutes to complete and were conducted by phone by one of the authors, Daniel J. Van Lehman, in English and Swahili between September 6, 2018 and December 29, 2018. Research protocols were approved by an Institutional Review Board.

Contact information was obtained on 22 of the approximately 35 to 45 Somali Bantu who have been deported to Somalia since 2016. Eighteen deportees were interviewed, and information was obtained about two others from interviewees who were deported together with them, for a total sample size of 20. Only two deportees in addition to these 20 in the sample refused to be interviewed, resulting in a minimum response rate of 90.9% (AAPOR Response Rate 3). The snowball sample represents a large proportion of the total eligible population (at least 44%), which is not more than 45 individuals. The whereabouts and survival of those who could not be reached is unknown.

Somali Bantu deportees were interviewed between one and 24 months after their arrival in Mogadishu, Somalia. For those deportees who were interviewed shortly after arrival, there is a high probability that they will attempt the journey from Mogadishu to Kenya via Kismayu. There is an attendant probability that, over time, these deportees will experience abuse, which would likely increase the rates of deportee torture described herein. Several deportees reported that other Somali Bantu deportees were kidnapped and executed in Somalia, but were unable to provide victim details, which excluded these cases from the survey results.

II. THE SOMALI BANTU PEOPLE

A. *Description of the Somali Bantu People*

Somalia's constitution structures its "4.5" electoral representation system along ethnic lines by grouping all Somalis into one of five clan categories.⁶ Somalia is not a homogeneous country, and those Somalis who do not belong genealogically to one of the four Majority or "Noble" clans are listed as belonging in the Minority category. The Minorities have "a different—usually mixed—parentage, with some Asian, Oromo or Bantu ancestors."⁷ Among the most discriminated against of these Minority groups are the traditionally farming Somali Bantu (also known as *Jareer*), who originate in the Jubba and Shabeelle River Valleys; the light-skinned traditionally mercantile Barawa people native to the southern Indian Ocean coastal city of Barawa; and the traditionally maritime Bajuni people indigenous to Kismayu and the Bajuu Islands.⁸ In contrast, most Majority-clan Somalis share a common ethnic heritage, religion, and nomad-influenced culture.⁹

The Somali Bantu people, who "heavily occupy" the southernmost nine of the country's 18 regions,¹⁰ can be divided into two groups. The first is indigenous to southern Somalia. This group is thought to have migrated to Somalia thousands of years ago and is regarded as the remnants of a pre-Somali population.¹¹ Since then, this population survived as a maroon community among the nomadic Majority clans. The second group of Somali Bantu, to which the deportees belong, are the descendants of the nineteenth-century East African slave trade.¹² Regardless of their heritage, both groups suffer similar prejudice in Somali society.

There are several observable characteristics that Majority-clan Somalis use to distinguish a Somali Bantu. The Somali Bantu predominantly speak minority languages, notably Maay Maay, Zigua, and Swahili, which the Maxaa-speaking Majority-clan Somalis rarely speak. Physically, the Somali Bantu's distinct Negroid features elicit derogatory terms such as *jareer* (kinky hair), *sankadhuthi* (big nose), and *adoon* (slave) from Majority-clan Somalis.¹³ Also, the Somali Bantu are predominantly excluded from professional positions in the Somali government, non-governmental organizations,

6. MOHAMED A. ENO, *THE BANTU-JAREER SOMALIS: UNEARTHING APARTHEID IN THE HORN OF AFRICA* 13 (Adonis & Abbey Publishers, 2008).

7. LEE CASSANELLI, *IMMIGR. & REFUGEE BD. OF CAN., VICTIMS AND VULNERABLE GROUPS IN SOUTHERN SOMALIA* (1995).

8. MARTIN HILL, *MINORITY RIGHTS GROUP INTERNATIONAL, NO REDRESS: SOMALIA'S FORGOTTEN MINORITIES* 8-13, (2010).

9. U.S. DEP'T OF STATE, *supra* note 4, at 36.

10. *Id.*

11. ENO, *supra* note 6, at 66.

12. *Id.* at 93; DANIEL J. LEHMAN, *RESETTLEMENT OF THE MUSHUNGULI: SOMALI REFUGEES OF SOUTHEAST AFRICAN ORIGIN* 2, (Paper sent to the Fifth International Congress of Somali Studies, Holy Cross College, 1-3 December 1993). (With Permission of the UNHCR Country Representative in Nairobi).

13. ENO, *supra* note 6, at 15.

and business. Jobs considered beneath the Majority clans are largely reserved for the Somali Bantu, including crop farming, the building trades, the mechanical trades, and difficult manual labor.¹⁴

B. *Historical Persecution in Somalia – 1840 to 1960*

In the 19th Century, the Sultanate of Zanzibar enslaved approximately 50,000 of the Somali Bantu's ancestors in present-day Tanzania, Mozambique, and Malawi.¹⁵ The Bantu slaves were brought to Somalia where they were sold to Majority-clan Somali plantation owners in the Shabelle River Valley. Somali Bantu slaves who either escaped captivity or were manumitted relocated to arable and sparsely populated areas on the banks of the heavily forested Jubba River. Over the course of the late 19th century, the Somali Bantu defended themselves against re-enslavement by Majority-clan Somalis.¹⁶

In the early 1930s, the Italian colonial authorities deemed Somalia's Jubba River Valley suitable for the development and exploitation of large-scale agriculture. The colonists, determined to establish large agricultural plantations, forced the Somali Bantu to work as farmers and confiscated their land.¹⁷ This draconian *kolonyo* program, initiated in 1935, was made possible with the assistance of former slave-owning Majority-clan Somalis. *Kolonyo* uprooted entire Somali Bantu communities, relocated them onto plantation estates, and, essentially, created a regime of slavery.¹⁸ *Kolonyo* remained part of the Somali establishment until the British conquered Italian Somaliland in the early years of WWII.¹⁹

C. *Modern Persecution in Somalia – 1960 to Present*

Despite Somalia gaining independence in 1960, the Somali Bantu faced institutional discrimination under the new Somali government, which was run by and for the Majority clans. This new governmental regime regarded the Somali Bantu's Maay Maay language as illegitimate and in 1973 established the Majority clans' Maxaa language, which is unintelligible with Maay Maay,²⁰ as the only official written Somali language of the nation.²¹ The Somali Bantu were widely excluded from government positions, political representation, and public services, particularly education and health

14. *Id.* at 65.

15. Lee V. Cassanelli, *The Ending of Slavery in Italian Somalia: Liberty and the Control of Labor, 1890-1935*, in *THE END OF SLAVERY IN AFRICA* 308, 319 (Suzanne Miers & Richard Roberts eds., 1988).

16. ENO, *supra* note 6, at 95.

17. Ken Menkhaus, *From Feast to Famine: Land and the State in Somalia's Lower Jubba Valley*, in *THE STRUGGLE FOR LAND IN SOUTHERN SOMALIA: THE WAR BEHIND THE WAR* 133,142 (Catherine Besteman & Lee V. Cassanelli eds., 2003).

18. ENO, *supra* note 6, at 117.

19. Menkhaus, *supra* note 17, at 143.

20. ENO, *supra* note 6, at 26.

21. Cassanelli, *supra* note 15, at 17.

care.²² Starting in the 1970s, the Somali government began a land expropriation campaign of Somali Bantu ancestral lands. Title to this land was given to large state farms and absentee Majority-clan supporters of the regime.²³ Since the onset of the civil war in the early 1990s, competing Majority-clan warlords have violently exploited Somali Bantu land and labor. As a result, many Somali Bantu have fled. And within Somalia, there are currently 2.6 million internally displaced people.²⁴

Over a decade ago, Al Shabaab conquered Somali Bantu lands and soon began a campaign of slavery, starvation, and persecution against the Somali Bantu. This has accelerated their displacement. Al Shabaab's confiscation of agricultural produce and forcible conscription of Somali Bantu boys and men to fight against professional soldiers with the African Union Mission to Somalia (AMISOM) and the American army is not without precedent.²⁵ Over the past few years, Al Shabaab's loss of territory and ability to attract new recruits has compelled it to take this model one step further by kidnapping male Somali Bantu children from schools and religious gatherings.²⁶ This contention is supported by Al Shabaab's higher defection rates due to counter-terrorism efforts by the United States and its partners.²⁷ Parents who wish to exclude their children from this recruitment must either pay a hefty opt out penalty or face the wrath of Al Shabaab, up to and including execution.²⁸

Due to customary law in Somalia, Al Shabaab cannot easily force Majority clan children into battle; there is no such restriction, however, on the forcible conscription of the Somali Bantu.²⁹ Regarding the specific duties Al Shabaab demands of the children it forcibly recruits, the U.S. Department of State reports:

Al-Shabaab continued to recruit and force children to participate in direct hostilities, including suicide attacks. Al-Shabaab raided schools,

22. U.S. DEP'T OF STATE, *supra* note 4, at 36.

23. Menkhaus, *supra* note 17, at 147.

24. UN HIGH COMM'R FOR REFUGEES, UNHCR SOMALIA FACTSHEET – June 2018 (2018).

25. Cassanelli, *supra* note 15, at 18; ENO, *supra* note 6, at 173. When Somalia's president, Siad Barre, initiated war with Ethiopia in 1977, his military confiscated Somali Bantu's surplus harvests and "discriminatively conscripted and sent to the war front" Somali Bantu youth to fight on the front lines against professional Ethiopian soldiers.

26. Rep. of the Monitoring Group on Somalia and Eritrea, transmitted by Letter Dated 7 October 2016 from the Chairman of the Security Council Comm. Established Pursuant to Resolutions 751 (1992) and 1907 (2009), Concerning Somalia and Eritrea Addressed to the President of the Security Council, Annex VII, ¶¶ 7-8, U.N. Doc. S/2016/919 (Oct. 31, 2016) [hereinafter 2016 Monitoring Group Report Annex VII].

27. U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2017, SOMALIA 42 (2018).

28. Catherine Besteman & Daniel Van Lehman, *Somalia's Southern War: The Fight over Land and Labor* in SOUTHERN SOMALIA IN WAR AND PEACE IN SOMALIA 299, 305 (Michael Keating & Matt Waldman eds., 2018).

29. *Id.* at 305.

madrassas, and mosques to recruit children. Children in al-Shabaab training camps were subjected to grueling physical training, inadequate diet, weapons training, physical punishment, and religious training. The training also included forcing children to punish and execute other children. Al-Shabaab used children in combat, including placing them in front of other fighters to serve as human shields and suicide bombers. In addition, al-Shabaab used children in support roles, such as carrying ammunition, water, and food; removing injured and dead militants; gathering intelligence; and serving as guards. The organization sometimes used children to plant roadside bombs and other explosive devices. The Somali press frequently reported accounts of al-Shabaab indoctrinating children at schools and forcibly recruiting students into its ranks.³⁰

While an overwhelming percentage of Somalis are Muslim, a handful are Christian.³¹ Organizations in the West that monitor Christian persecution report that over the course of Al Shabaab's control of Somali Bantu lands in southern Somalia, it has murdered and beheaded Somalis for their actual and perceived Christian faith.³² An Al Shabaab commander, Ali Mohamed Hussein, stated in 2014 that Somalis returning from the West will be viewed as individuals who have given up their religion and are a valid military target. He states:

... the diaspora returnees who have been taught garbage, evil and lack of religion and are being used to spread evil ... They are working for the infidels and since they are working for the infidels, they are the same as the infidels they are working for as far as we are concerned. They will be killed and fought against in the same manner.³³

Some Somali experts raise the potential that since the outbreak of the civil war, the Somali Bantu have suffered genocide.³⁴ This includes the estimated 250,000 thought to have died at the outbreak of the war in the 1990s as well as a similar number who died of starvation due to Al Shabaab's denial of

30. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., *supra* note 4, at 16.

31. FREEDOM HOUSE, Somalia Profile, FREEDOM IN THE WORLD 2018: DEMOCRACY IN CRISIS (2018), <https://freedomhouse.org/report/freedom-world/2018/somalia>.

32. Simba Tian, *Somalia: Militants Kill Elderly Christian for Carrying Bibles*, COMPASS DIRECT NEWS, Sept. 22, 2009, <https://www.christianheadlines.com/news/somalia-militants-kill-elderly-christian-for-carrying-bibles-11608822.html>.

33. Mary Harper, *Somalis Sent Back Home in Fear of al-Shabaab*, BBC NEWS, June 16, 2014, <https://www.bbc.com/news/world-africa-27817431>.

34. Rep. of the Monitoring Group on Somalia and Eritrea (2014), transmitted by Letter Dated 9 October 2015 from the Chairman of the Security Council Comm. Established Pursuant to Resolutions 751 (1992) and 1907 (2009), Concerning Somalia and Eritrea Addressed to the President of the Security Council, Annex VI, ¶ 28, U.N. Doc. S/2015/801 (Oct. 19, 2015) [hereinafter 2015 Monitoring Group Report Annex VI]; Catherine L. Besteman, *Genocide in Somalia's Jubba Valley and Somali Bantu Refugees in the U.S.* in HOW GENOCIDES END (Soc. Science Res. Council, ed., 2007).

food aid in the 2011 drought.³⁵ Not only this, Somali Bantu in IDP camps and confined in Al Shabaab-held territory have died of preventable illnesses, starvation, and execution. An unknown but growing number of Somali Bantu civilians, including children forcibly conscripted into Al Shabaab's militia, have been killed during combat operations.³⁶

The U.N. Security Councils sums up its assessment of the human rights violations against the Somali Bantu as:

The range of persistent and serious violations experienced by the [Somali Bantu] community as documented by the Monitoring Group may constitute war crimes in non-international armed conflict and crimes against humanity, including with respect to the underlying acts of persecution, murder, torture and sexual slavery. The nature and scale of the persecution and forced displacement of the [Somali Bantu] community, coupled with allegations of inward transfer of population to lands from which the community has been displaced (yet to be investigated by the Monitoring Group) may also be understood as ethnic cleansing.³⁷

III. GOVERNMENT, TERRORISM AND ETHNIC DYNAMICS IN SOMALIA

A. *Political Landscape in Somalia*

In terms of political rights, civil liberties, and human rights Somalia is considered extremely weak. Freedom House gives Somalia a country rating of 7/100, which places it among the bottom eight of the 210 countries surveyed.³⁸ The international corruption rating organization, Transparency International, listed Somalia in 2018 as the most corrupt country in the world, a place Somalia has held this entire decade.³⁹ The Fund for Peace, which focuses on violent conflict, state fragility, and security and human rights, rated Somalia in 2018 as the second worst country of 178 states surveyed.⁴⁰ Since 2008, Somalia has held the worst or penultimate position on this index.⁴¹

Somalia is driven by clan allegiances and divided by competing ethnic-based regional states and militias that profit from the international assistance that follows Al Shabaab terrorist attacks and human rights violations.⁴² These

35. The U.N. Accountability Project – Somalia, *Neither Inevitable nor Accidental: The Impact of Marginalization in Somalia* in WAR AND PEACE IN SOMALIA 41, 43 (Michael Keating & Matt Waldman eds., 2018).

36. See 2016 Monitoring Group Report Annex VII, *supra* note 26, at ¶¶ 7-8.

37. 2015 Monitoring Group Report Annex VI, *supra* note 34, at ¶ 27.

38. FREEDOM HOUSE, *supra* note 31.

39. TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX - 1995 TO 2018 (2018), <https://www.transparency.org/research/cpi/overview>.

40. FUND FOR PEACE, FRAGILE STATES INDEX 2018 (2018), <http://fundforpeace.org/fsi/data/>.

41. *Id.*

42. Amanda Sperber, *Somalia is a Country without an Army*, FOREIGN POLICY, Aug. 7, 2018, <https://foreignpolicy.com/2018/08/07/somalia-is-a-country-without-an-army-al-shabab-terrorism-horn-africa-amisom/>.

ill-gotten profits and open collaboration with Al Shabaab would be jeopardized if there was a functioning central government.⁴³ Reports further state that “al Shabaab is ostensibly one with the [Majority clan] population, including the government.”⁴⁴ While advantaged members of Somalia’s Majority clans profit from the lawlessness in Somalia,⁴⁵ the Minority groups bear the brunt of the human rights abuses, land expropriation, and deprivation.⁴⁶

The Federal Government of Somalia (FGS) offers scant protection and controls little of its territory in Mogadishu. The city is largely controlled by militarily powerful business and clan militias. A report by Britain’s Home Office describes security there as follows:

Mogadishu is to some extent under the control of AMISOM/SNA [African Union Mission in Somalia/Somali National Army] and al Shabaab has no military camps in Mogadishu. The city is, however, under constant threat as al-Shabaab has reach inside Mogadishu, and the city is by several sources considered as infiltrated by al-Shabaab, including Mogadishu International Airport and Villa Somalia [presidential palace].⁴⁷

In addition to controlling little of its own territory, the FGS “did not maintain effective control over the security forces and had limited ability to provide human rights protections to society.”⁴⁸ The U.S. Department of State details the general human rights issues in Somalia that include:

... killings of civilians by security forces, clan militias, and unknown assailants, but the terrorist group al-Shabaab committed the majority of severe human rights abuses, particularly terrorist attacks on civilians and targeted assassinations. Other major human rights abuses included disappearances; torture and other cruel, inhuman, or degrading treatment or punishment. Impunity generally remained the norm. Government authorities took minimal steps to prosecute and punish officials who committed violations, particularly military and police officials accused of committing rape, killings, clan violence, and extortion.⁴⁹

43. *Id.*

44. *Id.*

45. *Id.*

46. U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., *supra* note 4, at 36.

47. HOME OFFICE, COUNTRY POLICY AND INFORMATION NOTE: SOMALIA (SOUTH AND CENTRAL): FEAR OF AL SHABAAB VERSION 2.0, 2018, ¶ 5.1.3 (UK), <https://www.justice.gov/eoir/page/file/982591/download>.

48. U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., *supra* note 4, at 1.

49. *Id.*

Freedom House grades the democratic freedom of every country according to an index accounting for: 1) political rights for minority groups, 2) an independent judiciary, 3) due process in civil and criminal matters, 4) protection from illegitimate use of physical force and freedom from war and insurgencies, 5) laws, policies, and practices that guarantee equal treatment across the population, 6) freedom of movement, 7) personal social freedoms, and 8) equality of opportunity and freedom from economic exploitation.⁵⁰ The organization gives Somalia a 0/4, its lowest rating, in all eight of these categories.

Due to the government's lack of control over national security and citizen registration, most countries do not recognize Somali identity documents, leaving Somalis with few options for travel document verification.⁵¹ Without a proper ID system within Somalia, alternative measures are used to verify if one is a native Somali. Reports from Somali Bantu deportees indicate that one's fluency and accent in the Somali languages of Maay Maay and Maxaa are used by government soldiers, militiamen and Al Shabaab to help determine if a person is a native Somali. Those who intersperse English in their spoken Somali will immediately be assumed to have lived in a foreign country. Somali Bantu deportees arriving at MIA who are not fluent in Somali, or speak English, report they are regarded by airport personnel as being non-Somali and often-times suspected of being spies.

B. *Somalia as a Terrorist Safe Haven*

The U.S. Department of State's Bureau of Terrorism acknowledges that while action by Somali and international forces have disrupted terrorist activities, "Somalia remain[s] a terrorist safe haven."⁵² Kidnapping, torture and ransom have seemingly developed in recent years into an industry in Somalia for cash-strapped security personnel, Majority-clan militias and gangs, and Al Shabaab. In the first six months of 2017, UNSOM estimated that Al Shabaab kidnapped 216 people, including 70 men women and children in a four-day period.⁵³

C. *The Ethnic Dynamics of Insecurity Across Somalia*

In dominant Somali society, the Minorities are not considered "real" Somalis and are not accepted in the Majority-clans' traditional protection system known as *Xeer*.⁵⁴ According to Menkhaus:

50. FREEDOM HOUSE, *supra* note 31.

51. U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, *supra* note 27, at 41

52. U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, *supra* note 27, at 40.

53. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., *supra* note 4, at 14.

54. Ken Menkhaus, *No access: Critical bottlenecks in the 2011 Somali famine*, 1 GLOB. FOOD SEC., 29, 34 (2012).

One of the most troubling but least discussed aspects of Somalia's recurring humanitarian crises is the low sense of Somali social and ethical obligation to assist countrymen from weak lineages and social groups. This stands in sharp contrast to the very powerful and non-negotiable obligation Somalis have to assist members of their own lineage.⁵⁵

Freedom and security for a Somali depends largely on whether one's clan is powerful enough to secure protection for its members in its regional homeland or occupied region and in a rival clan's region of influence. Minorities, including the Somali Bantu, neither have an ethnic safe haven, nor the ability to enforce protection of its people in regions controlled by the Majority-clan Somalis.⁵⁶ The Minorities are native to southern Somalia where Al Shabaab and other Majority-clan warlords are and have been forcibly occupying Minority lands for decades. Since being driven out of Mogadishu and Kismayu by AMISOM, Al Shabaab has over the past several years established its base of operations in the Somali Bantu's native regions in the Jubba River Valley.⁵⁷ The U.S. Government describes insecurity there as follows:

Minority groups, often lacking armed militias, continued to be disproportionately subjected to killings, torture, rape, kidnapping for ransom, and looting of land and property with impunity by faction militias and majority clan members, often with the acquiescence of federal and local authorities. Many minority communities continued to live in deep poverty and to suffer from numerous forms of discrimination and exclusion.⁵⁸

The slave ancestry of some Somali Bantu, including the deportees, further marginalizes them among Majority-clan Somalis. Being outside of the traditional *Xeer* system means that the Minorities suffer abuse that goes unpunished. A conflict assessment report funded by the U.K. Government outlined the security threat to, among others, returnees (refugees) and internally displaced people (IDP), most of whom are from the weaker and unarmed Somali Bantu and other Minority groups. For the capital city, Mogadishu, the report states that [IDPs are] "very vulnerable to criminal violence and predation by uncontrolled security forces."⁵⁹

55. *Id.*

56. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., *supra* note 4, at 36.

57. *Id.* at 1.

58. *Id.* at 36.

59. KEN MENKHAUS, DANISH DEMINING GROUP, DADAAB RETURNEE CONFLICT ASSESSMENT 2, (Aug. 2017).

Since about 2015, Al Shabaab and ISIS have stepped up attacks in central and northern Somalia, sometimes with child soldiers from southern Somalia. The Somali Bantu face harassment when relocating to government or Majority-clan militia-controlled areas in Somalia, particularly in the central and northern regions where they have even fewer rights and less protection than in their native southern regions.

Kismayu is the largest city in southern Somalia after Mogadishu and closest to the Somali Bantu's native homeland in the Jubba River Valley. Kismayu is now under the control of the Jubbaland State, which is led by Ahmed Mohamed Islam (Madobe)'s Majority Darood-Ogaden-clan militia. The Jubbaland State is arguably a kleptocracy, or "militia state," that collaborates with Al Shabaab to break international law through the illegal trade of charcoal⁶⁰ and sugar,⁶¹ diverting international food aid,⁶² and profits from the sale of harvests purchased from Al Shabaab that were extorted from Somali Bantu farmers. Furthermore, the U.N. reports human rights violations by the Jubbaland State against the Somali Bantu as the following:

the unlawful use of force attributed to the forces of the Interim Jubba [Jubba] administration (IJA), including detentions, unlawful killings and torture, were the most frequently alleged. The most common allegation from clan representatives, non-governmental organizations (NGO) staff members and members of the government was of assassinations of members of particular clans not allied to the government structure (particularly the Bantu, Adjuran and Marehan), often disguised as Al Shabaab killings.⁶³

United Nations-funded research on living conditions for the Somali Bantu in Al Shabaab-held regions revealed that the Somali Bantu there are forced to give up their underage boys as fighters and laborers⁶⁴ and their underage girls as sex slaves for Al Shabaab.⁶⁵ Al Shabaab prevents the free movement of Somali Bantu in and out of the Jubba River Valley and punishes, up to and including execution, those Somali Bantu caught escaping from or returning

60. Rep. of the Monitoring Group on Somalia and Eritrea (2014), transmitted by Letter Dated 9 November 2018 from the Chairman of the Security Council Comm. Established Pursuant to Resolutions 751 (1992) and 1907 (2009), Concerning Somalia and Eritrea Addressed to the President of the Security Council, ¶¶ 170-172, U.N. Doc. S/2018/1002 (Nov. 9, 2018) [hereinafter 2018 Monitoring Group Report].

61. Jacob Rasmussen, *Sweet Secrets: Sugar Smuggling and State Formation in the Kenya-Somalia Borderlands* 9 (Danish Inst. for Int'l Stud., Working Paper 11, 2017).

62. Rep. of the Monitoring Group on Somalia and Eritrea, transmitted by Letter Dated 7 October 2016 from the Chairman of the Security Council Comm. Established Pursuant to Resolutions 751 (1992) and 1907 (2009), Concerning Somalia and Eritrea Addressed to the President of the Security Council, Annex VI, ¶ 38, U.N. Doc. S/2016/919 (Oct. 31, 2016) [hereinafter 2016 Monitoring Group Report Annex VI].

63. 2015 Monitoring Group Report Annex VI, *supra* note 34, at ¶ 12.

64. 2016 Monitoring Group Report Annex VI, *supra* note 26, at ¶¶ 7-8.

65. Besteman & Van Lehman, *supra* note 28, at 305.

to their homes in these Al Shabaab-controlled regions.⁶⁶ Somali Bantu in the diaspora report that their relatives are now kidnapped for ransom by Al Shabaab, a tactic that is employed by other Majority-clan armed groups against minority families that “are understood to have access to resources either directly or through supportive relatives abroad.”⁶⁷

The Somali Bantu, including some deportees, who did not flee Somalia but were driven out of their homes by Al Shabaab or Majority-clan militias are forced to either live in IDP camps or risk emigration through Al Shabaab-held territory to refugee camps in Kenya. A majority of the IDPs in southern Somalia are Bantu,⁶⁸ but the IDP camps are managed by Majority-clan Somalis and their militias. Gender-based violence, including rape of the female IDPs, is a major problem⁶⁹ that is perpetrated by not only armed militias, but also security forces affiliated with the government.⁷⁰ Marginalized groups such as the Somali Bantu and IDPs “suffered disproportionately from gender-based violence.”⁷¹ Extortion by the IDP camp managers—or “gatekeepers”—is commonplace, as are restrictions on freedom of movement.⁷²

IV. PROFILE OF SURVEYED SOMALI BANTU DEPORTEES

Somali Bantu interviewees were asked general demographic questions as well as ones concerning their experience in Immigration and Customs Enforcement (ICE) custody. For clarity purposes, 20 Somali Bantu deportees were accounted for in the survey but only 18 were interviewed.

All Somali Bantu deportees are male. The deportees interviewed ranged in age from 23 to 42 years old at the time of removal with a mean age of 28.3 years. Of those deportees interviewed, just fewer than half were born in the Dadaab, Kenya refugee camps. When combined with those who arrived there as infants two years of age or younger, the figure is 61.1 percent.⁷³ All have family (siblings and parents) legally residing in the United States. Those with wives in the United States accounted for just fewer than half of the deportees while just over three quarters have children – 37 in total - whom were born in the United States.

66. *Id.* at 306.

67. 2015 Monitoring Group Report Annex VI, *supra* note 34, at ¶ 23.

68. DANISH REFUGEE COUNCIL, DURABLE SOLUTIONS FRAMEWORK - LOCAL INTEGRATION FOCUS: LOWER JUBA REGION 9, (2016).

69. HUM. RTS. WATCH, HOSTAGES OF THE GATEKEEPERS: ABUSES AGAINST INTERNALLY DISPLACED IN MOGADISHU, SOMALIA 4 (2013).

70. *Id.* at 4.

71. U.S. DEP'T OF STATE, *supra* note 4, at 36–37; HUM. RTS. WATCH, *supra* note 69, at 4-5.

72. HUM. RTS. WATCH, *supra* note 69, at 27.

73. The Somali Bantu deportees born in Kenya consider that country, and not Somalia, as the one to which they should have been deported.

All the Somali Bantu deportees arrived legally in the United States as refugees between 2003 and 2006. The deportees' duration of incarceration in ICE custody ranged from one month to 36 months with the mean duration being 12.9 months. The deportees were all removed from the United States between 2016 and 2018 with 20 percent having arrived in 2016, 35 percent in 2017, and 45 percent in 2018.

Among the Somali Bantu deportees, just over three quarters are fluent in English. Upon arrival in Somalia, just over half say they were fluent in Maay Maay, while Zigua, Maxaa and Swahili were each spoken by approximately one quarter of the deportees. The highest level of education achieved by two thirds of the deportees was less than high school completion, while one third either only have a high school diploma/GED or attended/graduated from college.

Of the Somali Bantu deportees surveyed at the time of this writing, just fewer than half reached Kenya, while the balance is split between Kismayu and Mogadishu. While deportees in Somalia and Kenya are eligible for legal immigration status, only one is known to have acquired Somali citizenship documents and none have been granted legal refugee status by the UNHCR in Kenya.⁷⁴ This has resulted in onward migrations, in some cases to destinations beyond of Kenya.

V. SURVEY RESULTS ON THE TORTURE OF SOMALI BANTU DEPORTEES

This section reports on the Somali Bantu deportee's experiences with torture, fear of torture, and protection strategies to escape from torture after they arrived at MIA. Of the 20 Somali Bantu deportees who were removed to Somalia, 55 percent were physically tortured with a 50 percent torture rate for those deported in 2016, 42.9 percent for those deported in 2017, and 66.7 percent for those deported in 2018. Survey results show that at least two Somali Bantu deportees were kidnapped and tortured more than once in Somalia.

All 18 of the deportees interviewed responded that they feared for their lives at some time while in Somalia with 94.4 percent of them stating they feared for their lives at MIA and 88.2 percent in the City of Mogadishu. Of the 13 deportees who made it to Kismayu, 92.3 percent said they feared for their lives while 100 percent of the nine deportees who escaped through Al Shabaab-held territory feared for their lives.

Of the 13 instances of detention, kidnapping and torture for ransom of Somali Bantu deportees, 61.5 percent were carried out by one or more uniformed Somali government security personnel. Of the seven instances at

74. UNHCR refugee camp administrators in Kenya denied Somali Bantu deportees' requests for refugee status and ration cards.

MIA, uniformed Somali government security personnel were responsible for 57.1 percent of the abductions. Of the four instances in Mogadishu, uniformed Somali security personnel were responsible for 75 percent of the abductions and torture. Of the two instances in Kismayu, uniformed Somali security personnel were responsible for fifty percent of the abductions and torture.

A. *Mogadishu International Airport*

Of the 20 Somali Bantu deportees who arrived at MIA, 10 percent were met at the airport by friends or relatives. In response to the question “how were you treated at MIA customs,” 11.1 percent of the 18 Somali Bantu deportees interviewed reported that they were professionally processed. Of the 20 deportees, 90 percent experienced oral or physical abuse, detention for more than one hour, forcible payment of a bribe, interrogation, torture, or forcible payment of a ransom by uniformed Somali security personnel stationed at the airport.⁷⁵ In response to the question “how were the Somali deportees from the Majority clans treated at MIA,” 88.9 percent of the 18 Somali Bantu deportees answered “professionally processed.” The Somali Bantu deportees added that the Majority-clan Somalis were largely welcomed by the Somali customs officials and were received at the airport by family and friends.

B. *The City of Mogadishu*

In response to the question “did any of the following happen to you in the city of Mogadishu,” 100 percent of the 18 Somali Bantu deportees reported that they were orally or physically abused, detained for more than four hours, forced to pay a bribe, interrogated, kidnapped, tortured, or forced to pay ransom. Of the 13 Somali Bantu deportees who fled Mogadishu, 100 percent stated their reason as wanting to avoid being abused, tortured, and murdered. All the deportees offered that they wanted to leave Somalia altogether in order to reach Kenya.

C. *Safe-Haven Options in Somalia*

None of the 16 Somali Bantu deportees questioned said they considered traveling north from Mogadishu to the central and northern regions of Somalia where the Galmudug, Puntland and Somaliland regional governments are in control. None of the Somali Bantu deportees reported that they in fact fled Mogadishu to these central and northern regions in

75. One Somali Bantu deportee who was later tortured noted that “it seemed like they knew we were coming and were prepared to kidnap us.” A second deportee added that his family in the United States started to receive ransom requests from the kidnappers one month before he arrived in Somalia and for a few months after his family paid a ransom freeing him from his kidnappers.

Somalia.⁷⁶ Of the 16 Somali Bantu deportees' reasons for not wanting to flee to central and northern Somalia, 76.5 percent answered "fear of being tortured," or "fear of being murdered," while 17.6 percent said these regions were "foreign" to them or they "lack of family/ethnic networks." Many of the deportees offered that the central and northern regions were dominated by Majority-clan Somalis whom would treat the deportees as bad as or worse than those Majority-clan Somalis in Mogadishu. The deportees volunteered that their parents and relatives advised the deportees to flee Mogadishu for Kismayu and then on to Kenya. Of the 18 Somali Bantu deportees, 83.3 percent reported that they did in fact relocate to Somalia's southern regions.⁷⁷

D. *The City of Kismayu*

In response to the question "did any of the following happen to you in the city of Kismayu," the 13 Somali Bantu deportees reported that 66.7 percent were either orally abused, physically, abused, detained, forced to pay a bribe, interrogated, kidnapped, tortured, or forced to pay ransom. The deportees attributed the low rate of abuse in Kismayu to their adaptation of survival strategies in Somalia.

Of the eight Somali Bantu deportees who were abused in the City of Kismayu, 50 percent identified their abusers as the Jubbaland State police and 50 percent as Al Shabaab. One deportee in hiding offered that three Al Shabaab soldiers murdered his cousin as a penalty for not revealing the whereabouts of the deportee. A second deportee volunteered that during his one week in Kismayu, he witnessed the beachfront execution of two local Somali Bantu men.

In response to the question concerning how they obtained money to survive in Kismayu, the 13 Somali Bantu deportees reported that 15.4 percent earned money from "employment," 23.1 percent received money from "distant relatives and family friends in Kismayu," 46.2 percent received remittances from "relatives and friends in the United States," none received assistance from "charity organizations," and 30.8 percent from "begging on the streets and in the markets."⁷⁸

Of the nine Somali Bantu deportees who fled Kismayu, 66.7 percent reported they did so to "avoid being tortured" or "avoid being murdered"

76. Some Somali Bantu deportees didn't know anything about these northern regions or that they even existed.

77. Kismayu is the principal city of Somalia's southern regions as well as being its main transportation hub for overland and air travel. The territory between Mogadishu and Kismayu is predominantly controlled by Al Shabaab, so Somali Bantu deportees who could afford the safe passage of a flight to Kismayu overwhelming did so.

78. The Somali Bantu deportees' employment in Kismayu is informal and intermittent and includes such work as washing the feet of Somali worshippers at mosque and lugging commercial goods for vendors and customers.

while 33.3 percent responded, “transit to Kenya.” In addition to the scripted survey responses, the deportees volunteered that they wanted to leave Somalia to reach the safety of Kenya where many were born or lived for years.⁷⁹

E. *Escaping to Kenya through Al Shabaab-Held Territory*

Although only nine Somali Bantu deportees in Kenya have so far been interviewed, between 10 and 15 are believed to have survived the journey from Kismayu south to the Kenyan border, all of which is Al Shabaab-controlled territory.⁸⁰ None of the Somali Bantu deportees who transited through Al Shabaab-held territory with its multiple armed checkpoints reported being tortured, which is not to say none were discovered, tortured and executed. Of the nine Somali Bantu deportees interviewed who travelled from Kismayu to the Kenyan border, 100 percent said the organization they feared most was Al Shabaab.⁸¹ All of the deportees who successfully escaped through Al Shabaab-held territory to reach Kenya individually reported they “feared for my life” while on the journey.⁸²

Of the 16 Somali Bantu deportees who responded, 100 percent said they wished to return to the United States. In response to the question, “do you believe you will return to the United States,” 68.8 percent of the deportees responded, “yes.” The reasons most Somali Bantu deportees gave for wanting to return to the United States were wishing to see their children and parents again and because it is their home.

F. *Remittances and Perceived Wealth of the Somali Bantu Deportees*

In response to the question, were you able to safely receive remittances from the *Dahabshil* in Mogadishu, 11.8 percent of the Somali Bantu deportees responded “yes” while 30.8 percent in Kismayu responded answered “yes.”⁸³ The Somali Bantu, especially those believed to have been in the United States or even those thought to have relatives in the United States, are prime targets for remittance extortion from corrupt police, Al Shabaab, and

79. Unlike Mogadishu, the primary factor limiting travel from Kismayu south to Kenya is not financial but rather risk tolerance. In order to reach the border with Kenya, the Somali Bantu deportees must risk their lives by attempting to pass undetected through Al Shabaab-held territory.

80. While there are flights between Somalia and Kenya, the Somali Bantu deportees are precluded from legally flying into Kenya and would be detected by Kenyan customs officials at the airport and removed back to Somalia.

81. Since Al Shabaab soldiers had their faces and heads covered, the deportees could not determine by physical appearance whether or not the abusers were Somalis from the Majority clans.

82. The Somali Bantu deportees employed a variety of protection tactics that if discovered by Al Shabaab would likely have resulted in torture and execution.

83. *Dahabshil* is a Somali-owned international money transfer system similar to the Western Union.

other gangs in the business of kidnapping and torture for ransom.⁸⁴ One Somali Bantu deportee wishing to collect a remittance at Dahabshil in Mogadishu recounted how his taxi driver alerted Al Shabaab via cell phone and then drove to an isolated area where Al Shabaab gunmen were waiting to kidnap the deportee.

G. *Description of Torture Tactics*

Of the 20 Somali Bantu deportees included in this survey, 75 percent were kidnapped or narrowly escaped kidnapping. The deportees described how they were either forcefully abducted from the streets by police and armed gangs or deceived into detention by taxi drivers and police at the airport or road checkpoints. Throughout their experience in Somalia, the deportees describe how they were continually derided for being Bantu and for having abandoned Somalia for the United States. This oral abuse took place throughout the kidnapping and torture phases. The deportees kidnapped off the streets were hooded or forced to the floor of the vehicle and driven to rural detention sites outside of Mogadishu that they said were operated by Al Shabaab. Deportees deceived into detention at the airport or police roadblocks were respectively brought to holding rooms at or near the airport or to nondescript building in Mogadishu and Kismayu.

Once the deportees arrived at their torture destination, they were isolated from other deportees in individual cells or locked rooms. In cases where Al Shabaab were the kidnappers, the deportees were handcuffed or tied to a pole or beam to restrict their movement during the interrogation and torture. Deportees describe how multiple captors would participate in the torture. In addition to the oral abuse described earlier, the torturers would also threaten the deportees with execution. The physical torture included beating the deportees with truncheons and whip-like weapons made from old vehicle tires.⁸⁵ Additional physical abuse included stabbing the deportees in the back with knives.⁸⁶ In an individual case, more extreme torture tactics were described by a deportee. During the torture, the kidnappers told the deportees they could save their lives by paying a ransom that ranged from US\$200 to US\$1,500.

In cases where uniformed Somali government security personnel were the perpetrators of torture, the deportees were led into individual rooms where

84. The other deportees state that in order to safely receive money from Dahabshil in Mogadishu, they must find a native or long-time resident of Mogadishu whom can receive the money on their behalf.

85. Two of the deportees appeared to exhibit PTSD-like symptoms from their torture experience with one of them having impaired speech and cognition due to his physical abuse.

86. Deportees offered to send pictures of their stab wounds as proof of their torture.

multiple police, some occasionally wearing plain clothes, would beat the deportees with the butt of a gun and or a truncheon-like weapon. In two cases, the deportees' dreadlocks were aggressively cut off. Those Somali Bantu with tattoos were particularly targeted for oral and physical abuse by the police. During this torture process, the police derided the deportees for abandoning Somalia and accused them of being Christians or spies for the United States. The police demanded ransom payments from the deportees in order to secure their release.

Since the deportees were penniless, they had to call relatives in the United States, sometimes using the torturers' cell phone, requesting ransom payments. As poor Somali Bantu families in the United States don't have ready access to hundreds of dollars for ransom, it oftentimes took several days for the family to marshal the resources from their local Somali Bantu community in the United States. In the meantime, the deportees continued to be abused, forced to live in unsanitary conditions, and given little food and water to sustain themselves. In some cases, the captive deportee reported witnessing the execution of local Somali Bantu prisoners who could not come up with the ransom money. Once the ransom was paid to the captors, the deportees were again hooded and driven into Mogadishu where they were released and told to leave Mogadishu or face execution.

H. *Protection Strategies by the Deportees to avoid Recapture and Torture*

The Somali Bantu deportees employed strategies to protect themselves from further kidnapping and torture. Of the 20 deportees, 75 percent escaped Mogadishu for Kismayu, while those without funds to pay for transport to Kismayu went into hiding in Mogadishu and disguised themselves as local Somali Bantu while in public. Kismayu has a higher Somali Bantu population than Mogadishu as well as being on the way to Kenya. Of the 15 deportees who fled to Kismayu, 60 percent continued their flight through Al Shabaab-held territory to reach Kenya.⁸⁷

Most of the deportees reported that they only go out at night so as not to draw attention to themselves. The Somali Bantu deportees offered that in order to prevent themselves from being detected by hostile Somali policemen, Al Shabaab soldiers and their collaborators, the deportees all had to take on the mannerisms, dress and language use of the local Somali Bantu, many of whom are IDPs. This meant acting and looking

87. Important factors determining length of time spent in a Somali city are availability of money to pay for transportation as well as the presence or not of a distant relative or friend with whom the deportee can reside.

respectively more submissive and sullied as well as never speaking English.

VI. APPLICATION OF THE CONVENTION AGAINST TORTURE TO THE DEPORTATION OF SOMALI BANTU

A. *Deportations⁸⁸ of the Somali Bantu to Somalia*

Deportations of individuals under orders of removal are handled by the Immigration and Customs Enforcement division of the Department of Homeland Security. The removal proceedings that precede deportation, however, are adjudicated by the Department of Justice through the Executive Office of Immigration Review, which encompasses Immigration Courts and the Board of Immigration Appeals.⁸⁹ Immigration Courts hear evidence and issue removal decisions, which can then be appealed to the Board of Immigration Appeals.⁹⁰ In addition, the Attorney General may certify the Board's decisions to him or herself, and directly issue a decision that then binds the Board and Immigration Courts.⁹¹ Although the Supreme Court has emphasized that "the Board should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication,'" ⁹² Board decisions that construe immigration regulations are reviewable in federal courts, which have not hesitated to reverse the Board.⁹³

The number of Somali Bantu removed from the United States has depended in part on the relationship between the United States and Somalia. On January 5, 1991, because of the Somali Civil War, the United States ended its diplomatic presence in Somalia by closing its embassy.⁹⁴ As Somalia descended into violence and famine with no recognized government in control, the United States slowed deportations of Somalis living in the United States. Between 1992 and 1996, the United States deported only two

88. The term "deportation" as used in this article means the formal removal of a person who is not a citizen of the United States after a finding that the person violated immigration laws. See *Deportation*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/tools/glossary/deportation> (last visited Jan. 2, 2019). Before April 1997, the Immigration and Naturalization Service ("INS") used separate procedures, called "deportation" and "exclusion," to remove individuals, depending on whether the individual had formally entered the United States or not. *Id.* After April 1, 1997, the INS was abolished and these procedures were consolidated into a single "removal" procedure. See *id.*; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 304, 110 Stat. at 3009-587 (codified at sections 239, 240 of the Act, 8 U.S.C. §§ 1229, 1229a (Supp. II 1996)); *Matter of N-B-*, 22 I. & N. Dec. 590, 593 n.1 (B.I.A. 1999).

89. 8 U.S.C. § 1103(a)(1); *Negusie v. Holder*, 555 U.S. 511, 516-17 (2009); see MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32276, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS 7 (2009).

90. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (citing 8 C.F.R. § 3.1(d)(1) (1998)).

91. 8 U.S.C. § 1103(a)(1); *Negusi*, 555 U.S. at 516-17.

92. *Negusie*, 555 U.S. at 517; *Aguirre-Aguirre*, 526 U.S. at 425.

93. See *infra* Part VI.C.

94. *U.S. Relations with Somalia*, U.S. DEP'T OF STATE, <https://www.state.gov/r/pa/ei/bgn/2863.htm> (last visited Jan. 5, 2019).

Somali citizens.⁹⁵ Between 1997 and 2016, the United States deported approximately 48 people per year on average,⁹⁶ even though there was no functioning government in Somalia to give advance consent to these deportations.⁹⁷

95. IMMIGR. & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 1999 Statistical Yearbook of the Immigration and Naturalization Service at 185 (2002), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_1999.pdf.

96. The numerical breakdown is as follows:

Year	Total Removed
1997	22
1998	23
1999	34
2000	50
2001	40
2002	45
2003	27
2004	30
2005	40
2006	39
2007	19
2008	23
2009	26
2010	39
2011	31
2012	41
2013	62
2014	63
2015	144
2016	157

OFF. OF IMMIGR. STAT., DEP'T OF HOMELAND SEC., 2016 Yearbook of Immigration Statistics 98, 101, 104 (2017), <https://www.dhs.gov/sites/default/files/publications/2016%20Yearbook%20of%20Immigration%20Statistics.pdf>; OFF. OF IMMIGR. STAT., DEP'T OF HOMELAND SEC., 2007 Yearbook of Immigration Statistics 109, 112, 115 (2008), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2007.pdf; IMMIGR. & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 1998 Statistical Yearbook of the Immigration and Naturalization Service 224 (2000), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_1998.pdf. The Department of Homeland Security has not yet released the deportation numbers for 2017 at the time of this writing.

97. See *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005).

In January 2013, the United States officially recognized a new Somali government, the Federal Republic of Somalia.⁹⁸ The United States subsequently welcomed the first Somali ambassador and sent its Secretary of State, John Kerry, to Mogadishu.⁹⁹ Then, on November 18, 2015, the Federal Republic of Somalia reopened its embassy in Washington, D.C.¹⁰⁰ Since this reopening, removals¹⁰¹ of Somali citizens have steadily risen, jumping in 2017 to 528,¹⁰² more than triple the number in 2016.

B. *Relief from Deportation*

There are three primary forms of relief¹⁰³ that that can prevent a person from being removed to a country where he or she faces persecution or torture: asylum,¹⁰⁴ withholding of removal,¹⁰⁵ and relief under the Convention Against Torture.¹⁰⁶ All of these forms of relief—save one—have strict eligibility requirements that bar many individuals from accessing them.¹⁰⁷ The one form of relief that is available to all individuals is “deferral of removal”¹⁰⁸ under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“the Convention”).¹⁰⁹

98. *Federal Republic of Somalia Re-opens Embassy in Washington*, U.S. MISSION TO SOMALIA (Nov. 19, 2015), <https://so.usmission.gov/federal-republic-somalia-re-opens-embassy-washington/>.

99. *Id.*

100. *Id.*

101. The Department of Homeland Security (“DHS”), which tracks the number of removals by country, defines the term “removal” as “the compulsory and confirmed movement of an inadmissible or deportable alien out of the United States based on an order of removal.” 2016 Yearbook of Immigration Statistics, *supra* note 96, at 109 n.1.

102. Layla Mahmood, *Deported from the US to a Somali Danger Zone*, BBC NEWS, July 4, 2018, <https://www.bbc.com/news/world-africa-44551333>.

103. *See* *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005) (listing forms of relief). This list does not include more specialized or ad hoc forms of relief that may enable individuals who are not in removal proceedings to enter or remain in the United States, including Temporary Protected Status, 8 U.S.C. § 1254a, humanitarian parole, 8 U.S.C. § 1182(d)(5), and deferred action. *See* The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. ____ (Nov. 19, 2014), <https://www.justice.gov/file/179206/download>.

104. 8 U.S.C. § 1158(b)(1).

105. 8 U.S.C. § 1231(b)(3)(A).

106. *See* 8 C.F.R. §§ 208.16(c)(4), 208.17(a) (2004).

107. *See, e.g.*, 8 C.F.R. § 1208.4(2)(i)(A) (one-year filing deadline for asylum); *Negusie v. Holder*, 555 U.S. 511, 513–14 (2009); 8 U.S.C. § 1158(b)(2)(A)(ii) (“particularly serious crime” bar to asylum); 8 U.S.C. § 1231(b)(3) (“particularly serious crime” bar to withholding of removal (also known as “restriction on removal”)); *Matter of G-G-S-*, 26 I. & N. Dec. 339, 339 (B.I.A. 2014) (“particularly serious crime” bar to withholding of removal under the Convention Against Torture).

108. 8 C.F.R. § 208.17.

109. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 1 [hereinafter the Convention]. The Convention was adopted by the U.N. General Assembly in 1984 and took effect in 1987 after twenty States ratified it. Six years later, the United States followed suit. *See* Hans Danelius, *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, AUDIOVISUAL LIBRARY OF INT’L LAW, <http://legal.un.org/avl/ha/catcidtp/catcidtp.html>. Because the Convention was not self-executing, *see* S. REP. NO. 101-30, at 10 (1990) (Exec. Rep.), Resolution of Advice and Consent to Ratification (1990), the United States implemented it by enacting several statutes and regulations, including the regulations at Part 8 of the Code of Federal Regulations, which govern removal proceedings. *See* 8 C.F.R. § 1208.17 (2004).

Courts have not hesitated to reverse the Board's removal decisions when the Board erroneously interprets regulations implementing the Convention. Even so, courts often disagree, so the requirements for the Convention may vary by jurisdiction.¹¹⁰ To make matters more confusing, where federal courts have not spoken, the Board follows its own precedent.¹¹¹ Below is a summary of the basic requirements for relief under the Convention Against Torture, including the primary conflicts among courts and the Board relevant to Somali Bantu claims under the Convention.

C. *Overview of the Convention's Requirements*

Unlike asylum, relief under the Convention is mandatory if the Convention's requirements are met.¹¹² To obtain relief, an individual must carry his or her burden of proof to establish that he or she will face torture in the country of removal.¹¹³ "Torture" is defined as follows:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹¹⁴

The Board and courts have distilled this definition into five broad requirements:

- (i) *The act must cause severe pain or suffering.* The act must be an extreme form of cruel and inhuman treatment. Torture does not include lesser forms of cruel, inhuman or degrading treatment or punishment.¹¹⁵ Although torture can include mental pain or suffering, that mental pain or suffering must be prolonged, and result from severe physical pain or suffering, mind altering

110. See *infra* Part C.

111. Cf. *Matter of D-R-*, 27 I. & N. Dec. 105, 108 (B.I.A. 2017) ("The agency's interpretation of a statute applies, regardless of the circuit court's contrary precedent, unless "the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.") (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *Holder v. Martinez Gutierrez*, 566 U.S. 583, 591 (2012)).

112. *Matter of H-M-V-*, 22 I. & N. Dec. 256, 264 (B.I.A. 1998) ("The Department of Justice, through the Attorney General and the General Counsel of the Service, takes the position that the United States has a binding obligation under Article 3 of the Torture Convention not to remove an individual to a country where he or she will face torture.")

113. See *infra* Part C.1.

114. 8 C.F.R. § 1208.18(a)(1)

115. *Id.* § 1208.18(a)(2).

substances or similar procedures, the threat of imminent death, or the threat that any of these things could be imminently inflicted on another person.¹¹⁶

- (ii) *The pain or suffering must be intentionally inflicted.* Torture requires specific intent to inflict such pain or suffering. If the pain or suffering is unanticipated or unintended, then the act is not torture.¹¹⁷
- (iii) *The infliction must be for an unlawful purpose.* Unlawful purposes include obtaining information or a confession, punishment for a victim's or another's act, intimidating or coercing a victim or another; or any discriminatory purpose.¹¹⁸ But an act is not torture if it is "inherent in or incidental to lawful sanctions," including judicially imposed sanctions such as the death penalty.¹¹⁹ That said, noncompliance with legal procedures does not per se constitute torture, either.¹²⁰
- (iv) *A public official or other person acting in an official capacity must inflict, instigate, consent to, or acquiesce to the pain or suffering.*¹²¹ The public official or other person acquiesces when, before the activity constituting torture, he or she is "has awareness of such activity and thereafter breach[es] his or her legal responsibility to intervene to prevent such activity."¹²²
- (v) *The offender must have custody or physical control of the victim.*¹²³

The Board and courts disagree on the scope and meaning of the last two requirements (requiring a public official or other person acting in an official capacity to acquiesce to torture, and requiring the offender to have custody or physical control of the victim), so that a person may be eligible for Convention relief in one jurisdiction but not another. Because these disagreements are complex, the law governing each requirement and its application to the Somali Bantu is separately explored below.

116. *Id.* § 1208.18(a)(4); see *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1135–36 (7th Cir. 2015) ("We should note . . . that "torture" as defined in the Convention Against Torture as well as in the regulations includes killing whether or not accompanied by other torture—and it is indeed death as well as torture that the petitioner in this case fears. See 1465 U.N.T.S. 85, Art. 1(1), defining torture to include "any act by which severe pain or suffering . . . is intentionally inflicted," and 8 C.F.R. § 1208.18(a)(4)(iii), including "the threat [and a fortiori the actuality] of imminent death.").

117. 8 C.F.R. § 1208.18(a)(5). The Board and federal courts have elaborated on this standard, explaining that the actor must intend to both commit the act as well as achieve the consequences. *Matter of J-E-*, 23 I. & N. Dec. 291, 298 (B.I.A. 2002); *Pierre v. U.S. Att'y. Gen.*, 528 F.3d 180, 189 (3d Cir. 2008).

118. *Matter of J-E-*, 23 I. & N. Dec. at 298.

119. 8 C.F.R. § 1208.18(a)(3).

120. *Id.* § 1208.18(a)(8).

121. *Id.* § 1208.18(a)(6).

122. *Id.* § 1208.18(a)(7).

123. *Id.* § 1208.18(a)(6).

1. *Application of the “Severe Pain and Suffering,” “Intent,” and “Purpose” Requirements to the Experience of the Somali Bantu*

There can be little argument that Somali Bantu deportees who are kidnapped and tortured upon arrival in Somalia meet the first three requirements listed above.

First, an individual would suffer severe physical and mental pain if he or she were kidnapped off the street, hooded and forced to the floor of a vehicle, isolated in an individual cell, handcuffed to a pole or beam, and threatened with execution.¹²⁴ Further evidence of severe pain and suffering includes any PTSD-like symptoms and impaired speech and cognition due to the physical abuse.¹²⁵ Even if the individual somehow did not experience extreme physical pain or suffering, he or she would experience extreme mental pain or suffering when threatened with death after being kidnapped and tied up. Given those circumstances and the fearsome reputation of Al Shabaab as terrorists, the individual would likely believe that death was imminent, especially if he or she observes the kidnappers kill another victim. These threats would be egregious enough to constitute torture.¹²⁶

Second, the acts above were intentionally inflicted. Certainly, a claim that the individual’s pain or suffering was “unanticipated” or “unintended” would be regarded as absurd. The circumstances themselves demonstrate that the kidnappers had to intend such pain or suffering: they must inflict it to force their victim to comply with their demands, call his family, and frighten them into sending money. As noted above, sending large amounts of money is difficult for the victims’ families; they would need persuasion. Unless the kidnappers can persuade the family that their loved one is undergoing severe pain or suffering, their ransom request cannot yield results.

Third, the kidnappers’ purpose is unlawful: they inflict severe pain and suffering to intimidate or coerce their victim’s families into paying a ransom. Their purpose is also discriminatory. They target the Somali Bantu because the Somali Bantu are a vulnerable and socially reviled population. The remaining requirements are more complex and are dealt with below.

D. *The Standard of Proof*

Article 3 in the Convention Against Torture prohibits signatories from sending individuals to a country where they would face torture. The standard of proof for establishing whether an alien would face torture is in the text of Article 3 and the regulations interpreting it, as follows:¹²⁷

124. See *supra* Part V.G.

125. See *supra* note 85.

126. See *Zubeda v. Ashcroft*, 333 F.3d 463, 474 (3d Cir. 2003) (stating that threats must be prolonged and egregious).

127. See Oona A. Hathaway, Aileen Nowlan & Julia Spiegel, *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT’L L. 791, 837 n.27 (2012) (“As stated in Article 31(1) of the Vienna Convention on the Law of Treaties, ‘[a] treaty shall be interpreted in good

No State shall expel, return (“refouler”) or extradite a person to another State where there are *substantial grounds for believing that he would be in danger of being subjected to torture* [emphasis added].

The regulation at 8 C.F.R. § 1208.16(a) provides the requirements for relief (withholding or deferral of removal) under the Convention Against Torture as follows:

In considering an application for [relief] under the Convention Against Torture, the immigration judge shall first determine whether the alien *is more likely than not to be tortured* in the country of removal. If the immigration judge determines that the alien *is more likely than not to be tortured* in the country of removal, the alien is entitled to protection under the Convention Against Torture. . . .¹²⁸

Therefore, the regulation interprets the Convention’s standard of proof, “substantial grounds” for believing that the individual would be “in danger” of suffering torture, to mean the individual must “more likely than not” suffer torture if returned to the country. Although courts have historically interpreted the phrase “more likely than not” to mean anything over 50 percent,¹²⁹ the Seventh Circuit has described how ludicrous such a measurement is, where torture is concerned:

The phrase [“more likely than not”], though repeated in numerous opinions . . . cannot be and is not taken literally, and this for several reasons: It would contradict the Convention (which as noted above requires only “substantial grounds for believing that” if removed the alien “would be in danger of being” tortured). It would dictate that while an alien who had a 50.1 percent probability of being tortured in the country to which he had been ordered removed would be granted deferral of removal, an otherwise identical alien who had “only” a 49.9 percent probability of being tortured would be removed—an absurd distinction. And it is not enforceable. The data and statistical methodology that would enable a percentage to be attached to a risk of torture simply do not exist.¹³⁰

The Seventh Circuit has therefore enunciated a different standard that hews more closely to the Convention’s text:

faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 21 U.S.T. 77, 1155 U.N.T.S. 331 . . .”).

128. 8 C.F.R. § 1208.16(a) (emphasis added).

129. See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); *Milosevic v. I.N.S.*, 18 F.3d 366, 372 (7th Cir. 1994).

130. *Rodriguez-Moliner v. Lynch*, 808 F.3d 1134, 1135–36 (7th Cir. 2015).

All that can be said responsibly on the basis of actually obtainable information is that there is, or is not, a substantial risk that a given alien will be tortured if removed from the United States. As we pointed out in *Yi–Tu Lian v. Ashcroft*, 379 F.3d 457, 461 (7th Cir.2004): “How one translates all this vague information into a probability that [the alien, if removed] will be tortured (remember the test is ‘more likely than not’) is a puzzler. Maybe probability is the wrong lens through which to view the problem. ‘More likely than not’ is the standard burden of proof in civil cases (the ‘preponderance’ standard) and rarely is the trier of fact asked to translate it into a probability (i.e., more than 50 percent). Maybe some strong suspicion that [the alien] is at risk of being tortured if he is [removed] . . . would persuade the immigration authorities to let him stay.”¹³¹

Apart from the Eleventh Circuit (in a single, unpublished decision),¹³² other circuit courts and the Board continue to apply the “more likely than not” or “greater than fifty percent” standard.¹³³ When determining whether an individual has carried his or her burden, all relevant evidence must be considered, including

- (i) past torture the applicant suffered;
- (ii) whether the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
- (iii) gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
- (iv) other relevant information regarding conditions in the country of removal.¹³⁴

Given this guidance, courts have agreed that an applicant can carry his burden with country-conditions evidence alone.¹³⁵ Therefore, even if the

131. *Id.* (emphasis added).

132. *Arguelles v. U.S. Att’y. Gen.*, 661 Fed.Appx. 694, 714 (11th Cir. 2016) (unpublished) (Martin, J. concurring) (reasoning that the Seventh Circuit’s “substantial risk” standard better reflects the language of the Convention Against Torture).

133. *E.g.*, *Guo v. Sessions*, 897 F.3d 1208, 1217 (9th Cir. 2018); *Gao v. Gonzales*, 424 F.3d 122, 128 (2d Cir. 2005); *Hospedales v. Holder*, 363 Fed.Appx. 795, 797 (2d Cir. 2010) (unpublished); *Mart v. Gonzales*, 217 Fed.Appx. 751, 754 (10th Cir. 2007) (unpublished); *Matter of J-R-G-P-*, 27 I. & N. Dec. 482, 484 (B.I.A. 2018); *Matter of J-C-H-F-*, 27 I. & N. Dec. 211, 218 (B.I.A. 2018).

134. 8 C.F.R. § 208.16(c)(3).

135. *Aguilar-Ramos v. Holder*, 594 F.3d 701, 705 (9th Cir. 2010); *see Mansour v. Immigration & Naturalization Serv.*, 230 F.3d 902, 908 (7th Cir. 2000); *Mapouya v. Gonzales*, 487 F.3d 396, 415 (6th Cir. 2007); *Zubeda v. Ashcroft*, 333 F.3d 463, 477 (3d Cir. 2003); *see Matter of J-C-H-F-*, 27 I. & N. Dec. at 218 (relying on 8 C.F.R. § 1208.16(c)(2) and *Shrestha v. Holder*, 590 F.3d 1034, 1048–49 (9th Cir. 2010) and reasoning that “[s]ince the applicant lacked credibility and the objective evidence in the record does not independently establish his claim, he did not satisfy his burden to prove his eligibility for protection under the Convention Against Torture.”).

applicant is deemed not to be credible, he or she may still be able to obtain Convention relief.¹³⁶

1. *Application of the Standard of Proof to the Experience of the Somali Bantu*

The survey of the Somali Bantu deported in the last three years is strong evidence that they are substantially likely to suffer torture, regardless of whether the “more likely than not” standard of proof is applied. Fifty-five percent of recent Somali Bantu deported between 2016 and 2018 suffered torture,¹³⁷ easily exceeding the “greater than fifty percent” requirement. The likelihood of torture appears to be increasing, with 66.7 percent of those deported in 2018 experiencing it.¹³⁸ At least two Somali Bantu deportees were kidnapped and tortured more than once, indicating an even higher likelihood of torture. Because this data is narrowly focused and establishes the outcome for those with very similar circumstances, it is not only relevant to the Somali Bantu currently seeking relief under the Convention Against Torture, it is highly predictive for them.¹³⁹

To establish they meet Convention requirements, the Somali Bantu will most likely have to rely heavily on country conditions evidence, especially if they have little recent personal experience in Somalia. Some Somali Bantu applicants may have experienced torture in the past, which is relevant to the likelihood of future torture. But even if a particular applicant has not, he will be able to establish that he cannot relocate anywhere in Somalia to escape torture.¹⁴⁰ Indeed, 7 out of the 20 deportees in this study, or 35 percent, could not even leave the Mogadishu International Airport without being detained and tortured.¹⁴¹ Those who made it out of the airport could not relocate to Mogadishu. Four of the deportees, or 20 percent, were kidnapped off of its streets and tortured.¹⁴² Kismayu is also unsafe. Two of the 13 deportees, or

136. *Kamalthas v. Immigration & Naturalization Serv.*, 251 F.3d 1279, 1284 (9th Cir.2001); *Singh v. Ashcroft*, 398 F.3d 396, 404–06 (6th Cir. 2005); *Camara v. Ashcroft*, 378 F.3d 361, 371–72 (4th Cir. 2004); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 185 (2d Cir. 2004); *Settenda v. Ashcroft*, 377 F.3d 89, 95 (1st Cir. 2004).

137. *See supra* Part V.

138. *See supra* Part V.

139. *Cf. Mei Fun Wong v. Holder*, 633 F.3d 64, 76 (2d Cir. 2011) (“Second, the BIA did not explain how it distinguished Wong’s case from similar circumstances that were found to constitute persecution [for purposes of asylum] in *In re Chao Qun Jiang*, A78 386 894 (B.I.A. Sept. 27, 2006) We remand to allow the Board to address these concerns.”); *U.S. v. Gonzalez-Flores*, 804 F.3d 920, 927–28 (9th Cir. 2015) (“In assessing whether the alien carried this burden [of establishing that the Immigration Judge would have granted him voluntary departure], we focus on whether aliens with similar circumstances received relief.”); *Huang v. Att’y Gen. of U.S.*, 620 F.3d 372, 386 (3d Cir. 2010) (“Many aliens flee their home countries under very similar circumstances that should, in fairness, lead to similar outcomes in their asylum petitions.”).

140. The applicant should not have to establish that relocating is impossible; the ability to relocate is just one consideration in determining the likelihood of future torture. *Maldonado v. Lynch*, 786 F.3d 1155, 1164 (9th Cir. 2015).

141. *See supra* Part V.

142. *See supra* Part V.

15.3 percent, who reached that city were detained and tortured.¹⁴³ The process of relocation to Kismayu is also dangerous, requiring passage through territory controlled by Al Shabaab.¹⁴⁴ Somali Bantu also cannot relocate to the northern or central regions of Somalia, where they lack any protection from the Majority clans that control the region, thus exposing them to further victimization and torture.¹⁴⁵ The Ninth Circuit has noted, “[I]t will rarely be safe to remove a potential torture victim on the assumption that torture will be averted simply by relocating him to another part of the country.”¹⁴⁶ This is most certainly true for the Somali Bantu.

Further, the Somali Bantu should have little trouble establishing gross, flagrant and mass violations of human rights in Somalia, especially against themselves. As described above, the rise of Al Shabaab, and its control of Somali Bantu lands for over a decade, have resulted in slavery and starvation of the Somali Bantu. The Somali Bantu’s forced displacement, loss of agricultural land, and the forced conscription of their children¹⁴⁷ are clearly gross, flagrant, and mass violations of their human rights. In addition, individual Somali Bantu applicants will be able to offer evidence in the form of testimony about their personal experience with the marginalization and discrimination that exemplifies country conditions in Somalia.

Other relevant information includes whether the Somali Bantu can escape to Kenya; whether others can protect them from torture; and whether they have financial means to protect themselves against torture. None of these alternatives is available to the Somali Bantu. They cannot safely escape to Kenya because of Al Shabaab. To travel to Kenya from Mogadishu, deportees must first travel to Kismayu, and then to Kenya. Al Shabaab not only controls much of the territory between Mogadishu and Kismayu, it also controls the territory from Kismayu to Kenya.¹⁴⁸ While there are flights between Somalia and Kenya, Kenyan customs officials would prevent any Somali Bantu deportees from entering Kenya because they lack legal authorization and would remove them back to Somalia.¹⁴⁹

Other Somalis cannot protect Somali Bantu deportees from torture because the Somali Bantu, as minorities, lack access to *Xeer*.¹⁵⁰ Somali Bantu deportees also cannot rely on the local Somali Bantu, who live in the southern regions of Somalia controlled by Al Shabaab.¹⁵¹ Finally, the Somali Bantu deportees lack financial means to protect themselves against torture. Whereas

143. See *supra* Part V.

144. See *supra* note 3.

145. See *supra* Part V.C.

146. *Nuru v. Gonzales*, 404 F.3d 1207, 1219 (9th Cir. 2005).

147. See *supra* Part II.C.

148. See *supra* note 3, 5.

149. See *supra* note 85.

150. See *supra* Part III.C.

151. See *supra* Part II.C.

wealthy individuals might be able to hire private security firms, Somali Bantu deportees have no such financial means.

E. *Infliction, Instigation, or Acquiescence by Public Officials*

Although the Board and courts agree that the Convention requires state involvement, they disagree on the contours of that involvement. Most of the disagreement centers on three questions: (1) Who qualifies as a “public official”? (2) Must public officials be “acting in an official capacity”? and (3) When does a public official “acquiesce”? Each of these questions will be addressed in turn below.

1. *Who Qualifies as a “Public Official”?*

The primary conflict between the Board and federal courts centers on whether a “public official” can be a local government employee, or whether that term only applies to the country’s government as a whole. The Board examines whether this element has been met by referring to the country’s government as a whole:

The relevant inquiry under the Convention Against Torture, however, is whether governmental authorities would approve or “willfully accept” atrocities committed against persons in the respondent’s position. . . . To suggest that this standard can be met by evidence of *isolated rogue agents* engaging in extrajudicial acts of brutality, which are not only in contravention of the jurisdiction’s laws and policies, but are committed despite authorities’ best efforts to root out such misconduct, is to empty the Convention’s volitional requirement of all rational meaning.¹⁵²

Therefore, the term “public official” cannot include “rogue” officers who are corrupt, and whom others in the government denounce.¹⁵³ It may also not include local officials, if the national government has undertaken efforts to reform them.¹⁵⁴ The First and Fourth Circuit agree.¹⁵⁵ The Seventh, Eighth and Ninth Circuits do not.¹⁵⁶ According to the Ninth Circuit,

152. Matter of Y-L-, 23 I. & N. Dec. 270, 283 (U.S. Att’y Gen. 2002).

153. *See id.*

154. *See id.*

155. Suarez-Valenzuela v. Holder, 714 F.3d 241, 248 (4th Cir. 2013); Costa v. Holder, 733 F.3d 13, 17–18 (1st Cir. 2013).

156. Mendoza-Sanchez v. Lynch, 808 F.3d 1182, 1185 (7th Cir. 2015) (“It is irrelevant whether the police are ‘rogue’ (in the sense of not serving the interests of the Mexican government). A petitioner for deferral of removal under the Convention Against Torture need not prove that the Mexican government is complicit in the misconduct of its police officers. It’s simply not enough to bar removal if the government may be trying, but without much success, to prevent police from torturing citizens at the behest of drug gangs.”); Ramirez-Peyro v. Holder, 574 F.3d 893, 901 (8th Cir. 2009) (“[I]t is not contrary to the purpose of the CAT . . . to hold Mexico responsible for the acts of its officials, including low-level ones, even when those officials act in contravention of the nation’s will”); Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1080 (9th Cir. 2015) (“Avendano-Hernandez was not required to show acquiescence by a

The BIA's "rogue official" rationale is inconsistent with circuit law. The BIA held that the danger Barajas-Romero faced from the drug cartel and corrupt police did not establish government involvement because Mexican law, and national policy to root out the corruption, established the absence of official acquiescence. But we held in *Madrigal v. Holder* that "if public officials at the state and local level in Mexico would acquiesce in any torture [petitioner] is likely to suffer, this satisfies CAT's requirement that a public official acquiesce in the torture, even if the federal government in Mexico would not similarly acquiesce." The four police who tortured Barajas-Romero and told him he would be killed if he returned to Mexico were themselves government officials. As we held in *Madrigal*, the "efficacy of the government's efforts to stop the drug cartels' violence," not just the willingness of the national government to do so, must be examined.⁴⁹ Here, the BIA focused only on the national government's efforts and not their efficacy, which was mistaken under *Madrigal*.¹⁵⁷

The Seventh Circuit has also made clear that the applicant does not need to prove that a particular, individual public official will be directly involved in the torture. Rather the government as a whole can demonstrate how public officials can be implicated:

The Board stated that W.G.A. had "not indicated that there was any involvement of a public official" in "any of the threats directed" at him. W.G.A. does not need to show that a public official was involved directly. Perhaps for this reason, the immigration judge and Board ignored key evidence on this point too. They did not address the extensive record that describes how corruption, judges' refusal to protect witness anonymity, and the police's fear of reprisal all allow gangs to act with a high degree of impunity.¹⁵⁸

2. *Must Public Officials be "Acting in an Official Capacity"?*

According to the Board, public officials must act in an official capacity, or in other words, "under color of law."¹⁵⁹ The Fifth and Eighth Circuits agree

higher level member of the Mexican government because 'an applicant for CAT relief need not show that the entire foreign government would consent to or acquiesce in [her] torture.' It is enough for her to show that she was subject to torture at the hands of local officials.") (internal citations omitted).

157. *Barajas-Romero v. Lynch*, 846 F.3d 351, 363 (9th Cir. 2017) (quoting *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013)).

158. *W.G.A. v. Sessions*, 900 F.3d 957, 968 (7th Cir. 2018), *reh'g denied* (Oct. 22, 2018) (citing *Sarhan v. Holder*, 658 F.3d 649, 657–58 (7th Cir. 2011)).

159. *Matter of G-K-*, 26 I. & N. Dec. 88, 93 (B.I.A. 2013); *Matter of Y-L-*, 23 I. & N. Dec. 270, 280, 285 (U.S. Att'y Gen. 2002).

that officials must be acting “under color of law” as that term is used in the civil rights context.¹⁶⁰ Therefore, according to the Fifth Circuit,

[A]n act is under color of law when it constitutes a ‘[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’” We have recognized on numerous occasions that acts motivated by an officer’s personal objectives are “under color of law” when the officer uses his official capacity to further those objectives.¹⁶¹

In its “under color of law” analysis, the Fifth Circuit implicitly rejected the Board’s “rogue officer” line of reasoning:

[P]roving action in an officer’s official capacity “does not require that the public official be executing official state policy or that the public official be the nation’s president or some other official at the upper echelons of power. Rather . . . the use of official authority by low-level officials, such a[s] police officers, can work to place actions under the color of law even where they are without state sanction.”¹⁶²

The Second Circuit nominally follows the Board’s requirement that public officials act in an official capacity, but in doing so, emphasizes how rarely the “rogue officers” analysis would apply:

To the extent that the Egyptian police are acting in their official capacities—as is strongly suggested by the fact that their goal is to extract confessions—then the acts are carried out “by . . . a public official . . . acting in an official capacity.” To the extent that these police are acting in their purely private capacities, then the “routine” nature of the torture and its connection to the criminal justice system supply ample evidence that higher-level officials either know of the torture or remain willfully blind to the torture and breach their legal responsibility to prevent it. As two of the CAT’s drafters have noted, when it is a public official who inflicts severe pain or suffering, it is only in exceptional cases that we can expect to be able to conclude that the acts do

160. *Ahmed v. Mukasey*, 300 Fed. App’x. 324, 328 (5th Cir. 2008) (unpublished) (“[T]he applicant must demonstrate that, if removed to his country of origin, it is more likely than not he would be tortured by, or with the acquiescence of, government officials acting under color of law.”); *Ramirez–Peyro*, 574 F.3d at 900.

161. *Marmorato v. Holder*, 376 Fed. App’x. 380, 385 (5th Cir. 2010) (unpublished) (citations omitted).

162. *Id.* at 386 (quoting *Ramirez–Peyro*, 574 F.3d at 901 (citing *Screws v. United States*, 325 U.S. 91, 111 (1945)); and citing *Silva–Rengifo v. Att’y Gen.*, 473 F.3d 58, 68, n. 7 (3d Cir. 2007) (noting that an “alien can establish sufficient collusion between groups in the country, or factions within the government itself, whose actions are tolerated, if not condoned by those in government.”); *Ontunez–Tursios v. Ashcroft*, 303 F.3d 341, 354 (5th Cir. 2002) (considering evidence of acquiescence by low-level officials (such as local police) and high-level officials (such as the President of Honduras)).

not constitute torture by reason of the official acting for purely private reasons.¹⁶³

In contrast, the Ninth Circuit has completely rejected the Board's analysis, concluding that public officials need not be acting in an official capacity at all. The Ninth Circuit reasons that "the word 'or' between the phrases 'inflicted by . . . a public official' and 'acting in an official capacity' can only mean that either one suffices."¹⁶⁴

3. *When Does a Public Official "Acquiesce"?*

The Attorney General and the Board have construed the regulatory requirement that public officials have awareness of the torturous activity and breach their legal responsibility to intervene to mean that public officials must approve or "willfully accept" the activity, thus corresponding to the Oxford dictionary definition of "acquiescence" as "silent or passive assent."¹⁶⁵ Further, the "activity" the official acquiesces to must be the specific torture that the applicant fears, not just general violence.¹⁶⁶ Finally, public officials must be more than merely powerless to stop the activity.¹⁶⁷

Every circuit court that has addressed the issue, which is all of them apart from the Eleventh, has disagreed. These circuits have implicitly or explicitly concluded that public officials need not willfully accept torture; they merely need to be willfully blind to it.¹⁶⁸ Some circuit courts also disagree with the premise that the government must have some power over those inflicting the torture: the Seventh Circuit has found governmental powerlessness irrelevant, and the Third Circuit has found it relevant, but not dispositive.¹⁶⁹

163. *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004) (citations omitted) (quoted by *Ramirez-Peyro*, 574 F.3d at 904). *But see* *Barwari v. Mukasey*, 258 Fed. App'x 383, 385 (2d Cir. 2007) (unpublished) (relying on *Khouzam* to conclude that rogue officers can carry out torture even when acting outside their official capacities).

164. *Barajas-Romero v. Lynch*, 846 F.3d 351, 362 (9th Cir. 2017).

165. *Matter of S-V-*, 22 I. & N. Dec. 1306, 1312 (B.I.A. 2000); *Matter of Y-L-*, 23 I. & N. Dec. 270, 283 (U.S. Att'y Gen. 2002).

166. *Matter of S-V-*, 22 I. & N. Dec. at 1313.

167. *Id.* at 1312; *see Matter of Y-L-*, 23 I. & N. Dec. at 283.

168. *Aguilar-Ramos v. Holder*, 594 F.3d 701, 705–06 (9th Cir. 2010); *Zheng v. Ashcroft*, 332 F.3d 1186, 1192–93 (9th Cir. 2003) (explaining the history of the U.S.'s conditions on the Convention, and the U.S.'s revisions removing "knowledge" from its requirements so that officials need only have "awareness" of activities constituting torture); *see Khouzam v. Ashcroft*, 361 F.3d 161, 170–71 (2d Cir. 2004); *Perez v. Loy*, 356 F.Supp.2d 172, 177–78 (D. Conn. 2005); *Silva-Rengifo v. Att'y Gen.*, 473 F.3d 58, 65 (3d Cir. 2007); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 240 (4th Cir. 2004); *Hakim v. Holder*, 628 F.3d 151, 156–57 (5th Cir. 2010); *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006); *Lozano-Zuniga v. Lynch*, 832 F.3d 822, 831 (7th Cir. 2016); *Mouawad v. Gonzales*, 479 F.3d 589, 596 (8th Cir. 2007), *amended by* 485 F.3d 405 (8th Cir. 2007); *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1192 (10th Cir. 2005).

169. *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1139 (7th Cir. 2015); *Pieschacon-Villegas v. Atty. Gen.*, 671 F.3d 303, 311 (3d Cir. 2011). *But see Ramirez-Peyro v. Gonzales*, 477 F.3d 637, 639 (8th Cir. 2007) ("it is not enough that a government is aware of torture but powerless to stop it"); *Garcia-Milian v. Holder*, 755 F.3d 1026, 1034 (9th Cir. 2014) ("Evidence that the police were aware of a particular crime, but failed to bring the perpetrators to justice, is not in itself sufficient to establish acquiescence in the crime. Instead, there must be evidence that the police are unable or unwilling to oppose the crime.").

4. *Application to Somali Bantu Deportees*

Somali Bantu individuals can establish a substantial likelihood that public officials inflicted or instigated their torture. Most instances of detention, kidnapping, and torture were carried out by one or more uniformed Somali government security personnel.¹⁷⁰ Of the seven instances at MIA, uniformed Somali government security personnel were responsible for 57.1 percent of the abductions.¹⁷¹ Of the 4 instances in Mogadishu, uniformed Somali government security personnel were responsible for 75 percent of the abductions and torture.¹⁷² Of the two instances in Kismayu, uniformed Somali government security personnel were responsible for one of the abductions and torture.¹⁷³

Further, such public officials would be acting in their official capacities. Somali security personnel are stationed at the MIA,¹⁷⁴ and control whether Somali Bantu returnees are processed like Majority-clan Somalis, or, as was the case 90 percent of the time, detained and abused.¹⁷⁵ Without the power intrinsic in these government positions, they would not be nearly as effective in an area as public and visible as MIA. The international airport in Mogadishu is a government-controlled facility where uniformed police and customs officials are responsible for security. Government officials, who don uniforms that “clothe [them] with the authority of state law,”¹⁷⁶ abuse their power to the detriment of the Somali Bantu. In addition, people in plain clothes are able to position themselves in the airport as government officials who are responsible for three of the seven, or 42.9 percent, Somali Bantu deportees abducted and tortured at or from the airport. To the extent that these individuals are impersonating customs officials at MIA, they are doing so with the consent of actual public officials. This consent is evident from the fact that these plain-clothed individuals are able to detain Somali Bantu deportees in the airport, a government-controlled facility.

Public officials also acquiesced to the kidnapping and torture of the one deportee whom Al Shabaab kidnapped off the streets of Kismayu.¹⁷⁷ Since Somalia is governed by Majority clans, and discrimination is widespread and deeply rooted against the Somali Bantu, whether or not specific “rogue officers” allowed this kidnapping is irrelevant. The bigotry against the Somali Bantu demonstrates that the police, like the rest of Somali society, are willfully blind to violence against the Somali Bantu. Low-level officers declining to oppose crimes against the Somali Bantu by Al Shabaab would be acting no

170. *See supra* Part V.

171. *See supra* Part V.

172. *See supra* Part V.

173. *See supra* Part V.

174. *See supra* Part V.A.

175. *See supra* Part V.A.

176. *See supra* text accompanying note 161.

177. *See supra* Part V.

differently than high-level officers—all form part of the Majority-clan-based society that enforces Somali Bantu marginalization.¹⁷⁸

The argument could be made that Somali police and security forces are in an ongoing war against Al Shabaab and are simply powerless to stop them. Indeed, the Third Circuit addressed a similar claim in *Hussein v. Attorney General of the United States*.¹⁷⁹ In that case, the plaintiff, a member of the Tuni ethnic group, whom the court noted were disrespected by Majority clans and used as slave labor, argued that the Somali transitional government would acquiesce to his torture because it comprised former warlords.¹⁸⁰ Further, Islamic zealots would target him because he was a non-observant Shiite.¹⁸¹ The Third Circuit affirmed the Board in denying relief, reasoning in part that the transitional government would not acquiesce to such torture given the plaintiff's "unsupported references to the general impunity enjoyed by militia members and the police."¹⁸² Here, given the high levels of participation by Somali security personnel in kidnappings and torture,¹⁸³ there is abundant evidence that the Somali government itself is instigating the torture. Further, the Somali government acquiesces to the torture of Somali Bantu given that this torture is systematic and routine. It involves a consistent methodology of kidnapping at MIA, a location with a strong governmental presence.¹⁸⁴

Another possible argument against relief under the Convention could be that Al Shabaab targets many individuals whom it views as enemies of its extreme religion, including tourists, Westerners, government officials, and non-Muslims; therefore, the Somali Bantu are no more likely to be targeted than anyone else. The problem with this argument is that it does not address governmental willful blindness towards the Somali Bantu. That is, Al Shabaab may target many individuals, but they single out the Somali Bantu for particularly harsh punishment.¹⁸⁵ Similarly, security forces may battle Al Shabaab for many reasons, but Al Shabaab's victimization of the Somali Bantu is not one of them. Whereas clan-based networks, which include police and security forces, protect others, no one protects the Somali Bantu.

178. Cf. *Sarhan v. Holder*, 658 F.3d 649, 657 (7th Cir. 2011) ("Persecution is something a government does, either directly or by abetting (and thus becoming responsible for) private discrimination by throwing in its lot with the deeds or by providing protection so ineffectual that it becomes a sensible inference that the government sponsors the misconduct.") (quoting *Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir.2005)).

179. 273 Fed. App'x 147 (3d Cir. 2008) (unpublished).

180. *Id.* at 154.

181. *Id.*

182. *Id.* at 155.

183. See *supra* Part V.

184. Cf. *Mendoza-Sanchez v. Lynch*, 808 F.3d 1182, 1185 (7th Cir. 2015) (finding governmental acquiescence given the routine torture committed by drug cartels); *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004) (reasoning that the routine nature of torture indicated that higher-level officials in Egypt either know of the torture or remained willfully blind to it, and breached their legal responsibility to prevent it).

185. See *supra* Part V.

F. *Custody or Control of the Victim*

The Board has construed the regulation requiring the offender to have custody or control of the victim as requiring that the public official—the one inflicting, instigating, or acquiescing to the torture—have custody or control of the victim.¹⁸⁶ Several circuit courts have repeated the Board’s construction of this regulation without otherwise addressing it.¹⁸⁷ But the Ninth Circuit addressed it in *Azanor v. Ashcroft*,¹⁸⁸ as follows:

The Board apparently derived its erroneous state custody requirement from a previous decision, *In re J–E–*, 23 I. & N. Dec. 291 (BIA 2002) (en banc), in which it misread INS regulations to require proof that petitioners would likely suffer torture “by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim,” *id.* at 297 (emphasis added). The *In re J–E–* standard impermissibly prevents aliens from seeking relief under the Torture Convention for claims based on threats of torture when not in official custody. Rather than perpetuate the Board’s error by deferring to its misinterpretation of section 208.18, we hold that the Board abused its discretion by transgressing Congress’s clearly expressed intent to protect aliens from nongovernmental acts of torture committed with public officials’ consent or knowing acquiescence.¹⁸⁹

In this case, the vast majority of Somali Bantu deportees who suffer torture do so either while in the custody or control of public officials or because public officials initially took custody of the deportees and then handed them off to others who actually conducted the torture. Either way, public officials have enmeshed themselves in the abuse.

VII. CONCLUSION

Somali Bantu deportees are reviled in Somalia and have no standing or protection in Somali society. The entire nation of Somalia is on a war footing, especially in the south, where there has been a breakdown in civil society over the past 25 years. With widespread poverty and no law and order beyond ethnic warlords, the Somali Bantu are constantly at risk of predation by Majority-clan Somali criminals and police. Since 2016, there has been a rise in kidnapping and torture for ransom of local and deported Somali Bantu

186. *Matter of J-E-*, 23 I. & N. Dec. 291, 291 (B.I.A. 2002).

187. *See* *Lamgar v. Holder*, 562 F.3d 71, 79 n.8 (1st Cir. 2009); *Oxygene v. Lynch*, 813 F.3d 541, 547 (4th Cir. 2016); *Green v. Att’y Gen.*, 694 F.3d 503, 507 (3d Cir. 2012); *Cadet v. Bulger*, 377 F.3d 1173, 1181 (11th Cir. 2004).

188. 364 F.3d 1013 (9th Cir. 2004).

189. *Azanor v. Ashcroft*, 364 F.3d 1013, 1019–20 (9th Cir. 2004) (granting a petition for review when the Board required evidence that public officials were “willfully accepting of the torture of its citizens by a third party”) (citing *Zheng v. Ashcroft*, 332 F.3d 1186, 1196–97 (9th Cir. 2003)); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1059 (9th Cir. 2006).

people by Al Shabaab and Somali security personnel, who are members of Majority clans.

The Somali Bantu are the predominant group residing in internally displaced person camps in urban Somalia. They are the primary victims of the civil unrest in Somalia and were designated by the American Government and the United Nations as a vulnerable ethnic group deserving of protection through resettlement in the United States. A recent effort by the Kenyan Government to forcibly return Somali refugees—including 50,000 Somali Bantu—resulted in an Open Letter of protest to the UNHCR on July 15, 2016. Twenty-one Somali and western academicians and human rights activists put their name on this protest letter opposing the repatriation of Somali Bantu due to the likelihood of human rights abuses against them should they return.¹⁹⁰ As of today, the refugees have not been repatriated.

The local Somali Bantu people who have relatives in the United States are victims of kidnapping for ransom, torture, and execution by armed groups who perceive them as an easy target for extortion. Evidence herein from the Somali Bantu in East Africa who were deported to Somalia by the American government between 2016 and 2018 shows that at least 55 percent of them have been kidnapped, detained, and tortured in Somalia. For those who were kidnapped, tortured, or narrowly escaped kidnapping, the rate increases to 75 percent. All Somali Bantu deportees have a credible fear of being tortured. So bad is the security landscape in Somalia for the deportees that shortly after their arrival in Mogadishu, most of them made the perilous journey to Kismayu, with many of them risking their lives escaping through Al Shabaab-held territory in hopes of reaching Kenya. There is no safe place anywhere in Somalia for these deportees.

The frequency with which the surveyed Somali Bantu deportees underwent kidnapping and torture should be determinative in the removal proceedings of other Somali Bantu; they will more likely than not suffer torture if removed to Somalia. Of those Somali Bantu individuals who suffered abuse, many experienced a similar pattern of kidnapping, torture and payment of ransom. Whereas Majority-clan travelers at MIA were processed without trouble, the Somali Bantu were detained. Further, Majority-clan deportees can rely on clan connections and protection, while the Somali Bantu faced marginalization and abuse. Given the similarity between the Somali Bantu deportees and Somali Bantu individuals currently facing removal, the survey is powerful evidence that Somali Bantu individuals currently facing removal warrant relief under the Convention Against Torture. Public officials (Somali airport security officials and police) or members of Al Shabaab will intentionally inflict or instigate severe pain or suffering for an unlawful purpose:

190. Daniel Van Lehman & Catherine Besteman, OPEN LETTER TO THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, (Rites in Exile, Nov 9, 2018, 9:55 AM) <http://rightsinexile.tumblr.com/search/%22somali+bantu%22>. See Appendix.

ransom. Public officials also acquiesce to torture inflicted against the Somali Bantu deportees by third parties and may even pass information about Somali Bantu deportees to these parties.

Most of the current Somali Bantu deportees are old enough to remember their lives in the refugee camps in Kenya, although only a few can recall life in Somalia. Those memories, while tenuous, enable some of them to draw on assets in Somalia, including distant relatives in East Africa and Somali Bantu culture and languages, to protect themselves once they arrive in Mogadishu. But in years to come, those Somali Bantu who arrived in the United States as infants will lack even these distant memories. Future Somali Bantu removals will increasingly be more American and less Somali, and therefore at even higher risk of standing out in Somalia, where they can more easily be kidnapped and tortured for ransom than the current cohort of deportees.

APPENDIX: OPEN LETTER TO THE UNITED NATIONS HIGH COMMISSIONER FOR
REFUGEES

We write to express our concern about the fate of Somali Bantu refugees currently living in Dadaab and Kakuma refugee camps. As scholars of and from southern Somalia, we implore the United Nations to prevent the refolement of any Somali refugee in Kenya fearing persecution in his or her home country. The refugees particularly vulnerable to refolement are the minority farmers from the Juba and Shabelle River Valleys known as Somali Bantus. Their home regions in southern Somalia have been fought over and controlled by a host of militias, including the Islamic Courts Union and Al Shabaab, since the war commenced in the early 1990s. Prior to the war, Somali Bantus experienced regular violations of their civil and human rights. In recognition of their extreme victimization during the early years of the war by occupying militias, 12,000 Somali Bantus were resettled in the United States under a P-2 or “persecuted minority group” designation after 2004. During the past 25 years, the militias occupying southern Somalia and profiting from the control of ports and roads have continued to exploit Somali Bantus as slave labor.

The degree of persecution increased after Al Shabaab imposed its extremist version of Islam on Somali Bantus. While the exploitation of the farmers as slave labor continues under Al Shabaab, it also murders Somali Bantu men and boys who refuse to take up arms against AMISOM, extorts money from Somali Bantus who have family in the United States, and amputates, stones to death, and decapitates Somali Bantus who are accused of disparaging Islam. This persecution forced a second wave of Somali Bantus numbering in the tens of thousands to seek refuge in Dadaab and Kakuma. It is also the reason they cannot repatriate to Somalia. Al Shabaab regularly executes Somalis whom it suspects of being western or AMISOM spies or having collaborated with non-Muslim organizations such as western NGOs and the Kenyan government. Somali Bantus do not have the protection of a militarily powerful clan in Somalia and are exploited and murdered with impunity by Al Shabaab, as well as by other militias. We urge UNHCR to find a safe resolution for Somali Bantus and to ensure they are not returned to Somalia against their will.

Sincerely,

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Lee V. Cassanelli, Professor of History and former Director, Africa Center,
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Ken Menkhaus, Professor and Chair, Department of Political Science, Davidson
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Elizabeth Kimball Kendall and Elisabeth Hodder Professor, History, Wellesley
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Mohamed Eno, Dean and Professor, African Studies, St. Clements University

Laura Hammond, Head and Reader, Department of Development Studies, SOAS

Ahmed Samatar, James Wallace Professor and Chair, International Studies, Macalaster College

Mohamed Mukhtar, Professor and Chair of Social and Behavioral Sciences, Savannah State University

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