

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

<b>ABUKAR HASSAN AHMED,</b>	:	CASE NO. 2:10-cv-00342
<b>Plaintiff,</b>	:	
<b>v.</b>	:	JUDGE SMITH
	:	MAGISTRATE ABEL
<b>ABDI ADEN MAGAN,</b>	:	
<b>Defendant.</b>	:	

**NOTICE OF PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT OR, IN THE  
ALTERNATIVE, FOR DEFAULT JUDGMENT**

First, pursuant to Federal Rules of Civil Procedure Rule 56 and Local Rule 7.2, Plaintiff Abukar Hassan Ahmed (also known as “Yare,” hereinafter referred to as “**Plaintiff**” or “**Professor Ahmed**”) hereby moves for partial summary judgment on his claims under the Alien Tort Statute (“**ATS**”), 28 U.S.C. § 1350, and the Torture Victim Protection Act (“**TVPA**”), 28 U.S.C. § 1350. There is no dispute of material fact that Plaintiff was arbitrarily detained; subjected to cruel, inhuman, or degrading treatment or punishment; and tortured, constituting violations of the ATS and the TVPA. Therefore, the Court should enter judgment as a matter of law in favor of Plaintiff on these claims. Plaintiff further moves for partial summary judgment that Defendant Abdi Aden Magan (“**Defendant**” or “**Colonel Magan**”) is liable for Plaintiff’s arbitrary detention, torture, and cruel, inhuman and degrading treatment or punishment because he exercised command responsibility over, aided and abetted, and conspired with subordinates in the National Security Service in accordance with a common plan to abuse the rights of perceived political opponents of the government of Somalia, and that Plaintiff was arbitrarily detained,

tortured, and subjected to cruel, inhuman or degrading treatment by subordinates of Defendant or others acting in accordance with this common plan.

Accordingly, Plaintiff moves for partial summary judgment on the following portions of his claims:

- (1) That Plaintiff was arbitrarily detained pursuant to his claims under the ATS;
- (2) That Plaintiff suffered torture pursuant to his claim under the ATS and TVPA;
- (3) That Plaintiff suffered cruel, inhuman, or degrading treatment or punishment pursuant to his claim under the ATS;
- (4) That Defendant is liable for Plaintiffs' arbitrary detention, torture, and cruel, inhuman or degrading treatment punishment:
  - (a) because he had command responsibility over those who perpetrated these acts;
  - (b) because he aided and abetted those who perpetrated these acts;
  - (c) because he conspired with those who perpetrated these acts; and
  - (d) because he participated in a joint criminal enterprise with the perpetrators.

Second, and in the alternative, Plaintiff moves for the entry of a default judgment under Federal Rules of Civil Procedure Rule 37(b)(2)(A)(vi) against Defendant based on his willful failure to comply with the Court's Discovery Orders.

If the Court grants Plaintiff's motion for partial motion for summary judgment on the merits of the dispute or default judgment, Plaintiff respectfully requests an evidentiary hearing as to damages pursuant to Federal Rules of Civil Procedure Rule 55(b)(2) and Local Rule 7.1(b)(1).

This motion is based on the accompanying statement of material facts, memorandum of law, expert reports, declarations and the exhibits attached thereto, and all pleadings and documents on file in this action.

Dated: August 9, 2012

Respectfully submitted,

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**Plaintiff,** :  
 : JUDGE SMITH  
**v.** : MAGISTRATE ABEL  
**ABDI ADEN MAGAN,** : Electronically Filed  
 :  
**Defendant.** :

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR DEFAULT JUDGMENT**

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## I. INTRODUCTION

Plaintiff Abukar Hassan Ahmed (“**Professor Ahmed**” or “**Plaintiff**”) files this Motion for Partial Summary Judgment or, in the Alternative, Default Judgment against Defendant Colonel Abdi Aden Magan (“**Defendant**”), former Chief of the Somali National Security Service (“**NSS**”) Department of Investigations. Plaintiff brings this claim under the Alien Tort Statute (“**ATS**”) and Torture Victim Protection Act (“**TVPA**”) for Defendant’s role in the arbitrary detention and brutal torture of Professor Ahmed. The overwhelming evidence demonstrates that Defendant was responsible for these acts directly and/or through command responsibility, aiding and abetting, conspiracy, or joint criminal enterprise liability.

Part II of this motion sets out the statement of undisputed material facts in support of Plaintiff’s Motion for Partial Summary Judgment. Part III addresses the facts and procedural history in support of Plaintiff’s alternative Motion for Default. Plaintiff’s argument in support of the Motion for Partial Summary Judgment is addressed in Part IV and V. Part VI sets out Plaintiff’s alternative Motion for Default. Plaintiff provides a conclusion in Part VII.

The overwhelming evidence in the record demonstrated that the Court should grant Plaintiff Motion for Partial Summary Judgment pursuant to Federal Rules of Civil Procedure Rule 56(c) because there is no issue of material fact in dispute. In the alternative, the record demonstrates that Defendant’s conduct fulfills the requirements for default judgment pursuant to Federal Rules of Civil Procedure Rule 37(b)(2)(A)(vi). Therefore, if the Court finds that Plaintiff has not met his burden with respect to summary judgment, Plaintiff respectfully requests that the Court enter default judgment against the Defendant.

## II. STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

### A. The Barre Regime Established The National Security Service, The “Black SS,” To Suppress All Opposition To The Dictatorship

#### 1. The Barre Regime, Including the National Security Service, Targeted Perceived Opponents of the Regime

In October 1969, General Siad Barre led a coup that toppled the first and only democratic government of the new nation of Somalia, establishing in its place a military dictatorship (the “**Barre regime**”).<sup>1</sup> In 1970, as part of a series of measures designed to suppress and punish opposition to the military regime, the Barre regime enacted Law No. 14, entitled “Establishment of the National Security Service,” which created the National Security Service (“NSS”), the official state security force, and other related laws granting significant authority to the NSS.<sup>2</sup> Responsible for internal security and intelligence, the NSS came to be known as the “Black SS” or “Gestapo of Somalia” because of the cruel interrogation techniques and tactics it employed to extract confessions from detainees, particularly torture.<sup>3</sup>

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<sup>1</sup> Expert Report of Professor Lee Cassanelli, dated May 24, 2012 (“**Cassanelli Report**”), ¶¶ 14-15; The Declaration of Christina Georgia Hioureas in Support of Motion for Summary Judgment, dated Aug. 6, 2012 (“**Hioureas S.J. Decl.**”), Exh. 1: U.S. Dep’t of State, *1989 Country Reports on Human Rights Practices*, P-000749-55, at P-000750.

<sup>2</sup> The Declaration of Abdulkarim Shabel in Support of Motion for Summary Judgment, dated July 2, 2012 (“**Shabel S.J. Decl.**”), ¶ 7; Shabel S.J. Decl., Exh. 1: Somali Law No. 14, Establishment of the NSS (Feb. 15, 1970), P-000979-81; Hioureas S.J. Decl., Exh. 2: Amnesty International U.S.A., *Suleiman Nuh Ali*, P-000369-71, at P-000369-70; Hioureas S.J. Decl., Exh. 3: *Background: The Human Rights Situation in the Somali Democratic Republic*, P-000892-901, at P-000895-96.

<sup>3</sup> Cassanelli Report, ¶ 26; The Declaration of Nick Williams in Support of Motion for Summary Judgment, dated July 5, 2012 (“**Williams S.J. Decl.**”), Exh. D: Amnesty International, *Amnesty International Reports 1988-1990*, P-000068-77, at P-000073; Williams S.J. Decl., Exh. B: Amnesty International, *Detention Without Trial in Somalia*, AI Index: AFR 52/12/80 (Aug. 1988), P-000012-21, at P-000012; Williams S.J. Decl., Exh. G: Amnesty International, *Somalia: Detention Without Trial*, AI Index: AFR 52/12/80 (Aug. 1988), P-000325-335, at P-000325; Hioureas S.J. Decl., Exh. 4: U.S. Dep’t of State Cable No. 1988MOGADI12222, (Oct. 1988), P-000997-1019, at P-001002; Williams S.J. Decl., Exh. E: Amnesty International, *Death Penalty*, P-000311-12, at P-000311.

Having “virtually unlimited powers of surveillance, investigation, search, arrest, and detention,” the NSS became the most important agency for suppressing political opposition.<sup>4</sup> Over the years, the NSS arrested, executed, or imprisoned thousands of perceived opponents of the military government.<sup>5</sup> The NSS was also responsible for the widespread and systematic use of torture, arbitrary and prolonged detentions, and extrajudicial killings against the civilian population of Somalia.<sup>6</sup>

The Barre regime enacted several laws to legitimate the detention of political opponents.<sup>7</sup> For example, Law No. 54 of 1970, entitled “Law for Safeguarding National Security,” defined a wide range of political offenses relating to “safeguarding national security.”<sup>8</sup> Law No. 54 “institutionalized the denial of fundamental human rights.”<sup>9</sup> Article 18 of the law (“Anti-State Propaganda”) made it a crime punishable by *death* to print, broadcast, or distribute “any material with the purpose of subverting or weakening State Authority,” and Article 19 provided that those

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<sup>4</sup> Cassanelli Report, ¶ 23; *see also* Williams S.J. Decl., Exh. A: Amnesty International, *Somalia – Torture*, AI Index: AFR 52/11/88 (June 1988) P-000003-11, at P-000004-5; Williams S.J. Decl., Exh. B: Amnesty International, *Detention Without Trial in Somalia*, AI Index: AFR 52/12/88 (Aug. 1988), P-000012-21, at P-000012-14.

<sup>5</sup> Hioureas S.J. Decl., Exh. 4: U.S. Dep’t of State Cable No. 1988MOGADI12222, (Oct. 1988), P-000997-1019, at P-000998; Williams S.J. Decl., Exh. B: Amnesty International, *Detention Without Trial in Somalia*, AI Index: AFR 52/12/88 (Aug. 1988), P-000012-21, at P-000012-14; Williams S.J. Decl., Exh. I: Amnesty International, *Somalia: The Imprisonment of Members of the Issaq Clan Since Mid-1988*, AI Index: AFR 52/41/88 (Dec. 1, 1988), P-000363-68, at P-000363, P-000365-66.

<sup>6</sup> Williams S.J. Decl., Exh. A: Amnesty International, *Somalia – Torture*, AI Index: AFR 52/11/88 (June 1988), P-000003-11, at P-000003-4; Hioureas S.J. Decl., Exh. 6: Amnesty International, *Fear of Torture/Legal Concern*, AI Index: AFR 52/17/88 (June 16, 1988), P-000022-23; Hioureas S.J. Decl., Exh. 4: U.S. Dep’t of State Cable No. 1988MOGADI12222, (Oct. 1988), P-000997-1019, at P-001002.

<sup>7</sup> Williams S.J. Decl., Exh. A: Amnesty International, *Somalia – Torture*, AI Index: AFR 52/11/88 (June 1988), P-000003-11, at P-000004.

<sup>8</sup> The Supplemental Declaration of Abukar Hassan Ahmed in Support of Motion for Summary Judgment, dated July 28, 2012, (“**Ahmed Supp. Decl.**”), Exh. 1: Somali Law No. 54, Law for Safeguarding National Security (Sept. 10, 1970), P-000884-91, at P-000884; Ahmed Supp. Decl. ¶ 4.

<sup>9</sup> Hioureas S.J. Decl., Exh. 7: *Reported Massacres and Indiscriminate Killings in Som.: Hearing Before the Subcomm. on Afr. of the H. Comm. on Foreign Affairs*, 100th Cong. 7-25 (1988) (statement of Aryeh Neier, Vice Chairman, Human Rights Watch), P-000139-68, at P-000146; Hioureas S.J. Decl., Exh. 2: Amnesty International U.S.A., *Suleiman Nuh Ali*, P-000369-71, at P-000369-70; Cassanelli Report, ¶ 24.



in possession of seditious material were subject to imprisonment for up to 15 years.<sup>10</sup> Under authority of this law, NSS officers searched homes without warrants, conducted unauthorized detentions, denied the right to an attorney upon arrest, used force to extract confessions, and abolished any recourse through the judicial system.<sup>11</sup> These laws were enforced arbitrarily and were widely condemned for violating internationally recognized human rights and facilitating repression by government security forces.<sup>12</sup>

2. The Barre Regime, Including the NSS, Favored Clans Related to Barre and Oppressed Clans Perceived to Oppose the Dictatorship.

To consolidate its power, throughout the 1980s and until its eventual collapse, the Barre regime systematically exploited Somalia's historic clan system, "creating an alliance of three sub-clans from the Darod clan family, commonly referred to as the M.O.D. alliance, comprised of Siad Barre's own Marehan sub-clan as well as those of his mother (the Ogaden)" and his son-in-law (the Dolbahante).<sup>13</sup> For instance, by the late 1980s, almost all NSS agents were members of the Marehan sub-clan.<sup>14</sup> At the same time, the Barre regime systematically excluded disfavored clans from positions of power within the government and military while pursuing political and economic policies intended to weaken and harm members of these groups.<sup>15</sup> The

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<sup>10</sup> Ahmed Supp. Decl., Exh. 1: Somali Law No. 54, Law for Safeguarding National Security (Sept. 10, 1970), P-000884-91, at P-000889.

<sup>11</sup> Cassanelli Report, ¶ 25; Hioureas S.J. Decl., Exh. 4: U.S. Dep't of State Cable, 1988MOGADI12222, P-000997-1019, at P-001003, P-001005; Williams S.J. Decl., Exh. F: Amnesty International, Legal Concern/Fear of Torture, AI Index: AFR 52/06/88 (Mar. 22, 1988), P-000313-14, at P-000313.

<sup>12</sup> See Williams S.J. Decl., Exh. B: Amnesty International, *Detention Without Trial in Somalia*, AI Index: AFR 52/12/80 (Aug. 1988), P-000012-21, at P-000020-21; Hioureas S.J. Decl., Exh. 5: International Commission of Jurists Review, *Somalia*, June 1982, P-000881-83, at P-000881-82; Hioureas S.J. Decl., Exh. 1: U.S. Dep't of State, *1989 Country Reports on Human Rights Practices*, P-000749-55, at P-000751.

<sup>13</sup> Cassanelli Report, ¶ 21; Declaration of Abdirizak Mohamed Warsame in Support of Motion for Summary Judgment, dated June 21, 2012 ("**Warsame S.J. Decl.**"), ¶ 21; Shabel S.J. Decl., ¶¶ 11-13.

<sup>14</sup> Cassanelli Report, ¶¶ 21-22.

<sup>15</sup> Cassanelli Report ¶ 21; Hioureas S.J. Decl., Exh. 1: U.S. Dep't of State, *1989 Country Reports on Human Rights Practices*, P-000749-55, at P-000750-52.

Barre regime systematically arrested and arbitrarily detained civilians based on their clan affiliation and/or perceived opposition to the government.<sup>16</sup>

In order to stem the growth of opposition movements, the Barre regime took increasingly harsh measures against perceived opponents. “These measures—including the arrest, torture, and interrogation of businessmen [and women], civil servants, and technicians not known to be politically active—were intended to terrorize the civilian population and deter it from supporting the growing opposition movements.”<sup>17</sup> In response to this abuse, many members of the Hawiye clan, the most populous group in Mogadishu and surrounding areas, began supporting a group called the United Somali Congress, which opposed the Barre’s regime, leading to a government crackdown in 1989.<sup>18</sup>

Throughout 1989 and 1990, the Barre regime’s crimes against civilians escalated.<sup>19</sup> By 1991, armed opposition factions finally drove Barre out of power, resulting in the complete collapse of the central government.<sup>20</sup>

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<sup>16</sup> Shabel S.J. Decl., ¶¶ 11-12; Hioureas S.J. Decl., Exh. 4: U.S. Dep’t of State Cable No. 1988MOGADI12222, (Oct. 1988), P-000997-1019, at P-000998-99; Hioureas S.J. Decl., Exh. 8: U.S. Dep’t of State Cable No. 1989MOGADUI5258, (May 1989), P-000728-38, at P-000728-29, P-000737; Cassanelli Report, ¶¶ 37-42.

<sup>17</sup> Cassanelli Report, ¶ 40.

<sup>18</sup> Cassanelli Report, ¶¶ 40-41; Hioureas S.J. Decl., Exh. 1: U.S. Dep’t of State, *1989 Country Reports on Human Rights Practices*, P-000749-55, at P-000750-52; Hioureas S.J. Decl., Exh. 9: Human Rights Watch, *Human Rights Watch World Report 1989 – Somalia* (Jan. 1, 1990), P-000768-73, at P-000768; Williams S.J. Decl., Exh. H: Amnesty International, *Somalia: Human Rights Concerns Following An Amnesty International Visit In June 1989* (Oct. 4, 1989), P-000339-47, at P-000342-43.

<sup>19</sup> Hioureas S.J. Decl., Exh. 10: U.S. Dep’t of State, *1990 Country Reports on Human Rights Practices*, P-000756-62, at P-000757-759.

<sup>20</sup> Cassanelli Report, ¶ 43; Hioureas S.J. Decl., Exh. 11: U.S. Dep’t of State, *1991 Country Reports on Human Rights Practices*, P-000763-67, at P-000764.

**B. Defendant, As Chief Of The Department Of Criminal Investigations Of The NSS, Exercised His Authority To Brutally Suppress Perceived Opponents Of The Regime**

By early 1988, as a member of Barre's favored Marehan sub-clan, the defendant in this case—Colonel Abdi Aden Magan (hereinafter “**Defendant**”)— had become Chief of the Department of Criminal Investigations of the NSS Headquarters in Mogadishu, Somalia, and he served in that capacity until Barre and his supporters were ousted from power.<sup>21</sup> Defendant was the top commander of the NSS Department of Criminal Investigations, answerable only to the head of the NSS himself.<sup>22</sup>

On Defendant's watch, the NSS systematically targeted ordinary citizens perceived as opponents of the Barre regime and subjected them to prolonged arbitrary detention, cruel treatment, and torture.<sup>23</sup> Further, as Chief of the Department of Criminal Investigations of the NSS, Defendant Colonel Magan had command authority over NSS officers and members of the Somali armed forces working in the NSS Department of Criminal Investigations, including, but not limited to, Abdullahi Agojiid and Mohamoud Hagi Farah Egal.<sup>24</sup> He also had command authority over NSS officers Hussein Sufi Derow, Mohamed Abdi, Antar, Deeq, and Hassan Ga'al.<sup>25</sup> These officers were directly involved in Professor Ahmed's detention and torture.<sup>26</sup>

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<sup>21</sup> Hioureas S.J. Decl., Exh. 12: Defendant's Response to Plaintiff's First Set of Interrogatories, No. 2; Dkt. # 18, Defendant's Motion to Dismiss, at 2; Dkt. # 18, Magan Aff., ¶¶ 6-8; Hioureas S.J. Decl., Exh. 13: U.S. Dep't of State Cable No. 1989MOGADI14054, (Dec. 1989), P-000905-16, at P-000905.

<sup>22</sup> See Hioureas S.J. Decl., Exh. 12: Defendant's Response to Plaintiff's First Set of Interrogatories, Nos. 2; 6; 13; Dkt. # 90: Order on Motion for Sanctions, ¶¶ 1, 2; Shabel S.J. Decl., ¶¶ 5, 9.

<sup>23</sup> Cassanelli Report, ¶ 27; The Declaration of Abdullahi Mohamed Jimale in Support of Motion for Summary Judgment, dated July 5, 2012 (“**Jimale S.J. Decl.**”), ¶¶ 4, 7, 10; Shabel S.J. Decl., ¶¶ 13-15.

<sup>24</sup> Warsame S.J. Decl., ¶ 11; Hioureas S.J. Decl., Exh. 12: Defendant's Response to Plaintiff's First Set of Interrogatories, Nos. 6, 7, 8; Dkt. # 90: Order on Motion for Sanctions, ¶¶ 2, 9; Ahmed Supp. Decl., ¶¶ 9, 11-18; see also Ahmed Supp. Decl., Exh. 4: Letter from A. Ahmed to Amnesty International, dated Oct. 6, 1989, P-000831-32, at P-000831 (“**Ahmed 1989 Letter**”).

<sup>25</sup> Ahmed Supp. Decl., ¶¶ 11-18; Hioureas S.J. Decl., Exh. 12: Defendant's Response to Plaintiff's First Set of Interrogatories, No. 8; Hioureas S.J. Decl., Exh. 14: Plaintiff's Second Set of Interrogatories Nos. 21,

During his tenure as Chief of the Department of Criminal Investigations of the NSS, Defendant knew when prisoners were brought into the detention and interrogation facilities at the NSS headquarters in Mogadishu.<sup>27</sup> Interrogations by the NSS Department of Criminal Investigation from 1988 to 1990 were conducted by NSS agents or officers operating under Defendant's command; they were ordered by and reported to him.<sup>28</sup> Defendant was personally in charge of the political detainees' cases, like the one involving Professor Ahmed.<sup>29</sup>

The NSS had the practical and formal authority to interrogate and torture Somalis without supervision by the National Security Court or any other judicial authority.<sup>30</sup> NSS detentions were not often reported or documented to the National Security Court.<sup>31</sup> In most cases, the NSS operated without a formal warrant.<sup>32</sup>

NSS interrogation procedures involved the systematic abuse of prisoners, including, but not limited to, threats of death, beatings, sleep deprivation, food deprivation, sense-deprivation (through constant exposure to light or blindfolding), tying or cuffing in stress positions, simulated drowning through pouring large quantities of water and sand into a prisoner's mouth,

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22, 24, 25; Dkt. # 90: Order on Motion for Sanctions, ¶¶ 2, 9); *see also* Ahmed Supp. Decl., Exh. 4: Ahmed 1989 Letter, at P-000831.

<sup>26</sup> Ahmed Supp. Decl., ¶¶ 15-17; Dkt. # 90: Order on Motion for Sanctions, ¶¶ 2, 9; *see also* Ahmed Supp. Decl., Exh. 4: Ahmed 1989 Letter, at P-000831.

<sup>27</sup> Hioureas S.J. Decl., Exh. 12: Defendant's Response to Plaintiff's First Set of Interrogatories, No. 9; Dkt. # 90: Order on Motion for Sanctions, ¶ 4.

<sup>28</sup> Hioureas S.J. Decl., Exh. 12: Defendant's Response to Plaintiff's First Set of Interrogatories, Nos. 2, 5, 6, 9, 13; Dkt. # 90: Order on Motion for Sanctions, ¶¶ 5-6; Ahmed Supp. Decl., ¶¶ 14-16; *see also* Ahmed Supp. Decl., Exh. 4: Ahmed 1989 Letter, at P-000831; Warsame S.J. Decl., ¶ 9.

<sup>29</sup> Warsame S.J. Decl., ¶ 9; Jimalé S.J. Decl., ¶ 10; *see also* Ahmed Supp. Decl., Exh. 4: Ahmed 1989 Letter, at P-000831.

<sup>30</sup> Shabel S.J. Decl., Exh. 1: Somali Law No. 14, Art. 6, P-000979-81, at P-000980 (providing that the NSS "shall, without any warrant, have the power to arrest any person"); Warsame S.J. Decl., ¶ 24; Shabel S.J. Decl., ¶ 8.

<sup>31</sup> Shabel S.J. Decl., ¶ 8; Dkt. # 90: Order on Motion for Sanctions, ¶ 8.

<sup>32</sup> Warsame S.J. Decl., ¶¶ 24-25; Shabel S.J. Decl., ¶ 8; Cassanelli Report, ¶ 26.

and sexual abuse, including squeezing a prisoner's testicles with metal instruments.<sup>33</sup> NSS agents conducting interrogations under his command reported this abuse to Defendant.<sup>34</sup> Defendant at least once beat a prisoner unconscious.<sup>35</sup> Defendant never attempted to prevent these abuses or to punish his subordinates for committing such abuses.<sup>36</sup> Due to the widespread use of torture techniques under his command, Defendant was notorious and greatly feared among the population, especially in Mogadishu.<sup>37</sup>

**C. Professor Ahmed Taught International Human Rights And Constitutional Law In Mogadishu, Somalia**

Between 1973 and 1989, Professor Ahmed was a practicing attorney before the Somali courts, as well as a law professor at the Somali National University.<sup>38</sup> He was born into the disfavored Hawiye clan.<sup>39</sup> He taught courses covering constitutional law and human rights law, and his curriculum included the protection of human rights contained in the Somali Constitution.<sup>40</sup> Professor Ahmed was known for his great respect for the rule of law and for his

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<sup>33</sup> See, e.g., Williams S.J. Decl., Exh. A: Amnesty International, *Somalia – Torture*, AI Index: AFR 52/11/88 (June 1988), P-000003-11, at P-000005-06; Williams S.J. Decl., Exh. C: Amnesty International, *Somalia – A Long-Term Human Rights Crisis*, AI Index: AFR 52/26/88 (Sept. 1988), P-000921-76, at P-000927; Shabel S.J. Decl., ¶ 15; Hioureas S.J. Decl., Exh. 4, U.S. Dep't of State Cable No. 1988MOGADI12222, (Oct. 1988), P-000997-1019, at P-001003-04.

<sup>34</sup> Hioureas S.J. Decl., Exh. 12: Defendant's Response to Plaintiff's First Set of Interrogatories, Nos. 2, 5, 9, 13; Dkt. # 90: Order on Motion for Sanctions, ¶ 7.

<sup>35</sup> Shabel S.J. Decl., ¶ 14.

<sup>36</sup> Hioureas S.J. Decl., Exh. 12: Defendant's Response to Plaintiff's First Set of Interrogatories, Nos. 3-4 (denying that he had knowledge of any disciplinary procedures at all).

<sup>37</sup> Jimale S.J. Decl., ¶ 10; Warsame S.J. Decl., ¶ 12; Shabel S.J. Decl., ¶ 13.

<sup>38</sup> Ahmed Supp. Decl., ¶ 3.

<sup>39</sup> *Id.* at ¶ 2.

<sup>40</sup> Jimale S.J. Decl., ¶ 2; Ahmed Supp. Decl., ¶ 3.

defense of justice and human rights in Somalia.<sup>41</sup> He was well-known among educated people in Somalia and particularly in the Mogadishu legal community.<sup>42</sup>

**D. Prior To The Events At Issue In This Case, Professor Ahmed Was Detained From 1981 To 1986, During Which Time Amnesty International Named Him A “Prisoner Of Conscience”**

From January 1981 until March 1986, due to his outspoken criticism of the Barre regime, his defense of human rights, and because he was born into a disfavored clan, the Hawiye, Plaintiff was imprisoned without charge at the NSS detention facility in north Mogadishu. His detention included fifteen months of solitary confinement.<sup>43</sup>

While in prison, Professor Ahmed was designated by Amnesty International as a “Prisoner of Conscience,” meaning that he had been jailed because of his political, religious, or other conscientiously held beliefs, ethnic origin, sex, color, language, national or social origin, economic status, birth, sexual orientation or other status.<sup>44</sup> The U.S. State Department also listed him as a political prisoner.<sup>45</sup> Amnesty International campaigned for his release by writing letters on his behalf to the Somali government and Somali diplomatic missions, and wrote about

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<sup>41</sup> Jimale S.J. Decl., ¶ 3; Ahmed Supp. Decl., ¶ 4; *see also* Ahmed Supp. Decl., Exh. 4: Ahmed 1989 Letter, at P-000831.

<sup>42</sup> Jimale S.J. Decl., ¶ 3.

<sup>43</sup> Ahmed Supp. Decl., ¶ 5; Hioureas S.J. Decl., Exh. 8, U.S. Dep’t of State Cable No. 1989MOGADUI5258, (May 1989), P-000728-38, at P-000732.

<sup>44</sup> *See* Amnesty International website, available at <http://www.amnestyusa.org/our-work/issues/prisoners-and-people-at-risk/prisoners-of-conscience>; *see also* Ahmed Supp. Decl., Exh. 2: Amnesty International, *Amnesty International Report 1987*, P-000807-09, at P-000808; Hioureas S.J. Decl., Exh. 15: Amnesty International Letter from Dr. M. Hill, (Apr. 20, 2000), P-000917-20, at P-000917; Ahmed Supp. Decl., ¶ 6.

<sup>45</sup> Hioureas S.J. Decl., Exh. 8: U.S. Dep’t of State Cable No. 1989MOGADUI5258, (May 1989), P-000728-38, at P-000732, P-000737.

Professor Ahmed's arbitrary detention in its published reports.<sup>46</sup> Finally, in March 1986, he was released without explanation.<sup>47</sup>

**E. Professor Ahmed Was Detained A Second Time, Suffering Multiple Human Rights Violations By NSS Officers Under Defendant's Command.**

1. Professor Ahmed Was Detained and Brutalized by NSS Officers Under Defendant's Command at NSS Headquarters

After his release in 1986, Professor Ahmed returned to his position as a law professor at Somali National University, where he continued teaching his students about human rights law.<sup>48</sup> He also resumed his law practice, defending clients before the National Security Court.<sup>49</sup> But the Barre regime's brutal treatment of Professor Ahmed due to his political beliefs and clan affiliation was far from over.

On or about November 19, 1988, three NSS officers approached Professor Ahmed in the center of Mogadishu.<sup>50</sup> At the time, Professor Ahmed was carrying a copy of an Amnesty International report entitled, *Somalia: A Long-Term Human Rights Crisis*.<sup>51</sup> After the officers searched Professor Ahmed, they confiscated the report, placed him in handcuffs, and transported him to a detention facility located at NSS Headquarters.<sup>52</sup>

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<sup>46</sup> See, e.g., Ahmed Supp. Decl., Exh. 2: Amnesty International, *Amnesty International Report 1987*, P-000807-09, at P-000808.

<sup>47</sup> Ahmed Supp. Decl., ¶ 5.

<sup>48</sup> Ahmed Supp. Decl., ¶ 7; Jimale S.J. Decl., ¶¶ 2-3.

<sup>49</sup> Ahmed Supp. Decl., ¶¶ 3, 4, 7.

<sup>50</sup> Ahmed Supp. Decl., ¶ 8; see also Ahmed Supp. Decl., Exh. 4: Ahmed 1989 Letter, at P-000831.

<sup>51</sup> Williams S.J. Decl., Exh. C: Amnesty International, *Somalia – A Long-Term Human Rights Crisis*, AI Index: AFR 52/26/88 (Sept. 1988), P-000921-76; Ahmed Supp. Decl., ¶ 8; see also Ahmed Supp. Decl., Exh. 4: Ahmed 1989 Letter, at P-000831.

<sup>52</sup> Ahmed Supp. Decl., ¶ 8.

Yet again, Professor Ahmed was placed in solitary confinement with continuous artificial lighting.<sup>53</sup> Visitors were prohibited from seeing or contacting him.<sup>54</sup> His cell was small and windowless.<sup>55</sup> Professor Ahmed's right wrist was tightly handcuffed to his left ankle for twenty-four hours a day, except during interrogations.<sup>56</sup> He was nearly starved, being fed only rancid bread, butter and tea once a day.<sup>57</sup> He was forced to sleep on cold or wet floors without a mat or blanket.<sup>58</sup> There was no toilet in the cell.<sup>59</sup> He was forced to discharge his urine in empty milk cans.<sup>60</sup> This routine lasted for nearly three months.<sup>61</sup>

During the night of February 7, 1989, two NSS officers took Professor Ahmed to Defendant's office at NSS Department of Investigations.<sup>62</sup> Defendant falsely accused Professor Ahmed of being a member of a group called the United Somali Congress as well as a group called the Patriotic Front of Somali Unity, groups that opposed the Barre regime.<sup>63</sup> Professor Ahmed's case was important and politically charged, with orders for his arrest coming from the highest ranks of government directly to Defendant.<sup>64</sup> Defendant told Professor Ahmed that if he did not confess to being a member of the opposition groups, Defendant would obtain his

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<sup>53</sup> Ahmed Supp. Decl., ¶ 9.

<sup>54</sup> Warsame S.J. Decl., ¶ 7; Jimale S.J. Decl., ¶ 6.

<sup>55</sup> Ahmed Supp. Decl., ¶ 9.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at ¶ 10.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at ¶ 9.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at ¶ 18.

<sup>62</sup> *Id.* at ¶ 12.

<sup>63</sup> Ahmed Supp. Decl., ¶ 12; *see also* Ahmed Supp. Decl., Exh. 4: Ahmed 1989 Letter, at P-000831.

<sup>64</sup> Warsame S.J. Decl., ¶ 9; Jimale S.J. Decl., ¶ 10.



confession through torture.<sup>65</sup> Professor Ahmed nonetheless refused to confess; the accusation was false.<sup>66</sup>

A few hours later, a group of NSS officers approached Professor Ahmed's cell.<sup>67</sup> One of the officers, Hassan Ga'al, blindfolded him, but the blindfold was tied loosely, allowing him to see.<sup>68</sup> Professor Ahmed was then taken from his cell and brought outside where several interrogators were present. There, as Defendant had promised just a few hours earlier, the NSS officers under Defendant's direction and authority brutally tortured Professor Ahmed.<sup>69</sup>

The NSS officers tied Professor Ahmed's two big toes together with a cord, tied Professor Ahmed's hands and feet together with cloth and then handcuffed them.<sup>70</sup> They forced him to sit down and pushed his legs back over his head, exposing his genitals.<sup>71</sup> The officers then proceeded to squeeze his testicles with iron instruments—a signature method of NSS investigators designed to cause excruciating and immeasurable pain.<sup>72</sup> Subsequently, the officers forced a five liter container of water, sand, and small stones into Professor Ahmed's mouth, cutting off his air supply.<sup>73</sup> Unable to stand the pain any longer, Professor Ahmed fainted.<sup>74</sup> When he regained consciousness, he was beaten with sticks and suffered a blow to the

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<sup>65</sup> Ahmed Supp. Decl., ¶¶ 13.

<sup>66</sup> Ahmed Supp. Decl., ¶ 12; *see also* Ahmed Supp. Decl., Exh. 4: Ahmed 1989 Letter, at P-000831.

<sup>67</sup> Ahmed Supp. Decl., ¶ 14; *see also* Ahmed Supp. Decl., Exh. 4: Ahmed 1989 Letter, at P-000831.

<sup>68</sup> Ahmed Supp. Decl., ¶ 14.

<sup>69</sup> *Id.* at ¶¶ 15-16; *see also* Ahmed Supp. Decl., Exh. 4: Ahmed 1989 Letter, at P-000831.

<sup>70</sup> Ahmed Supp. Decl., ¶ 15.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at ¶ 16; Williams S.J. Decl., Exh. C: Amnesty International, *Somalia – A Long-Term Human Rights Crisis*, AI Index: AFR 52/26/88 (Sept. 1988), P-000921-76, at P-000927.

<sup>73</sup> Ahmed Supp. Decl., ¶ 16.

<sup>74</sup> *Id.*

head from an AK47.<sup>75</sup> During this torture, the NSS officers repeatedly questioned Professor Ahmed about his involvement with political opposition and human rights groups.<sup>76</sup>

2. Subjected to a Sham Trial at the National Security Court and Hounded by the NSS After His Release, Professor Ahmed Finally Escaped Somalia

While Professor Ahmed was imprisoned, his friends and colleagues in the legal community contacted Amnesty International in the Netherlands to lobby for his release.<sup>77</sup> They also made efforts to prevent his torture.<sup>78</sup> Additionally, some of his colleagues and acquaintances pleaded with the then-Prosecutor General, Nur Hassan Hussein, to bring Professor Ahmed's case to court and to release Professor Ahmed.<sup>79</sup>

As a result of these efforts, at the end of February 1989, Professor Ahmed was transferred from NSS Headquarters to the Central Prison.<sup>80</sup> The Duty Officer at the Central Prison informed Professor Ahmed that he was charged with violation of Article 18 of Law 54, 1970, Authoring Subversive Material, which carried a death penalty sentence.<sup>81</sup> This was the first time Professor Ahmed had been informed of any charges against him.<sup>82</sup>

Then, in March 1989, Professor Ahmed was brought before the National Security Court. One day before his trial, Professor Ahmed received a notice of the trial hearing and learned that the charge against him had been changed to a violation of Article 19 of Law 54, 1970,

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<sup>75</sup> *Id.*; Jimale S.J. Decl., ¶ 8; *see also* Hioureas S.J. Decl., Exh. 21: Expert Report of Dr. Coleen Kivlahan (May 31, 2012) (“**Kivlahan Report**”), ¶ 56).

<sup>76</sup> Ahmed Supp. Decl., ¶ 16; Ahmed Supp. Decl., Exh. 4: Ahmed 1989 Letter, at P-000831.

<sup>77</sup> The Declaration of Hassan Muhamed Omar in Support of Motion for Summary Judgment, dated May 22, 2012 (“**Omar S.J. Decl.**”), ¶ 7; *see also* Ahmed Supp. Decl., Exh. 4: Ahmed 1989 Letter, at P-000832.

<sup>78</sup> Warsame S.J. Decl., ¶¶ 6-10, 13-14; Jimale S.J. Decl., ¶¶ 5, 7.

<sup>79</sup> Warsame S.J. Decl., ¶¶ 13-14.

<sup>80</sup> Ahmed Supp. Decl., ¶ 18.

<sup>81</sup> *Id.* at ¶ 18.

<sup>82</sup> *Id.* at ¶ 18.

Possession of Subversive Material, which carried a three to five year prison sentence or a fine of 15,000 Somali shillings.<sup>83</sup>

The trial lasted less than one hour.<sup>84</sup> During the trial, Professor Ahmed informed the court that NSS officers had tortured him and that Defendant had ordered his torture.<sup>85</sup> Professor Ahmed rolled up the sleeves of his shirt and the legs of his trousers and showed the court the injuries he had sustained while in detention.<sup>86</sup> Those present in the courtroom, including Professor Ahmed's friends and colleagues, could clearly see on Professor Ahmed's face and body bruises, gashes, deep wounds, and other marks of the torture he had endured.<sup>87</sup> He had become emaciated and appeared to be in bad health.<sup>88</sup>

The court did not order any investigation of the torture but rather the presiding judge—Judge Shongole—convicted Professor Ahmed of violating Article 19 of Law 54, 1970, Possession of Seditious Material and fined him 15,000 Somali Shillings.<sup>89</sup> Professor Ahmed's friend, Mr. Abdirizak Warsame, paid the fine on his behalf and Professor Ahmed was immediately released.<sup>90</sup>

After his release, still determined to promote human rights and constitutional law, Professor Ahmed yet again returned to his law practice and his teaching position at the Somali

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<sup>83</sup> *Id.* at ¶ 19.

<sup>84</sup> *Id.* at ¶ 20.

<sup>85</sup> *Id.*; *see also* Jimale S.J. Decl., ¶ 8; Ahmed Supp. Decl., Exh. 4: Ahmed 1989 Letter, at P-000831.

<sup>86</sup> Jimale S.J. Decl., ¶ 8; Ahmed Supp. Decl., ¶ 20.

<sup>87</sup> Jimale S.J. Decl., ¶ 8.

<sup>88</sup> *Id.*

<sup>89</sup> Ahmed Supp. Decl., ¶ 19; *see also* Ahmed Supp. Decl., Exh. 4: Ahmed 1989 Letter, at P-000831; Warsame S.J. Decl., ¶ 14.

<sup>90</sup> Ahmed Supp. Decl., ¶ 20; Warsame S.J. Decl., ¶ 14.

National University.<sup>91</sup> NSS officers continued to follow and monitor him.<sup>92</sup> Professor Ahmed was threatened and intimidated by reports from his students and even his mother that members of the NSS were questioning them about him.<sup>93</sup>

Several months after his release, Professor Ahmed and Defendant came across each other in the office of the Attorney General of the National Security Court when Defendant barged into a professional meeting between Professor Ahmed and the Attorney General.<sup>94</sup> During that encounter, Professor Ahmed told Defendant that Professor Ahmed knew Defendant had sent individuals to harass him and told Defendant that he “would denounce him then, before the prosecutor.”<sup>95</sup> Defendant asserted in response that he was not only “above the law,” but that “he *was* the law.”<sup>96</sup>

“On July 13, 1989, the NSS arrested several prominent figures and outspoken critics of the government in Mogadishu and detained them without charge.”<sup>97</sup> Professor Ahmed had been away on business, but upon his return his mother informed him that Defendant and his men had waited all night and until noon the following day for his return.<sup>98</sup> She urged him to hide.<sup>99</sup>

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<sup>91</sup> Ahmed Supp. Decl., ¶ 21.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at ¶ 24.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (emphasis in original).

<sup>97</sup> Cassanelli Report, ¶ 42; Hioureas S.J. Decl., Exh. 1: U.S. Dep’t of State, *1989 Country Reports on Human Rights Practices*, P-000749-55, at P-000750-52; Hioureas S.J. Decl., Exh. 8: U.S. Dep’t of State Cable No. 1989MOGADUI5258, (May 1989), P-000728-38, at P-000732.

<sup>98</sup> Ahmed Supp. Decl., ¶ 25; Warsame S.J. Decl., ¶ 16.

<sup>99</sup> Ahmed Supp. Decl., ¶ 25.

On July 14, 1989, Professor Ahmed went into hiding at Mr. Warsame's house, where he remained until he fled Somalia.<sup>100</sup> Following Professor Ahmed's escape from Somalia, the NSS continued to search for him and NSS officer Abdellahi Agojiid – under Defendant's direct control – told Mr. Warsame, if “we see him, we will kill him.”<sup>101</sup> Professor Ahmed eventually made his way to the United Kingdom, where he became a citizen.<sup>102</sup>

Amnesty International, in the 1990 Annual Report, wrote about Professor Ahmed's detention, trial, and release:

Abukar Hassan Ahmed, known as “Yare”, a law lecturer arrested in Mogadishu in November 1988, was tried by the National Security Court in March 1989, after spending four months in pre-trial detention on charges of possessing seditious publications. One of these was an Amnesty International report, *Somalia: A Long-Term Human Rights Crisis*, published in September 1988. He pleaded not guilty and complained that he had been tortured by National Security Service officers. The judges did not order any investigation of his torture allegations and he was convicted. He was freed on payment of a fine and later fled the country to avoid rearrest.

Some reports were received of torture or ill-treatment of people arrested during the year for political reasons, particularly after the July demonstrations.<sup>103</sup>

### 3. Professor Ahmed's Lasting Trauma and Injuries Bear Witness to His Torture

The detention, cruel treatment, and torture that Professor Ahmed suffered took a significant toll on him, and he bears psychological and physical symptoms to this day that are attributable to the severe abuse he suffered. Following his release from prison, Professor Ahmed

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<sup>100</sup> *Id.* at ¶ 26; Warsame S.J. Decl., ¶¶ 16-17.

<sup>101</sup> Warsame S.J. Decl., ¶ 18; *see also* Ahmed Supp. Decl., ¶ 26; Hioureas S.J. Decl., Exh. 12: Defendant's Response to Plaintiff's First Set of Interrogatories, No. 9.

<sup>102</sup> Ahmed Supp. Decl., ¶ 26.

<sup>103</sup> Ahmed Supp. Decl., Exh. 5: Extract from the 1990 Amnesty International Annual Report relating to Somalia, P-000075-77, at P-000077.

was frail and in constant fear for his safety.<sup>104</sup> He was emaciated and in bad health.<sup>105</sup> He could not and continues not to be able to sleep through the night due to vivid nightmares and flashbacks involving the torture he had endured.<sup>106</sup>

His body carries the scars and signs of torture long after his release.<sup>107</sup> For example, his left ankle is still scarred from the deep abrasive trauma he received from the grinding of the metal shackle against his skin during his detention.<sup>108</sup> He suffers from severe physical ailments that are directly attributable to his having been tortured.<sup>109</sup>

In addition to his severe physical ailments, Professor Ahmed suffers from Post-Traumatic Stress Disorder (“**PTSD**”), a psychiatric syndrome related to the effects of prior traumatic events in his life, consistent with that of a trauma survivor.<sup>110</sup>

### **III. STATEMENT OF FACTS AND PROCEDURAL HISTORY IN SUPPORT OF PLAINTIFF’S ALTERNATIVE MOTION FOR DEFAULT**

Plaintiff has demonstrated that there is no issue of material fact as to the above points and that, therefore, Plaintiff is entitled to partial summary judgment. However, in the event that this Court finds Professor Ahmed has not met his burden with respect to summary judgment, he respectfully requests, in the alternative, that the Court enter default judgment in his favor.

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<sup>104</sup> *Id.* at 21.

<sup>105</sup> Warsame S.J. Decl., ¶ 15; Jimale S.J. Decl., ¶ 8; Ahmed Supp. Decl., ¶ 17.

<sup>106</sup> Warsame S.J. Decl., ¶ 15; Ahmed Supp. Decl., ¶ 17.

<sup>107</sup> Ahmed Supp. Decl., ¶ 17; Hioureas S.J. Decl., Exh. 21: Kivlahan Report, ¶¶ 6, 66, 75-77; Hioureas S.J. Decl., Exh. 16: Photographs of Prof. Ahmed Scars, P-000812-14.

<sup>108</sup> Ahmed Supp. Decl., 17; Hioureas S.J. Decl., Exh. 21: Kivlahan Report, ¶¶ 75, 113(A)(iii); Hioureas S.J. Decl., Exh. 16: Photographs of Prof. Ahmed Scars, P-000812-14.

<sup>109</sup> Ahmed Supp. Decl., 17; Hioureas S.J. Decl., Exh. 21: Kivlahan Report ¶¶ 66, 73, 75-77, 113-115; Hioureas S.J. Decl., Exh. 20: Medical Records of Prof. Ahmed, P-000821-89, P-000833-80, at P-000821, P-000846, P-000873, P-000880.

<sup>110</sup> Hioureas S.J. Decl., Exh. 22: Expert Report of Dr. Stuart Lorin Lustig, MD, MPH, (May 29, 2012) (“**Lustig Report**”), ¶¶ 28, 30.

Plaintiff Professor Ahmed filed suit against Defendant on April 21, 2010, under the Torture Victim Protection Act (Pub. L. No. 102-256, 106 Stat. 73 (1992) (“**TVPA**”)) and the Alien Tort Claims Act (28 U.S.C. § 1350 “**ATS**”, also known as the Alien Tort Statute or “**ATS**”).<sup>111</sup> Although Defendant initially retained an attorney and actively defended the case,<sup>112</sup> he effectively abandoned his defense by December 6, 2011, when Defendant’s counsel filed his motion to withdraw.<sup>113</sup> Since then, Defendant has failed to provide complete responses to Professor Ahmed’s reasonable discovery requests, even when ordered to do so by this Court.<sup>114</sup> Despite numerous warnings and explanations of his obligations, Defendant has failed to attend case management conferences, to obey no less than five Court Orders,<sup>115</sup> and even to keep the Court and Plaintiff informed of his current mailing address.<sup>116</sup>

Defendant did not attend his deposition.<sup>117</sup> As described in detail in Plaintiff’s Motion For Rule 37 Sanctions, which was granted, Defendant had been properly noticed for deposition; he had been subpoenaed; he had been sent letters informing him of his obligation to attend his deposition and the possible consequences of failing to do so – including default judgment; he had even been ordered by this Court to confirm his attendance at his deposition.<sup>118</sup> To date—after

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<sup>111</sup> Dkt. # 1.

<sup>112</sup> *See, e.g.*, Dkt. # 18.

<sup>113</sup> Dkt. # 70.

<sup>114</sup> Dkt. # 79; 81; 82; 84; 85; 86; 90; 93.

<sup>115</sup> Dkt. #'s 73; 75; 76; 81; 84; 93.

<sup>116</sup> Dkt. # 92.

<sup>117</sup> Dkt. # 90, Hioureas Decl., ¶ 9, Exh. 2.

<sup>118</sup> Dkt. # 86, Hioureas Aff., ¶ 4, Exh. B (Court Reporter Transcript); Hioureas S.J. Decl., Exh. 17: Email and Letter from K. Cookson to A. Magan, (Mar. 5, 2012), attaching Notice of Deposition; Hioureas S.J. Decl., Exh. 18: Email and Letter from K. Cookson to A. Magan, (Mar. 22, 2012) attaching Subpoena; Dkt. # 81; Hioureas S.J. Decl., Exh. 19: Email and Letter from C. Hioureas to A. Magan, (Apr. 3, 2012); Dkt. # 90, Hioureas Decl., ¶ 10, Exh. 3.

the discovery period set by the Court has closed—Defendant has not produced a single document or provided any additional information.<sup>119</sup>

As a result of Defendant's failure to participate in discovery, Professor Ahmed has not been able to access key evidence to prepare his case.<sup>120</sup> In a good faith effort to exhaust extrajudicial means before requesting the Court to intervene, Plaintiff has expended significant time sending Defendant numerous emails and letters since December 2011 requesting that he comply with his discovery obligations.<sup>121</sup> Because of Defendant's failure to communicate, in defiance of this Court's order to notify Plaintiff whether he would attend his duly noticed and subpoenaed deposition, Plaintiff further incurred unjustified expenses in attending Defendant's deposition for which he failed to appear.<sup>122</sup>

In addition, Defendant's unresponsiveness hampered Professor Ahmed's ability to comply with his own discovery obligations. Plaintiff filed a Motion for a Protective Order on March 29, 2012,<sup>123</sup> which this Court granted on April 27, 2012,<sup>124</sup> to enable him to produce his medical records. Despite the explicit instructions contained in that order, Defendant failed to acknowledge its receipt and failed to assure Plaintiff that he would keep his medical records and private information confidential in accordance with the Order.<sup>125</sup> Plaintiff then filed another motion with this Court, asking, in the event that Defendant failed to make the necessary assurances in accordance with the order, that the Court deem Professor Ahmed's medical records and expert reports relying on them as produced for the purposes of satisfying Plaintiff's

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<sup>119</sup> Hioureas S.J. Decl. ¶ 5..

<sup>120</sup> Dkt. #'s 79, 80, 82, 86, 90.

<sup>121</sup> Dkt. # 90, Hioureas Decl., ¶¶ 3-4.

<sup>122</sup> Dkt. # 90, Hioureas Decl. ¶¶ 9-10, 15.

<sup>123</sup> Dkt. # 80.

<sup>124</sup> Dkt. # 83.

<sup>125</sup> Dkt. # 80, Hioureas Aff., ¶ 15, Exh. J.



discovery obligations. The Court granted this motion on July 9, 2012, ordering that if Defendant failed to provide the necessary assurances by August 3, 2012, the Court would deem Professor Ahmed to have complied with his discovery obligations. Defendant has failed to comply with his discovery obligations. By the close of discovery, July 29, 2012, Professor Ahmed had fully complied with the Court's discovery orders and, excluding these protected materials, produced a total of 962 pages of documentary evidence as well as the information for all potential experts and eye-witnesses.<sup>126</sup>

In its March 29, 2012 order, this Court warned, "Defendant is cautioned that, under Fed. R. Civ. P. 37(b)(2)(A), a party failing to obey a discovery order and failure of a party to attend his deposition may be subject to sanctions up to and including the rendition of default judgment against the disobedient party."<sup>127</sup> In addition to this Court's warning, Plaintiff sent Defendant a number of letters to ensure he would understand the importance of his compliance with the Court's orders and to prompt his participation in the discovery process. On April 3, 2012, Plaintiff sent Defendant a letter reiterating the Court's warning in bold text. On April 11, 2012, following Defendant's failure to comply with the Court Order and attend his deposition, Plaintiff warned Defendant:

[Y]our failure to attend your deposition or to in any way contact Plaintiff's counsel and express an intent to defend this lawsuit is a valid basis for monetary sanctions and may lead to a judgment against you on the merits of this case. I am writing to inform you that Plaintiff intends to file a motion with the Court to that effect in due course.<sup>128</sup>

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<sup>126</sup> Hioureas S.J. Decl. ¶ 3.

<sup>127</sup> Dkt. # 81.

<sup>128</sup> Dkt. # 90, Hioureas Decl., ¶ 10, Exh. 3.

On May 23, 2012, referencing the Court's Order that Defendant supplement his responses to Plaintiff's First Set of Interrogatories and Document Requests, Plaintiff wrote to Defendant:<sup>129</sup>

[I]f you fail to comply with the Court's Discovery Order, we may ask the Court for sanctions under Federal Rule of Civil Procedure 37(b)(2)(A). . . As we have previously informed you, we reserve our right to seek sanctions for your continuous failure to comply with the Court's orders.<sup>130</sup>

On June 7, 2012, Plaintiff sent a letter referencing Defendant's failure to comply with the May 22, 2012 Court Order, advising Defendant that if he did not comply, Plaintiff would "seek sanctions."<sup>131</sup>

Defendant never once advised Plaintiff of any difficulty in complying with his discovery obligations.<sup>132</sup> Defendant's numerous failures to participate in his defense were not due to a lack of familiarity with or ability to participate in U.S. litigation: in fact, Defendant recently had been deposed in a personal injury case in which he was the plaintiff, *Magan v. Voans Capital Park Ltd. P'ship*, No. 10 CVC-06-8228, and settled the case in November 2011 – just before his counsel withdrew from this case.<sup>133</sup>

#### **IV. THIS COURT SHOULD GRANT SUMMARY JUDGMENT IN FAVOR OF PROFESSOR AHMED BECAUSE NO GENUINE ISSUE OF MATERIAL FACT EXISTS**

##### **A. Legal Standard For Summary Judgment**

Under Federal Rule of Civil Procedure 56(c), Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

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<sup>129</sup> Dkt. # 90, Hioureas Decl., ¶ 14, Exh. 7.

<sup>130</sup> *Id.*

<sup>131</sup> Dkt. # 90, Hioureas Decl., ¶ 13, Exh. 6.

<sup>132</sup> Hioureas S.J. Decl. ¶ 4.

<sup>133</sup> Dkt. # 90, Hioureas Decl., Exh. 4, *Magan v. Voans Capital Park, Ltd.*

party is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). Once the moving party has identified the basis for an absence of general issue of material fact, the burden shifts to the nonmoving party to demonstrate “specific facts showing that there is a genuine issue for trial.” *Abeita v. TransAmerica Mailings, Inc.*, 159 F.3d 246, 250 (6th Cir. 1998). A genuine issue of material fact exists for trial “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The nonmoving party must “identify specific facts, supported by evidence, and may not rely on mere allegations contained in the pleadings.” *Harris v. Gen. Motors Corp.*, 201 F.3d 800, 802 (6th Cir. 2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). While a district court may consider all record evidence, the court has no duty to search the record for evidence that supports a party’s position. *Street v. J.C. Bradford & Co.* 886 F.2d 1472, 1479 (6th Cir. 1989); *U.S. Structures, Inc. v. J.P. Structures, Inc.*, 130 F.3d 1185, 1191 (6th Cir. 1997); *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001).

A *pro se* litigant’s pleadings are subject to the same requirement as those of a represented party: “[o]rdinary civil litigants proceeding *pro se* . . . are not entitled to special treatment, including assistance in regards to responding to dispositive motions.” *McKinnie v. Roadway Express, Inc.*, 341 F.3d 554, 558 (6<sup>th</sup> Cir. 2003) (citing *Brock v. Hendershott*, 840 F.2d 339, 343 (6th Cir. 1988)). Where a party—*pro se* or otherwise—fails to respond to a dispositive motion, the Federal Rules of Civil Procedure contemplate that the court may “consider the fact[s] undisputed for purposes of the motion” and may “grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it.” Fed. R. Civ. P. 56(e), *see e.g.*, *Prestige Equip. Corp. v. Case Mach. Co.*, No. 5:08

CV 2164, 2009 WL 2232859, at \*2-3 (N.D. Ohio July 22, 2009) (granting default judgment against a *pro se* defendant).

There are no material facts in dispute. Thus, Professor Ahmed is entitled to summary judgment as a matter of law that the Defendant is legally responsible for the torture, cruel, inhuman, or degrading treatment or punishment; and arbitrary detention of Plaintiff Abukar Hassan Ahmed.

**B. The Alien Tort Statute And The Torture Victim Protection Act**

The ATS provides in its entirety that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” ATS 28 U.S.C. § 1350 (2006). The Supreme Court has interpreted the act as authorizing federal courts to hear claims that are “based on the present-day law of nations [that] rest on a norm of international character accepted by the civilized world. . . .” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). Courts have since recognized torture, arbitrary detention, and cruel, inhuman, or degrading treatment or punishment (“CIDT”) as international law norms actionable under the ATS. *See, e.g., Chavez v. Carranza*, 559 F.3d 486, 490 (6th Cir. 2009) (affirming a jury verdict awarding damages to victims of torture); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1092-95 (N.D. Cal. 2008), *cert. denied*, 132 S. Ct. 1968 (2012) (finding claims for CIDT cognizable under the ATS); *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1320-26 (N.D. Cal. 2004) (finding claims for CIDT and prolonged arbitrary detention in poor conditions cognizable under the ATS); *Taveras v. Taveraz*, 477 F.3d 767, 771 (6th Cir. 2007).

The TVPA provides that “an individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual.” TVPA, Pub. L. No. 102-256, 106 Stat. 73, §2(a)(1) (1992). According to the legislative history, it is an “unambiguous and modern basis for a cause of

action” for torture and extrajudicial killing. H.R. Rep. No. 102-367, at 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 86.

**C. This Court Should Grant Plaintiff’s Summary Judgment Motion On His Claim For Arbitrary Detention**

1. Prima Facie Elements of a Claim for Arbitrary Detention

To establish a claim of arbitrary detention, Plaintiff must demonstrate that he was detained, that the person(s) who detained him did so while acting under the actual or apparent authority or color of law of a foreign nation, and that the detention violated principles of justice or dignity of the person. *See Mehinovic v. Vukovic*, 198 F. Supp. 2d 1322, 1349 (N.D. Ga. 2002); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987).

Courts have found that any one of the following factors constitutes a violation of the principles of justice or dignity of the person applicable in the context of detention: (1) the detention was not accompanied by notice of the charges brought against the detainee; (2) the detainee did not have an early opportunity to communicate with family or consult counsel; (3) the detainee was not brought to trial within a reasonable time; (4) the detainee was tortured while in detention; or (5) the detention was otherwise incompatible with principles of justice or with the dignity of the person. *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998) (*citing* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt. h and the International Covenant on Civil and Political Rights, art. 9, adopted Dec. 16, 1966, S. Treaty Doc. 95-2, 99 U.N.T.S. 171 (Sept. 8, 1992)); *Mehinovic*, 198 F.Supp.2d at 1349 (same); *Doe v. Lui Qi*, 349 F. Supp. 2d 1258, 1326 (N.D. Cal. 2004) (finding that, *inter alia*, the conditions of confinement may be a factor); *see also, Hilao v. Estate of Marcos*, 103 F.3d 789, 795 (9th Cir. 1996) (finding arbitrary detention when plaintiffs were held without notice of the charges and not brought to trial within a reasonable time).

2. Plaintiff's Evidence Establishes Without Genuine Factual Dispute that Professor Ahmed Was Arbitrarily Detained

a. *Plaintiff was detained*

On or about November 19, 1988, Plaintiff was taken by NSS officers to the detention facility at NSS Headquarters. He was detained there until the end of February 1989, and then detained at the Central Prison until March 1989. *See supra* § I.E.1-2.

b. *Plaintiff's detention was under color of law*

Plaintiff was detained by the NSS, which was the official Somali security force. NSS officers apprehended Plaintiff, handcuffed him, and took him to the detention facility at NSS headquarters. Plaintiff remained in the custody of state agents throughout his detention. *See supra* § I.E.1-3.

c. *Plaintiff's detention violated principles of justice and dignity of the person*

Any one of the following factors is sufficient to establish that Plaintiff's detention violated principles of justice or dignity of the person:

i. Detention Was Not Accompanied by Notice of Charges

Plaintiff was arrested and detained without a warrant. He did not learn of the charges against him until three months later. *See supra* § I.E.2.

ii. Plaintiff Was Not Given Opportunity to Communicate with Family

The NSS refused to allow Professor Ahmed's family and friends to see or speak to Plaintiff; the NSS did not allow visitors. *See supra* § I.E.1-2.

iii. Plaintiff Was Tortured While in Detention

Plaintiff was repeatedly tortured while in detention. *See supra* § I.E.1, 3; *infra* § III.D.2.

iv. Plaintiff's Detention Was Otherwise Incompatible with Principles of Justice or Dignity of the Person

Plaintiff's detention was otherwise incompatible with principles of justice and dignity of the person. Deprivation of liberty is arbitrary if the individual is detained pursuant to a national law that violates international law, in particular if the law is arbitrary or is enforced arbitrarily in a given case. *Prosecutor v. Milorad Krnojelac*, No. IT-97-25-T, Judgment, ¶ 114 (Int'l Crim. Trib. for the Former Yugoslavia, Mar. 15, 2002). The laws under which Plaintiff was arrested, detained, and tried were themselves arbitrary. *See supra* § I.A.

Further, Plaintiff's sham trial did not meet international standards for a fair and just trial. The National Security Court offered virtually no procedural rights to individuals before the court, in violation of internationally recognized standards for fair trials and justice, as set out above. Plaintiff's trial lasted less than one hour. He was not given time to prepare a defense, nor was he allowed to have an attorney present. *See supra* § I.E.2.

Finally, in addition to all the brutal treatment enumerated above, the conditions under which Plaintiff was detained were inhuman. *See e.g Eastman Kodak v. Kavlin*, 978 F. Supp. 1078, 1094 (S.D. Fla. 1997) (finding sharing a filthy cell with murderers, being left without food, a blanket, or protection from the inmates, and being forced to sleep on the floor constituted inhuman conditions sufficient to support a finding of arbitrary detention). Plaintiff was held in solitary confinement, in a small windowless cell in an unventilated basement, with continuous artificial lighting. He had no toilet in his cell, forcing him to relieve himself into empty milk cans. His wrist was constantly handcuffed to his leg, except during interrogations. He received rancid food only once a day. He was forced to sleep on cold or wet floors without a mat or

blanket. *See supra* § I.E.1-3. These conditions are inhuman and violate the dignity of the person. *See Eastman Kodak*, 978 F. Supp. at 1094.

Based on the undisputed facts stated above, Plaintiff is entitled to summary judgment on his claim of arbitrary detention.

**D. This Court Should Grant Plaintiff’s Summary Judgment Motion On His Torture Claim**

1. *Prima Facie* Elements of Torture

“The TVPA and the ATS share a common purpose in protecting human rights internationally,” including by providing an avenue for victims of torture to seek civil redress. *Chavez*, 559 F.3d at 492; *see also* 28 U.S.C. § 1350. Under both statutes, a plaintiff’s torture claim must establish five elements, that: (1) the victim experienced severe pain or suffering, either physical or mental; (2) the severe pain or suffering was “intentionally inflicted” on the victim; (3) the acts were committed for a prohibited purpose, including extracting a confession or punishment or to intimidate or coerce the victim; (4) the acts were inflicted under the actual or apparent authority, or color of law of a foreign nation, including by or with the acquiescence of a public official or other person acting in an official capacity; and (5) the victim was in the offender’s custody or physical control. TVPA, Pub. L. No. 102-256, 106 Stat. 73, § 3(b)(1);<sup>134</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 884-90 (2d Cir. 1980) (*cited with approval in Sosa*, 542 U.S.at 732); *Enahoro v. Abubakar*, 408 F.3d 877, 884 (7th Cir. 2005); *In re Estate of Ferdinand Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126

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<sup>134</sup> The TVPA defines severe “mental pain or suffering” as the: prolonged mental harm caused by or resulting from — (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality. TVPA, Pub. L. No. 102-256, 106 Stat. 73, § 3(b)(2) (A)-(D).



(1995); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1152 (11th Cir. 2005); *see also Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987) (holding that “a police chief who tortures, or orders to be tortured, prisoners in his custody fulfills the requirement that his action be ‘official’ simply by virtue of his position and the circumstances of the act; his conduct may be wholly unratified by his government and even proscribed by its constitution and criminal statutes.”); *Xuncax v. Gramajo*, 886 F. Supp. 162, 174, 178 (D. Mass. 1995) (holding that having the authority and discretion to order an individual’s release can establish “custody” for the purposes of defining torture.).

Regarding the first element, a victim’s severe pain or suffering, courts have recognized a variety of facts as “severe” enough to constitute torture, including trauma inflicted to the genitals, beatings, simulated drowning, sleep deprivation, and starvation. *See Lui Qi*, 349 F. Supp. 2d at 1317 (“sustained systematic beatings or use of particularly heinous acts such as electrical shock or other weapons or methods designed to inflict agony does constitute torture”); *see also Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222, 226 (D.D.C. 2002); *Hilao*, 103 F.3d at 790-91; *Mehinovic*, 198 F. Supp. 2d at 1345; *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 45 (D.D.C. 2000).

With respect to the second element, courts have inferred intent from the facts and circumstances, including the severity of the pain and suffering, the nature of official action, and the evidence of a prohibited purpose. *See Filartiga*, 630 F.2d at 884-890; *Sosa*, 542 U.S. at 753 (Ginsburg, J., concurring); *Chavez*, 559 F.3d at 491; *Kilburn v. Islamic Republic of Iran*, 699 F. Supp. 2d 136, 152 (D.D.C. 2010); *Daliberti*, 146 F. Supp. 2d at 22.

2. Plaintiff's Evidence Establishes Without Factual Dispute That Plaintiff Was Tortured

a. *Plaintiff endured severe pain and suffering*

Defendant's subordinates at the NSS threatened and brutalized Professor Ahmed, causing him severe mental and physical pain and suffering. *See supra* § I.E.1-2. Professor Ahmed continues to suffer from the injuries he sustained as a result of this trauma: he has nightmares, flashbacks, severe body pain, urological problems, and he has been rendered unable to have additional children. *See supra* § I.E.3.

b. *Plaintiff's suffering was intentionally inflicted and was for the proscribed purposes of eliciting a confession or punishment*

There is no issue of material fact that these brutal acts were intended to elicit a confession from Professor Ahmed that he was a member of an opposition political group or that he was collaborating with human rights "watch dogs" and that they were also intended to punish him for his political beliefs and his clan affiliation. Specifically, they were intended to punish Professor Ahmed for possessing Amnesty International materials perceived as a threat to the regime. *See supra* § I. A.1-2; I.B.; I.E.1.

Defendant personally threatened that Plaintiff would be tortured if he did not confess to being a member of an opposition political group that Plaintiff did not even know existed at that time. Defendant ordered NSS officer Dherow to "do his job, if [Plaintiff] does not confess."<sup>135</sup> Defendant then ordered Professor Ahmed's torture, which Captain Dherow, along with four other NSS officers, Lt. Mohamoud Farah Egal, Lt. Mohamed Abdi, Antar, and Deeq, executed. *See supra* § I.E.1.. The NSS officers' clear purpose was to inflict suffering to intimidate and coerce Professor Ahmed to obtain a confession and/or punish him. *See supra* §§ I.E.1., I.A.1-2.

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<sup>135</sup> Ahmed Supp. Decl. ¶ 13.

c. *Plaintiff's suffering was inflicted under the color of law*

Plaintiff was brutalized by officers of the NSS, the official state security force. Defendant was acting in his official government capacity when Defendant ordered his subordinates in the NSS to detain and torture Professor Ahmed. His orders were supported by the “weight of the State” as he had a high ranking position as Chief the Department of Criminal Investigations of the NSS, which was created to punish and suppress opposition to the government. *See supra* § I.E.1-3.

d. *Plaintiff was under the offenders' custody or control*

Professor Ahmed was under the custody and control of the NSS agents who brutalized him. *See supra* Section I.E.1-2; *see also supra* Section III.C(2)(a)&(b).

For the reasons and based on the evidence stated above, the Court should grant Plaintiff's claim of torture under the ATS and the TVPA.

**E. This Court Should Grant Plaintiff's Summary Judgment Motion On His Claim For Cruel, Inhuman, Or Degrading Treatment Or Punishment**

1. *Prima Facie* Elements of the Cruel, Inhuman, or Degrading Treatment or Punishment Claim

“[C]ruel, inhuman, or degrading treatment includes acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which do not rise to the level of ‘torture’ or do not have the same purposes as ‘torture.’” *Tachiona v. Mugabe*, 216 F. Supp. 2d 262, 281 (S.D.N.Y. 2002), *aff'd in part, rev'd on other grounds*, 386 F.3d 205 (2d Cir. 2004) (*quoting Mehinovic*, 198 F.Supp.2d at 1348); *see also Ntsebeza v. Daimler AG (In re S. African Apartheid Litig.)*, 617 F. Supp. 2d 228, 253 (S.D.N.Y. 2009); *Xuncax*, 886 F. Supp. at 185-89; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. 51, U.N. Doc. A/39/51, art.16(1) (1984). The acts also must have been committed under color of law, by or at the instigation of or with the consent

or acquiescence of a public official or other person acting in an official capacity. *Ntsebeza*, 617 F. Supp. 2d at 253; *Bowoto*, 557 F. Supp. 2d at 1092-95; *Liu Qi*, 349 F. Supp. 2d at 1320-25; *Jama v. I.N.S.*, 22 F. Supp. 2d 353, 365 (D.N.J. 1998), *aff'd sub. nom. Dasilva v. Esmor Corr. Servs. Corp.*, 167 Fed. App'x 303 (3d Cir. 2006); CAT 39 U.N. GAOR Supp. 51, U.N. Doc. A/39/51, art. 16(1) (1984).

2. Plaintiff's Evidence Establishes Without Genuine Factual Dispute that Professor Ahmed was Subjected to Cruel, Inhuman, or Degrading Treatment or Punishment

The treatment that Abukar suffered at the hands of the NSS meets or exceeds the treatment or punishment that other courts have found cruel, inhuman, or degrading. Like the plaintiffs in *Bowoto*, Professor Ahmed was confined in wretched conditions, bound in painful positions, beaten and tormented through genital mutilation. *Bowoto*, 557 F. Supp. 2d at 1094. Like the plaintiffs in *Wiwa*, he was forced to flee his homeland in fear of arbitrary arrest, torture and death. *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV 8386, 2002 WL 319887, at \*8 (S.D.N.Y. Feb. 22, 2002). And like the plaintiffs in *Jama*, he was restricted to a starvation diet of rancid food, confined in close proximity to his own urine and excrement, and deprived of sleep under bright lights. *Jama*, 22 F. Supp. 2d at 358-59. Defendant and the NSS officers under his command and authority also repeatedly threatened Professor Ahmed with torture and execution and imprisoned him in solitary confinement for over three months. *See supra* § I.E.1-3. As with his other claims, this cruel treatment was inflicted under the color of law of the State of Somalia. *See supra* §§ I.E.1-3, III.C.2.b., and III.D.2.c.

**F. This Court Should Grant Plaintiff's Summary Judgment Motion As To Defendant's Responsibility For The Acts**

Defendant is responsible for the conduct of the NSS officers because he:

(1) exercised command or control over the NSS officers who perpetrated the harms suffered by Plaintiff, including, but not limited to, directing his subordinates to commit the acts; (2) conspired with NSS officers to commit the harms suffered by Plaintiff; (3) aided and abetted the NSS officers who committed the harms suffered by Plaintiff; and/or (4) engaged in a joint criminal enterprise with the NSS officers who committed the harms suffered by Plaintiff. There is no genuine issue of material fact as to Defendant's liability for Plaintiff's arbitrary detention; torture; and cruel, inhuman, or degrading treatment or punishment.

1. Defendant Exercised Command Responsibility Over the NSS Officers Who Perpetrated the Offenses Against Professor Ahmed

a. *Prima facie elements of command responsibility*

A commanding officer can be held responsible for the acts of his subordinates, even if the commanding officer did not directly participate in the commission of the acts himself. *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1709 (2012); *Chavez*, 559 F.3d at 499; *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1148 (E.D. Cal. 2004); S. REP. NO. 102-249, at 8-9 (1991) (“[R]esponsibility . . . extends beyond the person or persons who actually committed those acts [to] anyone with higher authority who authorized, tolerated or knowingly ignored those acts.”).

To hold a defendant liable under the doctrine of command responsibility, a plaintiff must establish that the defendant: (1) had a superior-subordinate relationship with the person or persons who committed the human rights abuses; (2) knew or should have known, in light of the circumstances at the time, that subordinates had committed, were committing, or were about to commit human rights abuses;<sup>136</sup> and (3) failed to take all necessary and reasonable measures to

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<sup>136</sup> Actual knowledge of the particular abuses against a plaintiff is not required; courts assume knowledge sufficient to establish command responsibility when there is evidence of a pervasive pattern and practice of abuses. *Lui Qi*, 349 F. Supp. 2d at 1332-33 (“it may be inferred that both defendants either ‘knew or should have known’ of the human rights violations committed by their subordinate police and security forces” where the complaints alleged “the patterns of repression and abuse were widespread, pervasive, and

prevent human rights abuses or punish the individuals who committed the human rights abuses for their actions. *Chavez* 559 F.3d at 499 (6th Cir. 2009) (*cited with approval in Mohamad*, 132 S. Ct. at 1709 (“petitioners rightly note that the TVPA contemplates liability against officers who do not personally execute the torture or extrajudicial killing.”). Of course, a commanding officer will also be held responsible for directly ordering the tortfeasors to commit the acts, as here. *Mohamad*, 132 S. Ct. at 1709; *Doe v. Saravia*, 348 F. Supp. 2d at 1148.

A superior-subordinate relationship exists where the defendant: (1) holds a higher rank than or had authority over the persons accused of committing the human rights abuses and (2) had “effective control” over the persons accused of committing the human rights abuses. *Lui Qi*, 349 F. Supp. 2d at 1331.<sup>137</sup>

b. *Defendant was the superior of NSS officers who committed the offenses*

A superior-subordinate relationship existed between Colonel Magan and the NSS officers who arbitrarily detained, tortured, and otherwise cruelly treated Professor Ahmed. Defendant was the Chief of the Department of Criminal Investigations at the NSS from 1988-1990.<sup>138</sup> As the Chief, Defendant was in charge of investigations, holding a position of authority over officers in the department. Defendant achieved this formal position of authority in part because he was a member of Siad Barre’s sub-clan of the Darod – Marehan – and because of his reputation for cruelty – both of which tend to show he had effective authority within the NSS Department of Criminal Investigations. Defendant had authority over Colonel Agojiid, officer Egal, and the

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widely reported” for both ATS and TVPA claims of arbitrary detention and torture); (*quoting Ford (Ex. rel. Estate of Ford) v. Garcia*, 289 F. 3d 1282, 1288 (11<sup>th</sup> Cir. 2002); *citing* S. REP. NO. 102-249, at 9 (1991)).

<sup>137</sup> Even where a superior is not the ultimate authority, a superior may still be liable under the doctrine of command, as multiple individuals can exercise effective control and be liable under command responsibility. *See Lui Qi*, 349 F. Supp. 2d at 1331. Absolute authority is not required. *Id.*

<sup>138</sup> Dkt. # 18, Magan Aff., ¶ 6-7; Hioureas S.J. Decl., Exh. 12: Defendant’s Response to Plaintiff’s First Set of Interrogatories, No. 2.

other NSS officers who detained and tortured Professor Ahmed.<sup>139</sup> And Defendant demonstrated his effective command by ordering his subordinates to torture Professor Ahmed. *See supra* §§ I.B, I.E.1.

c. *Defendant knew or should have known that his subordinates were committing such offenses*

It is undisputed that Defendant knew his subordinates were torturing detainees. Not only was the NSS use of torture widely known and known specifically to the high-ranking officers within the NSS, Defendant himself participated in brutalizing detainees. *See supra* §§ I.A, B. In addition, Defendant informed Plaintiff that he would be tortured by Defendant's subordinates, and he ordered his subordinates to torture Plaintiff. *See supra* § I.E.1.

Moreover, the record indicates that the NSS was responsible for widespread and systematic use of torture, arbitrary detention, and cruel, inhuman, or degrading treatment. *See* § I.A. As the Chief of the Department of Investigations of the NSS, Defendant knew (or should have known) about this pattern of human rights violations. *See supra* § I.B. *See Lui Qi*, 349 F. Supp. 2d at 1332-33.

d. *Defendant failed to take reasonable steps to prevent the offenses or to punish his subordinates for their bad acts*

There is no dispute of material fact that Defendant failed to take any steps to prevent abuses from occurring or to punish his subordinates when they engaged in such abuse: in fact, Defendant denies having knowledge of any disciplinary procedures at all. *See supra* § I.B.

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<sup>139</sup> Hioureas S.J. Decl., Exh. 12: Defendant's Response to Plaintiff's First Set of Interrogatories, Nos. 6, 7, 8; Hioureas S.J. Decl., Exh. 14: Plaintiff's Second Set of Interrogatories Nos. 21-25; Ahmed Supp. Decl. ¶¶ 13-15.

2. Defendant Aided and Abetted Subordinates in the NSS Who Committed the Offenses Against Professor Ahmed.

a. *Prima facie elements of aiding and abetting*

To establish aiding and abetting liability, a plaintiff must show that a defendant (1) knowingly and substantially assisted in the underlying conduct and (2) was “generally aware of his role as part of an overall illegal or tortious activity at the time he provided the assistance.” *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 35 (D.C. Cir. 2011) (citation omitted); *see also Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 533 (6th Cir. 2000); *Cabello*, 402 F.3d at 1158-59. Courts look to five factors to determine whether the defendant’s assistance was “substantial”: (1) the nature of the act encouraged; (2) the amount of assistance provided; (3) defendant’s presence or absence at the time of the conduct; (4) his relation to the other actors; and (5) defendant’s state of mind. *Exxon*, 654 F.3d at 35; *see also* RESTATEMENT (SECOND) OF TORTS § 876 (1979).

b. *Defendant’s knowing, substantial assistance to his subordinates who perpetrated the offenses against Professor Ahmed*

Defendant knowingly and substantially assisted in the underlying conduct and was aware of his role in the overall activity when he interrogated Professor Ahmed and told him that he would be tortured if he did not confess. Defendant thereafter directed his subordinates to torture Professor Ahmed. After Professor Ahmed was released, Defendant told Professor Ahmed that he was “above the law.”<sup>140</sup> *See supra* §§ I.E.1-2.

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<sup>140</sup> Ahmed Supp. Decl. ¶ 24.



3. Defendant Conspired with Subordinates to Commit the Offenses Against Perceived Political Opponents, Resulting in the Offenses Against Professor Ahmed

a. Prima facie *elements of conspiracy*

Defendant may also be held vicariously liable for Plaintiff's injuries based on a theory of civil conspiracy. To prove civil conspiracy, a plaintiff must demonstrate "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme." *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983); *see also Cabello*, 402 F.3d at 1159 (applying these elements to uphold jury's verdict of liability for TVPA and ATS violations based on the existence of a civil conspiracy); *Aetna*, 219 F.3d at 534; *In re Chiquita Brands Int'l, Inc. Alien Tort Statute and S'holder Derivative Litig.*, 792 F. Supp. 2d 1301, 1343–44 & n.64 (S.D. Fla. 2011) (deriving substantially the same standard from international law); *Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 491 (D. Md. 2009), *aff'd on other grounds*, 402 Fed. App'x 834 (4th Cir. 2010). The existence of an agreement can be proven by circumstantial evidence. *Halberstam*, 705 F.2d at 480.

b. *Defendant's conduct*

The undisputed evidence here demonstrates an agreement to use the NSS's "virtually unlimited powers of surveillance, investigation, search, arrest, and detention" to target political opponents of the Barre Regime, "terrorize the civilian population[,] and deter it from supporting the growing opposition movements."<sup>141</sup> The NSS specifically targeted Professor Ahmed as a perceived opponent of the regime and sought to obtain Professor Ahmed's confession through detention and torture. Such evidence of the regime's objective to suppress political opposition,

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<sup>141</sup> Cassanelli Report, ¶¶ 23, 40.

especially members of disfavored clans, such as Professor Ahmed’s Hawiye clan; Defendant’s reputation for brutality and loyalty to the Barre regime; Defendant’s statements that they would torture Professor Ahmed to obtain his confession; Colonel Agojiid’s later statement that “[i]f we see [Professor Ahmed], we will kill him”;<sup>142</sup> Defendant’s own, previous abuse of at least one prisoner; and the NSS’s well-known and systematic use of arbitrary detention and torture, all demonstrate an agreement between officers of the NSS to suppress perceived political opposition through unlawful arbitrary detention and torture. *See Cabello*, 402 F.3d at 1158-59 (finding proof of an agreement based on circumstantial evidence of a military unit’s objective to kill certain prisoners, threatening comments by members of the military unit, and a pattern of similar killings by the unit before and after the alleged violations at issue in the case); *see also Lizarbe*, 642 F. Supp. 2d at 491. *See supra* §§ I.A.,B.,E.

This evidence of the conspiracy’s widely known objectives and practices, Defendant’s position in the organization, and his active involvement in Professor Ahmed’s torture and detention, *see supra* § III.F.3, further demonstrate Defendant’s knowledge of the conspiracy’s objectives and his intent to participate in accomplishing its goals. *See Presbyterian Church of the Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 263 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79 (2010) (“[I]ntent must often be demonstrated by the circumstances,” including “the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.”) (internal quotation omitted); *see also Cabello*, 402 F.3d at 1159. Finally, NSS officers

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<sup>142</sup> Warsame S.J. Decl., ¶ 18.

committed the overt act of torturing not only Professor Ahmed but countless others in furtherance of their scheme to suppress opposition groups. *See supra* §§ I.A., I.D.

4. Defendant Engaged in a Joint Criminal Enterprise with Subordinates to Commit the Offenses Against Perceived Political Opponents, resulting in the Offenses Against Professor Ahmed

a. *Prima facie elements of joint criminal enterprise*

To establish a joint criminal enterprise claim, a plaintiff must first demonstrate that the defendant intended to enter into a common criminal design or plan. *Lizarbe*, 642 F. Supp. 2d at 490 (D. Md. 2009) (accepting joint criminal enterprise as a separate basis for liability); *Prosecutor v. Tadic*, IT-94-1-A, Judgment of Appeals Chamber, ¶ 227 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1081 (C.D. Cal, 2010).

A defendant is liable for offenses committed in the course of the execution of the common design or plan under any of the following circumstances: (1) he intended to commit the specific offenses; (2) a system of “ill-treatment” or “repression” existed, the defendant was aware of the repressive nature of the system, and he intended to further the system, even if he did not intend the specific offenses; or (3) the specific offenses fell outside of the participants’ common design but were “natural and foreseeable consequences” of the design. *See Tadic*, No. IT-94-1A, ¶¶ 195–206, 220, 227–229; *see also Lizarbe*, 642 F. Supp. 2d at 490. Liability for acts in accordance with a joint criminal enterprise does not require the actor to have given assistance that bears a direct causal relationship to the underlying crime. *Doe v. Nestle, S.A.*, 748 F. Supp. 2d at 1080-81. Instead, the requirement is met if the acts were directed to the furtherance of the common design. *Id.*; *see also Tadic*, No. IT-94-1-A, ¶¶ 227(iii), 229(iii).

b. *Defendant's conduct*

It is undisputed that members of the NSS, and Defendant's Department in particular, shared a common design to suppress perceived opposition to the Barre regime through the use of detention and torture. *See supra* § III.F.4.b. Defendant intended for Professor Ahmed to be tortured as demonstrated by his specifically ordering Professor Ahmed's torture; he was aware of the repressive nature of the system and intended to further it by abusing NSS prisoners and by overseeing such abuse in his role as Chief of the Department of Criminal Investigations of the NSS; and Professor Ahmed's arbitrary detention, cruel treatment, and torture were the natural and foreseeable consequences of this common design or plan. *See Lizarbe*, 642 F. Supp. 2d at 491 (finding a joint criminal enterprise adequately pled based on evidence of a defendant military official's presence at a meeting discussing an army raid and the official's command of a unit that participated in the raid by blocking the escape of fleeing villagers); *Krnjelac*, No. IT-97-25-A, ¶¶ 85, 111; *Tadic*, Case No. IT-94-1-A, ¶¶ 178–183, 230–232.

**V. CONCLUSION**

The overwhelming evidence in the record demonstrated that Plaintiff was arbitrarily detained; tortured; and subjected to cruel, inhuman, or degrading treatment or punishment, each of which constitutes a violation of the ATS and the TVPA. The evidence further demonstrates that Defendant was responsible for these acts directly and/or through command responsibility, aiding and abetting, conspiracy, or joint criminal enterprise liability. This is further bolstered by the Court's Order granting Plaintiff's Motion for Rule 37 Sanctions Against Defendant, ordering specified facts as established and drawing adverse inferences from Defendant's failure to comply

with his discovery obligations.<sup>143</sup> The Court should, therefore, grant Plaintiff's motion for partial summary judgment on the merits.

## **VI. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT**

### **A. The Legal Standard For Granting Default Judgment**

Federal Rules of Civil Procedure Rule 37 provides that if a party fails to comply with a court order, appear for his deposition, respond to interrogatories, or supplement responses, the court can "(vi) rende[r] a default judgment against the disobedient party." Fed. R. Civ. P. 37(b)(2)(A)(vi). The Sixth Circuit has laid out four elements that must be met to enter a default judgment: (1) whether failure to participate in discovery is due to willfulness, bad faith or fault and not inability to cooperate; (2) whether the moving party was prejudiced by the opposite party's failure to conduct discovery; (3) whether the defaulted party was sufficiently warned of the risk that default judgment may be entered; and (4) whether less drastic sanctions were imposed or considered before entry of default. *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1073 (6th Cir. 1990); *Bass v. Jostens*, 71 F.3d 237, 241 (6th Cir. 1995). As set out below, Defendant's conduct meets each of these elements.

### **B. This Court Should Grant Plaintiff's Motion In The Alternative For Default Judgment**

1. Defendant's Failure to Participate in Discovery Resulted from Willfulness, Bad Faith, or Fault.
  - a. *The standard for willfulness, bad faith, or fault*

The Sixth Circuit deems the failure to participate due to willfulness, bad faith, or fault, rather than inability to cooperate, to be the most important criterion in determining whether entry of default is appropriate. *Ndabishuriye v. Albert Schweitzer Soc'y, USA, Inc.*, 136 Fed. App'x

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<sup>143</sup> Dkt. # 96.

795, 800 (6th Cir. 2005). “Simply put, if a party has the ability to comply with a discovery order and does not, . . . entry of default is not an abuse of discretion.” *Bank One of Cleveland*, 916 F.2d at 1073 (internal citation omitted). Willful failure to participate occurs when there is a conscious and intentional failure to comply with discovery orders. *Bass*, 71 F.3d at 241 (citing *Brookdale Mill, Inc. v. Rowley*, 218 F.2d 728 (6th Cir. 1954)). A party may demonstrate willfulness, bad faith, or fault by such conduct as failing to respond to court orders, failing to meet discovery deadlines, refusing to answer interrogatories, providing evasive answers, or refusing to provide documents. See *Stamtec, Inc. v. Anson*, 195 Fed. App’x 473, 480-481 (6th Cir. 2006); *Thomas v. Victoria’s Secret Stores*, 141 F.R.D. 456, 458-459 (S.D. Ohio 1992) (citing *Brookdale Mill, Inc. v. Rowley*, 218 F.2d 728 (6th Cir. 1954)); *Bratka v. Anheuser-Busch Co.*, 164 F.R.D. 448, 460 (S.D. Ohio 1995).

In *Vogel v. Elliott*, No. 09-713–MRB-JGW, 2010 WL 4683950, at \*3 (S.D. Ohio, Sept. 9, 2010), this Court found the defendant’s failure to appear for his deposition, refusal to respond to communications from plaintiff’s counsel, and failure to produce any discovery responses exhibited willful bad faith. In *Vogel*, the defendant refused to comply with two court orders and refused delivery of a third. Further, he refused to respond to repeated emails, telephone calls, and written correspondence from the plaintiff’s counsel and did not communicate any explanation for his failure to attend his deposition. The court held that defendant’s conduct demonstrated a “complete disregard for the authority of the Court” and that “Defendant’s course of conduct evidence[d] a continuing course of bad faith that amount to an abuse of the judicial process, for which entry of a default judgment [was] appropriate.” *Id.*<sup>144</sup>

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<sup>144</sup> Defendant’s *pro se* status should not impact this Court’s assessment of whether entry of default judgment is appropriate against Defendant. *Monea v. Zimmerman* (In re *Family Resorts of Am., Inc.*), No. 91-4127, 1992 WL 174539, at \*3 (6th Cir. July 24, 1992) (“mere *pro se* status will not excuse a failure to respond properly to discovery requests.”) (citing *Bank One of Cleveland*, 916 F.2d at 1079); see also *Ward v. Am.*

b. *Defendant's conduct shows willfulness, bad faith, and fault*

Defendant willfully disregarded the Court's authority in bad faith, as he had the capacity to comply with his discovery obligations and chose not to. Defendant is aware of the duties associated with being a party in a case, especially since he has already been a party to two judicial procedures. Moreover, Defendant attended his deposition in his personal injury lawsuit, where compliance with his discovery obligations served his interests.

The record of Defendant's discovery abuses since December 2011 is telling: as detailed in section II above, despite numerous warnings and explanations of his obligations, Defendant failed to attend case management conferences, disregarded no less than five Court Orders and even failed to keep the Court and Plaintiff informed of his change of mailing address. Despite Plaintiff noticing Defendant's deposition, subpoenaing Defendant, sending letters informing Defendant of his obligation to attend his deposition, and despite the Court ordering Defendant to confirm his attendance at his noticed deposition, Defendant chose not to attend his deposition. Defendant failed to provide complete responses to Plaintiff's reasonable discovery requests, even after having been ordered to do so by this Court. To date Defendant has not produced a single document or provided any of the additional information required.<sup>145</sup>

Here, as in *Vogel*, despite repeated letters from the plaintiff and several court orders, the defendant has failed to appear for his deposition and to cooperate with discovery, showing a "complete disregard for the authority of the Court." No. 09-713-MRB-JGW, 2010 WL 4683950, at \*3. Thus, as in *Vogel*, "Defendant's course of conduct evidences a continuing course of bad faith that amount to an abuse of the judicial process, for which entry of a default judgment is appropriate." *Id.*

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*Pizza Co.*, 279 F.R.D. 451, 458 (S.D. Ohio, 2012) ("[p]ro se litigants are not to be accorded any special consideration when they fail to adhere to readily-comprehended court deadlines.")

<sup>145</sup> Hioureas S.J. Decl. ¶ 5.

2. Plaintiff Has Been Prejudiced by Defendant's Failure to Comply with His Discovery Obligations

a. *The standard for prejudice from non-compliance*

Prejudice to the moving party includes “deprivation of information through non-cooperation with discovery’ and need not include irreparable harm.” *Tech. Recycling Corp. v. City of Taylor*, 186 Fed. App’x 624, 636 (6th Cir. 2006) (citation omitted). The Sixth Circuit found that a party was prejudiced where it did not receive information critical to its case and wasted time and money dealing with a defendant’s abuses over several months, noting that “[p]laintiffs have been forced to turn to the Court time and time again to enforce compliance with the basic obligations of discovery, at a great cost in time and expense.” *Grange Mut. Cas. Co. v. Mack*, 270 Fed. App’x 372, 376 (6th Cir. 2008) (citation omitted); *see also Monea*, 1992 WL 174539, at \*4 (finding loss of evidence, increased difficulty in discovery or greater opportunity for fraud and collusion as indicia of prejudice). In *Vogel*, this Court held that the plaintiff “has been severely prejudiced by her inability to conduct discovery in this case, and has wasted significant time and money first attempting to gain defendant’s voluntary cooperation, and subsequently seeking defendant’s forced cooperation through this court. Plaintiff cannot be expected to do more.” *Vogel*, No. 09-713–MRB-JGW, 2010 WL 4683950, at \*3.

b. *Plaintiff has been prejudiced by defendant’s non-compliance*

Defendant’s disregard for his duty to comply with the discovery process since December 2011 has hampered Plaintiff’s ability to present his case, has wasted his time, and has caused him to expend resources without justification. Plaintiff has not been able to access key evidence to prepare his case as a result of Defendant’s failure to attend his duly noticed deposition, or respond sufficiently (if at all) to Plaintiff’s reasonable discovery requests. *See supra* § II.



As in *Vogel*, Plaintiff has been “severely prejudiced” by his inability to conduct discovery, Plaintiff has wasted significant time and money to secure Defendant’s voluntary and then forced cooperation through the court, and “Plaintiff cannot be expected to do more.” *See Vogel*, 2010 WL 4683950, at \*3.

3. Defendant Was Repeatedly Warned of the Risk of Sanctions and Ignored All Warnings

a. *The standard for warning*

Warnings can take different forms, be written or oral, in orders or recommendations. *See, e.g. Bass*, 71 F.3d at 242 (sanctioning a party who had been “amply warned that her continued failure to comply with the court’s discovery orders would result in the case being dismissed”); *Vogel*, 2010 WL 4683950, at \*3 (finding two warnings, in bold text, were “clear and obvious even to a *pro se* litigant.”); *Monea*, 1992 WL 174539, at \*3-4; *Bank One of Cleveland*, 916 F.2d 1067 at 1078-9; *Exact Software N. Am. v. Infocon*, 479 F. Supp. 2d 702, 713-714 (N.D. Ohio 1976).

b. *Defendant was more than adequately warned*

Defendant was clearly warned in no less than six instances that failure to properly discharge his duties with respect to discovery could subject him to sanctions up to and including default judgment, far exceeding the warnings this Court found to be clear and obvious in *Vogel*. Defendant was warned:

1. In this Court’s March 29, 2012 Discovery Order: “Defendant is cautioned that, under Fed. R. Civ. P. 37(b)(2)(A), a party failing to obey a discovery order and failure of a party to attend his deposition may be subject to sanctions up to and including the rendition of default judgment against the disobedient party”;<sup>146</sup>

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<sup>146</sup> Dkt. # 81

2. In Plaintiff's April 3, 2012 letter reiterating the Court's warning in bold text;
3. In Plaintiff's April 11, 2012 letter, stating:

[Y]our failure to attend your deposition or to in any way contact Plaintiff's counsel and express an intent to defend this lawsuit is a valid basis for monetary sanctions and may lead to a judgment against you on the merits of this case. I am writing to inform you that Plaintiff intends to file a motion with the Court to that effect in due course;<sup>147</sup>

4. In Plaintiff's May 23, 2012 letter explaining:

[I]f you fail to comply with the Court's Discovery Order, we may ask the Court for sanctions under Federal Rule of Civil Procedure 37(b)(2)(A). . . As we have previously informed you, we reserve our right to seek sanctions for your continuous failure to comply with the Court's orders;<sup>148</sup>

5. In Plaintiff's June 7, 2012 letter, advising that Plaintiff would "seek sanctions" against Defendant;<sup>149</sup> and

6. Then on June 19, 2012, Plaintiff filed a Motion for Rule 37 Sanctions Against Defendant. In this motion, Plaintiff noted that "[c]ourts have found that default judgment is an appropriate sanction for a party's failure to comply with discovery orders," further putting the Defendant on notice of the consequences his conduct.<sup>150</sup> On August 6, 2012, the Court granted Plaintiff's Motion for Sanctions Against Defendant, ordering specified facts as established and drawing adverse inferences from Defendant's failure to comply with his discovery obligations.<sup>151</sup>

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<sup>147</sup> Dkt. # 90, Hioureas Decl., ¶ 10, Exh. 3.

<sup>148</sup> Dkt. # 90, Hioureas Decl., ¶ 14, Exh. 7.

<sup>149</sup> Dkt. # 90, Hioureas Decl., ¶ 13, Exh. 6.

<sup>150</sup> Dkt. # 90 at 24, n.4 (internal citation omitted).

<sup>151</sup> Dkt. # 96.

4. The Court Has Considered and Taken Lesser Sanctions

a. *The standard for considering lesser sanctions*

The Supreme Court has emphasized the importance of the deterrent effect of entering a default judgment, thus encouraging the use of default judgment as sanction to only the most egregious conduct. *NHL v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976). However, the Court need not order lesser sanctions, if they would be futile. *Bank One of Cleveland*, 916 F.2d at 1079. *See also Bratka*, 164 F.R.D. at 463 (finding “an award of fees and expenses alone would not be a sufficient sanction” in a case where defendant failed to produce relevant documents and comply with a court order). This Court has also stressed that “a default judgment on the issue of liability would . . . have a direct relationship to the specific evidence which defendant failed to produce, namely evidence relevant to the issues of defendant’s fault.” *Bratka*, 164 F.R.D. at 463.

b. *Defendant’s conduct demonstrates that lesser sanctions would be futile*

The record demonstrates that the Court has considered and taken lesser sanctions including granting Plaintiff’s discovery motions and motion for Rule 37 sanctions against Defendant.<sup>152</sup> Defendant did not file any opposition to either of Plaintiff’s motions, and no sanctions have had any effect on Defendant’s willingness to participate in this case. In light of Defendant’s conduct, any lesser sanctions would be futile. *See supra* § II.

**VII. CONCLUSION**

The overwhelming evidence in the record demonstrated that Plaintiff was arbitrarily detained; tortured; and subjected to cruel, inhuman, or degrading treatment or punishment, each of which constitutes a violation of the ATS and the TVPA. The evidence further demonstrates

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<sup>152</sup> Dkt. # 90.

that Defendant was responsible for these acts directly and/or through command responsibility, aiding and abetting, conspiracy, or joint criminal enterprise liability. This is further bolstered by the Court's Order granting Plaintiff's Motion for Rule 37 Sanctions Against Defendant, ordering specified facts as established and drawing adverse inferences from Defendant's failure to comply with his discovery obligations. The Court should, therefore, grant Plaintiff's motion for partial motion for summary judgment on the merits.

In the alternative, the record demonstrates that Defendant's conduct fulfills the requirements for default judgment pursuant to Federal Rules of Civil Procedure Rule 37(b)(2)(A)(vi). Therefore, if the Court finds that Plaintiff has not met his burden with respect to summary judgment, Plaintiff respectfully requests that the Court enter default judgment against the Defendant.

In the event that the Court grants Plaintiff's motion for partial summary judgment or default judgment, Plaintiff respectfully requests an evidentiary hearing as to damages pursuant to Federal Rules of Civil Procedure Rule 55(b)(2) and Local Rule 7.1(b)(1).

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

<b>ABUKAR HASSAN AHMED,</b>	:	CASE NO. 2:10-cv-00342
<b>Plaintiff,</b>	:	
<b>v.</b>	:	JUDGE SMITH
	:	MAGISTRATE ABEL
<b>ABDI ADEN MAGAN,</b>	:	
<b>Defendant.</b>	:	

**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of August, 2012, I electronically transmitted the foregoing **MOTION, MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR DEFAULT JUDGMENT, THE EXPERT REPORT OF PROF. LEE CASSANELLI, THE DECLARATIONS OF ABUKAR HASSAN AHMED, CHRISTINA GEORGIA HIOUREAS, NICHOLAS WILLIAMS, HASSAN MOHAMED OMAR, ABDIRIZAK MOHAMED WARSAME, ABDULLAHI MOHAMED JIMALE, ABDULKARIM SHABEL IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT and the PROPOSED ORDER** with the Clerk of the Court using the CMJECF system for filing and Notice of Electronic Filing of the Motion to the following CMJECF registrants:

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