15-1831

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUHAIL NAJIM ABDULLAH AL SHIMARI; TAHA YASEEN ARRAQ RASHID; SALAH HASAN NUSAIFAL-EJAILI; ASA'AD HAMZA HANFOOSH AL-ZUBA'E,

Plaintiffs-Appellants,

and

SA'AD HAMZA HANTOOSH AL-ZUBA'E,

Plaintiffs,

v.

CACI PREMIER TECHNOLOGY INC.,

Defendant-Appellee,

and

TIMOTHY DUGAN; CACI INTERNATIONAL, INC., L-3 SERVICES, INC.,

Defendants.

On Appeal from the United States District Court
for the Eastern District of Virginia (Alexandria)

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMNESTY INTERNATIONAL, AND HUMAN RIGHTS WATCH IN SUPPORT OF PLAINTIFFS-APPELLANTS

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RULE 29(C)(5) STATEMENT

Pursuant to Fed. R. App. P. 29(c)(5) *amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the undersigned counsel for *amici* hereby discloses that *amici* have no parent corporations and that no corporation directly or indirectly holds 10% or more of the ownership interest in any of the *amici*.

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INTEREST OF *AMICI CURIAE*

Amici are civil liberties and human rights organizations whose work includes a commitment to ensuring States uphold the worldwide prohibitions on torture, cruel, inhuman, and degrading treatment, and war crimes. An essential element of the prohibition is the guarantee of the right of victims to seek effective redress through the courts. *Amici* respectfully submit this brief to aid the Court in its review of the district court's unprecedented decision that the judiciary has no role to play in adjudicating claims alleging severe abuse, torture, and grave violations of U.S. and international law.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution, the laws of the United States, and the international laws and treaties by which the United States is bound. As part of this organizational mission, the ACLU works to uphold the bans against torture and cruel treatment through litigation, advocacy, and public education. Through Freedom of Information Act lawsuits it has secured the public release of over one hundred thousand pages of official U.S. government documents detailing post-9/11 U.S. torture policies and practices. It has also litigated on behalf of victims of torture in this Court and others, including by representing the plaintiffs

in *El–Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), and *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012).

Amnesty International is a global movement of people working for the protection of internationally recognized human rights. The organization has members and supporters in more than 150 countries and is independent of any government, political ideology, economic interest or religion. It bases its work on international human rights instruments adopted by the United Nations and regional bodies. As a core part of its mission, Amnesty International has campaigned for decades to put an end to the use of torture and cruel, inhuman or degrading treatment or punishment.

Human Rights Watch, a non-profit organization, is the largest U.S.-based international human rights organization. It was established in 1978 to investigate and report on violations of fundamental human rights and now reports on some 90 countries worldwide. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others in order to end abusive practices. Human Rights Watch has documented torture in many countries, and has advocated globally and consistently for respect of the Convention Against Torture, including the requirement to conduct prompt and impartial investigations into credible allegations of torture and to provide redress to

victims. Human Rights Watch's US Program has monitored U.S. compliance with the Convention against Torture extensively for years, producing research on torture in the United States in many contexts, including in prison conditions, immigration detention, torture by the military, and torture by the Central Intelligence Agency. U.S. failure to account for torture and other ill-treatment undermines its efforts to advocate against torture to other countries, and consequently global compliance with the prohibition. Its advocates in the field often raise abusive detention and interrogation practices with officials in other countries who frequently cite to U.S. abuses and failure to account for them to justify their own actions. Therefore, the issues raised by this case are of great importance to Human Rights Watch.

ARGUMENT

To *amici*'s knowledge, aside from the district court in this case, no U.S. court has stated that it lacks manageable standards to determine whether particular conduct meets the recognized definition of torture. That is no surprise, as torture has been unambiguously proscribed for centuries, and its definition has been consistent under U.S. and international law for decades. The prohibition on cruel, inhuman, and degrading treatment or punishment ("CIDT") under both U.S. and international law is similarly clear.[1] The district court's contrary conclusions are incorrect. They are belied by the fact that courts in the United States and throughout the world have routinely addressed the question of whether particular conduct falls within the torture and CIDT prohibitions. And to the extent that there are questions about the contours of "the distinction between torture and CIDT," A1404, courts have the ability, responsibility, and obligation to adjudicate them; any difficulty the district court posited in explaining the distinction to a jury does not render claims for torture and CIDT nonjusticiable.

The district court further erred by misunderstanding the absolute nature of the prohibition on torture and CIDT. The court wrongly reasoned that the Executive Branch could unilaterally abrogate the prohibition on CIDT, rendering noncitizens detained by the United States in Iraq unprotected. And it erred in

[1] The prohibition is often abbreviated as "CIDT/P," but *amici* use "CIDT" throughout to conform to the decision of the district court.

finding that it could not adjudicate the plaintiffs' war crimes claims, based on its mistaken belief that the protections of Common Article 3 of the Geneva Conventions turn on whether a detainee is "innocent."

Finally, *amici* respectfully submit that the district court's conclusion that it lacked judicially manageable standards to determine the plaintiffs' claims is profoundly dangerous. It led the court to abdicate the critically important role of the judiciary in adjudicating claims of torture and CIDT, undermining vital human rights prohibitions and threatening victims' rights to a remedy.

I. TORTURE AND CRUEL, INHUMAN, AND DEGRADING TREATMENT ARE UNIVERSALLY PROSCRIBED AND CLEARLY DEFINED.

There can be no question that the prohibition against torture is one of the most fundamental and established principles of the U.S. legal system, dating back to the English Bill of Rights of 1689. *See Gregg v. Georgia*, 428 U.S. 153, 169 (1976). For more than three centuries, Anglo-American jurisprudence has rejected the use of torture and cruelty as a means of extracting information, *see Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944), or of inflicting punishment, *see Gregg*, 428 U.S. at 173.

In its rejection of torture, U.S. law accords with the law of nations, which prohibits torture absolutely. The torturer, "like the pirate and slave trader before him," is "*hostis humani generis*, an enemy of all mankind." *Filartiga v. Pena-*

Irala, 630 F.2d 876, 890 (2d Cir. 1980). Just as "[t]orture has long been illegal" in the United States, 151 Cong. Rec. 30,756 (2005) (statement of Sen. Graham), it has also long been prohibited under international law. For decades, this fundamental prohibition has been recognized by U.S. courts as a *jus cogens* norm.[2] *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004); *Filartiga*, 630 F.2d at 880–85 (listing numerous sources, including the opinion of the State Department, showing that torture is prohibited as a matter of customary international law and renounced by virtually all countries). The international legal prohibition on torture is enshrined in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture" or "CAT"), which the United States signed and ratified more than two decades ago.[3] *See U.S. v. Belfast*,

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[2] "A *jus cogens* norm, also known as a 'peremptory norm of general international law,' can be defined as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'" *Yousef v. Samantar*, 699 F.3d 763, 775 (4th Cir. 2012) (quoting Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331). This Court and others have acknowledged the *jus cogens* status of the prohibition against torture. *See, e.g.*, *Yousuf*, 699 F.3d at 777; *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1261 (11th Cir. 2012); *Nuru v. Gonzales*, 404 F.3d 1207 (9th Cir. 2005).

[3] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 *signed* Apr. 18, 1988. As of September 28, 2015, there are 158 States Parties to the Convention. Torture is also prohibited under the International Covenant on Civil and Political Rights ("ICCPR") art. 7, Dec. 19, 1966, 999

611 F.3d 783, 802 (11th Cir. 2010) (recognizing that "CAT became the law of the land on November 20, 1994"). In light of the web of prohibitions against torture, "a violation of the international law of human rights is (at least with regard to torture) *ipso facto* a violation of U.S. domestic law." *Yousuf v. Samantar*, 699 F.3d 763, 777 (4th Cir. 2012) (quoting *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir.2000) (quotation marks omitted).

The prohibition on CIDT is also firmly established. This principle is recognized in the authoritative Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987), which provides that CIDT "violates international law." The norm prohibiting CIDT is an entrenched and longstanding principle of international law, enshrined in numerous international treaties and declarations. *See, e.g.*, Universal Declaration of Human Rights, art. 5, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948 (prohibiting "cruel, inhuman or degrading treatment"); International Covenant on Civil and Political Rights ("ICCPR") art. 7, Dec. 19, 1966, 999 U.N.T.S. 171, 175 (same). The Convention Against Torture also explicitly prohibits CIDT, requiring that "[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1." CAT, *supra*, pmbl., arts. 1, 16. This

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U.N.T.S. 171, 175, which the U.S. ratified in 1992. As of September 28, 2015, there are 168 States Parties to the ICCPR.

Court has cited authority recognizing the prohibition on CIDT as *jus cogens*. *See Yousuf*, 699 F.3d at 775 (citing Evan J. Criddle & Evan Fox–Decent, *A Fiduciary Theory of Jus Cogens*, 34 Yale J. Int'l L. 331, 331 (2009) (explaining that "jus cogens . . . include[s], at a minimum, the prohibitions against . . . torture or other cruel, inhuman, or degrading treatment or punishment")); *see also* Restatement (Third) of Foreign Relations Law § 702 and cmt. n (same).[4]

Torture and cruel, inhuman, and degrading treatment are specifically barred in the context of wartime detention under the Geneva Conventions and the War Crimes Act. Common Article 3 of the Geneva Conventions requires that detainees "shall in all circumstances be treated humanely," and prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 287. From 1997, when the War Crimes Act was enacted, to 2006, any violation of Common Article 3 was a crime under U.S. law. *See* Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1998, Pub. L. No. 105–118, 111 Stat. 2386 (1997) (codified at 18 U.S.C. § 2441(c) (2000)). In 2006 Congress amended the War Crimes Act by limiting its scope to "grave breaches" of Common Article 3. *See* War Crimes Act, 18 U.S.C.

[4] When the Senate ratified the Convention Against Torture, it made a reservation to ensure that the CIDT prohibition would be interpreted consistently with existing prohibitions in U.S. law. *See* S. Exec. Rep. No. 101-30 at 36. That reservation does not purport to render CIDT lawful.

§ 2441(c)(3). That amendment specifically maintained the longstanding criminalization of "torture" and "cruel or inhuman treatment." *See id.* §§ 2441(d)(1)(A–B).[5]

Torture is clearly defined in both the Convention Against Torture and domestic law. Article 1.1 of the Convention defines torture as

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

As the Senate Committee on Foreign Relations noted in recommending the ratification of the Convention, this definition "correspond[s] to the common understanding of torture as an extreme practice which is universally condemned." S. Exec. Rep. No. 101–30, at 13 (1990). Similarly, the Torture Act proscribes "any act committed by a person acting under the color of law specifically intended to

[5] Non-grave breaches of Common Article 3 remain unlawful, even if they are not prosecutable under the War Crimes Act. *See e.g.*, 152 Cong. Rec. S10,409, (daily ed. Sept. 28, 2006) (statement of Sen. Biden) ("First, our colleagues did the right thing by rejecting the attempt by the administration to reinterpret, by statute, Common Article III of the Geneva Conventions."); 152 Cong. Rec. S10,399, (daily ed. Sept. 28, 2006) (statement of Sen. Levin: "And would the Senator from Arizona agree with my view that section 8(a)(3) does not make lawful or give the President the authority to make lawful any technique that is not permitted by Common Article 3 or the Detainee Treatment Act?" Sen. McCain: "I do agree." Sen. Warner: "I agree with both of my colleagues.").

inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." 18 U.S.C. § 2340. "Severe mental pain and suffering" is further defined under the Torture Act as "prolonged mental harm caused by or resulting from" either:

> (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.

Id. § 2340 (2).[6]

In keeping with their established role, courts in Alien Tort Statute suits have consistently evaluated on a case-by-case-basis whether specific conduct violated the torture prohibition. *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d at 890; *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994); *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Aldana v. Del Monte Fresh Produce, N.A. Inc.*, 416 F.3d 1242 (11th Cir. 2005); *see also* Pet. Br. 55–56. Federal courts also routinely apply the U.S. regulatory definition of torture in hundreds of cases involving immigration relief for individuals who seek

[6] *Amici* note that the definition in the Torture Act imposes limitations not present in the Convention's broad prohibition on torture. Those limitations are not at issue here.

protection under the Convention Against Torture. *See, e.g.*, *Avendano-Hernandez v. Lynch*, — F.3d –, No. 13-73744, 2015 WL 5155521, at *5 (9th Cir. Sept. 3, 2015) ("Rape and sexual abuse due to a person's gender identity or sexual orientation, whether perceived or actual, certainly rises to the level of torture for CAT purposes."); *Tchemkou v. Gonzales*, 495 F.3d 785, 795 (7th Cir. 2007) (finding torture definition satisfied by conduct including "a beating and a detention under deplorable conditions," and an "abduction and beating" that "only could be described as the intentional infliction of severe pain or suffering"). Likewise, international courts and tribunals regularly apply the definition of torture to claims of particular abuses. *See, e.g.*, *Maritza Urrutia v. Guatemala*, Judgment of November 27, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 103 (2003) (finding that the victim suffered physical violence amounting to torture); *Selmouni v. France*, Application No. 25803/94, Judgment of 28 July 1999 (abuse amounted to torture); *Aydin v. Turkey*, 1997-V Eur. Ct. H.R. 1866, 1873-74, 1891 (same).

Courts also regularly determine whether particular conduct constitutes cruel, inhuman, and degrading treatment. Courts "focus[ ] on the particular conduct in question to decide whether the customary international norm against cruel, inhuman, and degrading treatment is sufficiently specific, universal and obligatory as applied to that conduct." *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1023 (S.D. Ind. 2007). Although the contours of the definition develop on a case-

by-case basis, this does not undermine the status of the prohibition on CIDT, nor render violations non-justiciable under the Alien Tort Statute. *See Xuncax v. Gramajo*, 886 F.Supp. 162, 187 (D. Mass. 1995) (explaining that "[i]t is not necessary for every aspect of what might comprise a standard" for CIDT to "be fully defined and universally agreed upon before a given action meriting the label is clearly proscribed under international law"). The district court's concern that it "would have a difficult time instructing a jury on the distinction between torture and CIDT," A1404, cannot support its abdication of the judiciary's essential role:

> That it may present difficulties to pinpoint precisely where on the spectrum of atrocities the shades of cruel, inhuman, or degrading treatment bleed into torture should not detract from what really goes to the essence of any uncertainty: that, distinctly classified or not, the infliction of cruel, inhuman or degrading treatment by agents of the state, as closely akin to or adjunct of torture, is universally condemned and renounced as offending internationally recognized norms of civilized conduct.

Tachiona v. Mugabe, 234 F. Supp. 2d 401, 437 (S.D.N.Y. 2002), *rev'd on other grounds sub nom. Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004).

To be sure, there may be legitimate questions about whether specific conduct rises to the level of torture, cruel, inhuman, or degrading treatment, or war crimes—just as there may be questions in a constitutional case about whether particular conduct "shocks the conscience." Answering those questions is ultimately the role of the courts, which are charged with the responsibility to interpret the relevant statutes and norms and the constitutional "duty . . . to say

what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). A lack of complete clarity in the law is not a license to abdicate courts' role in deciding controversies.[7]

Yet the district court did not even consider whether the defendant violated the prohibition on torture. It held instead that "the lack of clarity as to the definition of torture during the relevant time period creates enough of a cloud of ambiguity to conclude that the court lacks judicially manageable standards to adjudicate the merits of Plaintiffs' ATS torture claim." A1403. The district court based its conclusion on the Ninth Circuit's qualified immunity decision in *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012). *Amici* respectfully submit that *Padilla* is wrongly decided, as articulated below. But the Ninth Circuit's erroneous conclusion in that case is also legally irrelevant to the question here. *Padilla* concerned only the question of qualified immunity—inapplicable here—based on the Executive Branch's self-created "debate" in memoranda that by their own terms did not apply to military detainees in Iraq—as plaintiffs all were. *Cf.* Pet. Br. 57. It says nothing about whether courts have standards against which to assess torture claims.

[7] The "judicial Power" conferred by Article III belongs to the courts alone; it may not be ceded to or exercised by any other branch. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58–59 (1982). It has long been held that neither the Legislature nor the Executive may "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *United States v. Klein*, 80 U.S. 128, 146 (1871).

Padilla provides no support for the district court's conclusion that torture claims arising in 2003 are nonjusticiable. In evaluating the wholly separate question of qualified immunity, the Ninth Circuit considered whether it was "beyond debate" between 2001 and 2003 that "specific interrogation techniques allegedly employed against Padilla, however appalling, necessarily amounted to torture." 678 F.3d at 768 (quotation marks omitted). That question has nothing to do with whether courts *are capable of determining* whether specific conduct constitutes torture. The Ninth Circuit addressed an entirely distinct question, applicable only in the qualified immunity context: whether courts *had previously determined* the contours of a specific right, so that "existing precedent" already "placed the statutory or constitutional question beyond debate" at the time the right was violated. *Padilla*, 678 F.3d at 758 (quotation marks omitted). The court concluded that immunity was warranted for the defendant in Mr. Padilla's case based on what it characterized as "considerable debate, both in and out of government, over the definition of torture as applied to specific interrogation techniques." *Id.* at 768. That conclusion, regardless of its merit, has no bearing on this case. The judicial inquiry necessary here—whether the alleged abuses violate the prohibition on torture—does not turn on what was "beyond debate" in 2003.

Although the Ninth Circuit's decision in *Padilla* has no relevance outside of the qualified immunity context, it is worth considering the dangers of the court's

reasoning about the ostensible uncertainty it thought existed between 2001 and 2003. As the Department of Justice Office of Professional Responsibility concluded, the "debate" around torture was largely a manufactured one, created by the Executive Branch in an attempt to justify torture. *See* Dep't of Justice, Office of Prof'l Responsibility, Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists (July 29, 2009) ("OLC Investigation") 226 (memoranda purporting to objectively evaluate torture "were drafted to provide the client with a legal justification for an interrogation program that included the use of certain" coercive techniques).

The Executive Branch's attempt to generate a legal fiction of ambiguity where the courts and Legislature have adopted clear standards undermined the absolute prohibition on torture. In the wake of the September 11, 2001 attacks, the CIA sought advice from lawyers at the Justice Department's Office of Legal Counsel as to whether specific torture techniques could be legally employed. The Office of Professional Responsibility evaluated the CIA's motivation in seeking that secret legal analysis and found "ample evidence that the CIA did not expect just an objective, candid discussion of the meaning of the torture statute." OLC Investigation at 226. Instead, "the agency was seeking maximum legal protection for its officers" and even sought "advance declination of criminal prosecution." *Id.*

Executive Branch lawyers from the Office of Legal Counsel crafted memoranda that used spurious legal reasoning in an attempt to muddy the definition of and prohibition on torture. By creating "illogical" and "convoluted" justifications for the CIA's chosen torture techniques—including notoriously relying "upon the phrase 'severe pain' in medical benefits statutes to suggest that the torture statute applied only to physical pain that results in organ failure, death, or permanent injury"—they created the appearance of ambiguity where none existed. OLC Investigation at 228, 230. The resulting memoranda "had the effect of authorizing a program of CIA interrogation that many would argue violated the torture statute, the War Crimes Act, the Geneva Convention, and the Convention Against Torture." OLC Investigation at 251–52.

Once exposed, the Executive Branch's self-generated "cloud of ambiguity" around torture quickly dissipated. There was no legitimate uncertainty in 2001 to 2003 as to whether the abuse inflicted on Jose Padilla, resulting in his "'severe physical pain,'" the "'profound disruption of his senses and personality,'" and lasting "'severe mental and physical harm,'" ran afoul of the prohibition on torture. *Padilla*, 678 F.3d at 766-67 (describing combined and prolonged use of coercive methods included sleep deprivation, threats of physical assault and death, and extended use of stress positions). The reasoning in the memoranda that underpinned the manufactured torture "debate" has been widely repudiated and the

memos have been withdrawn.[8] As the President recognized, there can be no debate that "we tortured some folks."[9]

II. TORTURE AND CRUEL, INHUMAN, AND DEGRADING TREATMENT ARE UNEQUIVOCALLY PROHIBITED AT ALL TIMES.

The district court's decision misapprehended the categorical nature of the prohibitions on subjecting prisoners to torture and cruel, inhuman, and degrading treatment. There are no gaps in the absolute prohibition: neither the status and identity of the victim, nor their "innocence," nor the location and context of the abuse is relevant to evaluating a claim of torture or CIDT. The law is simple and unambiguous. Torture and CIDT are at all times and in all places prohibited; all individuals are protected by law.

The Convention against Torture provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal

[8] The Office of Professional Responsibility concluded that the memoranda underpinning the torture "debate" were so flawed, misleading, and outcome-oriented as to constitute professional misconduct. *See* OLC Investigation at 254. Associate Deputy Attorney General David Margolis found that memos contained "significant flaws" but did not meet the standard for professional discipline. David Margolis, Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report 67 (Jan. 5, 2010). He noted, however, that his "decision should not be viewed as an endorsement of the legal work that underlies those memoranda." *Id.* at 2.

[9] Press Release, White House, Press Conference by the President (Aug. 1, 2014) (transcript of press conference), https://www.whitehouse.gov/the-press-office/2014/08/01/press-conference-president

political instability or any other public emergency, may be invoked as a justification of torture." CAT, *supra*, at art. 2(2). This prohibition was viewed by the drafters as "necessary if the Convention is to have significant effect, as public emergencies are commonly invoked as a source of extraordinary powers or as a justification for limiting fundamental rights and freedoms."[10] And in 2000, the U.S. Department of State confirmed that the United States was in compliance with the Convention's absolute prohibition on torture. Initial Report of the United States of America to the United Nations Committee Against Torture ¶ 6, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) (representing that U.S. law allowed no exceptions to the prohibitions on torture and CIDT for "exigent circumstances" or "orders from a superior officer or public authority.").[11]

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[10] President's Message to Congress Transmitting the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, May 23, 1988, S. Treaty Doc. No. 100-20, reprinted in 13857 U.S. Cong. Serial Set at 3 (1990).

[11] The absolute prohibition on torture has been affirmed by numerous international tribunals. For example, the European Court of Human Rights emphasized in *Selmouni v. France*, 29 Eur. H.R. Rep. 403 (1999), that the prohibition against torture is "one of the most fundamental values of democratic societies," and that "[e]ven in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment." The same principle has been recognized by the Inter-American Court of Human Rights, *see Lori Berenson Mejia v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 119 (Nov. 25, 2004)); and the International Criminal Tribunal for the former Yugoslavia, *see Prosecutor v. Furundzija*, Case No. IT-95-17/1-T (Oct. 2, 1995).

The district court's erroneous decision that the prohibition on CIDT was suspended at Abu Ghraib based on the mere say-so of the Executive Branch abdicated judicial responsibility and ignored the legislative branch's own statements. The district court failed to examine whether the Executive Branch possessed authority to disregard the firmly-established ban on CIDT, simply accepting as dispositive that "[t]he position of the United States, at the time of the conduct involved in this action took place, was that the provision in the Convention Against Torture addressing CIDT did not apply to alien detainees held abroad." A1404. The only basis for the court's conclusion that the plaintiffs could not seek a remedy for their cruel, inhuman, and degrading treatment was a 2005 letter from Assistant Attorney General William E. Moschella. A1404 n. 4. The district court's failure to evaluate whether the Executive Branch could unilaterally limit the prohibition on CIDT at Abu Ghraib is especially misguided in light of the Legislature's clear statement, several months before the Moschella letter, that recognized the force of that prohibition specifically as applied to U.S. detainees at Abu Ghraib. *See* Reagan National Defense Authorization Act for Fiscal Year 2005 ("Reagan Act"), Pub. L. No. 108-375, § 1091(a)(6), 118 Stat. 1811, 2068 (codified at 10 U.S.C. § 801 note) (confirming that "the Constitution, laws, and treaties of the United States" prohibit "cruel, inhuman, or degrading treatment of foreign prisoners held in custody by the United States"). The

Executive was not free to unilaterally limit the ban on CIDT at Abu Ghraib, and the court's decision erred in effectively conceding that it could.[12]

The district court's belief that "the elements of an ATS war crime claim" require a determination of whether tortured prisoners "were insurgents, innocent civilians, or even innocent insurgents," A1405, is erroneous and baseless. The Geneva Conventions allow for no exceptions to the prohibition on torture and cruel, inhuman, or degrading treatment. As the Supreme Court recognized, these "minimum" protections are provided by Common Article 3 to all prisoners detained in a conflict in the territory of a signatory to the Conventions. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006). Common Article 3 prohibits subjecting any prisoner "at any time and in any place whatsoever" to "cruel treatment and torture" or "humiliating and degrading treatment." Inflicting these abuses on military detainees is a grave breach of the Geneva Conventions and

[12] Moreover, as the Ninth Circuit has explained, *jus cogens* norms are not subject to individual government's self-interested choices. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (*jus cogens* is "binding on all nations and is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations" (quotation marks omitted)). Accordingly, this Court has held that *jus cogens* violations are inherently criminal and at all times proscribed, even if the state purports to excuse them: "[A]s a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign." *Yousuf*, 699 F.3d at 776; *see also Comm. of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 940-41 (D.C. Cir. 1988) (observing that fundamental international legal norms "may well restrain our government in the same way that the Constitution restrains it").

criminally prohibited under the War Crimes Act—regardless of whether victims are "innocent" or "guilty," whether "civilians" or "insurgents." In evaluating war crimes alleging detainee and prisoner abuse, the identity and status of the victims are simply irrelevant.

III. JUDICIAL ABSTENTION FROM DETERMINING CLAIMS OF TORTURE UNDERMINES THE TORTURE PROHIBITION.

A fundamental component of the ban against torture is the provision of an effective judicial remedy for victims. The importance of the judicial process as an avenue for redress for victims of torture has been recognized by U.S. courts, ratified by the other branches of government, and enshrined in international treaties by which the United States is bound. If upheld, the district court's determination that no judicially manageable standards exist to adjudicate claims of torture would drastically undermine the torture ban.

Courts have long emphasized the importance of redress for torture. When the Court of Appeals for the Second Circuit upheld the right of noncitizen torture victims to bring claims under the Alien Tort Statute in the landmark *Filartiga* decision, it recognized that "giving effect to a jurisdictional provision enacted by our First Congress[] is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence." 630 F.2d at 890.

Congress's repeated legislation against torture has stressed the importance of providing victims with an avenue to seek redress for their injuries. In *Sosa v.*

Alvarez- Machain, the Supreme Court noted that Congress enacted the Torture Victims Protection Act (TVPA) to further buttress the accountability for torture provided by the Alien Tort Statute. *See* 542 U.S at 730–731. In enacting the TVPA, Congress acknowledged that "universal condemnation of human rights abuses 'provide[s] scant comfort' to the numerous victims of gross violations if they are without a forum to remedy the wrong." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000) (quoting H.R. Rep. No. 102-367, at 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 85). The Legislature viewed the TVPA and the Alien Tort Statute as complementary, with both houses of Congress acknowledging that remedies must be available in the United States for victims of torture. *See generally* H.R. Rep. No. 102-367 (1991); S. Rep. No. 102-249 (1991).[13] The Executive has likewise recognized the critical importance of providing a civil remedy to victims of torture. When President George H.W. Bush signed the TVPA into law, he stated it was consistent with a "strong and continuing commitment to advancing respect for and protection of human rights throughout the world," and that the "United States must continue its vigorous

[13] *See also* Torture Victim Protection Act: Hearings and Markup Before the Committee on Foreign Affairs and Its Subcommittee on Human Rights and International Organizations, 100th Cong., 1 (1988) (statement of Rep. Yatron, Member, House Subcomm. on Human Rights and International Organizations) ("International human rights violators visiting or residing in the United States have formerly been held liable for money damages under the Alien Tort Claims Act. It is not the intent of the Congress to weaken this law, but to strengthen and clarify it.").

efforts to bring the practice of torture and other gross abuses of human rights to an end wherever they occur." Statement on Signing the Torture Victim Protection Act of 1991, Mar. 12, 1992, 28 Weekly Comp. Pres. Doc. 465 (Mar. 16, 1992).

Numerous international treaties by which the United States is bound establish the right to an effective remedy for torture. The Convention Against Torture specifically requires that states ensure that their legal system allows torture victims to "obtain[] redress" through "an enforceable right to fair and adequate compensation." CAT, *supra*, art. 14. The State Department has reported on the United States' compliance with this provision, representing that "U.S. law provides various avenues for seeking redress, including financial compensation, in cases of torture and other violations of constitutional and statutory rights relevant to the Convention." United States Written Response to Questions Asked by the United Nations Committee Against Torture ¶ 5, Apr. 28, 2006 (Question 5), http://www.state.gov/j/drl/rls/68554.htm; *see also* United States Periodic Report to the United States Committee Against Torture ¶ 147, Aug. 5, 2013, http://www.state.gov/documents/organization/213267.pdf (same).

Judicial abstention undermines both the United States' treaty obligations as well as Congress's careful work to guarantee remedies to victims of torture. Congress enacted the Torture Statute, the War Crimes Act, and the Torture Victims Protection Act with the understanding that the federal courts were competent to

adjudicate whether conduct fell within the statutory definitions. In enacting the TVPA, Congress specifically recognized the federal courts' continued success in adjudicating claims of torture under the Alien Tort Statute. *See* S. Rep. No. 102-249 (1991) (explaining that "[t]he TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 of title 28"). If the definition of torture is rendered unclear whenever the Executive Branch makes self-serving legal pronouncements that torture or CIDT are not prohibited, the Alien Tort Statute would no longer provide either the deterrence or the remedy that Congress sought to expand through the TVPA. And because there is no way of distinguishing the definition of torture in the TVPA from the definition the district court reviewed here, that statute would likewise be rendered a dead letter so long as there were any dispute about whether particular conduct constitutes torture.

Judicial abstention from claims of torture is also inconsistent with a fundamental principle of international law: the principle of *ubi ius ibi remedium*—where there is a right, there is a remedy. The leading international formulation of this principle comes from the 1928 holding of the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case: "[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation." *Chorzów Factory* (Ger. v. Pol.), 1928 P.C.I.J.

(ser. A) No. 17, at 29 (Sept. 13) (emphasis added). Since the decisions of the International Military Tribunal at Nuremberg, established in the aftermath of the Second World War, international law has required states to hold perpetrators accountable for human rights violations not only through criminal punishment, but also through redress to victims.[14] An essential means of meeting this obligation is the requirement under international law that states open their legal systems to claims by victims and survivors of human rights abuses.[15]

* * *

Thirty-five years ago, the *Filartiga* court took "a small but important step in the fulfillment of the ageless dream to free all people from brutal violence." 630 F.2d at 890. If torture claims were nonjusticiable, that dream would become a fantasy. *Amici* respectfully urge this Court to make clear that the Fourth Circuit is still open to victims of torture—regardless of when and where they were abused.

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[14] *See* Robert H. Jackson, Final Report to the President on the Nuremberg Trials, Oct. 7, 1946, U.S. Dep't of State Bull. vol. XV, nos. 366-391, Oct. 27, 1946, at 771, 774; Universal Declaration on Human Rights, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), art. 8.

[15] *See, e.g.*, U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, paras. 2(b), 2(c), and 3(d), U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

CONCLUSION

For the reasons stated above, the judgment of the district court should be reversed.

Dated: September 28, 2015

Respectfully submitted,

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/s Dror Ladin
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Attorney of Record for *Amici Curiae*
Dated: September 28, 2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 28, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. All counsel for appellants and appellee in this case are registered CM/ECF users, so they will be served by the appellate CM/ECF system.

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