No. 20-827

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ZAYN AL-ABIDIN MUHAMMAD HUSAYN,
AKA ABU ZUBAYDAH, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* TORTURE SURVIVORS MAHER ARAR ET AL., IN SUPPORT OF RESPONDENTS ABU ZUBAYDAH ET AL.

PROF. HANNAH R. GARRY
Counsel of Record
UNIVERSITY OF SOUTHERN CALIFORNIA GOULD SCHOOL OF LAW
699 Exposition Blvd., #442
Los Angeles, CA 90089
hgarry@law.usc.edu
(213) 740 9154

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INTERESTS OF *AMICI*

Amici curiae are individuals or surviving family members of individuals who, like respondent Mr. Zayn al-Abidin Muhammad Husayn a/k/a Abu Zubaydah in this case, were subjected to acts of severe physical and mental harm – torture – while in detention, and interrogated by United States forces or their proxies in Afghanistan, Djibouti, Guantánamo Bay ("Guantánamo"), Pakistan, Syria, and other locations where the U.S. Central Intelligence Agency ("CIA") operated detention and interrogation centers commonly referred to as "black sites."[1] *Amici* and their interests in this case are as follows:

Mr. Maher Arar, a Canadian citizen, was intercepted by United States officials in September 2002 at John F. Kennedy International Airport in New York while on his way home to Canada. He was detained for thirteen days, denied access to the courts, and surreptitiously delivered to Syria, a country known to use torture in interrogations. In Syria, Mr. Arar was beaten, whipped with electrical cables, and interrogated for up to eighteen hours a day for two weeks. He was confined in an

[1] Pursuant to Rule 37(6) of the Rules of the Supreme Court of the United States, Counsel of Record discloses that no counsel for any party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No other person or entity other than *amici curiae* or their counsel contributed money for the preparation or submission of this brief. All parties have consented to the filing of this brief pursuant to Rule 37(3)(a) of the Rules of the Supreme Court of the United States.

underground grave-like cell for more than ten months, and finally released after a year, without charge, to return to his wife and two young children. Upon his return to Canada, Mr. Arar became a prominent human rights activist and sought justice and accountability for what government officials did to him. Canada convened a Commission of Inquiry into Canadian officials' conduct, which conducted a comprehensive investigation and issued a three-volume report, fully exonerating Mr. Arar. Canada apologized to Mr. Arar and compensated him for its role in his ordeal. In 2007, U.S. Congress members publicly apologized to Mr. Arar, who testified (via video-link) at a House Joint Committee Hearing about his rendition to Syria for torture. In contrast, Mr. Arar's case against U.S. officials was dismissed, which the Second Circuit Court of Appeals *en banc* affirmed (7-4), finding that judicial review of an extraordinary rendition would affect diplomacy, foreign policy, and national security interests. *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (*en banc*). Mr. Arar has been awarded several human rights awards, and in 2007, Time Magazine named him one of the TIME 100 most influential people in the world in the Heroes and Pioneers category. For Mr. Arar, redress is a form of admission that the perpetrators have done wrong to the victim. While it does nothing to undo the torture he went through, it helps him heal his psychological scars and move on with his life. As such, he supports Abu Zubaydah's efforts to seek a remedy, and requests the Court to allow for the depositions of former U.S. contractors in this case.

Mr. Mourad Benchellali, a French national, was captured in December 2001 by Pakistani

military forces on the Afghan border where he was handed over to U.S. military forces. He was then transferred to Kandahar prison, and finally to the Guantánamo Bay detention facility in January 2002. In Kandahar, Mr. Benchellali was beaten and humiliated for days. Guards would take the prisoners' clothes off, force them to pile up on each other, and take photographs. Mr. Benchellali was forced to wake up every half hour during the night, violently interrogated several times a day, and only fed once a day. Upon his arrival to Guantánamo, he was taken to the "X-RAY" camp for about a month and a half and held in a 1.7 by 2 meter cage where he had to sleep in the same position without touching the wire fence. He was later transferred to the "DELTA" camp, where he was regularly subjected to interrogation measures including sensory bombardment, stress positions, extreme cold, and sexual violence and humiliation. Mr. Benchellali was released from Guantánamo on July 27, 2004. On November 14, 2004, together with *amicus* Mr. Nizar Sassi, listed below, he filed a criminal complaint in French courts with respect to the torture they suffered in U.S. detention facilities. An investigation was opened in 2005 but terminated in 2017 on grounds of State immunity and lack of U.S. cooperation. The decision to terminate was upheld on appeal, even though French courts acknowledged that Mr. Benchellali and Mr. Sassi had been tortured. The complaint is now pending before the European Court of Human Rights. In addition, Mr. Benchellali and Mr. Sassi filed a civil suit in French courts for compensation for torture, which is pending on appeal. Nearly two decades since he was first

detained by U.S. forces, Mr. Benchellali has not yet been fully recognized as a victim of State-sponsored torture and has not been compensated for what he has suffered. As *amicus* in this case, he seeks to underscore the importance of redress and reparations for victims like himself and Abu Zubaydah who have endured such serious crimes.

Mr. Murat Kurnaz, a Turkish national residing in Germany, was nineteen years old when apprehended from a civilian bus in Pakistan. He was ultimately turned over to U.S. forces for a bounty and detained by the U.S. military in an outside pen in Kandahar, Afghanistan, where he was subjected to severe abuse, including stress positions, simulated drowning, and being hung by his arms over his head for prolonged periods of time. Upon transfer to Guantánamo, he was beaten, sexually taunted, subjected to prolonged solitary confinement and sleep deprivation, and involuntarily drugged, among other things, even as U.S. officials recognized he had no connections to terrorism. When Mr. Kurnaz was repatriated to Germany in 2016, he did his best to live a normal and productive life, starting his own family, and working for the German government as a mentor to refugee boys. To this day, he feels deep pain and humiliation with respect to his treatment by U.S. officials, which he never expected from a country like the United States. While he has been outspoken about his detention, he still retains a deep sense of injustice and loss due to the lack of accountability for those who so clearly violated his human rights. Mr. Kurnaz knows many who have suffered torture by U.S. officials and believes that for all such persons, including Abu Zubaydah, finding

out the truth about the abuse they endured is critical for personal healing and well-being, as well as regaining a sense of justice in the world.

Ms. Zahra Ahmed Mohamed is the surviving spouse of **Mohammed Abdullah Saleh al-Asad**, a Yemeni national. On December 26, 2003, Mr. al-Asad was taken from their family home in Tanzania. Early the next morning, he was rendered to Djibouti at the behest of the United States. There, he was secretly detained and interrogated in a local facility for about two weeks before being handed to a CIA rendition team. During his time in the CIA detention program, Mr. al-Asad was subjected to numerous forms of ill-treatment, including "capture shock," a brutal procedure amounting to torture that the CIA deployed to foster what it termed "learned helplessness," a sense of total subjection to U.S. control. Mr. al-Asad was stripped naked, sexually assaulted, diapered, chained, and strapped down to the floor of an airplane, which transported him to Afghanistan. There, Mr. al-Asad was held in a pitch-dark cell, where he was unable to stand fully upright because of a shackle connecting him to the wall. His American captors blasted loud, thumping music twenty-four hours a day, overloading his senses, and preventing him from sleeping. Several months later, Mr. al-Asad was transferred to a purpose-built black site, where he was subjected to dietary manipulation, held in complete isolation, and kept away from sunlight. Mr. al-Asad was released from U.S. detention in May 2005. Until the time of his death in 2016, Mr. al-Asad experienced debilitating effects of the torture he experienced while in the secret detention program.

Mr. Nizar Sassi, a French national, was captured by Pakistani military forces in December 2001 on the border between Pakistan and Afghanistan. He was then handed over to U.S. military forces on site. He was transferred to Kandahar prison and then to the Guantánamo Bay detention facility in January 2002. In the Kandahar prison, Mr. Sassi was repeatedly beaten, humiliated, and threatened. Upon arrival, he and other detainees were greeted by "welcoming committees" that put the detainees in line and wrapped cable fences around them, and then a solder on each side of the line would pull the cable. As he and other detainees were moved from tent to tent, they would be "greeted" by being beaten, climbed on or urinated upon. At Guantánamo, Mr. Sassi was taken to the "X-RAY" camp for about a month and a half, where he was held in a cage and subjected to beatings every day. He was later transferred to the "DELTA" camp, where he suffered further physical and mental abuse, including through beatings, sensory overload, and sleep deprivation. Mr. Sassi was released from Guantánamo on July 27, 2004. In November 2004, he joined a criminal complaint in French courts with *amicus* Mr. Mourad Benchellali, listed above, addressing the torture they suffered in U.S. detention facilities. An investigation was opened in 2005 but terminated in 2017 on grounds of State immunity and lack of U.S. cooperation. The decision to terminate was upheld on appeal, even though French courts acknowledged that Mr. Sassi and Mr. Benchellali had been tortured. The complaint is now pending before the European Court of Human Rights. In addition, Mr. Sassi and Mr. Benchellali filed civil

suit in French courts for compensation for torture, which is pending on appeal. Since he was first detained by U.S. forces, Mr. Sassi has not yet been fully recognized as a victim of State-sponsored torture and has not been compensated as a victim of a serious crime. In light of the many obstacles he has faced in obtaining redress for the torture he suffered nearly two decades ago, Mr. Sassi hopes that his participation here will strengthen Abu Zubaydah's claim for a remedy in this case.

Amici understand, first-hand, the importance of justice and accountability for severe human rights violations. International human rights instruments recognize and affirm as key principles the promotion of rule of law, the pursuit of truth, the provision of remedies to victims, and the prevention of recurrence in the wake of systemic and severe violations of human rights, including through the punishment of those who committed or furthered torture.

Amici note that no less than the former President of the United States has recognized that the United States violated fundamental tenets of domestic and international law in its response to the September 11th attacks, including by authorizing, ordering, committing, and furthering torture.[2] Yet, in the

[2] *See, e.g.,* President Barack Obama, Press Conference by the President (Aug. 1, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/press-conference-president (". . . [I]n the immediate aftermath of 9/11 we did some things that were wrong. . . . [W]e tortured some folks."); President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university ("And in some cases, I believe we

nearly twenty years since, there has been no full accounting for the severe and long-lasting harm done to so many, including *amici*, through the U.S. rendition, interrogation, and detention program.

Amici make this submission to assist the Court as it considers the balance to be struck for protection of legitimate national security interests while also ensuring that the United States meets its core legal obligations to prevent, punish and redress torture.

SUMMARY OF ARGUMENT

This case implicates multiple fundamental rules of international law and, for many in the international community, serves as a bellwether as to the United States' commitment and adherence to rule of law.

The right to be free from torture is a fundamental right of the highest order from which there is no derogation, including in times of war or national emergency. The United States was instrumental to the codification of the prohibition against torture at the global level in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture" or "CAT"), which it ratified in 1994.[3] American leadership in the drafting of the Convention led not

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compromised our basic values – by using torture to interrogate our enemies, and detaining individuals in a way that ran counter to the rule of law.").

[3] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Apr. 18, 1988, S. Treaty Doc. No. 20, 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT].

only to the absolute prohibition of torture, but also the creation of an enforcement regime that recognizes territorial and nationality-based jurisdiction as well as the principle of universal jurisdiction. The Convention requires that the 172 States Parties assist one another in advancing criminal proceedings concerning torture, including by supplying all evidence at their disposal. CAT, art. 9. This robust enforcement regime reflects the global commitment to break the cycle of impunity for torture so as to prevent acts that strike against the inherent dignity of all persons from being committed in the future.

The United States likewise led on the inclusion of provisions that recognize the right of victims of torture to complain to and seek justice from an impartial tribunal, and affirm that victims of torture enjoy an enforceable right to a remedy.

The United States' assertion in this case of the judicially-created evidentiary State secrets privilege to block the deposition testimony of former government contractors for use in a criminal investigation of torture in Poland, conflicts with its obligations under international law, including as a signatory to the Convention Against Torture, to further prevention, punishment and remedies for acts of torture. The United States has failed to provide any meaningful measure of justice and accountability for torture, including to *amici curiae*, in its own courts. It must not be permitted to impede such efforts elsewhere.

The decision by the Court of Appeals for the Ninth

Circuit would allow the United States to meet its international legal obligations while protecting legitimate national security interests. That decision should be affirmed and the case remanded for further proceedings.

ARGUMENT

I. Torture is a Universally Recognized *Jus Cogens* Violation of International Law.

Torture is prohibited under treaty and customary international law binding on the United States. *See* International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, S. Treaty Doc. 95-20 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]; CAT, art. 4; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3(1)(a), 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III] (prohibiting torture as a war crime); *id.*, art. 129 (requiring parties to the Convention to criminalize grave breaches); *id*., art. 130 (defining torture as a grave breach); Geneva Convention Relative to the Protection of Civilian Persons in Times of War, art. 3(1)(a), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] (prohibiting torture as a war crime); *id.*, art. 146 (requiring parties to the Convention to criminalize grave breaches); *id*., art. 147 (defining torture as a grave breach). Torture is also prohibited under domestic law.[4] The prohibition is grounded in the recognition of the "inherent dignity" of all

[4] Torture Act, 18 U.S.C. §§ 2340-2340A (2004) [hereinafter Anti-Torture Statute]; *see also* 18 U.S.C. § 2441(d)(1)(A) (2006) (prohibiting torture as a war crime).

persons. CAT, Preamble.

The prohibition of torture constitutes a *jus cogens* norm that creates obligations *erga omnes*; as such, the right to be free from torture is non-derogable and imposes obligations that bind all States and which are owed by States to the international community as a whole.[5] ICCPR, art. 4(2) (no derogations are permitted from the prohibitions against torture and other cruel, inhuman, or degrading treatment); CAT, art. 2(2) ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture"); *Prosecutor v. Delalić*, Case No. IT-96-21-T, Trial Judgment, ¶ 454 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (finding that the prohibition against torture is absolute, non-derogable in all circumstances and a *jus cogens* norm); *Prosecutor v. Delalić*, Case No. IT-96-21-A, Appeal Judgment, n.225 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (affirming that torture is a *jus cogens* norm). Just as a state of war neither justifies nor allows the use of torture, combatting terrorism – engaging in a so-called "war on terror" – or public emergencies that threaten the life of the nation likewise provide no legal basis for

[5] According to the Vienna Convention on the Law of Treaties, a *jus cogens* norm (or peremptory norm) of international law is 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." Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331.

employing acts of torture. *See* Manfred Nowak & Elizabeth McArthur, The United Nations Convention Against Torture: A Commentary 2, 91 (Oxford University Press 2008); *see also Al Shimari v. CACI Premier Techn., Inc.*, 840 F.3d 147, 162 (4th Cir. 2016) (Floyd, J., concurring) ("While executive officers can declare the military reasonableness of conduct amounting to torture, it is beyond the power of even the President to declare such conduct lawful.").

The Convention Against Torture 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.

CAT, art. 1(1).

The U.S. Anti-Torture Statute, enacted in 1994 to implement the Convention Against Torture, "tracks the provisions of the CAT in all material respects." *United States v. Belfast*, 611 F.3d 783, 806 (11th Cir.

2010). It defines torture as an act "specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control." 18 U.S.C. § 2340(1).

Certain conduct, including acts alleged to have been committed against Abu Zubaydah, has been universally recognized to constitute an underlying act of torture. This includes acts such as "sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain," S. Exec. Rep. No. 101-30, at 14 (1990); "[i]nfliction of pain through chemicals or bondage (other than legitimate use of restraints to prevent escape)[;] [f]orcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time[;] [f]ood deprivation[;] [a]ny form of beating" and "[m]ock executions[;] [a]bnormal sleep deprivations[;] [c]hemically induced psychosis," U.S. Dep't of Army, *Field Manual 34 52: Intelligence Interrogation*, 1-8 (Sept. 28, 1992), https://www.loc.gov/rr/frd/Military_Law/pdf/intel_interrrogation_sept-1992.pdf; and "the use of rape and other forms of sexual violence," 22 U.S.C.A. § 2152, note (West 1999) (Sec. 3. definition).[6] Notably, courts and human

[6] *See also Prosecutor v. Kvočka*, Case No. IT-98-30-T, Trial Judgment, ¶ 144 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001) ("beating, sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance, as well as threats to torture, rape, or kill relatives . . ." held to constitute torture); U. N. Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, ¶ 24, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) [hereinafter Committee Against Torture Conclusions] (finding acts "involving sexual humiliation, 'waterboarding', 'short shackling' and using dogs to induce fear, [. . .] constitutes

rights bodies have assessed the totality of treatment to determine if it meets the "severe pain" threshold.[7]

Torture arises not only from the rendering of severe physical pain, but also from severe mental harm. Indeed, the drafters of the Convention Against Torture considered the infliction of severe mental harm sufficiently grave to constitute torture even in the absence of physical harm. CAT, art. 1(1) ("severe pain or suffering, whether physical or mental"); *see also* 18 U.S.C. § 2340(1) ("severe physical *or* mental pain or suffering") (emphasis added).

The Convention Against Torture further prohibits the transfer or return ("*refouler*") of detainees to countries where there are substantial grounds for believing they face a risk of being subjected to torture – or indeed, as relevant to the underlying facts of the case at issue and to the experience of *amici* subjected to "extraordinary rendition"[8] – where they were

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torture or cruel, inhuman or degrading treatment or punishment").

[7] For example, the United Nations Committee Against Torture, which monitors the implementation of the CAT, in its conclusions and recommendations to Israel, found that "(1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill" constitute torture. U. N. Comm. Against Torture, *Report of the Committee Against Torture*, ¶ 257, U.N. Doc. A/52/44 (Sept. 10, 1997).

[8] For more on the President George W. Bush-era practice of "extraordinary rendition" and the legal framework applicable thereto *see* Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 Geo. Wash. L.

intended to be tortured. CAT, art. 3(1). *See also I.N.S. v. Stevic*, 467 U.S. 407, 417, n.20 (1984) (referencing obligations of *non-refoulement* under the 1951 Convention Relating to the Status of Refugees). *Non-refoulement* has been recognized as a peremptory norm under international law. U.N. Comm. Against Torture, *Summary Record of the 624th Meeting*, ¶¶ 51-52, U.N Doc. CAT/C/SR.624 (Nov. 24, 2004).

II. The United States is obligated to prevent, punish and redress torture.

The United States ratified the Convention Against Torture in 1994. As a State Party to the Convention, as well as to the 1949 Geneva Conventions,[9] the United States is obligated to take certain measures to prevent, punish and redress torture. It is recalled that domestic statutes – and judicially-created evidentiary privileges or defenses – should be applied to conform with the United States' international legal obligations and commitments. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch), 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."). *See also*

Rev. 1333 (2007); Katherine R. Hawkins, *The Promises of Torturers: Diplomatic Assurances and the Legality of "Rendition,"* 20 Geo. Immigr. L.J. 213 (2006).

[9] *See* Geneva Convention III, art. 3(1)(a), (prohibiting torture as a war crime); *id.*, art. 129 (requiring parties to the Convention to criminalize grave breaches); *id.*, art. 130 (defining torture as a grave breach); Geneva Convention IV, art. 3(1)(a), (prohibiting torture as a war crime); *id.*, art. 146 (requiring parties to the Convention to criminalize grave breaches); *id.*, art. 147 (defining torture as a grave breach).

Vienna Convention on the Law of Treaties, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith"); *id.*, art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"). As the Trial Chamber in the seminal *Furundžija* case observed, "torture is prohibited by a peremptory norm of international law . . . [which] serves to internationally de-legitimise any legislative, administrative or judicial act authorizing torture." *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, ¶ 155 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

First, the United States is obligated to ensure that acts of torture are offences under its criminal law. CAT, art. 4.[10] The United States did so, in part, when it enacted its Anti-Torture Statute, which provides jurisdiction over acts of torture committed "outside the United States" when the perpetrators are nationals of the United States or present in the U.S.[11] 18 U.S.C. § 2340A. States' authorities "shall" proceed "to a prompt and impartial investigation, whenever

[10] The Convention Against Torture also requires that States prevent "acts of cruel, inhuman or degrading treatment, or punishment which do not amount to torture" in any territory under its jurisdiction when committed by a public official or another acting at the instigation or with the consent of a public official. CAT, art. 16(1). *See also* Geneva Convention III, art. 129; *id.*, art. 130; Geneva Convention IV, art. 146; *id.*, art. 147.

[11] Unusually, the Anti-Torture Statute excludes acts of torture committed on the territory of the United States and only applies extraterritorially. The Committee Against Torture has repeatedly called for the United States to enact a federal crime of torture consistent with article 1 of the Convention. *See* Committee Against Torture Conclusions, ¶ 13.

there is a reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." CAT, art. 12.

States Parties to the CAT are obligated to establish jurisdiction not only over acts of torture committed on their territory or by their nationals but also over alleged torturers present in their territory, regardless of nationality or where the acts of torture occurred. CAT, art. 5. The mandate to provide universal jurisdiction for torture was explained as such: "Torture . . . is . . . primarily committed by State officials, and the respective governments usually have no interest in bringing their own officials to justice." Manfred Nowak & Elizabeth McArthur, The United Nations Convention Against Torture: A Commentary 316 (Oxford University Press 2008). Notably, it was "the delegation from the United States that had convincingly argued that universal jurisdiction was intended primarily to deal with situations where torture is a State policy and where the respective government, therefore, was not interested in extradition and prosecution of its own officials accused of torture." *Id.* at 315.

Once the presence of the suspect is guaranteed, the Convention Against Torture requires that the State must immediately proceed to a preliminary inquiry. CAT, art. 6(2). This inquiry will make it possible to determine the follow-up necessary, in particular if the State Party itself will conduct the proceedings to their conclusion.

Under the definition in both the CAT and the U.S. Anti-Torture Statute, torture requires State action. *See* CAT, art. 1(1) (harm 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"); 18 U.S.C. § 2340(1) ("an act committed by a person acting under the color of law").[12] The United States has recognized that all U.S. officials, as well as contractors, are prohibited from engaging in torture. *See* Committee Against Torture Conclusions, ¶ 6. The United States and its current or former officials cannot cite official positions to evade obligations to investigate or punish acts of torture.[13]

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[12] There is no state action requirement for the commission of torture as a war crime or as an underlying act of genocide. *See Kadić v. Karadžić*, 70 F.3d. 232 (2d. Cir. 1995).

[13] Because torture is committed by State actors or non-State actors working with the State, superior orders cannot be invoked to justify torture. CAT, art. 2(3). Likewise, it would be contrary to the very object and purpose of the CAT to allow immunities to prevent the realization of one of the primary goals of the CAT. Because acts of torture cannot be attributable to the State due to the consensus among States that such acts are impermissible and illegal under all circumstances, they cannot fall within the scope of an official's sovereign authority under international law for which they enjoy immunity from prosecution. *See, e.g., Prosecutor v. Blaškić*, Case No. IT-95-14-AR108 *bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 41 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997) ("those responsible for [war crimes, crimes against humanity and genocide] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity"); *Attorney Gen. of Israel v. Eichmann*, 36 I.L.R. 277, 310 (Sup. Ct. Israel 1962) ("international law postulates that it is impossible for a State to sanction an act that violates its severe prohibitions, and from this follows the idea which forms the core of the concept of 'international crime' that a person who was a party to such crime must bear individual responsibility for it. If it were

In order to achieve the goal of preventing torture, States also have obligations to assist in the investigation and prosecution of alleged torturers carried out by other States Parties to the Convention Against Torture. Moreover, the *jus cogens* status of the prohibition against torture impacts inter-State relations. States Parties are required to "afford one another the greatest measure of assistance in connection with criminal proceedings" regarding allegations of torture "including the supply of all evidence at their disposal necessary for the proceedings." CAT, art. 9(1). Treaties on mutual judicial assistance can be used to facilitate the fulfilment of such obligations – and should not be written or applied so as to subvert the object and purpose of the substantive obligations. *See* Vienna Convention on the Law of Treaties, art. 31.

Finally, and as will be discussed in detail in Section III, the CAT requires States Parties to provide a remedy. Article 14 mandates States to ensure that victims of torture have "an enforceable right to fair and adequate compensation, including the means for as full a rehabilitation as possible." Torture Victim Protection Act of 1991, 28 U.S.C. § 1350, note, was enacted to satisfy this obligation, in part.

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otherwise, the penal provisions would be a mockery.").

III. The United States' Blanket Assertion of State Secrets Conflicts with its Obligation to Uphold the Right to a Remedy for Victims of Torture.

The principle *ubi jus ibi remedium* — "where there is a right, there is a remedy" — is well-established in international law. This fundamental tenet of law was recognized by the Permanent Court of International Justice ("PCIJ") in the seminal *Factory at Chorzów* case, which declared "a principle of international law that *the breach of an engagement involves an obligation to make reparation*." *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13) (emphasis added). Affirming the responsibility of States to redress breaches of their international obligations, the PCIJ further recognized that reparation "is the indispensable complement of a failure to apply a convention." *Id*.[14] The failure to provide a remedy promotes impunity, which in turn leads to further human rights abuses. Respect for and realization of the right to a remedy can thus be understood as a linchpin for upholding the international legal order.

In the century since the PCIJ decision, the right of victims of serious human rights violations to an effective remedy has been enshrined in numerous

[14] *See also* International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of Its Fifty-Third Session* art. 31(1), 2 Y.B. Int'l L. Comm'n 26–30, U.N. Doc. A/56/10 (2001) ("[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.").

international human rights treaties ratified by the United States, as well as in regional instruments.[15] The ICCPR, which the United States ratified in 1992, requires that all States Parties "ensure that any person whose rights or freedoms … are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." ICCPR, art. 2(3)(a). The CAT

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[15] *See, e.g.*, G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 10, 1948), art. 8 ("[e]veryone has the right to an effective remedy . . . for acts violating the fundamental rights granted him"); Convention on the Elimination of All Forms of Racial Discrimination art. 6, Dec. 21, 1965, 660 U.N.T.S. 195 ("States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions [. . .]"); American Convention on Human Rights art. 25, Nov. 22, 1969, 1144 U.N.T.S. 123 ("[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the [S]tate concerned or by this Convention"). *See also* European Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 221 ("Everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 27(1), June 9, 1998, CAB/LEG/665 ("If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."); Rome Statute of the International Criminal Court art. 75, July 17, 1998, 2187 U.N.T.S. 3 ("The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.").

mandates that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." CAT, art. 14. The Human Rights Committee, which oversees Member State compliance with the ICCPR, emphasizes that remedies must not just be available in theory but that "States Parties must ensure that individuals . . . have accessible and effective remedies to vindicate" their rights. U.N. Human Rights Comm., *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004) ("HRC General Comment 31"). The Committee Against Torture has emphasized the same in its General Comment on the Convention Against Torture, stating that redress "encompasses the concepts of 'effective remedy' and 'reparation.'" U.N. Comm. Against Torture, *General Comment No. 3 on Implementation of Article 14 by States Parties*, ¶ 2, U.N. Doc. CAT/C/GC/3 (Dec. 13, 2012) ("Committee Against Torture General Comment 3").

The right to a remedy has also been recognized in the case-law of regional bodies, including within the Inter-American system. In *Velásquez Rodríguez v. Honduras*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7 (July 21, 1989), the Inter-American Court of Human Rights issued a landmark decision on the right to a remedy. According to the Inter-American Court, "every violation of an international obligation which results in harm creates a duty to make adequate reparation." *Id.* at ¶ 25. This principle has frequently been

affirmed by the Inter-American Court.[16]

In 2005, the United Nations General Assembly acknowledged "the importance of addressing the question of remedies and reparation […] in a systematic and thorough way at the national and international levels." U.N. General Assembly, *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,* U.N. Doc. A/RES/60/147 (Dec. 16, 2005) ("U.N. Basic Principles"). The U.N. Basic Principles recognize that victims of gross violations of international human rights law are entitled to "equal and effective access to justice;" "adequate, effective and prompt reparation for harm suffered;" and "access to relevant information concerning violations and reparation mechanisms." U.N. Basic Principles, ¶ 11.

Notably, the right to a remedy or redress is not limited to compensation. It is a "comprehensive reparative concept [that] entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition." Committee Against Torture General Comment 3, ¶ 2; *see also* U.N. Basic

[16] *See, e.g.*, *Fleury v. Haiti*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 236, ¶ 115 (Nov. 23, 2011) (describing obligation to provide reparations as a "customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility."); *Neptune v. Haiti*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 180, ¶ 152 (May 6, 2008) ("It is a principle of international law that any violation of an international obligation that results in damage establishes the obligation to repair it adequately.").

Principles, ¶ 18; ICCPR, ¶ 16. *Amici* highlight that the ability to seek judicial remedies is a crucial means for achieving an effective remedy, particularly where there is a just process that allows for active and meaningful victim participation.[17] In the absence of such remedies, the Human Rights Committee has indicated that the purposes of the ICCPR would be defeated. HRC General Comment 31, ¶ 17. Particularly relevant to the matter before this Court and fundamentally linked to the other aspects and purposes of the right, a remedy also encompasses the right to an effective investigation.[18] The European Court of Human Rights recognized that an "effective official investigation" is the natural consequence of the obligation on States to protect fundamental rights – including the right to be free from torture – "[o]therwise, the general legal prohibition of torture and inhuman and degrading treatment and

[17] Active victim participation in judicial proceedings does not eliminate the obligations on States to investigate, facilitate and further proceedings, or shift the burden onto the victim to achieve a just outcome in judicial proceedings. *See, e.g.,* Committee Against Torture General Comment 3, ¶ 30 (States are obligated to "make readily available to the victims all evidence concerning acts of torture or ill-treatment upon the request of victims, their legal counsel, or a judge.").

[18] *See* European Court of Human Rights, Judgement in the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania,* App. No. 47848/08, Eur. Ct. H.R. at 55 (2014) (discussing the right to "a thorough and effective investigation capable of leading to the identification and punishment of those responsible"); *Aksoy v. Turkey*, App. No. 21987/93, Eur. Ct. H.R. at 26 (1996) ("notion of 'effective remedy' entails, in addition to payment of compensation where appropriate, thorough and effective investigation capable of leading to identification and punishment of those responsible").

punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control and with virtual impunity." *Al Nashiri v. Poland*, App. No. 28761/11, Eur. Ct. H.R. at 184 (2014). Further, *amici* endorse the conclusion that, regardless of outcome, an effective investigation is a critical step towards restoration of the dignity of victims of torture as rights holders. *See* Committee Against Torture General Comment 3, ¶¶ 4, 30.

The right to a remedy likewise includes the right to truth.[19] In this regard, the former United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, has expressed concern about States, including the United States, invoking secrecy provisions "to conceal illegal acts from oversight bodies or judicial authorities, or to protect itself from criticism, embarrassment and – more importantly – liability." U.N. Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism,*

[19] *See, e.g.,* U.N. Comm'n on Human Rights, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy*, ¶¶ 14-39, U.N. Doc. E/CN.4/2006/52 (Jan. 23, 2006) (on the administration of justice and the right to truth); G.A. Res. 68/165 (Dec. 18, 2013) (calling on States *inter alia* to preserve evidence of gross human rights violations to facilitate knowledge of such violations, their investigation and access to effective remedy); Human Rights Council Res. 9/11, U.N. Doc. A/HRC/RES/9/11, (Sept. 18, 2008); Committee Against Torture General Comment 3, ¶¶ 16-17.

Martin Scheinin, ¶ 59, U.N. Doc. A.HRC/10/3, (Feb. 4, 2009). He explained, "[t]he human rights obligations of States, in particular the obligation to ensure an effective remedy, require that such legal provisions [concerning secrecy provisions and public interest immunities] must not lead to a priori dismissal of investigations, or prevent disclosure of wrongdoing, in particular when there are reports of international crimes or gross human rights violations." *Id.* at ¶ 60. Indeed, the U.N. Basic Principles include "[v]erification of the facts and full and public disclosure of the truth." U.N. Basic Principles, ¶ 22.

Concomitant with the right to a remedy is the right of victims to have their claims adjudicated by an independent and impartial tribunal. ICCPR, art. 14; *see also* CAT, art. 13. As this Court has long recognized, it is the judiciary's role to interpret the law, mete out justice, and provide redress to victims. Undue deference to the Executive branch or judicially-created evidentiary privileges such as the State secrets privilege cannot be used to either impair the ability of courts to fulfil their duty to apply and uphold the law or deny victims their fundamental rights to justice and a remedy.

Based on the foregoing, it cannot be disputed that the United States has an obligation to provide a remedy to victims of torture. The position advanced by the United States in this case runs contrary to its obligations to victims of torture, including *amici* as well as Abu Zubaydah.

Moreover, as a matter of both its treaty

obligations and customary international law, the United States also has an obligation to assist other States in meeting *their* obligations to prevent, investigate, punish and remedy acts of torture. CAT, art. 9.[20] As set out above, the anti-torture regime is intended to be international in scope and relies upon States working together to achieve the goals of preventing torture, and when that fails, to punish those who perpetrated or furthered it so as to deter its reoccurrence and provide a remedy to victims. Failure by States to do so results in further injury to victims, undermines the prohibition against torture, and may itself constitute a violation of the prohibition.[21] The United States must not impede other States from achieving a measure of justice for victims of torture that it has thus far failed to provide. Denying *in toto* the depositions of the former U.S. contractors in this case constitutes just such an improper obstruction of justice.

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[20] *Amici* observe that in addition to obligations under the Convention Against Torture and customary international law, Poland has independent obligations to provide victims of torture with a remedy. *See, e.g.,* Directive 2012/29/EU, of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA (L 315).

[21] *See Aksoy v. Turkey*, Eur. Ct. H.R. at 26 (1996); *Assenov v. Bulgaria,* App. No. 24760/94, Eur. Ct. H.R. at 23 (1998). *See also*, *Labita v. Italy,* App. No. 26772/95, Eur. Ct. H.R. at 25-26 (2000); *Ilhan v. Turkey*, App. No. 22277/93, Eur. Ct. H.R. at 22-23 (2002); *Bueno-Alves v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 164, ¶¶ 88-90, 108 (2007).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit in this case should be affirmed and the case remanded for further proceedings.

Respectfully submitted,

PROF. HANNAH R. GARRY
Counsel of Record
UNIVERSITY OF SOUTHERN CALIFORNIA
GOULD SCHOOL OF LAW
699 Exposition Blvd., #442
Los Angeles, CA 90089
(213) 740-9154
hgarry@law.usc.edu

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