No. 08-1555

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF *et al.*,

Respondents.

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

BRIEF FOR RETIRED MILITARY PROFESSIONALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

LAURIE R. BLANK
ACTING DIRECTOR
INTERNATIONAL HUMANITARIAN LAW CLINIC
Emory Law School
Atlanta, GA 30322
(404) 712-1711

VIRGINIA A. SEITZ*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

January 27, 2010

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. OUR MILITARY HAS A LONG TRADITION OF ADHERENCE TO AND ENFORCEMENT OF THE LAW OF ARMED CONFLICT, PARTICULARLY THE PROHIBITION AGAINST TORTURE	10
A. The U.S. Military Has Always Prohibited Torture In Accordance With International Law	12
B. The U.S. Military Has A Centuries-Long Tradition Of Accountability For Torture And Other Abuses	14
II. GRANTING IMMUNITY WOULD UNDERMINE THE COMPREHENSIVE FRAMEWORK THAT THE U.S. HAS DESIGNED TO DETER TORTURE, ENSURE ACCOUNTABILITY, AND PROTECT OUR TROOPS	16
A. U.S. Adherence To The Law Of Armed Conflict And The Prohibition Of Torture In Particular Provides Reciprocal Protections For U.S. Servicemen And Women Overseas	16
B. Accountability Measures, Like The TVPA, Promote The Critical National Security Objective Of Deterring Rampant Human Rights Violations	19

TABLE OF CONTENTS – continued

Page

III. WHEN IT ENACTED THE TVPA, CONGRESS INTENDED TO BUTTRESS THESE PROTECTIONS AND PROVIDE A REMEDY FOR U.S. TROOPS TORTURED OVERSEAS 23

CONCLUSION 27

TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES – continued

Page

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Page

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Page

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Page

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INTEREST OF *AMICI CURIAE*[1]

Amici are retired military officers. Lieutenant General Robert G. Gard Jr., USA (Ret.) is a retired Lieutenant General who served in the U.S. Army. His military assignments included combat service in Korea and Vietnam. He is currently a consultant on international security and President Emeritus of the Monterey Institute for International Studies.

Lieutenant General Claudia J. Kennedy, USA (Ret.) is the first and only woman to achieve the rank of three-star general in the U.S. Army. She served as Deputy Chief of Staff for Army Intelligence, Commander of the U.S. Army Recruiting Command, and Commander of the 703rd military intelligence brigade in Kunia, Hawaii.

Lieutenant General Charles Otstott, USA (Ret.) served 32 years in the Army. As an Infantryman, he commanded at every echelon, including command of the 25th Infantry Division (Light) from 1988-1990. His service included two combat tours in Vietnam. He completed his service in uniform as Deputy Chairman, NATO Military Committee, 1990-1992.

Major General Fred E. Haynes, USMC (Ret.) is a combat veteran of World War II, Korea and Vietnam. He was a captain in the regiment that seized Mt. Suribachi, Iwo Jima on February 23, 1945. In Korea, he was Executive Officer of the 2nd Bn., 1st Marines. During the Vietnam War, he commanded the Fifth Marines, and was G-3 of the Third Marine Amphibious Force. During the Kennedy and Johnson

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[1] No person or entity other than *Amici* made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief, and the letters of consent have been filed with the Clerk.

eras, he served as Pentagon Director, Near Eastern and South Asian Affairs. As a general officer he commanded the Second and Third Marine Divisions. He is chairman of the Combat Veterans of Iwo Jima, and recently published a book, *The Lions of Iwo Jima: The Story of Combat Team 28 and the Bloodiest Battle of Marine Corps History*.

Rear Admiral John D. Hutson, JAGC, USN (Ret.) served in the U. S. Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson now serves as President and Dean of the Franklin Pierce Law Center in Concord, New Hampshire.

Major General Melvyn S. Montano, ANG (Ret.) retired as Adjutant General of New Mexico in 1999, completing a military career of more than 45 years. He began his military career in 1954 enlisting in the New Mexico Air National Guard. In 1970, after serving 16 years, he received a direct commission as a First Lieutenant. He is also a Vietnam veteran.

Brigadier General David M. Brahms, USMC (Ret.) served in the Marine Corps from 1963-1988. He was the Corps' senior legal adviser from 1983 until his retirement. General Brahms currently practices law in Carlsbad, California and sits on the board of directors of the Judge Advocates Association.

Brigadier General James P. Cullen, USA (Ret.) is a retired Brigadier General in the U.S. Army Reserve Judge Advocate General's Corps and last served as the Chief Judge (IMA) of the U.S. Army Court of Criminal Appeals. He currently practices law in New York City.

Brigadier General David R. Irvine, USA (Ret.) enlisted in the 96th Infantry Division, United States Army Reserve, in 1962. He received a direct

commission in 1967 as a strategic intelligence officer. He maintained a faculty assignment for 18 years with the Sixth U.S. Army Intelligence School, teaching prisoner of war interrogation and military law. He retired in 2002, as Deputy Commander for the 96th Regional Readiness Command. General Irvine served four terms as a Republican legislator in the Utah House of Representatives.

Brigadier General Richard O'Meara, USA (Ret.) is a retired Brigadier General in the U.S. Army and a combat veteran of the Vietnam War. Following that service, he earned a law degree and joined the Judge Advocate General's Corps. He retired from the Army in 2002, after 35 years of service. He continues to serve as Adjunct Faculty at the Defense Institute of International Legal Studies, teaching rule of law and peacekeeping subjects in diverse locations, including El Salvador, Peru, Cambodia, Rwanda, Philippines, Chad, Sierra Leone, Guinea, Ukraine, Moldova, and Iraq. As an Emergency Medical Technician, he served at the World Trade Center Site after 9/11.

Brigadier General Murray G. Sagsveen, USA (Ret.) entered the U.S. Army in 1968, with initial service in the Republic of Korea. He later joined the North Dakota Army National Guard, where his assignments included Staff Judge Advocate for the State Area Command, Special Assistant to the National Guard Bureau Judge Advocate, and Army National Guard Special Assistant to the Judge Advocate General of the Army (the senior judge advocate position in the Army National Guard). General Sagsveen currently serves as the general counsel of the American Academy of Neurology in St. Paul, Minnesota.

Brigadier General Anthony Verrengia, USAF (Ret.) retired from the USAF in 1989, after 38 years of uniformed service. He is a veteran of the Cold War,

Korean War, and Vietnam War. He is a Master Navigator and flew in all types of Military Air Transport Operations for over twenty years. He also held Command and Staff positions in Operations, Plans, Logistics, Training and Personnel, and served at all levels of Air Force Command from the Squadron to Numbered AF, to Major Air Command, to the Air Staff in Washington, D.C.

Brigadier General Stephen N. Xenakis, USA (Ret.) served 28 years in the U.S. Army as a medical corps officer. He held a wide of variety of assignments as a clinical psychiatrist, staff officer, and senior commander, including Commanding General of the Southeast Army Regional Medical Command. Dr. Xenakis has written widely on medical ethics, military medicine, and the treatment of detainees. He has an active clinical practice, and currently is working on the clinical applications of quantitative electroencephalography (QEEG) to brain injury and other neurobehavioral conditions.

Sergeant Leslie H. Jackson (Ret.), is currently the Executive Director of American Ex-Prisoners of War and has served in that capacity for nine years. He is also a veteran of World War II. He was shot down over Germany on April 4, 1944 and held prisoner at Stalag 17 in Germany for 13 months.

Professor Geoffrey S. Corn has been an Associate Professor of Law at South Texas College of Law since retiring from the U.S. Army as a Lieutenant Colonel. He served as the civilian Special Assistant to the U.S. Army Judge Advocate General for Law of War Matters, the Army's senior law of war expert advisor. He also was the supervisory defense counsel for the Western United States; Chief of International Law for U.S. Army Europe; Professor of International and National Security Law at the U.S. Army Judge

Advocate General's School, and Chief Prosecutor for the 101st Airborne Division. He is the lead author of *The Laws of War and the War on Terror* (Oxford University Press 2009).

Professor Sean Watts is an associate professor of law at Creighton Law School. He served as an active duty Army officer for 15 years, including service as an Armor Officer in a tank battalion and as a member of the Judge Advocate General's Corps. He was a professor of law at the Judge Advocate General's School. In addition to postings in the United States, he served in Germany, South Korea, and Afghanistan.

Professor Eric Jensen is a Visiting Assistant Professor of Law at the Fordham University School of Law and teaches national security and public international law. He served as the Chief of International Law at the Office of the Judge Advocate general of the U.S. Army from 2006-2009. Before that, he served as a legal advisor to the U.S. Forces in Baghdad, Iraq, Bosnia and Herzegovina, and Skopje, Macedonia, and associate professor of law at the Judge Advocate General's School. He has written numerous articles and two books related to the law of war.

Professor Victor Hansen teaches at New England Law School. Before joining that faculty in 2005, he served 20 years in the Army, primarily as a JAG Corps officer. He was a regional defense counsel for the U.S. Army Trial Defense Service. His previous assignments included work as a military prosecutor and supervising prosecutor. He also served as an associate professor of law at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. He is the author of articles and books on military law and national security issues.

Professor Roger Handburg is a Professor of Political Science, University of Central Florida, and served as a Captain in the U.S. Army from 1969-1971. His areas of research include American security policy, courts and law, and space policy, and he has published numerous articles and books.

In light of their background and experience, *Amici* are uniquely qualified to address how prohibitions against torture support and protect our troops and promote U.S. national security interests; how international and domestic laws are designed to ensure that the United States does not serve as a safe haven for perpetrators of grave human rights abuses such as torture and extrajudicial killing; and how a decision to grant immunity to former foreign officials who have committed torture and are currently residing in the United States would undermine these interests.

The prohibition against torture is a fundamental principle of human rights law and the law of armed conflict. That prohibition would be meaningless without measures of accountability. Indeed, the U.S. military has an established tradition of adherence to international law, particularly the prohibition against torture, and a parallel commitment to holding perpetrators accountable for violations of the law. That tradition has served the U.S. military well. It has enabled the U.S. military to demand reciprocity from other countries, thereby better protecting its servicemen and women.

In the judgment of *Amici*, granting immunity to the perpetrators of egregious human rights abuses would undermine important military and national security interests that Congress has sought to preserve and promote in mandating accountability for torture and other abuses. Indeed, *Amici* note that rampant

human rights abuses, coupled with impunity, can sow the seeds for instability and chaos in other countries. That chaos, in turn, often leads to a vacuum of state power and the conditions under which international terrorist groups can thrive. Whether for humanitarian purposes or in defense of national security, U.S. military engagement may often then follow, as it did in the case of Somalia in the 1990's. *Amici* submit that it would be paradoxical for the United States to commit troops to combat but then allow its soil to become a safe haven for the individuals who created the tumultuous conditions leading to U.S. military intervention.

SUMMARY OF ARGUMENT

As this Court has observed, the "United States frequently employs Armed Forces outside this country – over 200 times in our history – for the protection of American citizens or national security." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). International and domestic law, and the law of war in particular, provide key protections for members of our armed forces so deployed. The legal question in this case – whether the Foreign Sovereign Immunities Act ("FSIA") immunizes former foreign officials from suit under the Alien Tort Claims Statute ("ATS") and the Torture Victims Protection Act ("TVPA") – arises within this complex framework of international and domestic law.

Petitioner Mohamed Samantar ("Samantar") argues that, as a former government official of Somalia, he cannot be held accountable in the United States for torture and other atrocities, the same abuses our troops and civilians could face when overseas. Samantar's claim of immunity runs counter to the principles that have guided the U.S. military for

centuries, and a ruling in his favor would have profound implications for the U.S. military.

First, granting immunity to Samantar would call into question the U.S. commitment to accountability, thus increasing the risk of torture and abuse for our troops, prisoners of war, and civilians overseas. Experience demonstrates that U.S. adherence to and enforcement of the laws of war protects members of our military when engaged in combat or other operations overseas. Simply put, our soldiers receive better treatment at the hands of others when the United States steadfastly adheres to the key principles of international law. Thus, contrary to Petitioner's assertion it is the reciprocity of accountability – not impunity – that protects our troops.

Second, granting immunity would eviscerate the TVPA's powerful disincentive to torture – its mandate that no foreign official involved with torture will receive safe haven in the United States and that the perpetrators of torture who enter the United States will face civil liability for their wrongdoing. That disincentive plays an important role in U.S. foreign policy as it seeks to prevent the types of crises that create political instability and can lead to U.S. military engagement.

Third, in passing the TVPA, Congress explicitly found that the statute would be available to military personnel who are tortured while serving overseas. It would be manifestly unjust to deny U.S. military personnel, who have risked their lives in defense of this country, a forum for redress of harms that they suffered while serving overseas.

ARGUMENT

Throughout the course of its history, the United States has entered into numerous treaties and enacted many statutes that provide criminal and civil liability for torture and other abuses. The Geneva Conventions and the Convention against Torture are such treaties and they require parties to implement accountability measures to preclude impunity for torturers. In enacting these measures, the United States has demonstrated a consistent, full-throated commitment to the prohibition of torture and other abuses and to criminal and civil accountability for those who participate in such conduct. Likewise, the U.S. military has an established commitment to international law and has long enforced the prohibition against torture and accountability for the same.

The TVPA and the FSIA must be interpreted with this backdrop in mind; they are pieces of a larger policy that manifests a persistent, straightforward commitment to the ban on torture to accountability for its perpetrators. The immunity Samantar seeks will reverberate through the international community and diminish important reciprocal protections for our military and civilian personnel overseas, putting our military at risk. It will eliminate a meaningful deterrent against torture and other gross human rights abuses. It will also eliminate a key means of redress for our servicemen and women who are the victims of torture and atrocities abroad.

Amici urge this Court to conclude that Petitioner, like a member of our own military, is not above the law; that he should be held to account for the harm that he has inflicted; and that, after wreaking devastation in his own country, he should be not be afforded a safe haven in the United States.

I. OUR MILITARY HAS A LONG TRADITION OF ADHERENCE TO AND ENFORCEMENT OF THE LAW OF ARMED CONFLICT, PARTICULARLY THE PROHIBITION AGAINST TORTURE.

The prohibition against torture is a fundamental principle of international, domestic and military law. The four Geneva Conventions of 1949 (hereinafter the "Conventions of 1949") and the United Nations Convention Against Torture ("CAT") prohibit torture and abusive treatment in times of war and in times of peace.[2] The Conventions of 1949, to which all States are party, are a universal codification of the law of armed conflict and provide comprehensive standards for the treatment of persons in times of armed conflict.[3] U.S. military personnel are bound by and

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[2] The U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984) ("CAT"), prohibits torture in all forms and circumstances. Article 2(2) reinforces that "[n]o 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 for torture." *Id.* art. 2(2). The United States ratified the CAT in 1994 and noted that the prohibition against torture was "a standard for the protection of all persons, in time of peace as well as war." S. Exec. Rep. No. 101-30, at 11 (1990).

[3] *See, e.g.,* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 ("GC I" or the "First Convention"); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 ("GC II" or the "Second Convention"); Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GC III" or the "Third Convention"); Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6

enjoy the protection of the obligations and rights set forth therein.

Article 3 common to the Conventions of 1949 provides minimum standards of treatment applicable in non-international conflicts. In particular, common Article 3 prohibits "violence to life and person, . . . mutilation, cruel treatment and torture; . . . [and] outrages upon personal dignity, in particular, humiliating and degrading treatment." See*, e.g.,* GC I, art. 3; GC II, art. 3; GC III, art. 3; GC IV, art. 3. Article 17 of the Third Geneva Convention prohibits mistreatment of prisoners of war, declaring that "[p]risoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind."[4] GC III art. 17. The Fourth Convention governs the treatment of civilians in times of armed conflict and provides key safeguards to protect them from the ravages of war, reinforcing the prohibition on torture and inhuman and degrading treatment.

Each of the Geneva Conventions defines torture as a grave breach and mandates that all States party

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U.S.T. 3516, 75 U.N.T.S. 287 ("GC IV" or the "Fourth Convention").

[4] Article 27 provides that protected persons "shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof or against insults." Article 31 prohibits "physical or moral coercion . . . against protected persons." and the prohibition against causing any physical suffering in Article 32 applies "not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents." Finally, Article 118 reinforces that "all forms of cruelty without exception are forbidden." Notably, in this case, most of the allegations involve claims made by civilians.

undertake to search for and prosecute any person, regardless of nationality, who is alleged to have committed such acts. See, *e.g.*, GC III art. 130, GC IV art. 147. In light of this formal obligation to prosecute alleged torturers, Congress cannot have intended to grant such offenders immunity from civil liability on our shores.

A. The U.S. Military Has Always Prohibited Torture In Accordance With International Law.

Since its inception, the U.S. military has adhered to the law of armed conflict and condemned violent or abusive treatment. At the founding of our Republic, the Articles of War of 1776 criminalized "beating, or otherwise ill-treating any person" and also provided for punishment for any commander who failed to "see justice done on the offender." *Journals of the Continental Congress* § IX art. 1 (Sept. 20, 1776) (Articles of War).

The formal codification of the prohibition on torture and cruel treatment by the U.S. military, however, dates to the Civil War. In 1863, President Abraham Lincoln signed General Orders No. 100, also known as the Lieber Code. *Instructions for the Government of Armies of the United States in the Field* (Apr. 24, 1863). Today our military continues to uphold the values set forth in the Lieber Code – that military law must "be strictly guided by the principles of justice, honor and humanity – virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed." *Id.* § I, art. 4. In particular, the Lieber Code expressly prohibits torture, stating that "[m]ilitary necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in

fight, nor of torture to extort confessions." *Id.* § I, art. 16.[5]

In implementing the law of armed conflict into domestic military law and instructions, the U.S. military has emphasized its obligation to comply with the law in all military operations, as well as its long tradition of such compliance. Dep't of Def. Directive No. 2311.01E, ¶ 4.1 (May 9, 2006); Judge Advocate General's Sch., *Operational Law Handbook* 10 (Bill et al. ed. 2009) ("U.S. [law of war] obligations are national obligations, binding upon every Soldier, Sailor, Airman or Marine. DoD policy is to comply with the law of war "during all armed conflicts, . . . and in all other military operations," citing DoD 2311.01E, ¶ 3.1).

The prohibition of torture and other abusive treatment appears in the United States Department of the Army Field Manual 27-10, which promulgates the Army's interpretation of the law of war and incorporates references to international conventions, including the 1949 Geneva Conventions. See U.S. Dep't of the Army, Field Manual (FM) 27-10, *The Laws of Land Warfare* (July 1956) ("FM 27-10"). In particular, FM 27-10 incorporates Common Article 3 of the Conventions of 1949, *id.* art. 11, and prohibits torture and "other measures of brutality whether applied by civilian or military agents," *id.* art. 271.

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[5] The Lieber Code formed the foundation for the law of war, first codified in the Hague Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247; Geneva Convention [IV] Respecting the Laws and Customs of War on Land and Regulations Annexed Thereto, Oct. 18, 1907, 26 Stat. 2277; and the Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 20221, 118 U.N.T.S. 343 (1929 Geneva Convention).

B. The U.S. Military Has A Centuries-Long Tradition Of Accountability For Torture And Other Abuses.

Since the earliest days of the Republic, the U.S. military has valued and enforced accountability for misdeeds. During the Revolutionary War, numerous soldiers were charged with and found guilty of mistreating local civilians. See James C. Neagles, *Summer Soldiers: A Survey & Index of Revolutionary War Courts Martial* 103, 189 (1986) (describing, *inter alia*, courts-martial of Capt. James Christy and Thomas Man for "[b]eating a number of persons . . . and other abus[es]").

In 1865, Union Army officers issued a pronouncement that crystallized the importance of military justice in the U.S. military tradition:

> The many honorable gentlemen who hold commissions in the army of the United States . . . would keenly feel it as an insult to their profession of arms for any one to say that they could not or would not punish a fellow-soldier who was guilty of wanton cruelty to a prisoner, or perfidy towards the bearers of a flag of truce. [11 Op. Att'y. Gen. 297, 303-04 (1865).]

U.S. courts-martial also tried numerous U.S. military personnel and Philippine insurgents during the American counter-insurgency campaign in the Philippines at the turn of the century. In particular, Major Edwin Glenn was convicted of using torture to obtain information or confessions from insurgents. See *Trials of Court-Martial in the Philippines Islands in Consequence of Certain Instructions*, S. Doc. No. 57-213, at 1-43 (1903). Finding Major Glenn's light sentence and his lieutenant's acquittal on the same charges inadequate, the Judge Advocate General

declared that "[n]o modern state, . . . can sanction . . . a resort to torture with a view to obtain confessions, as an incident to its military operations." *Id.* at 42.

The Uniform Code of Military Justice replaced the Articles of War in 1951, and the military continued to enforce its standards through the Korean War and the Vietnam War. While serving in Korea, for example, U.S. Marine Sergeant Gallagher was convicted of murdering and torturing other fellow prisoners of war while held captive by the Chinese. *United States* v. *Gallagher*, 7 C.M.A. 506 (1957).

Granting Samantar immunity from liability for the atrocities he is alleged to have perpetrated during his tenure as Defense Minister of Somalia would undermine this long tradition of accountability and adherence to domestic and international law. As two former Judge Advocates state,

> We have learned . . . that victory without justice is meaningless if justice is not guaranteed to those who would risk their life for it. A defense organization cannot survive without a responsive system of law, since its very progress and success during conflict depends on the binding force of law and the effective discipline that precedes wartime endeavor. [Earle F. Lasseter & James B. Thwing, *Military Justice in Time of War*, 68 A.B.A.J. 566, 569 (1982)].

A grant of immunity to foreign officials who participate in torture would send a demoralizing message to our men and women in uniform – to wit, that we expect them to prosecute our own wrongdoers at the same time that we offer legal immunity and protection to perpetrators of gross atrocities abroad who are present here on our soil.

II. GRANTING IMMUNITY WOULD UNDERMINE THE COMPREHENSIVE FRAMEWORK THAT THE U.S. HAS DESIGNED TO DETER TORTURE, ENSURE ACCOUNTABILITY, AND PROTECT OUR TROOPS.

The TVPA was passed to meet U.S. obligations under the Convention against Torture.

> This legislation will carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was ratified by the U.S. Senate on October 27, 1990. The Convention obligates state parties to adopt measures to ensure that torturers within their territories are held legally accountable for their acts. This legislation will do precisely that by making sure that torturers and death squads will no longer have a safe haven in the United States. [S. Rep. No. 102-249, at 3 (1991)].

The purposes of U.S. domestic and military laws prohibiting torture are neither academic nor illusory; nor are these laws unrelated to our military's daily operations. Rather, as the following sections demonstrate, our servicemen and women depend on the obligations and protections of these international and domestic laws when they are deployed overseas.

A. U.S. Adherence To The Law Of Armed Conflict And The Prohibition Of Torture In Particular Provides Reciprocal Protections For U.S. Servicemen And Women Overseas.

Our steadfast adherence to international law has enabled the United States to demand greater protection for military personnel captured abroad. In the same way, our commitment to accountability for

perpetrators of torture and other abuses – whether U.S. or foreign nationals – provides a critical foundation for demanding accountability for perpetrators of abuses *against* U.S. military and civilian personnel. Thus, the ability to seek accountability offers additional leverage for protecting our troops.

Reciprocity forms one of the bedrock foundations for adherence to the laws of war. See Sean Watts, *Reciprocity and the Law of War*, 50 Harv. Int'l L.J. 365, 368 (2009) ("the law of war has long been conditioned on notions of reciprocal obligation and observation"). Beyond the historic and universal values underpinning the basic legal principles, nations comply with their obligations to respect enemy forces and protect civilians from the ravages of war because they expect enemy forces to do the same. The U.S. military trains its troops in the importance of reciprocity, advising them that "[o]bserving these rules will encourage the enemy to do the same, increase the chance that he will surrender, and make the return to peace easier." See Headquarters, Dep't of The Army, Training Circular 27-10-3, *Instructor's Guide, The Law of War* 4 (1985). Although our obligations do not depend on the enemy's adherence to the law, the U.S. military remains firmly convinced that our adherence to the law positively influences our enemies' behavior.

Men and women in the U.S. military have benefited from our adherence to international law and to the prohibition of torture in recent history. In Vietnam, for example, captured U.S. personnel initially faced atrocious treatment at the hands of the North Vietnamese army, including torture and beheadings. In 1967, the United States began a policy of extending prisoner-of-war status to all captured Vietnamese army personnel and all Viet Cong, even

those who did not follow the laws of war. See U.S. Military Assistance Command for Vietnam, Annex A of Directive No. 381-46 (Dec. 27, 1967), *reprinted in Contemporary Practice of the United States Relating to International Law*, 62 Am. J. Int'l L. 754, 766-67 (Charles I. Bevans ed., 1968). Obtaining "reciprocal benefits for American captives" was a major reason for this decision. See Maj. Gen. George S. Prugh, Dep't of the Army, *Vietnam Studies, Law at War: Vietnam 1964-1973*, at 62-63 (1975). The Vietnamese began according prisoner-of-war status to captured U.S. personnel and treatment of American captives improved as a result.

More recently, after forces under the control of Somali warlord Mohamed Farah Aideed captured U.S. Warrant Officer Michael Durant in 1993, the United States demanded that Durant receive treatment in accordance with international law and the Geneva Conventions. See Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror,"* 44 Harv. Int'l L.J. 301, 310 (2003). The United States specifically argued that breach of the protections set forth in the Geneva Conventions would leave Aideed liable for a violation of customary law. *Id.* Immediately following the U.S. demands, harsh treatment of Durant stopped and he was soon released. *Id.*

A year later, Chief Warrant Officer Bobby Hall was captured by North Korea when his helicopter strayed into North Korean airspace and was shot down. Despite uncertain applicability of the Geneva Conventions because of questions about whether there was an actual armed conflict, the North Koreans stated that Hall would be treated as a POW and he was released 13 days later. *Id.* at 311.

Samantar argues that denying immunity would "risk[] serious reciprocal implications" for U.S. officials. Pet. Brief 35-36. But the reciprocity on which our military depends is the reciprocity of accountability, the foundation of the law of war and the prohibitions on abusive treatment. This reciprocity – not reciprocity of impunity to which Petitioner alludes – is integral to our national security and our success in military operations abroad. If we expect those who commit atrocities against our personnel to be held accountable, the United States must demonstrate a like commitment to holding perpetrators within its jurisdiction accountable for atrocities. Granting Samantar immunity for torture and other alleged abuses against victims in this case flies in the face of this goal. Doing so undermines the fundamental guarantees the United States promises its own citizens, particularly military, diplomatic, intelligence and other personnel operating abroad.

B. Accountability Measures, Like The TVPA, Promote The Critical National Security Objective Of Deterring Rampant Human Rights Violations.

History has demonstrated that countries in which massive human rights abuses are perpetrated can readily turn into breeding grounds for instability and conflict. Notably for this case, in 1992, the United States committed troops to a peacekeeping operation in Somalia. That operation was necessary because after a decade of brutal repression under the Siad Barre regime (of which Samantar was the defense minister), Somalia descended into a state of civil war, which led to the deaths of hundreds of thousands of

people from war and famine.[6] As defense minister, Samantar was an architect of that repression.

Somalia is hardly the only example. In recent times, human rights abuses and armed conflict have coincided in Bosnia and Haiti. Indeed, scholars have concluded that "failed states and human rights wars ha[ve] become the breeding grounds of the two great threats we face[] – increasing terrorism and renewed genocide." John Shattuck, *The Legacy of Nuremberg: Confronting Genocide and Terrorism Through the Rule of Law*, 10 Gonz. J. Int'l L. 6, 10-12 (2006).

The TVPA was intended to provide a powerful disincentive to human rights abusers. "[I]n addition, one reason for enacting this bill is to discourage torturers from ever entering this country. There is no question that torture is one of the most heinous acts imaginable, and its practitioners should be punished and deterred from entering the United States." 138 Cong. Rec. S2667, 52688 (daily ed. Mar. 3, 1992) (statement of Sen. Specter).[7] That effect is critical

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[6] *See* Human Rights Watch, *Human Rights Watch World Report 1993 – Somalia*, ¶ 3 (Jan. 1, 1993), *available at* http://www.unhcr.org/refworld/docid/467fca601e.html; Dep't of Pub. Info., United Nations, *United Nations Operation in Somalia I*, ¶ 1, Mar. 21, 1997), http://www.un.org/Depts/DPKO/Missions/unosomi.htm.

[7] For example, the Guatemalan General Hector Gramajo came to the United States to obtain a graduate degree but fled after being sued for human rights violations under the ATS in *Xuncax* v. *Gramajo*, 886 F. Supp. 162 (D. Mass. 1995). *See* Amnesty Int'l, *United States of America: A Safe Haven for Torturers* 45-46 (2002). Subsequent to the ATS lawsuit, Gramajo's visa was revoked and he was barred from reentering the country. In addition, his political aspirations ended as his party failed to nominate him for office. Sandra Coliver, Jennie Green & Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts*, 19 Emory Int'l L. Rev.

because deterring massive human rights violations of the type experienced in Somalia can also mean deterring or alleviating the conditions that lead to military engagement.

Somalia has a long history of inter-clan rivalry.[8] However, these tensions were managed through traditional mechanisms until these and other traditional social institutions were undermined during the Siad Barre dictatorship (1969-1991). Once the traditional institutions collapsed, large-scale conflict, marked notably by brutal acts of torture, erupted and much of the country descended into civil war. U.S. Dep't of State, *Somalia Human Rights Practices, 1994*, ¶ 1 (Feb. 1995), *available at* http://dosfan.lib.uic.edu/ERC/democracy/1994_hrp_report/94hrp_report_africa/Somalia.html.

That period of instability led to U.S. military involvement in December 1992. The Bush administration committed U.S. ground troops as part of a multinational force to ensure delivery of humanitarian aid to Somalia. Dep't of Pub. Info., United

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169, 178 (2005); *see also* Tim Golden, *Controversy Pursues Guatemalan General Studying in U.S.*, N.Y. Times, Dec. 3, 1990, at A6.

After an ATS suit was filed against the former Ethiopia official, Kelbessa Negewo, *Abebe-Jira* v. *Negewo*, 72 F.3d 844 (11th Cir. 1996), the U.S. Attorney's office began denaturalization proceedings and removed Negewo to Ethiopia. *See Concerning Genocide and the Rule of Law: Hearing Before the S. Subcomm. On Human Rights Concerning Genocide and the Rule of Law*, 110th Cong. 7 (Feb. 5, 2007) (Statement of Sigal P. Mandelker, Deputy Assistant Attorney General), *available at* http://justice.gov/criminal/pr/testimony/2007/02/ 2007_4979_02-07-07daag-testimony.pdf.

[8] *See generally* Brief Of *Amici Curiae* Academic Experts in Somali History.

Nations, *supra*, ¶ 13. Although the troops were initially scheduled to remain in Somalia for one month, the humanitarian mission was extended by the Clinton administration.[9]

U.S. casualties mounted throughout the year. In October 1993, 18 U.S. soldiers died in a now infamous street battle in Mogadishu.[10] By the time U.S. troops withdrew in 1994, more than two dozen U.S. soldiers had died. Bureau of African Affairs, *supra* ¶ 14 ("The United States continued operations until March 25, 1994, when U.S. forces withdrew.").

Somalia has yet to fully recover from that destabilizing period. Indeed, brazen acts of piracy embody the lawlessness that still characterizes parts of Somalia. The United States and other countries now routinely use their military forces to patrol the waters off the coast of Somalia.[11] See *supra* n.8. Deterring the chain of human rights abuses, crisis and military intervention directly benefits the

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[9] *See* Bill Clinton, President of the U.S., Address on Somalia (Oct. 7, 1993) *in The Somalia Mission; Clinton's Words on Somalia: 'The Responsibilities of American Leadership,'* N.Y. Times, Oct. 8, 1993, *available at* http://www.nytimes.com/1993/10/08/world/somalia-mission-clinton-s-words-somalia-responsibilities-american-leadership.html?pagewanted=1.

[10] *See* Human Rights Watch, *supra* ¶ 17; Bureau of African Affairs, U.S. Dept. of State *Background Note: Somalia*, *History*, ¶ 14 (Jan. 2010), *available at* http://www.state.gov/r/pa/ei/bgn/2863.htm#history.

[11] Navy Lt. Jennifer Cragg, U.S. Dep't of Def., Am. Forces Press Serv., *Navy Task Force, Partner Nations Deter Pirate Attacks*, Jan. 30, 2009, http://www.defense.gov/news/newsarticle.aspx?id=52890; Bureau of Political-Military Affairs, US, Dep't of State, Fact Sheet, *United States Actions To Counter Piracy Off the Horn of Africa* (Sept. 1, 2009), http://www.state.gov/t/pm/rls/fs/128540.htm.

military. While the TVPA will not, by itself, stave off crises overseas, to the extent that it deters individuals from engaging in human rights abuses in the first instance, it can alleviate some of the conditions that precipitate military involvement.

III. WHEN IT ENACTED THE TVPA, CONGRESS INTENDED TO BUTTRESS THESE PROTECTIONS AND PROVIDE A REMEDY FOR U.S. TROOPS TORTURED OVERSEAS.

This Court has repeatedly stated that foreign policy and national and military security are core areas for the political branches. See, *e.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981); *Dep't of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). In multiple statutes, Congress has made torture and cruel, inhuman and degrading treatment subject to criminal prosecution in federal courts. Indeed, the right to be free of physical torture is recognized by all Nations. See *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732 (2004). This legal framework provides an important supplement to international, domestic and military law banning torture and ensures that there will be no safe haven in the United States for torturers and perpetrators of atrocities, including those who perpetrate atrocities against U.S. military or civilian personnel serving overseas.

The ATS and the TVPA provide a civil remedy for victims whose torturers come under the jurisdiction of U.S. courts. The TVPA states:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation

> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death. [28 U.S.C. § 1350 note.]

This plain language provides victims of torture and extrajudicial killing (or their representatives) with the right to bring a civil action seeking damages against individual officials of foreign nations who act under color of law or with actual or apparent authority. In enacting the TVPA, the Senate emphasized that

> [o]fficial torture and summary execution violate standards accepted by virtually every nation. This universal consensus condemning these practices has assumed the status of customary international law. [S. Rep. No. 102-249, at 3.]

Congress also recognized that our troops are vulnerable to torture when serving abroad. Thus, in passing the TVPA, Congress clearly stated its intent to protect our military:

> We have as a matter of current concern the torture of the U.S. service men and service women and the potential for more torture which, in addition to being a war crime and a violation of the Geneva Convention, would also provide a basis for a civil lawsuit in a U.S. court if this bill were passed. . . . Unfortunately, torture hits Americans abroad as well as innocent foreigners. Our soldiers languishing in Saddam Hussein's prisons have almost certainly been brutally

> tortured. This bill will give our P.O.W.'s a cause of action if any of their torturers should ever enter the United States in the future. [137 Cong. Rec. S1369, S1378 (daily ed., Jan. 31, 1991) (statement of Sen. Specter).]

In addition, Congress has emphasized its commitment to ensuring that torturers who have abused U.S. troops must be brought to justice:

> Those who murdered or tortured our American servicemen are still at large somewhere . . . There is no statute of limitations on the crimes committed against these American servicemen. Neither shall there be a statute of limitations on our commitment to discovering the true identity of those responsible for such crimes, so that they may be brought to justice. [*The Cuban Program: Torture of American Prisoners by Cuban Agents: Hearing Before the Comm. on Intern'l Relations*, 106th Cong. 1 (1999) (Statement by Rep. Benjamin A. Gilman, Chairman of the Committee).]

Construing the TVPA to preclude suits against former government officials would directly contravene Congress' intent and undermine protections for U.S. military and civilian personnel deployed overseas by foreclosing key options for seeking redress in the event of capture and abusive treatment.

Moreover, as Congress recognized in passing the TVPA, the United States should not be a safe haven for individuals who perpetrate torture. For the same reasons that survivors of torture should not be forced to confront those who tortured them on the streets of D.C., our servicemen and women should not be forced to live next door to those who caused them to put their lives in harm's way overseas.

In enacting the TVPA, Congress invoked its power to "define and punish . . . Offences against the Law of Nation," U.S. Const. art. I § 8, cl. 10; see S. Rep. No. 102-249, at 5. In doing so, it "put[] torturers on notice that they will find no safe haven in the United States. Torturers may be sued under the bill if they seek the protection of our shores." See 137 Cong. Rec. H11244 (daily ed. Nov. 25, 1991) (statement of Rep. Mazzoli.). The Act cannot be meaningfully enforced if the FSIA provides foreign officials involved in torture and other abuses with immunity from civil actions.

Congress has carefully delineated the circumstances in which victims of torture and extrajudicial killing – including U.S. servicemen and women – are entitled to seek civil redress against foreign officials in civil courts in the United States. This Court should defer to Congress's determination that foreign officials involved with torture and extrajudicial killings are subject to civil suits if they choose to come to the United States. The TVPA is part of an inter-related statutory scheme that holds torturers accountable for their acts. That scheme, *inter alia*, protects U.S. citizens abroad, including U.S. servicemen and women, by deterring torture and other abuses.

* * * *

Amici respectfully submit that Congress clearly intended to implement U.S. obligations under the Geneva Conventions and the Convention against Torture by holding foreign government officials accountable for torture. Failure to respect congressional intent will undermine our ability to insist that other nations do likewise, with grave implications for U.S. service members and civilians who fall into the hands of abusive foreign powers.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

LAURIE R. BLANK
ACTING DIRECTOR
INTERNATIONAL HUMANITARIAN LAW CLINIC
Emory Law School
Atlanta, GA 30322
(404) 712-1711

VIRGINIA A. SEITZ*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

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* Counsel of Record