IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

D.J.C.V., minor child and G.C., his father, ***Plaintiffs,*** **v.** **United States of America,** ***Defendant.***	**Case No. 1:20-cv-5747**

BRIEF OF HUMAN RIGHTS ORGANIZATIONS AND FORMER U.N. SPECIAL RAPPORTEURS ON TORTURE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS

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INTRODUCTION

This case reflects the profound and well-documented human costs of a government policy that used children as a means to an end.[1] This policy used the destruction of the family and the abuse of children to punish those who had sought asylum in this country, and to deter those who would similarly seek freedom and safety in the future. Accordingly, this case implicates several fundamental norms, including the right to family integrity and the individual rights of both parents and children.[2] The Plaintiffs have asserted some of their claims pursuant to universally accepted principles of international law—the right to be free from torture and other cruel, inhuman, or degrading treatment, and the prohibition of crimes against humanity.[3] Complaint ¶¶ 43–47. As the Court considers these claims, *Amici* believe its analysis should be informed by another international norm—the right to a remedy. This norm requires states to allow victims to present their claims in court and to have those claims considered.

INTEREST OF THE *AMICI*

Amici are human rights organizations that are committed to the rule of law and respect for fundamental rights. These organizations recognize the importance of promoting accountability for

[1] *See, e.g.*, Letter to Secretary Kirstjen Nielsen and Attorney General Jeff Sessions from 5,000 medical professionals and other interested parties (June 14, 2018), https://s3.amazonaws.com/PHR_other/Separation_Letter_FINAL.pdf (describing the negative health effects of child separation policy).

[2] *See, e.g.*, Carrie F. Cordero, Heidi Li Feldman, & Chimène I. Keitner, *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 430 (2020); Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213 (2003).

[3] *See, e.g.*, Beth Van Schaack, *The Torture of Forcibly Separating Children from Their Parents*, JUST SECURITY (Oct. 18, 2020), https://www.justsecurity.org/61138/torture-forcibly-separating-children-parents/; Juan E. Méndez & Kathryn Hampton, *Forced Family Separation During COVID-19: Preventing Torture and Inhumane Treatment in Crisis*, JUST SECURITY (July 8, 2020), https://www.justsecurity.org/71291/forced-family-separation-during-covid-19-preventing-torture-and-inhumane-treatment-in-crisis/.

violations of international law, including human rights violations, and providing victims with meaningful redress.

The **Center for Justice & Accountability** ("CJA") is a U.S.-based human rights organization dedicated to deterring torture, crimes against humanity, extrajudicial killings, and other serious human rights abuses. Through high-impact litigation, CJA holds perpetrators of abuses accountable and seeks truth, justice, and redress for survivors. Since its founding in 1998, CJA has worked to advance the rights of survivors, and has represented survivor-plaintiffs in numerous lawsuits filed in federal courts, including for torture and crimes against humanity.

Human Rights Watch ("HRW") is a non-profit, independent organization that investigates allegations of human rights violations in more than 90 countries around the world, including in the United States, by interviewing witnesses, gathering information from a variety of sources, and issuing detailed reports. Where human rights violations have been found, HRW advocates for the enforcement of those rights with governments and international organizations and mobilizes public pressure for change. HRW believes that the legal questions raised by this matter should be understood in the context of human rights norms and principles on the right to redress.

The **Center for Victims of Torture** ("CVT") is the oldest and largest torture survivor rehabilitation center in the United States and one of the two largest in the world. Through programs operating in the United States, the Middle East, and Africa—involving psychologists, social workers, physical therapists, physicians, psychiatrists, and nurses—CVT annually rebuilds the lives of nearly 30,000 primary and secondary survivors, including children. CVT also conducts research, training, and advocacy, with each of those programs rooted in CVT's healing services. The organization's legal and policy advocacy leverages the expertise of five stakeholder groups:

survivors, clinicians, human rights lawyers, operational and humanitarian aid providers, and foreign policy experts. The vast majority of CVT's clients in the United States are asylum seekers.

Amici are also former U.N. Special Rapporteurs on Torture. They were each appointed by the United Nations to serve in this distinguished capacity. The U.N. Special Rapporteur on Torture is appointed to examine questions relating to torture and other cruel, inhuman, or degrading treatment.[4] Accordingly, *Amici* are recognized experts in the fields of international law and human rights. They teach and have written extensively on these subjects. Indeed, their work is regularly cited by legal scholars and human rights institutions.

Juan E. Méndez served as the U.N. Special Rapporteur on Torture from 2010 to 2016. He is currently Professor of Human Rights Law in Residence at the American University – Washington College of Law, where he is the Faculty Director of the Anti-Torture Initiative. In 2017, Professor Méndez was appointed a Commissioner of the International Commission of Jurists. Previously, Professor Méndez served as Co-Chair of the Human Rights Institute of the International Bar Association (London) in 2010 and 2011 and Special Advisor on Crime Prevention to the Prosecutor of the International Criminal Court from 2009 to 2010. Until May 2009, Professor Méndez was the President of the International Center for Transitional Justice. Between 2000 and 2003, he was a member of the Inter-American Commission on Human Rights for the Organization of American States, and he served as its President in 2002. Professor Méndez directed the Inter-American Institute on Human Rights in San Jose, Costa Rica from 1996 to 1999, and worked for Human Rights Watch from 1982 to 1996.

[4] *See* U.N. Comm'n on Human Rights, Resolution Regarding Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/Res/1985/33 (Mar. 13, 1985). The U.N. Special Rapporteur's mandate includes transmitting appeals to states with respect to individuals who are at risk of torture as well as submitting communications to states with respect to individuals who were previously tortured.

Manfred Nowak served as the U.N. Special Rapporteur on Torture from 2004 to 2010. He is currently Professor of International Law and Human Rights at Vienna University, Co-Director of the Ludwig Boltzmann Institute of Human Rights, and Vice-Chair of the European Union Agency for Fundamental Rights (Vienna). He served as the U.N. Expert on Enforced Disappearances from 1993 to 2006 and Judge at the Human Rights Chamber of Bosnia and Herzegovina in Sarajevo from 1996 to 2003. Professor Nowak has written extensively on the subject of torture, including THE UNITED NATIONS CONVENTION AGAINST TORTURE—A COMMENTARY (with Elizabeth McArthur).

Because rights without remedies are of little value, *Amici* write to emphasize the significance of the right to a remedy under international law. In light of the international norms raised by the Plaintiffs, *Amici* believe this submission will assist the Court in its deliberations.

SUMMARY OF ARGUMENT

International law consists of both primary and secondary rules.[5] Several of the most fundamental primary rules of international law are implicated in this case, including the right to be free from torture and other cruel, inhuman, or degrading treatment, and the prohibition of crimes against humanity. But an equally important secondary rule is also implicated—the right to a remedy. Under international law, the violation of primary rules creates an obligation on the part of states to provide remedies for any injuries.

In this case, the Alien Tort Statute ("ATS") provides a mechanism for redress when a party has violated well-established precepts of international law. Indeed, the ATS was adopted to ensure

[5] ROBERT KOLB, THE INTERNATIONAL LAW OF STATE RESPONSIBILITY: AN INTRODUCTION 7 (2017) ("Primary rules are all the substantive and procedural rules of international law whose breach gives rise to responsibility. Secondary rules encompass all the new obligations or faculties which flow as consequences from the unlawful act.").

accountability for violations of international law that are specific, universal, and obligatory. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725, 732 (2004). While other statutes may provide federal subject matter jurisdiction for some of the Plaintiffs' claims, the ATS claims in this case are indispensable because they frame the true essence of the U.S. government's actions within the context of universally accepted international law. Accordingly, this Court should interpret the ATS consistent with its purpose as a remedial mechanism to redress violations of international law, and it should not allow the U.S. government to use blanket claims of sovereign immunity as a defense to accountability.

ARGUMENT

I. THE RIGHT TO A REMEDY IS A FUNDAMENTAL NORM OF INTERNATIONAL LAW.

The principle of *ubi ius ibi remedium*—"where there is a right, there is a remedy"—is a well-established principle of customary international law.[6] The seminal formulation of this fundamental principle comes from the 1928 holding of the Permanent Court of International Justice ("PCIJ") in the *Factory at Chorzów* case. According to the PCIJ, "it is a principle of international law, and even a general conception of law, that *any breach of an engagement involves an obligation to make reparation*." *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13, 1928) (emphasis added). The remedial principles governing violations of international law are heavily influenced by *Factory at Chorzów*. *See* DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 163 (3d ed. 2015) (acknowledging the basic principle of redress under international law was set forth by the PCIJ in *Factory at Chorzów*).

[6] *See* Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310 (2003) (noting the right to a remedy is "one of the oldest of Anglo-American rights, rooted in the Magna Carta and nourished in the English struggle for individual liberty and conscience rights.").

The right to a remedy is codified in virtually every human rights instrument of the past century. It was first set forth in the influential Universal Declaration of Human Rights, G.A. Res 217A (III), U.N. Doc. A/810 at 71 (Dec. 10, 1948) ("UDHR"), which was adopted by the U.N. General Assembly in 1948. Article 8 provides that "[e]veryone has the right to an effective remedy . . . for acts violating the fundamental rights granted him . . . ."). The UDHR established the foundation for a series of human rights treaties that built upon its core provisions.

The International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 ("ICCPR"), which the United States has signed and ratified, prohibits torture and other cruel, inhuman, or degrading treatment.[7] Significantly, the ICCPR also requires member states to provide effective remedies for violations of its provisions. For example, Article 2(3) provides:

> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

See generally PAUL M. TAYLOR, A COMMENTARY ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 59 (2020); (observing the right to a remedy "is pivotal to securing 'respect' for and for ensuring to all individuals under a State's responsibility the rights enshrined in the Covenant"); SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 867 (3d ed. 2013) (noting the right to a remedy "is a key component of the ICCPR").

[7] As of December 20, 2020, there are 173 parties to the ICCPR, including the United States.

The U.N. 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 [ICCPR], ¶ 15, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (Mar. 29, 2004) (emphasis added) ("HRC General Comment No. 31"). Such remedies can include restitution, rehabilitation, guarantees of non-repetition and bringing perpetrators of human rights violations to justice. *Id*. ¶ 16. In the absence of such remedies, the purposes of the ICCPR would be defeated. *Id*. ¶ 17. These principles have been affirmed by the U.N. Human Rights Committee for decades. *See, e.g.*, *Bithashwiwa & Mulumba v. Zaire*, Comm. No. 241/1987, at ¶ 14, U.N. Doc. CCPR/C/37/D/241/1987 (1989) (states must provide effective measures to remedy human rights violations, including allowing victims to effectively challenge violations before a court of law).

The right to a remedy appears in other human rights treaties as well. The United States has also signed and ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 ("Convention Against Torture"), a treaty which is directly relevant in this case.[8] The Convention Against Torture sets forth specific prohibitions regarding torture and other cruel, inhuman, or degrading treatment, and it also requires member states to provide effective remedies in the event of a breach. Specifically, Article 14(1) provides 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." *See generally* MANFRED NOWAK & ELIZABETH

[8] As of December 20, 2020, there are 171 parties to the Convention Against Torture, including the United States.

MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL: A COMMENTARY 370 (2d ed. 2019).

The U.N. Committee Against Torture, which oversees member state compliance with the Convention Against Torture, has explained that redress as required under Article 14 of the Convention Against Torture "encompasses the concept 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 (Nov. 19, 2012) ("CAT General Comment No. 3"). To be effective, a remedy must provide "fair and adequate compensation for torture or ill-treatment" and "should be sufficient to compensate for any economically assessable damage resulting from torture or ill-treatment, whether pecuniary or non-pecuniary." *Id.* ¶ 10. The Committee has emphasized the importance of judicial remedies for victims to achieve full rehabilitation: "*Judicial remedies must always be available to victims*, irrespective of what other remedies may be available, and should enable victim participation." *Id.* ¶ 30 (emphasis added). In fact, the failure to allow civil proceedings in a case involving claims of torture "may constitute a de facto denial of redress and thus constitute a violation of the State's obligations under article 14." *Id.* ¶ 17.

Similar statements on the right to a remedy appear in the U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) ("U.N. Basic Principles"). Adopted by the U.N. General Assembly, the U.N. Basic Principles indicate that the obligation to respect and implement international human rights law emanates from customary international law as well as treaties and the domestic law of states. *Id.* ¶ 1. Victims of human rights violations 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. *Id*. ¶ 11. Of particular relevance in this case, victims must have "equal access to an effective judicial remedy as provided for under international law." *Id*. ¶ 12. Full and effective reparations include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. *Id*. ¶ 18. Finally, the U.N. Basic Principles indicate that remedies are necessary to provide "[v]erification of the facts and full and public disclosure of the truth." *Id.* ¶ 22.

The well-regarded Articles on State Responsibility reiterate these basic principles of international law. REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION, II Y.B. INT'L L. COMM'N, U.N. Doc. A/56/10 (2001) ("ILC Articles"). Specifically, the ILC Articles provide that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." *Id*. art. 31(1). The ILC Articles "are considered by courts and commentators to be in whole or in large part an accurate codification of the customary international law of state responsibility." JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 43 (2013).

Regional human rights treaties also recognize the right to a remedy. These treaties reinforce the status of the right to a remedy as a principle of customary international law. For example, the American Convention on Human Rights provides that "[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 State concerned or by this Convention . . . ." American Convention on Human Rights art. 25(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. In *Velásquez Rodríguez v. Honduras* (Judgment), Inter-Am. Ct. H.R. (ser. C) No. 7, at ¶ 10 (July 21, 1989), the Inter-American Court of Human Rights held that "every violation of an international obligation which results in harm

creates a duty to make adequate reparation." This principle has been affirmed by the Inter-American Court on countless occasions. *See, e.g., Lysias Fleury et al. v. Haiti* (Merits and Reparations), Inter-Am. Ct. H.R. (ser. C) No. 236, at ¶ 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."); *Yvon Neptune v. Haiti* (Merits, Reparations and Costs), Inter-Am. Ct. H.R. (ser. C) No. 180, at ¶ 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."); *Durand & Ugarte* (Judgment), Inter-Am. Ct. H.R. (ser. C) No. 89, at ¶ 24 (Dec. 3, 2001) ("[A]ny violation of an international obligation carries with it the obligation to make adequate reparation.").

These principles are also well-established in both the European and African human rights systems. *See, e.g.*, 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 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.").

In sum, the right to a remedy is a fundamental norm of customary international law and applies whenever rights are violated. Whether referenced in classic terms (*ubi ius ibi remedium*)[9]

[9] *See* Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1639 (2004); *see also* EDWIN N. GARLAN, LEGAL REALISM AND JUSTICE 44 (1941).

or contemporary language (a right without a remedy is "nothing more than a nice idea"),[10] the right to a remedy is steeped in history and necessary to protect fundamental rights.

II. THE ATS SHOULD BE INTERPRETED CONSISTENT WITH ITS PURPOSE AS A REMEDIAL MECHANISM TO REDRESS VIOLATIONS OF INTERNATIONAL LAW AND SHOULD NOT BE NULLIFIED BY SOVEREIGN IMMUNITY.

The Alien Tort Statute was enacted by Congress in 1789 to provide the federal courts with jurisdiction "of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. As the Supreme Court has repeatedly stated, the ATS was adopted to provide "foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1406 (2018); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1667 (2013). In light of the international norms at issue here and as set forth below, this is such a case.

The assertion of sovereign immunity by the United States to protect itself from all liability in connection with the Plaintiffs' claims is contrary to international law. As set forth in the ICCPR and the Convention Against Torture, states are under a legal obligation to provide remedies for breaches of these agreements. Thus, states cannot use domestic law—including claims of immunity—to circumvent this obligation. According to the Committee Against Torture, "granting immunity, in violation of international law, to any State or its agents or to non-State actors for torture or ill-treatment, is in direct conflict with the obligation of providing redress to victims." CAT General Comment No. 3, *supra*, ¶ 42.

[10] *See* Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedie*s, 65 S. CAL. L. REV. 735, 735–36 (1992).

This basic principle is affirmed in the ILC's Articles on State Responsibility, which make clear that the United States may not rely on domestic legal principles to negate its legal obligation to make full reparation for any injuries caused by its internationally wrongful acts. According to the ILC Articles, a state "may not rely on the provisions of its internal law as justification for failure to comply" with its legal obligation to provide a remedy.[11] ILC Articles, *supra*, art. 32. This principle appears in other international instruments. *See, e.g.*, Vienna Convention on the Law of Treaties art. 27 May 23, 1969, 1155 U.N.T.S. 33 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."). In sum, "[t]he principle that a responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations arising out of the commission of an internationally wrongful act is supported both by State practice and international decisions." JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 192 (2002).

It is also significant that the international norms in this case are among the limited and discrete few that constitute *jus cogens* norms—non-derogable obligations that bind all states.[12] The prohibitions against torture and other cruel, inhuman, or degrading treatment are codified in both the ICCPR and the Convention Against Torture, and their non-derogable status is clear.[13]

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[11] *See also* ILC Articles, *supra*, art. 3 ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.").

[12] 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, *supra*, art. 53.

[13] The United States has consistently affirmed its commitment to these norms in its reports to the United Nations. *See, e.g.*, *Combined Third to Fifth Periodic Reports of the Unites States of America*, ¶¶ 2-3, U.N. Doc. CAT/C/USA/3-5 (Aug. 12, 2013) ("The absolute prohibition of torture is of fundamental importance to the United States.").

Both treaties indicate these norms are absolute and non-derogable. ICCPR, *supra*, art. 4(2) (no derogations are permitted from the prohibitions against torture and other cruel, inhuman, or degrading treatment); Convention Against Torture, *supra*, 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.").[14] *See also* NOWAK & MCARTHUR, *supra*, at 2, 6, 91 (the prohibitions against torture and cruel, inhuman, or degrading treatment emerged after World War II as two norms that are non-derogable even in times of war, terrorism, or public emergencies that threaten the life of the nation); Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 331 (2009) (torture and cruel, inhuman, or degrading treatment constitute *jus cogens* norms). The prohibition of crimes against humanity is also a *jus cogens* norm. It is an absolute prohibition, and it is non-derogable.[15] LARRY MAY, CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT 24 (2004); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 63, 69–70 (1996) (the prohibition of crimes against humanity is a *jus cogens* norm).

The designation of torture, cruel, inhuman, or degrading treatment, and crimes against humanity as *jus cogens* norms means that claims of immunity are simply unavailable. NOWAK & MCARTHUR, *supra*, at 188–90. Immunity is contrary to the absolute prohibition against such acts.

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[14] *See also* U.N. Comm. Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, ¶ 5, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) ("The Committee considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability."); HRC General Comment No, 31, *supra*, ¶ 18 (When public officials commit torture or other cruel, inhuman, or degrading treatment, member states "may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties . . . and prior legal immunities and indemnities.").

[15] *See* Rome Statute of the International Criminal Court art. 27, July 17, 1998, 2187 U.N.T.S. 90 (official immunities shall not bar the Court from exercising jurisdiction).

To grant immunity would constitute a violation of the primary rules that prohibit these acts as well as the secondary rules that require a remedy for such violations. Thus, it is unsurprising that several federal courts have rejected claims of immunity by foreign government officials for violations of *jus cogens* norms. *See, e.g.*, *Yousuf v. Samantar*, 699 F.3d 763, 777 (4th Cir. 2012) ("We conclude that, under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity."). This conclusion has also been applied to the United States government. *See, e.g.*, *Al Shimari v. CACI Premier Technology, Inc.*, 368 F. Supp. 3d 935, 963 (E.D. Va. 2019) ("The place of *jus cogens* norms at the top of the hierarchy of international law norms and their status as obligatory and overriding principles that invalidate any contradictory state acts, as well as their development from the ashes of World War II, provide an additional reason that the United States does not have sovereign immunity here.") (emphasis in original).

Finally, the *jus cogens* nature of the norms violated in this case requires a remedy. Under established principles of international law, *jus cogens* norms are considered obligations *erga omnes*. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 306 (S.D.N.Y. 2003) ("Violations of *jus cogens* norms constitute violations of obligations owed to all ('*erga omnes*')."). That is, all states "have a legal interest in their protection." *Barcelona Traction, Light and Power, Ltd.* (Belg. v. Spain), 1970 I.C.J. REP. 3, 32 (Feb. 5). The ILC Articles also highlight the international consequences of an *erga omnes* breach. All states are under a legal obligation to "cooperate to bring to an end through lawful means" such violations. ILC Articles, *supra*, art. 41(1); *see also* AM. LAW INSTITUTE, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. o (1987) (violations of *erga omnes* obligations

are violations of obligations owed "to all other states and any state may invoke the ordinary remedies available to a state when its rights under customary law are violated").

In *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Chamber Judgment (Dec. 10, 1998), the International Criminal Tribunal for the former Yugoslavia ("ICTY") described the status of torture as an obligation *erga omnes*.

> [T]he prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.

Id. ¶ 151. *See generally* Lea Brilmayer & Isaias Yemane Tesfalidet, *Third State Obligations and the Enforcement of International Law*, 44 N.Y.U. J. INT'L L. & POL. 1, 21–25 (2011); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 317–18 (2006). The prohibition of crimes against humanity is also an *obligation erga omnes*. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 189 (2011) (affirming the existence of crimes against humanity as a *jus cogens* norm which raises obligation *erga omnes*).

The Plaintiffs have asserted claims based on violations of *jus cogens* norms, which are also obligations *erga omnes*. Thus, these violations give rise to international consequences that extend far beyond the individual victims in this case. In fact, the family separation policy that forms the basis of the Plaintiffs' claims has had "serious consequences in international affairs." *Sosa*, 542 U.S. at 715. Several United Nations bodies, including the current U.N. Special Rapporteur on

Torture, have condemned the policy.[16] In addition, the Inter-American Commission on Human Rights has issued two separate resolutions calling on the United States to end the family separation policy in light of the profound impact it had on both families and children.[17] If the ATS is intended to provide "foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable," the Plaintiffs' claims of torture, cruel, inhuman, or degrading treatment, and crimes against humanity fall squarely within this realm.[18] *Jesner*, 138 S. Ct. at 1406. The ATS was adopted by Congress precisely to address such claims and, therefore, sovereign immunity should not override such a clear congressional mandate.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court deny the U.S. government's motion to dismiss and allow this case to proceed.

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[16] *See, e.g.*, U.N. High Comm'r Hum. Rts., *UN Experts to US: "Release Migrant Children From Detention and Stop Using Them to Deter Irregular Migration*" (June 22, 2018), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23245&LangID=E; U.N. High Comm'r Hum. Rts., *Separating Children From Undocumented Migrant Parents is Shocking, Inhumane and Has Dire Effects on the Children* (Oct. 19, 2018), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23764&LangID=E.

[17] *See* Press Release, *IACHR Grants Precautionary Measures to Protect Separated Migrant Children in the United State* (Aug. 20, 2018), http://www.oas.org/en/iachr/media_center/PReleases/2018/186.asp. One of these resolutions was issued at the request of the National Commission of Human Rights of Mexico, the Ombudsman's Office of Colombia, the Ombudsman's Office of Ecuador, the Attorney General's Office of Guatemala, the National Commissioner of Human Rights in El Salvador, and the National Commissioner of Human Rights in Honduras. *See* Inter-Am. Comm. Hum. Rts., Res. 64/2018, Precautionary Measure No. 731-18: Migrant Children Affected by the "Zero Tolerance" Policy Regarding the United States of America (Aug. 16, 2018), https://www.oas.org/en/iachr/decisions/pdf/2018/64-18MC731-18-US-en.pdf.

[18] The Supreme Court has identified several examples for how countries can hold the United States accountable in the event of a breach of international law, including through diplomatic protests. In the extreme, such disputes can even give rise to war. *Jesner*, 138 S. Ct. at 1410 (Alito, J., concurring); *Kiobel*, 133 S. Ct. at 1668; *Sosa*, 542 U.S. at 715.

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Respectfully submitted,

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