No. 15-1831

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

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

Plaintiffs-Appellants,

– and –

SA'AD HAMZA HANTOOSH AL-ZUBA'E,

Plaintiff,

– v. –

CACI PREMIER TECHNOLOGY, INC.,

Defendant-Appellee,

– and –

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

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA (ALEXANDRIA)

CORRECTED BRIEF OF *AMICI CURIAE* ABUKAR HASSAN AHMED, DR. JUAN ROMAGOZA ARCE, ZITA CABELLO, AZIZ MOHAMED DERIA, CARLOS MAURICIO, GLORIA REYES, OSCAR REYES, CECILIA SANTOS MORAN, ZENAIDA VELASQUEZ, AND BASHE ABDI YOUSUF IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Uthman v. Obama,
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OTHER AUTHORITIES

Am. Civil Liberties Union, The Torture Database: *Court-Martial Record: Staff Sergeant Ivan L. Frederick, II*, Nov. 30, 2005 17
Chris Ingelse, *The UN Committee Against Torture: An Assessment,* Kluwer Law International (2001) 23
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Department of Defense Law of War Manual, 8.1.1, 8.1.4.1, 8.2.1 (2015).............25
Dolly Filártiga, *American Courts, Global Justice*, N.Y. Times, Mar. 30, 2004 7
Francis Lieber, LL. D., Instructions for the Government of Armies the United States in the Field, (1898)...25
Geneva Convention Relative to the Treatment of Prisoners of War ("Third Geneva Convention"), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (1949) 27, 28
H.R. Rep. No. 102-367 .... 6, 10, 11
John Langbein, Torture and the Law of Proof: Europe and England in the Ancien Regime (1977) 6
Manfred Novak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, 66-84 (2008) 23
Memorandum of the United States as *Amicus Curiae*, *Filártiga v. Peña-Irala,* 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146.................................13
No Safe Haven: Accountability for Human Rights Violators in the United States: Hearing on S.H. 110-548 before the Subcommittee on Human Rights and the Law of the Senate Judiciary Committee, 110th Cong. 26 (2007) 12
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Rules of Land Warfare, War Dept. Doc. No. 467, Office of the Chief of Staff (G.P.O. 1917) (approved Apr. 25, 1914)..25

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STATEMENT OF INTEREST AND AUTHORITY TO FILE

This brief of *Amici Curiae* is respectfully submitted pursuant to Federal Rule of Appellate Procedure 29 in support of the Plaintiffs-Appellants.

Amici Abukar Hassan Ahmed, Juan Romagoza Arce, Zita Cabello, Aziz Mohamed Deria, Carlos Mauricio, Gloria Reyes, Oscar Reyes, Cecilia Santos Moran, Zenaida Velasquez, and Bashe Abdi Yousuf are survivors of gross human rights violations who have won lawsuits against the individuals responsible for perpetrating those abuses under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS") and the Torture Victim Protection Act, Pub. L. 102–256, H.R. 2092, 106 Stat. 73 ("TVPA"). In the decision below, the District Court held that the ATS claims in this case, specifically claims for torture, cruel, inhuman or degrading treatment or punishment, and war crimes, "could not be adjudicated because the case lacks judicially manageable standards." *Al-Shimari v. CACI Premier Tech., Inc.*, No. 1:08-CV-00827-GBL, 2015 WL 4740217, at *12 (E.D. Va. June 18, 2015). This decision, if generalized, could effectively prevent survivors, such as *Amici,* from pursuing similar claims. The *Amici*, having held their tormentors accountable in U.S. courts for torture, cruel, inhuman or degrading treatment or punishment, and war crimes, are uniquely qualified to speak to the judicially manageable standards by which such claims may be adjudicated, as well as to the importance of access to this remedy.

No counsel for a party authored this brief in whole or in part, and none of the parties or their counsel, nor any other person or entity other than *Amici*, or *Amici's* counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties to this appeal have consented to the filing of this amicus brief, pursuant to Federal Rule of Appellate Procedure 29(a).

SUMMARY OF ARGUMENT

For over three decades, and in each case brought by *Amici*, federal courts have affirmed their power to adjudicate claims for egregious human rights abuses committed abroad. The District Court's opinion that claims for torture, cruel, inhuman, or degrading treatment or punishment ("CIDT"), and war crimes presented a non-justiciable political question due to "a lack of judicially discoverable and manageable standards" is not consistent with this line of cases and, if adopted, could categorically deprive survivors, such as *Amici,* of this important remedy. *See Al-Shimari*, 2015 WL 4740217, at *12; c*f. Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (determining not every case "touching foreign relations" is nonjusticiable and holding the action for violations of international law under the ATS and TVPA did not present nonjusticiable political questions despite pertaining to issues that arose in politically charged context).

Because claims brought under the ATS must satisfy the rigorous "specific, universal, and obligatory" standard imposed by the Supreme Court in *Sosa v.*

Alvarez Machain, 542 U.S. 692, 748 (2004), substantial U.S. case law on the ATS demonstrates the existence of judicially manageable standards. *See, e.g., Filártiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (adjudication of torture and extrajudicial killing); *Chavez v. Carranza*, 559 F.3d 486, 495 (6th Cir. 2009) (defendant "subject to civil liability for his violations," including torture and extrajudicial killing); *Cabello v. Fernández-Larios*, 402 F.3d 1148 (11th Cir. 2005) (adjudication for extrajudicial killing, torture, CIDT, and crimes against humanity); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (adjudication of torture and other cruel acts). In addition, liability of private individuals for such crimes has been recognized in international law and confirmed in numerous international trials since Nuremberg. *See Kadic*, 70 F.3d at 243 (citing Telford Taylor, *Nuremberg Trials: War Crimes and International Law,* 450 Int'l Conciliation 304 (April 1949) (collecting cases)). There is no ambiguity as to whether judicially manageable standards for torture, CIDT, and war crimes claims under the ATS existed prior to, and during, 2003 and 2004. Thus, it is this Court's obligation and responsibility to apply these manageable standards.

ARGUMENT

I. U.S. COURTS RECOGNIZE CLAIMS UNDER THE ATS ONLY WHEN THEY ARE BASED ON UNIVERSAL, SPECIFIC, AND OBLIGATORY INTERNATIONAL NORMS, A STANDARD THAT IMPLIES JUDICIAL MANAGEABILITY.

The Supreme Court has provided ample guidance in the adjudication of ATS claims resting on norms of customary international law. In *Sosa v. Alvarez Machain*, the Supreme Court explained that "although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law." 542 U.S. at 724. The Court elaborated that "[t]he jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Id.* The Court urged federal courts to proceed cautiously in exercising their power to recognize causes of action under the jurisdiction of the ATS, refraining from recognizing claims "for violations of any international law norm with less definite content and acceptance among civilized nations than the 18th century paradigms familiar when § 1350 was enacted." *Id.* at 731-32. Those paradigms were violations of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 715. Thus, courts should recognize only ATS claims that are "specific, universal, and obligatory." *Id.* at 732 (citing with approval *In re Estate of Marcos*

Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)). In particular, the Court noted that current international norms meeting the same standard as the historical paradigms include the prohibition against torture. *Id.* at 732 (citing to *Filártiga,* 630 F.2d at 890 ("[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.")).

The Supreme Court might fairly have assumed without stating that the lower courts would find torture claims judicially manageable, since the Court had applied "judicially manageable standards" to evaluate custodial interrogation for nearly 100 years. *See generally* Wayne LaFave et al., Criminal Procedure §§ 6.1 – 6.2 (5th ed. 1992). One 20th century example is *Ziang Sung Wan v. United States*, 266 U.S. 1 (1924), where the Court held that a lengthy and "severe" interrogation, accompanied by detention under arduous circumstances, made the statements thus obtained involuntary. *See also Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (reversing a conviction issued in the lower court by finding the incriminating confession was made under coercive pressures by law enforcement). Moreover, the Uniform Code of Military Justice has long defined and proscribed coercive interrogation. U.C.M.J. article 31. *See also* 10 U.S.C. § 855 (torture is a criminal offense punishable by court martial). Indeed, legal standards defining and prohibiting torture have existed in the common law system since about 1640. *See*

generally John Langbein, Torture and the Law of Proof: Europe and England in the Ancien Regime (1977) (noting that changes in legal procedure contributed to the perception that torture was no longer a necessary part of criminal procedure).

II. U.S. COURTS HAVE HAD NO DIFFICULTY IN DISCOVERING JUDICIALLY MANAGEABLE STANDARDS FOR ADJUDICATING TORTURE CLAIMS UNDER THE ATS.

U.S. courts have routinely adjudicated torture claims under the ATS since 1980, when the Second Circuit decided the landmark case, *Filártiga*, 630 F.2d at 884. Not only have U.S. courts regularly adjudicated torture claims under the ATS, but both the Congress and the Executive Branch have repeatedly supported U.S. adjudication of such claims. *See e.g*., H.R. Rep. No. 102-367, at 3 (1991) (noting that U.S. treaty obligations require this country "to adopt measures to ensure that torturers are held legally accountable for their acts"). Moreover, U.S. adjudication of such claims reflects international legal obligations to prevent and punish torturers. *See e.g., Xuncax v. Gramajo*, 886 F. Supp. 162, 176, 184-85 (D. Mass. 1995) (using the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [Dec. 10, 1984, 1465 U.N.T.S. 85] ("CAT") definition to find the defendant liable for torture under the ATS) (internal citations added).

A. U.S. COURTS HAVE ADJUDICATED TORTURE CLAIMS FOR DECADES.

U.S. courts first defined and adjudicated torture under the ATS in the path-breaking *Filártiga* case in 1979, and have successfully adjudicated these claims ever since. In 1976, Joelito Filártiga was kidnapped and tortured to death in Paraguay by Américo Norberto Peña-Irala, the Inspector General of Police Asunción, in retaliation for his father's outspoken criticism of Paraguay's dictator, General Alfredo Stroessner. 630 F.2d at 878-79. The Filártigas sought justice in Paraguay, but were harassed and put in jeopardy as a result. *See* Dolly Filártiga, *American Courts, Global Justice*, N.Y. Times, Mar. 30, 2004. Upon discovering that her brother's torturer was present in the United States, Joelito's sister, Dolly Filártiga, and their father filed suit under the ATS and became the first victims to use the statute successfully to seek justice for human rights violations. *See Filártiga*, 630 F.2d at 878.

The *Filártiga* court turned to international law to find that the prohibition against torture was universal and to define torture for the purposes of adjudication. 630 F.2d at 884. The court "examined the sources from which customary international law is derived," that is, "the usage of nations, judicial opinions and the works of jurists," and concluded that "official torture is now prohibited by the law of nations" and that the "prohibition is clear and unambiguous." *Id.* Finally, the court found that torture includes "any act by which severe pain and suffering,

whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as . . . intimidating him or other persons." *Id*. Thus, the Second Circuit recognized the Filártiga family's torture claims under the ATS. *Id.* at 878.

Filártiga has since been followed by the other circuits, including the Fourth Circuit, to adjudicate torture claims under the ATS. For instance, in *Ochoa Lizarbe v. Rondon,* 402 F. App'x 834 (4th Cir. 2010), the court found the elements of torture as sufficiently definite to proceed on the merits. Other circuit decisions include *Kadic*, 70 F.3d at 249 (stating that universally recognized norms of international law—including the prohibition against torture—provide judicially manageable standards for adjudicating suits brought under the ATS); *Abebe-Jira,*722 F.3d at 848 (affirming Negewo's liability for the torture and CIDT of plaintiffs); *Mehinovic v. Vuckovic,* 198 F. Supp. 2d 1322, 1345-47 (N.D. Ga. 2002) (finding the defendant liable under ATS for torture as defined by the CAT); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475-76 (9th Cir. 1994) (concluding that claims for torture under the ATS satisfied the CAT's definition); *Al-Sher v. I.N.S,* 268 F.3d 1143, 1141 (9th Cir. 2001) (applying CAT standards to plaintiff's alleged treatment and finding that it constituted torture). *See also, Yousuf v. Samantar*, 699 F.3d 763, 772 (4th Cir. 2012) (finding that violations of universally proscribed

norms, such as the prohibition against torture, could never be "official acts" for asserting immunity).

Several U.S. courts have entered judgment after trial on torture claims for violations occurring prior to 2003, amply demonstrating the existence of a manageable standard. *See, e.g., Doe v. Constant,* 354 F. App'x 543, 547 (2d Cir. 2009) (affirming lower court's $19 million judgment holding defendant liable for torture, crimes against humanity, and the systematic use of violence against women, including rape, committed in the early 1990s); *Chavez,* 559 F.3d at 491 (6th Cir. 2009) (affirming jury verdict on crimes against humanity, torture, and extrajudicial killing committed in the 1980s and awarding plaintiffs $6 million in damages); *Arce v. Garcia*, 434 F.3d at 1256 (11th Cir. 2006) (jury verdict awarding plaintiffs $54.6 million in damages for the torture of *Amici* Dr. Juan Romagoza and co-plaintiffs committed in the early 1980s); *Cabello*, 402 F.3d at 1157-60 (referencing the CAT in affirming $4 million judgment on torture, extrajudicial killing, and crimes against humanity claims committed in the early 1970s); *Ahmed v. Magan*, No. 2:10-CV-00342, 2013 WL 4479077 at *7 (S.D. Ohio Aug. 20, 2013) (final judgment awarding *Amicus* Ahmed $15 million for claims on torture and CIDT committed in the 1970s and 1980s); *Ochoa Lizarbe v. Hurtado,* No. 07-21783-Civ-Jordan, 2008 U.S. Dist. LEXIS 109517 (S.D. Fla. Mar. 4, 2008) (final judgment awarding $37 million for torture, extrajudicial killing, war crimes, and crimes

against humanity, which were committed in the 1980s). *See also* Complaint *Jara v. Barrientos,* No. 6:13-cv-01426-RBD-GJK, 2013 WL 4771739 (M.D. Fla. 2013) (finding claims of torture and extrajudicial killing committed in 1973 adequately pleaded).

U.S. courts have established this long line of cases adjudicating torture and other human rights abuses, and the political branches of the U.S. government have time and again affirmed that adjudication. In 1992, Congress passed the TVPA to endorse ATS actions as an important tool to bring to justice perpetrators of human rights violations overseas when they are found within the reach of U.S. courts. *See* S. Rep. No. 102-249, at 3, 4 (1991) ("The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under [the ATS]"; indicating Congressional intent in passing the TVPA to "mak[e] sure the torturers and death squads will no longer have a safe haven in the United States"); H.R. Rep. No. 102-367, at 4 (stating the "*Filártiga* case met with 'general approval'"). As the ATS limits jurisdiction to civil actions by aliens, Congress enacted the TVPA "to extend a civil remedy *also to U.S. citizens* who may have been tortured abroad." S. Rep. No. 102-249, at 4-5 (emphasis added); *see also* H.R. Rep. No. 102-367, at 3 (noting that U.S. treaty obligations require this country "to adopt measures to ensure that torturers are held legally accountable for their acts," including through the provision of "means of civil redress to victims of torture"). Congress expressed

the ATS "should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law." H.R. Rep. No. 102-367, at 4. *See also Sosa*, 542 U.S. at 731-32 (stating that Congress "not only expressed no disagreement with [the Court's] view of the proper exercise of the judicial power" in the *Filártiga* line of cases but "responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail").

Congress expressly affirmed the power of U.S. Courts to hear *Amicus* Dr. Juan Romagoza Arce's torture claims. Dr. Juan Romagoza, a medical doctor, was among those tortured by Salvadoran officials during the civil war of the 1970s and 1980s. Dr. Romagoza, was shot and detained in a military raid on a church clinic and was tortured for twenty two days in the National Guard headquarters. Second Amended Complaint for Torture; Crimes against Humanity; Cruel, Inhuman or Degrading Treatment or Punishment; and Arbitrary Detention & Jury Trial Demanded at 4-6, *Romagoza v. Garcia*, No. 99-8364 CIV-HURLEY (S.D. Fla. Feb. 17, 2000). The Guardsmen applied electric shocks to his tongue, testicles, anus, and the edges of his wounds. *Id.* Revived by beatings and cigarette burns, he was raped and asphyxiated with a hood containing calcium oxide. *Id.* His torturers shot him in his left hand and taunted him that he would never perform surgery

again. *Id.* Dr. Romagoza survived and received asylum in the United States in 1983. *Id.*

But his nightmare followed him into U.S. territory: the generals who had commanded his torturers were living out a comfortable retirement in Florida. *Id.* Dr. Romagoza and other victims filed, *inter alia*, torture claims against General Carlos Eugenio Vides Casanova, Director General of the Salvadoran National Guard, and General José Guillermo García, Minister of Defense from 1979 to 1983. *Id.* In 2002, a jury found both defendants liable. *Arce v. García*, 434 F.3d 1254, 1259 (11th Cir. 2006) (No. 99-cv-08364).

In 2007, Dr. Romagoza testified before the Senate Judiciary Subcommittee on Human Rights and the Law. Moved by his story, the subcommittee members agreed that his case belonged in a U.S. court. As Senator Richard Durbin remarked:

> I could not help but think . . . of how this morning might have started for these two generals . . . in the soft breezes of South Florida, drinking coffee and reading the paper and going about their business under the protection of the United States of America. If this Judiciary Committee is about justice, that is wrong.[1]

[1] *No Safe Haven: Accountability for Human Rights Violators in the United States: Hearing on S.H. 110-548 before the Subcommittee on Human Rights and the Law of the Senate Judiciary Committee*, 110th Cong. 26 (2007) (statement of Sen. Durbin) *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110shrg43914/pdf/CHRG- 110shrg43914.pdf.

The Executive branch agreed. In 2012, Dr. Romagoza testified in immigration removal proceedings against General Vides Casanova, which resulted in a finding of removability.

Moreover, the Executive Branch has repeatedly affirmed the power of the courts to adjudicate torture claims under the ATS. The Executive Branch has taken the position that "a refusal to recognize a private cause of action [for torture]… might seriously damage the credibility of our nation's commitment to the protection of human rights." Memorandum of the United States as *Amicus Curiae*, *Filártiga v. Peña-Irala,* 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146 at *22. *See also* Supplemental Brief for the United States as *Amicus Curiae* in Partial Support of Affirmance, *Kiobel v. Royal Dutch Petroleum, Co.*, 133 S. Ct. 1659 (2012) (No. 10-1491), 2012 WL 2161290 at *4 (explaining how failure to provide a remedy against individual torturers may "give rise to the prospect that this country would be perceived as harboring the perpetrator").

B. THE STANDARD FOR ADJUDICATING TORTURE IN THE U.S. REFLECTS INTERNATIONAL LAW.

By its own terms and according to the Supreme Court in *Sosa*, ATS claims must be based on "the law of nations" or customary international law. *See* 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). In *Sosa,* the Court analyzed the availability of a

cause of action in customary international law for purposes of the ATS, compared the violations alleged by the plaintiff "against the current state of international law, looking to those sources we have long, albeit cautiously, recognized," such as "the works of jurists…[which] are resorted to by judicial tribunals…for trustworthy evidence of what the law really is." *Sosa*, 542 U.S. at 733 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)). Accordingly, the Court looked to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights ("ICCPR"), and several national constitutions to determine whether kidnapping of Alvarez-Machain amounted to an arbitrary arrest in violation of customary international law. *Id.* at 734-736.[2] *Sosa* specifically cited approvingly to *Filártiga* and *Marcos*—both dealing with torture—as justiciable claims under the ATS. *Id.* at 732.

Torture is clearly defined under customary international law, and U.S. courts analyzing torture claims under the ATS "generally rely on the definition set forth in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT')." *Chavez v. Carranza*, 413 F. Supp. 2d 891,

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[2] Citing Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171; M. Cherif Bassiouni, Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions, 3 DUKE J. COMP. & INT'L L. 235, 260-61 (1993).

899-900 (W.D. Tenn. 2005) (citing *Aldana v. Del Monte Fresh Produce, N.A., Inc.,* 416 F.3d 1242, 1251 (11th Cir. 2005) (relying on the CAT definition of torture to evaluate ATS claim); *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F. Supp. 2d 289, 326 (S.D.N.Y.2003) (stating the most common definition for torture is found in the CAT); *Kadic,* 70 F.3d at 243-44 (relying on the CAT definition of torture to conclude the atrocities were actionable under the ATS). The CAT, itself an instrument intended to codify customary international law on the subject, defines torture as the intentional infliction, by act or omission, of severe physical or mental pain and suffering, aimed at obtaining information of a confession, or at punishing, intimidating, humiliating, or coercing the victim or a third party. UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* art. 1, December 10, 1984, 1465 U.N.T.S. 85. The CAT was designed to provide a definition of torture such that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction," (CAT, art. 2 (1)) and to establish jurisdiction for torture when the offender is, *inter alia*, a national of the state or present on the territory of the State and not subject to extradition for torture (CAT, art. 5).

International cases have also adopted this definition when adjudicating torture claims. *Prosecutor v. Furund'ija*, Case No. ICTY IT-95-17/1-T ¶ 162 (July

21, 2000); *see generally Aksoy v. Turkey*, (No. 26), 1996-VI Eur. Ct. H.R. 2260; *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T (Sept. 2, 1998); *Prosecutor v. Semanza*, Case No. ICTR 97-20-T (May 15, 2003). Furthermore, international cases have successfully discerned the various elements of the CAT's definition of torture. For example, international tribunals have held the intent of the actor can be inferred from the totality of the circumstances, such as the prohibitive purpose of the act. *Aksoy*, 1996-VI Eur. Ct. H.R., ¶ 64; *Akayesu*, Case No. ICTR-96-4-T; *Furund'ija* Case No. ICTY IT-95-17/1-T, ¶ 257; *see generally Semanza*, Case No. ICTR-97-20-T. This standard for adjudicating torture in domestic and customary international law continued, without change, in 2002. *See Semanza,* Case No. ICTR-97-20-T.

Against the weight of U.S. and international precedent and the endorsement of torture adjudication by the political branches, the District Court's reliance on *Padilla* to support its finding that there are no clear standards for adjudicating torture is unpersuasive. *Padilla v. Yoo*, 678 F.3ed 748 (9th Cir. 2012). Moreover, *Padilla* is not on point. The Ninth Circuit's analysis in *Padilla* is directed to qualified immunity, an analysis that turned first on whether an attorney in the Office of the Legal Advisor should reasonably have understood that "enemy combatants" were entitled to the same constitutional rights as ordinary prisoners, and, second, on whether the specific interrogation techniques to be used against Mr.

Padilla were so clearly known to constitute torture that it was "beyond debate" at the time the techniques were authorized. *Padilla*, 678 F.3d at 758 (9th Cir. 2012). Answering both of these questions in the negative, the Ninth Circuit granted the lawyer qualified immunity. *Id.* at 768. In its discussion, however, the Ninth Circuit "agree[d] with the plaintiffs that the unconstitutionality of torturing a United States citizen was 'beyond debate' by 2001" and recited a series of cases in which courts were able to make factual determinations about torture. *Id.* at 763, 766 (referencing, for example, *Estate of Marcos*, 103 F.3d 789).

While *Padilla* at most supports the proposition that the legality of certain interrogation techniques was debatable in 2001, the treatment suffered later by Mr. Al-Shimari at Abu Ghraib is not so debatable. Even the Bush Administration, which had advocated for the use of "enhanced interrogation techniques," condemned the treatment of Mr. Al-Shimari and the other Abu Ghraib detainees. *See* White House Press Release, *President Bush Meets with Al Arabiya Television*, 2004 WLNR 2540883 (May 5, 2004) (publicizing President Bush's statement that the acts at Abu Ghraib were "abhorrent" practices which "don't represent America"). Further, the soldiers implicated in the same conduct at issue in this case have been tried and convicted for detainee abuse.[3] If the District Court's position

[3] Am. Civil Liberties Union, The Torture Database: *Court-Martial Record: Staff Sergeant Ivan L. Frederick, II*, Nov. 30, 2005, *available*

that there are no judicially manageable standards for adjudicating torture were generalized, courts would be closed to victims of the worst abuses, while those who might otherwise have been deterred by these convictions could apparently proceed with impunity.

III. ATS CLAIMS FOR CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT ARE GOVERNED BY JUDICIALLY MANAGEABLE STANDARDS.

As with torture claims, U.S. courts have successfully adjudicated claims for cruel, inhuman, or degrading treatment or punishment under the ATS, and U.S. case law reflects and incorporates both international and domestic standards. *See, e.g.*, *Bowoto v. Chevron Corp.,* 557 F. Supp. 2d 1080, 1092-93 (N.D. Cal. 2008) (looking to international treaties on international law, the CAT, ICCPR, and precedent from U.S. courts to conclude that CIDT is actionable under the ATS), *aff'd,* 621 F.3d 1116 (9th Cir. 2010). Under international law, CIDT is a general category of prohibited conduct of which "torture is at the extreme end." *Wiwa v. Royal Dutch Petroleum Co*., No. 96 CIV. 8386 (KMW), 2002 WL 319887, at *7 (S.D.N.Y. Feb. 28, 2002) (citing *Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment,* S. Exec. Rep. 30, 101st Cong., 2d

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at https://www.thetorturedatabase.org/document/court-martial-record-staff-sergeant-ivan-l-frederick-ii-volume-1-8?search_url=search/apachesolr_search&search_args=filters=im_cck_field_doc_officials:1805.

Sess. 13 (1990)); CAT, art. 16, annex, 39 U.N. GAOR Supp., No. 51, at 197, U.N. Doc. A/39/51 (1984) (defining state obligations with respect to "other acts of [CIDT] or punishment which do not amount to torture").

A. U.S. COURTS HAVE LONG ADJUDICATED CLAIMS FOR CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT.

U.S. courts have long adjudicated claims of CIDT which do not amount to torture. *See*, *e.g., Samantar v. Yousuf*, 130 S. Ct. 2278 (2010); *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 756-60 (D. Md. 2010) *rev'd on other grounds* (finding the prohibition against CIDT is an international norm recognized in international agreements, U.S. foreign relations, and judicial precedent); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1322-23 (N.D. Cal. 2004) (citing to decisions from the UN Human Rights Committee and regional human rights courts and commissions for guidance in evaluating plaintiffs' CIDT claims); *Sarei v. Rio Tinto PLC,* 650 F. Supp. 2d 1004, 1028-29 (C.D. Cal. 2009), *judgment vacated on other grounds*, (surveying international and domestic case law to find that CIDT was actionable under the ATS and defining CIDT as acts that fall short of torture, but "inflict mental or physical suffering, anguish, humiliation, fear and debasement"); and *Wiwa v. Royal Dutch Petroleum Co.,* 626 F. Supp. 2d 377, 383 (S.D.N.Y. 2009) (citing two other S.D.N.Y. decisions from 2002 and 2009 supporting the conclusion that CIDT is actionable under the ATS).

Courts considering both claims for torture and CIDT have distinguished the two, such that a jury could clearly be instructed on the difference. Thus, the Southern District of New York noted CIDT was "conceptually linked to torture by shades of misconduct discernible as a continuum" and that "degrees of mistreatment" and "levels of malice the offender exhibits" inform the distinction between CIDT and torture. *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 437 (S.D.N.Y. 2002). In that ATS case, the court sustained a Magistrate Judge's findings that plaintiffs' relatives had been tortured when some had been repeatedly beaten in custody then set fatally aflame, or were burned with cigarettes, beaten, whipped, and threatened with bodily mutilation. *Id*. at 420-21. The court found this amounted to "severe pain and suffering," according to the CAT definition. *Id*. It then examined the relatives' claims for CIDT, and concluded, *inter alia*, that though the relatives themselves had not been tortured, when the perpetrators tortured their loved ones before their eyes and dragged their relatives' corpses through the street in front of their home, this amounted to CIDT. *Id*. at 437-38. The court noted that difficulties in establishing a precise definition of CIDT should not deter courts from adjudicating the claim:

> That it may present difficulties to pinpoint precisely where on the spectrum of atrocities the shades of cruel, inhuman, or degrading treatment bleed into torture should not detract from what really goes to the essence of any uncertainty: that, distinctly classified or not, the infliction of cruel, inhuman or degrading treatment by agents of the state, as closely akin to or adjunct of

> torture, is universally condemned and renounced as offending internationally recognized norms of civilized conduct.

Tachiona, 234 F. Supp. 2d at 437.

If the District Court's opinion was generalized, *Amicus* Abukar Ahmed's case would not have gone to judgment on both torture and cruel treatment under the ATS. In granting summary judgment for Professor Ahmed, the court found that acts of stress positions, starvation, sleep deprivation, and confinement in close proximity to one's own urine and excrement amounted to CIDT; whereas the use of iron instruments on Professor Ahmed's genitals and the forcible feeding of a five-liter container filled with water, sand, and small stones cutting off his air supply amounted to severe pain and suffering meeting the ATS's definition of torture. *Ahmed v. Magan,* Civ. No. 2:10-cv-00342 at 12 (S.D. Ohio, Nov. 20, 2012); *see also Qi,* 349 F. Supp. 2d at 1321-22 (entering a default judgment on one plaintiff's CIDT claim regarding sexual abuse while under police custody and dismissing the other plaintiffs' CIDT claims); *Al-Quraishi*, 728 F. Supp. 2d at 760 (finding that beatings, electric shocks, threats of death and rape, mock executions, and hanging from the hands and feet may justify a finding of CIDT); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1077 (C.D. Cal. 2010) (holding that the plaintiffs' descriptions of severe beatings, deprivation of food, and extended confinements could be adequate to claim CIDT).

B. THE STANDARD FOR ADJUDICATING CRUEL, INHUMAN, OR DEGRADING TREATMENT IN THE U.S. REFLECTS INTERNATIONAL LAW.

U.S. cases echo international jurisprudence on CIDT claims, and additional guidance can be found there. For instance, in *Ireland v. United Kingdom*, the European Court of Human Rights found that harm derived from wall-standing, hooding, and other pain-inducing acts did not constitute torture, but that those acts amounted to CIDT. *Ireland v. United Kingdom*, 23 Eur. Ct. H.R. (1978); *see also Al-Quraishi*, 728 F. Supp. 2d at 759 (citing *Ireland v. United Kingdom* as authority); *Sarei*, 650 F. Supp. 2d at 1028-29, *judgment vacated on other grounds*. The CAT prohibits torture and "cruel, inhuman or degrading treatment or punishment which do not amount to torture." CAT, art. 16.

The International Criminal Tribunal for the Former Yugoslavia ("ICTY") has held that severe beatings with bare hands, metal sticks and rifles, such as those conducted by the defendants in *Deliç*, constituted inhumane acts, but not torture. *Prosecutor v. Deliç*, Case. No. ICTY IT-04-83-T ¶¶ 315-319 (Sept. 15, 2008). *But see Prosecutor v. Naletilic*, Case No. ICTY IT-98-34-T ¶¶ 366-68 (Mar. 31, 2003) (holding that beatings, and threats of further beatings and of death amounted to torture).

The distinction between torture and CIDT has also been addressed in the jurisprudence of the Commission and the Court of Human Rights under the

European Convention. In the *Greek Case*, the Commission "established that the difference between the prohibited acts described in article 3 of the [European Convention of Human Rights] was only a matter of degree: '[…] all torture must be inhuman and degrading treatment, and inhuman treatment also degrading.'" *Greek Case*, 12 Y.B. Eur. Conv. on H.R. 186, 461-65 (1969).[4] Two U.S. Courts—the District of Massachusetts and the Northern District of California—later cited this decision to determine the difference between torture and CIDT. *Xuncax*, 886 F.Supp. at 187; *Bowoto*, 557 F. Supp. 2d at 1094. Furthermore, torture is distinguished from CIDT by the element of the prohibited purpose for which someone is subjected to abusive acts, such as obtaining information or a confession, or the execution of a (non-lawful) punishment. *See generally* CAT; Manfred Novak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, 66-84 (2008).

Courts regularly adjudicate claims that vary by degree. Thus, whether assessing a party's requisite *mens rea* in a civil case, or evaluating whether a "search and seizure" violates Fourth Amendment protection, determining that facts fall into one legal category because they "fall short" of another is not an

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[4] In the *Greek Case*, the Commission added that treatment or punishment of an individual is degrading if it grossly humiliates the victim vis-à-vis other persons, or forces him to act against his will or consciousness. Chris Ingelse, *The UN Committee Against Torture: An Assessment,* Kluwer Law International, 58-59 (2001).

unmanageable judicial exercise. *See, e.g.*, *Kent Nowlin Const. Co. v. Occupational Safety & Health Review Comm'n*, 648 F.2d 1278, 1282 (10th Cir. 1981) (noting that a defendant can still be liable for an intentional or negligent *mens rea* that "falls short" of willfulness); *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (restating the scope of Fourth Amendment protections as applying to searches and seizures that "fall short" of traditional arrest). The definition of CIDT as severe treatment of detainees that "falls short" of torture is no more difficult to manage. Conversely, if the District Court's position that there are no judicially manageable standards for CIDT were adopted, there would be no way to evaluate the treatment of detainees at all, and even the worst abuses could go without remedy.

IV. THE PROHIBITION ON WAR CRIMES IS GOVERNED BY JUDICIALLY MANAGEABLE STANDARDS UNDER THE ATS.

Codified after the Second World War, the Geneva Conventions provide "a precise, universally accepted definition of war crimes," including crimes related to the mistreatment of detainees. *In re XE Servs. Alien Tort Litigation,* 665 F. Supp. 2d 569, 582 (E.D. Va. 2009). In addition, "Congress has clearly defined the law of nations to include a binding prohibition on the commission of war crimes," and "it follows that an allegation of a war crime states a cause of action under the ATS." *Id.* U.S. courts have successfully adjudicated war crimes since at least 1946, and such adjudications reflect and incorporate both international and domestic standards for war crimes. *See, e.g., In re Yamashita*, 327 U.S. 1 (1946).

A. U.S. COURTS HAVE LONG ESTABLISHED JUDICIALLY MANAGEABLE STANDARDS FOR ADJUDICATING WAR CRIMES.

Attacks on personal integrity in the course of hostilities have long been recognized in the United States as violations of the law of war. *See, e.g.,* Francis Lieber, LL. D., Instructions for the Government of Armies of the United States in the Field, (1898); Rules of Land Warfare, War Dept. Doc. No. 467, Office of the Chief of Staff (G.P.O. 1917) (approved Apr. 25, 1914) ("Lieber Code"); *In re Yamashita,* 327 U.S. at 14 (noting that war crimes, including carrying out "a deliberate plan and purpose to massacre and exterminate ... unarmed noncombatant civilians … without cause or trial … are recognized in international law as violations of the law of war"). *See also* 18 U.S.C. § 2441 (defining war crimes as "a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party"); and Department of Defense Law of War Manual, §§ 8.1.1, 8.1.4.1, 8.2.1 (2015) (explaining torture and CIDT are always forbidden in wartime detention).

U.S. courts have adjudicated claims for war crimes under the ATS for decades. In *Amici* Bashe Yousuf and Aziz Deria's case *Yousuf v. Samantar*, the court awarded $21 million, *inter alia*, for war crimes, including torture and CIDT, committed in Somalia in the 1980s. *Yousuf v. Samantar,* Memorandum Opinion, No. 1:04CV1360, 2012 WL 3730617 (E.D. Va. August 28, 2012). *See also Kadic,*

70 F.3d at 239-40 (holding war crimes violate fundamental norms of international law and are actionable under the ATS, and noting, "The Executive Branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Act for…war crimes"); *In re Chiquita Brands Intern., Inc. Alien Tort Statute and Shareholder Derivative Litigation*, 792 F. Supp. 2d 1301, 1333-34 (S.D. Fla. 2011) (providing guidance on adjudication of claims for war crimes, including torture); *Doe v. Drummond Co., Inc.*, No. 2:09-CV-01041-RDP, 2010 WL 9450019, at *8 n.16 (N.D. Ala. Apr. 30, 2010) (highlighting defendant's improper assertion that a victim of a war crime must be an innocent civilian to qualify for relief under ATS; explaining that "this court can find no authority for the contention that the definition of civilian for crimes against humanity claims applies to claims brought as war crimes, nor that civilian status is an element of a war crimes claim").

B. THE STANDARD FOR ADJUDICATING WAR CRIMES IN THE U.S. REFLECTS INTERNATIONAL LAW.

Legal accountability for war crimes has been recognized since World War I, and trials at Nuremberg confirmed this principle after World War II. *Kadic*, 70 F.3d at 243 (citing to Taylor, *Nuremberg Trials: War Crimes and International Law,* at 304 (collecting cases)). The U.S. jurisprudence elaborated above is tightly bound to international law.

"By ratifying the Geneva Conventions, Congress has adopted a precise, universally accepted definition of war crimes." *In re XE Servs.,* 665 F. Supp. 2d at 582. The third article of all four Geneva Conventions ("Common Article Three"), prescribes legal obligations for parties to a conflict not of an international character, including treatment of detainees:

> Persons taking no active part in hostilities, including members of armed forces … placed 'hors de combat' by … detention … shall in all circumstances be treated humanely … To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, cruel treatment and torture…
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment …

Geneva Convention Relative to the Treatment of Prisoners of War ("Third Geneva Convention") art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (1949) ("Common Article Three"). Thus, in the context of wartime detention, torture and CIDT are always prohibited. *See id.* Through enactment of a separate federal statute, Congress further incorporated this precise definition into the federal criminal law. 18 U.S.C. § 2441 (defining torture without reference to civilian status: "The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful

sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind”). International tribunals and courts adjudicate war crimes liability in accordance with this standard. *See, e.g.*, *Prosecutor v. Mucić*, Case No. ICTY IT-96-21-T, Judgment, ¶¶ 494-96 (Nov. 16, 1998) (defining elements of torture as a war crime and holding rape by interrogators constitutes an act of torture in violation of the laws of war); *Prosecutor v. Akayesu*, Case No. ICTR-86-4-T, Judgment, ¶¶ 599, 629 (Sept. 2, 1998) (evaluating torture charges as violations of Common Article Three; noting the eligible class of victims to be “persons taking no active part in the hostilities,” which includes former combatants no longer participating in hostilities due to detention). *See also* Rome Statute of the International Criminal Court arts. 8(2)(c) and (e), July 17, 1998, 2187 U.N.T.S. 3 (defining war crimes to include cruel treatment and torture of detainees, without reference to civilian status). It follows that the District Court’s holding that adjudication of war crimes would require adjudication of whether victims were civilians (much less “innocent” civilians) is plain error. *See generally* Common Article Three; *Al-Shimari*, No. 1:08-CV-00827-GBL, 2015 WL 4740217, at *15.[5] Were the District

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[5] Even if this were not so, courts have routinely adjudicated the question of

Court's position that war crimes cannot be adjudicated generalized, one of the oldest line of cases in U.S. law would be overturned, increasing impunity and denying access to remedy for victims of such crimes.

CONCLUSION

The definitions of torture, cruel, inhuman, or degrading treatment, and war crimes employed by U.S. courts and reflected in international law provide more than sufficient guidance for courts to proceed in a principled, rational, and reasoned fashion in evaluating such claims under the ATS. If the District Court's refusal to perform its judicial function in adjudicating these well-established human rights claims based on their unmanageability were generalized, it could

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whether individuals in U.S. military custody are properly classified as combatants or civilians. *See, e.g., Boumediene v. Bush,* 553 U.S. 723 (2008) (reaffirming judicial authority to review habeas corpus claims and combatant status determinations); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality opinion) (finding a U.S. citizen detained as a combatant is entitled to "a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker"); *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (vacated on other grounds) ("The law of war provides clear rules for determining an individual's status during an international armed conflict, distinguishing between "combatants" (members of a nation's military, militia, or other armed forces, and those who fight alongside them) and "civilians" (all other persons)). *See also Ex Parte Quirin,* 317 U.S. 1, 30–31 & n. 7 (1942); *Ex Parte Milligan,* 71 U.S. 2, 121–22 (1866); *Padilla v. Hanft,* 423 F.3d 386, 391 (4th Cir. 2005); *Latif v. Obama*, 666 F.3d 746, 753 (D.C. Cir. 2011); *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011); *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2011); *Parhat v. Gates*, 532 F.3d 834, 846-47 (D.C. Cir. 2008); *Awad v. Obama*, 646 F. Supp. 2d 20, 23 (D.D.C. 2009); *United States v. Hamidullin*, No. 3:14CR140-HEH, 2015 WL 4241397 (E.D. Va. July 13, 2015).

only undermine the credibility of the United States, its courts in particular, established through decades of legal precedent up until now. Accordingly, the District Court's dismissal of Appellants' ATS claims should be reversed.

Dated: September 29, 2015

Respectfully submitted,

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I hereby certify that on September 29, 2015, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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