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 OF FORMER UNITED STATES DIPLOMATS MORTON I. ABRAMOWITZ, J. BRIAN ATWOOD, HARRIET C. BABBITT, HARRY G. BARNES, JR., J.D. BINDENAGEL, JAMES BISHOP, JAMES L. BULLOCK, A. PETER BURLEIGH, HODDING CARTER III, GOODWIN COOKE, PATRICIA DERIAN, ROBERT S. GELBARD, WILLIAM C. HARROP, SAMUEL F. HART, JOHN L. HIRSCH, ALLEN HOLMES, PRINCETON N. LYMAN, MARILYN McAFEE, JAMES C. O'BRIEN, THOMAS R. PICKERING, LAURENCE E. POPE, DAVID J. SCHEFFER, JOHN SHATTUCK, PAUL K. STAHNKE, ALEXANDER F. WATSON AND ROBERT WHITE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DOUGLASS CASSEL
Counsel of Record
SEAN O'BRIEN
AMY GRIFFIN
CENTER FOR CIVIL AND HUMAN RIGHTS
NOTRE DAME LAW SCHOOL
2150 Eck Hall of Law
Notre Dame, Indiana 46556
(574) 631-8555

Counsel for Amici Curiae

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STATEMENT OF INTEREST

Amici curiae, former United States diplomats and State Department officials, submit this brief in support of the proposition that our national interest in amicable relations among nations does not support sovereign immunity for former officials of foreign governments from suit in United States courts for alleged torture and extrajudicial executions.[1]

Amici are the following former United States diplomats and State Department officials:

Morton I. Abramowitz was Assistant Secretary of State for Intelligence and Research from 1986 to 1989. Among other positions in his government career, he was also Ambassador to Thailand from 1978 to 1981, Ambassador to Turkey from 1989 to 1991 and Ambassador to the Mutual and Balanced Force Reduction Negotiations in Vienna from 1983 to 1984.

J. Brian Atwood served as Under Secretary of State for Management in 1993 and as Administrator of the United States Agency for International Development from 1993 to 1999.

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[1] The parties have consented in writing to the filing of this brief. Counsel for *amici* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Center for Civil and Human Rights of Notre Dame Law School made a monetary contribution to the preparation or submission of this brief.

Harriet C. Babbitt served as Ambassador and Permanent Representative of the United States to the Organization of American States from 1993 to 1997, and as Deputy Administrator of the United States Agency for International Development from 1997 to 2001.

Harry G. Barnes, Jr., served as Ambassador to Romania from 1974 to 1977, Director General of the Foreign Service and Director of Personnel in the Department of State from 1977 to 1981, Ambassador to India from 1981 to 1985 and Ambassador to Chile from 1985 to 1988.

J.D. Bindenagel was Ambassador and Special Envoy for Holocaust issues from 1999 to 2002 and U.S. Special Negotiator for Conflict Diamonds from 2002 to 2003. During his 28-year career as a Foreign Service Officer he served in Asia and in Europe.

James Bishop was Deputy Assistant Secretary of State for Africa from 1981 to 1987 and Principal Deputy Assistant Secretary of State for Human Rights and Humanitarian Affairs from 1991 to 1993. During his 33 years as a U.S. Foreign Service Officer, he also served as Ambassador to Niger from 1979 to 1981, Ambassador to Liberia from 1987 to 1990 and Ambassador to Somalia from 1990 to 1991.

James L. Bullock is Minister Counselor, retired. His final post was as Minister Counselor for Public Affairs at the U.S. Embassy in Paris from 2006 to 2009. Among other posts in his 30-year Foreign Service career, he served in Embassy section head

assignments in several Arab world capitals and as press attaché at the U.S. Embassy in Moscow.

A. Peter Burleigh served as Ambassador and Coordinator for Counter-terrorism from 1991 to 1992, Ambassador to Sri Lanka and the Maldives from 1995 to 1997, and Ambassador and Deputy Permanent Representative to the United Nations from 1997 to 1999.

Hodding Carter III was Assistant Secretary of State for Public Affairs from 1977 to 1980.

Goodwin Cooke was Ambassador to the Central African Republic from 1978 to 1980. His career as a Foreign Service Officer included posts in Africa, Asia, Canada and Europe.

Patricia Derian was Assistant Secretary of State for Human Rights and Humanitarian Affairs from 1977 to 1981.

Robert S. Gelbard was Assistant Secretary of State for International Narcotics and Law Enforcement Affairs from 1993 to 1997. Among other senior diplomatic posts, he served as Ambassador to Bolivia from 1988 to 1991, Ambassador to Indonesia from 1999 to 2001, and as the President's Special Representative to the Balkans from 1997 to 1999.

William C. Harrop served as Ambassador to Guinea from 1975 to 1977, Deputy Assistant Secretary of State for Africa from 1977 to 1980, Ambassador to Kenya from 1980 to 1983, Inspector General of the Department of State and the Foreign Service from

1983 to 1987, Ambassador to Zaire from 1987 to 1991, and Ambassador to Israel from 1991 to 1993.

Samuel F. Hart served as Ambassador to Ecuador from 1982 to 1985.

John L. Hirsch served as Ambassador to Sierra Leone from 1995 to 1998.

Allen Holmes served as Ambassador to Portugal from 1982 to 1985, Assistant Secretary of State for Political-Military Affairs from 1985 to 1989, and Assistant Secretary of Defense for Special Operations and Low Intensity Conflict from 1993 to 1999.

Princeton N. Lyman served 37 years with the U.S. Government. His positions included Deputy Assistant Secretary of State for African Affairs from 1981 to 1986, Ambassador to Nigeria from 1986 to 1989, Ambassador to South Africa from 1992 to 1995, and Assistant Secretary of State for International Organization Affairs from 1997 to 1998.

Marilyn McAfee was a career foreign service officer from 1968 to 1998. She served as Ambassador to Guatemala from 1993 to 1996. Other postings included Nicaragua, Iran, Washington, Costa Rica, Venezuela, Chile and Bolivia, where she was Deputy Chief of Mission from 1989 to 1992. In 1997 she was designated Assistant Inspector General for Inspections, and subsequently Acting Deputy Inspector General of the Department of State.

James C. O'Brien was Principal Deputy Director of the Office of Policy Planning in the Department of State from 1998 to 2000, and Special Presidential

Envoy to the Balkans from 2000 to 2001. He served in the Department of State from 1989 to 2001.

Thomas R. Pickering was Under Secretary of State for Political Affairs from 1997 to 2001. He also served as Ambassador to Jordan from 1974 to 1978, Assistant Secretary of State for Oceans, Environment and Science from 1978 to 1981, Ambassador to Nigeria from 1981 to 1983, Ambassador to El Salvador from 1983 to 1985, Ambassador to Israel from 1985 to 1988, Ambassador and Representative to the United Nations from 1989 to 1992, Ambassador to India from 1992 to 1993, and Ambassador to the Russian Federation from 1993 to 1996.

Laurence E. Pope served as Associate Coordinator for Counter-terrorism from 1991 to 1993, Ambassador to Chad from 1993 to 1996, and Political Advisor to the Commander in Chief, U.S. Central Command, from 1997 to 2000.

David J. Scheffer was Ambassador at Large for War Crimes Issues from 1997 to 2001 and was Senior Adviser and Counsel to the U.S. Permanent Representative to the United Nations, as well as a member of the Deputies Committee of the National Security Council, from 1993 to 1997.

John Shattuck was Assistant Secretary of State for Democracy, Human Rights and Labor from 1993 to 1998, and Ambassador to the Czech Republic from 1998 to 2000.

Paul K. Stahnke is Minister Counselor, retired. Among other posts, he was Counselor of Mission at the United States Mission to the Organization for Economic Cooperation and Development in Paris from 1978 to 1982, and Permanent Representative to

the United Nations Economic and Social Council for Asia and the Pacific from 1982 to 1988. He was in the U.S. Embassy in Mogadishu, Somalia, at the time the Barre regime took power.

Alexander F. Watson served as Ambassador to Peru from 1986 to 1989, Ambassador and Deputy Permanent Representative to the United Nations from 1989 to 1993, and Assistant Secretary of State for Western Hemisphere Affairs from 1993 to 1996.

Robert White served as Ambassador to Paraguay in 1977 to 1980 and Ambassador to El Salvador in 1980 to 1981. Among other posts during his 25-year career as a Foreign Service Officer, he also served as Latin American Director of the Peace Corps and as Deputy Permanent Representative to the Organization of American States.

As former diplomats and State Department officials with collectively broad and diverse experience, *amici* are uniquely suited to comment on whether our national foreign policy interests would be served by extending sovereign immunity to former foreign officials sued in our courts for alleged torture and extrajudicial execution. *Amici* believe that such a blanket extension is not only unwarranted, but would conflict with our national interests. In view of long-standing American policy recognizing our national interest in holding human rights violators accountable, sheltering former foreign officials behind an impenetrable wall of sovereign immunity is inappropriate in such cases.

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SUMMARY OF ARGUMENT

Amici curiae are former American diplomats and State Department officials. *Amici* submit this brief in support of the proposition that our national interest in amicable relations among nations does not support a blanket extension of sovereign immunity to former foreign officials in the narrow and discrete context of their being sued in United States courts for alleged torture and extrajudicial executions.[2]

We understand that the Court of Appeals interpreted the Foreign Sovereign Immunities Act not to confer sovereign immunity on individual foreign officials and former officials.[3] We express no view on that broad statutory holding. We address only a narrow question within our professional expertise and squarely presented by the facts of this case: whether extending sovereign immunity to former foreign officials sued for alleged torture and extrajudicial executions is in our national interest.[4] As the Court of Appeals recognized, sovereign immunity is a matter of comity among nations. Its purpose is to protect "'our national interest' and the preservation

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[2] This *amicus* brief expresses no view on sovereign immunity for former foreign officials outside the context of cases of torture and extrajudicial executions.

[3] *Yousuf v. Samantar*, 552 F.3d 371, 373, 381, 383 (4th Cir.), *cert. granted*, 130 S. Ct. 49 (2009) (hereinafter "*Yousuf*").

[4] We understand that respondents in this case focus on the issue of sovereign immunity for former foreign officials.

of amicable international relations" (majority opinion).[5] By nature sovereign immunity is "inextricably bound up with the executive branch's conduct of foreign affairs" (concurring opinion).[6] These are matters within our ken. And our collective experience teaches that amicable international relations do not require that former foreign officials be given blanket immunity from suit in our courts for alleged torture and extrajudicial executions.

We recognize that there may be occasions where the executive branch believes that it is not in the national interest for a particular lawsuit to proceed. In such cases, courts have ample tools, such as the political question and act of state doctrines, among others, to dismiss lawsuits on a case by case basis without granting immunity to all former foreign officials accused of torture and extrajudicial executions. The national interest can thus be protected without a blanket extension of the blunt and over-inclusive tool of sovereign immunity.

On the other hand, there are occasions where the national interest is consistent with the very purpose of a lawsuit. If the facts alleged here are true – a matter on which we express no view – the present suit may be such a case. Plaintiffs allege that a former senior official of a brutal and undemocratic

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[5] *Yousuf*, 552 F.3d at 383 (citations omitted).

[6] *Id*. at 384 (Duncan, J., concurring).

regime was responsible for their torture and for extrajudicial executions of their family members.[7] That regime is no longer in power, that nation (Somalia) is widely viewed as a paradigm of a failed state, its courts are dysfunctional, and the former official now resides in our country.[8] In such circumstances, there is good reason to believe that our fundamental foreign policy commitment to human rights and the rule of law – cornerstones of American foreign policy for decades – may be vindicated by allowing our courts to hear the suit.

Counter arguments have been raised: We are urged to respect foreign courts and not to judge former foreign officials by American laws. But neither contention applies here, where the foreign courts are those of a failed State, and where the suit is based not on American but on international law. We are also told that to deny sovereign immunity to former foreign officials, even in cases of torture, would make the United States unique. In fact, as illustrated by the British House of Lords' judgment denying sovereign immunity to General Pinochet in 1999,[9] we would hardly be the first to deny sovereign immunity in a case of alleged torture.

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[7] *Id*. at 374.

[8] *Id*. (indicating that Mr. Samantar now resides in United States).

[9] *R v. Bow Street Magistrate, ex parte Pinochet*, [2000] 1 AC 147, [1999] 2 All ER 97, [1999] 2 WLR 827.

Finally, we are admonished that to deny sovereign immunity to former foreign officials in our courts would lead to denial of immunity to former American officials in foreign courts. But our former officials are already significantly protected from foreign suits by the act of state and other judicial doctrines, as well as by American diplomacy. Considerations of reciprocity would further limit their exposure in the event this Court denies sovereign immunity to former foreign officials specifically in cases of alleged torture and extrajudicial execution.

For these reasons, we respectfully suggest that the very purpose of sovereign immunity – comity among nations – is consistent with denying sovereign immunity to former foreign officials sued in our courts for torture and extrajudicial executions. Comity among nations does not imply a utopian state of international harmony, but rather calls on each nation to "respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement."[10] In view of international law prohibitions of torture and extrajudicial executions, as well as longstanding American policy recognizing our national interest in holding human rights violators

[10] *Sosa v. Alvarez Machain*, 542 U.S. 692, 761 (2004) (Breyer, J., concurring) (stressing that it is important for courts to ask "whether the exercise of jurisdiction under the AT[CA] is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement").

accountable, sheltering former foreign officials behind an impenetrable wall of sovereign immunity is inappropriate in such cases.

ARGUMENT

I. COMITY AMONG NATIONS DOES NOT REQUIRE THAT FORMER FOREIGN OFFICIALS BE SHIELDED BY SOVEREIGN IMMUNITY FROM SUIT FOR ALLEGED TORTURE AND EXTRAJUDICIAL EXECUTIONS.

Citing precedent from this Court,[11] the Court of Appeals recognized that the purpose of sovereign immunity is to protect the national interest in preserving amicable international relations.[12] In our judgment, international harmony does not require extending sovereign immunity to former foreign officials sued for torture and extrajudicial executions, for two reasons.

First, where a suit against a former foreign official is not in our national interest, courts already have adequate tools – short of sovereign immunity – to dismiss such a suit. Second, unlike those flexible

[11] *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983); *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945); *Republic of Austria v. Altmann,* 541 U.S. 677, 696 (2004).

[12] *Yousuf*, 552 F.3d at 382-83.

and adaptable tools, a blanket extension of sovereign immunity to former officials would mean that foreign torturers could *never* be held to account by our courts – even where there are good reasons, consistent with the national interest, to bring them before American courts. Because of our national interest in holding human rights violators accountable, immunizing all foreign officials sued for torture and extrajudicial executions is particularly unwise.

A. Courts Have Adequate Tools to Dismiss Suits When They Are Contrary to the National Interest.

There are occasions when allowing a particular suit to proceed is against our national interest. Yet our courts do not need the additional tool of a blanket, inflexible extension of sovereign immunity to all former foreign officials sued for torture. Encouraged by this Court,[13] on a case by case basis, courts often dismiss suits or claims deemed to be contrary to the national interest. In doing so courts rely on doctrines of nonjusticiable political questions,[14] act of state,[15]

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[13] *Sosa v. Alvarez Machain*, 542 U.S. at 733 n.21 (2004) (endorsing "case-specific deference to the political branches").

[14] *E.g., Alperin v. Vatican Bank*, 410 F.3d 532, 538 (9th Cir. 2005), *cert. denied*, 546 U.S. 1137 (2006) (dismissing human rights and international law claims under political question doctrine).

[15] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

separation of powers,[16] and international comity.[17] Normally the courts rule on such matters at the request of the defense, and often after requesting, receiving, and taking into account the views of the Executive Branch as articulated by the State Department.

The virtue of all these tools is that they are flexible and case-specific: they can be applied and tailored to meet the specific national interest at stake in each case. Unlike broad assertions of sovereign immunity, they are not extended across-the-board to an entire class of beneficiaries – former foreign officials – in cases of alleged torture and extrajudicial execution. The national interest can be protected without extending the over-inclusive shield of sovereign immunity that far.

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[16] *Sosa v. Alvarez Machain*, 542 U.S. at 733 n.21 (2004) (where State Department opposes suit on foreign policy grounds, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"); *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20, 21, 23-24 (D.D.C. 2005) (dismissing federal claims based on separation of powers and foreign policy impacts).

[17] In *Sosa v. Alvarez Machain*, Justice Breyer's concurring opinion stressed that it is important for courts to ask "whether the exercise of jurisdiction under the AT[CA] is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement." 542 U.S. at 761.

B. Suits Against Former Foreign Officials For Torture and Extrajudicial Execution May Be Consistent with the National Interest and Should Not Be Barred Categorically by Sovereign Immunity.

The present suit is brought under the Alien Tort Statute and the Torture Victim Protection Act.[18] Suits under the Alien Tort Statute often allege torture and extrajudicial executions[19] (as in the present case).[20] By statutory definition, suits under the Torture Victim Protection Act are limited to cases of alleged torture and extrajudicial executions.[21]

The purpose of such suits is consistent with longstanding, central aims of United States foreign policy – to uphold human rights and the rule of law. Our national foreign policy commitment to human rights and the rule of law has been codified for

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[18] *Yousuf*, 552 F.3d at 373, citing Alien Tort Statute, 28 U.S.C. § 1350, and Torture Victim Protection Act of 1991, see Pub. L. 102-256, 106 Stat. 73 (1992) (reproduced at 28 U.S.C. § 1350 note).

[19] *E.g.*, *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d 1325 (S.D. Fla. 2002), *aff'd*, 402 F.3d 1148 (11th Cir. 2005) (extrajudicial killing, torture, crimes against humanity, and cruel, inhuman or degrading punishment or treatment); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (summary execution, torture, disappearance, cruel, inhuman or degrading treatment).

[20] *Yousuf*, 552 F.3d at 373-74.

[21] Torture Victim Protection Act, §§ 2(a) and 3(a) and (b).

decades in legislation,[22] and reiterated by Administrations of both parties.[23] Most recently in December 2009 Secretary of State Hillary Rodham Clinton reaffirmed that our "commitment to human rights starts with universal standards and with holding everyone accountable to those standards."[24] She added:

> By holding ourselves accountable, we reinforce our moral authority to demand that all governments adhere to obligations under international law; among them, not to torture, arbitrarily detain and persecute dissenters, or engage in political killings. Our government and the international community must . . . hold violators to account.[25]

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[22] Under United States law, "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally protected human rights by all countries." 22 U.S.C. § 2304(a)(1).

[23] Two decades ago, for example, President George Bush proclaimed, "In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere." *Statement on Signing the Torture Victim Protection Act of 1991*, 28 Weekly Comp. Pres. Doc. 465 (March 12, 1992).

[24] *Remarks on the Human Rights Agenda for the 21st Century*, Georgetown University, December 14, 2009, accessible at http://www.state.gov/secretary/rm/2009a/12/133534.htm, last visited Jan. 6, 2010.

[25] *Id*.

This commitment to accountability for torturers not only reflects our basic values, but also prudently defends our interests. Foreign governments that commit gross violations of human rights breed political instability and commercial insecurity. Especially in the current, worldwide battle for hearts and minds, our visible national commitment to human rights and accountability is among our most important foreign policy assets.

Reflecting this commitment, on a case by case basis, past Administrations have expressly refrained from objecting to suits against alleged torturers under the Alien Tort Statute or Torture Victim Protection Act, and have even affirmatively supported such suits. For example, in 1980 the State Department submitted a brief in support of a suit under the Alien Tort Statute against a former Paraguayan official accused of torture and extrajudicial execution,[26] and in 1997 a State Department letter advised a district court that "at this time adjudication of the claims based on allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma."[27]

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[26] *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980), *see Memorandum for the United States as* Amicus Curiae, Filartiga v. Pena-Irala, *reprinted at* 19 I.L.M. 585, 601-06 (1980).

[27] *Statement of Interest of the United States*, National Coalition Gov't of Burma v. Unocal, Inc., 176 F.R.D. at 362 (C.D. Cal. 1997) (No. 96-6112), 1997 U.S. Dist. LEXIS 20975.

If the facts alleged here are true – a matter on which we express no view – the present case may well be an example of a suit that affirmatively promotes our national interest. Plaintiffs allege that a former senior official of a brutal and undemocratic regime authorized their torture and extrajudicial executions of their family members.[28] That regime is no longer in power,[29] that nation (Somalia) is widely viewed as a paradigm of a failed state,[30] its courts are dysfunctional,[31] and the former official now resides in our country.[32]

Permitting a suit against an alleged torturer to go forward in these circumstances could thus vindicate our national interest in accountability for human rights violators. But if sovereign immunity were automatically extended to all former foreign officials, such as the defendant in this case (a former Minister of Defense and Prime Minister of a defunct regime), in the context of suits for torture and extrajudicial executions, accountability would be thwarted not only in this case, but in every such case.

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[28] *Yousuf*, 552 F.3d at 374.

[29] *Id*.

[30] *E.g*., International Crisis Group, *Somalia: Countering Terrorism in a Failed State*, Africa Report No. 45, 23 May 2002, accessible at http://www.crisisgroup.org/home/index.cfm?id=1690&l=1, last visited Jan. 6, 2010; *see also* State Department Country Report for 2008, note 35 *infra* ("absence of functioning institutions").

[31] *See* note 36 *infra*.

[32] *Yousuf*, 552 F.3d at 374.

Such a rigid rule would not serve our national interest.

II. THE RATIONALES FOR SOVEREIGN IMMUNITY DO NOT JUSTIFY ITS EXTENSION TO FORMER FOREIGN OFFICIALS SUED FOR TORTURE AND EXTRAJUDICIAL EXECUTIONS.

At least four rationales for sovereign immunity have been suggested by other *amici* in this case.[33] But none applies in this case or cases like it.

First, to the extent that sovereign immunity from suit rests on "mutual respect for the adequacy of the foreign State's legal system,"[34] no respect is due to the foreign legal system in this case. The State Department's most recent Country Report on Human Rights Practices notes that Somalia is afflicted by a general "absence of functioning institutions."[35] As for Somalia's legal system, assessed as of the date of the Report (February 2009), "Judicial systems were not well established, were not based upon codified law,

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[33] *Brief of* Amici Curiae *Former Attorneys General of the United States in Support of the Petitioner,* in the instant case (hereafter "Amici A.G.").

[34] Amici A.G. at 5.

[35] U.S. Dept. of State, Bureau of Democracy, Human Rights and Labor, 2008 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, *Somalia*, Feb. 25, 2009, 3d paragraph, accessible at http://www.state.gov/g/drl/rls/hrrpt/2008/af/119024.htm (last visited Jan. 6, 2010).

did not function, or simply did not exist in most areas of the country."[36]

Second, it is argued that "a foreign sovereign's acts should not be tested in United States courts, according to United States legal principles."[37] That rationale is singularly inapplicable to cases, such as the present, brought under the Alien Tort Statute and Torture Victim Protection Act. The Alien Tort Statute confers jurisdiction on United States courts,[38] solely to hear suits for violations "of the law of nations or a treaty of the United States."[39] The applicable "legal principles" in such suits are solely those of international law. Likewise the Torture Victim Protection Act, although not merely jurisdictional,[40] makes international law prohibitions of torture and extrajudicial executions enforceable in our courts.

Third, it is argued that denying sovereign immunity to former foreign officials would place the United States out of step with foreign jurisdictions,[41] where "[f]oreign sovereign immunity for officials discharging their governmental duties historically

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[36] *Id*., § 1.d.

[37] Amici A.G. at 5 (citing *First Nat'l City Bank v. Banco Nacional de Cuba,* 406 U.S. 759, 763 (1972), in turn citing *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)).

[38] *Yousuf*, 552 F.3d at 374-75.

[39] 28 U.S.C. § 1350.

[40] *Yousuf*, 552 F.3d at 375.

[41] Amici A.G. at 9-13.

had been absolute."[42] That may have been true historically. Nowadays, however, granting absolute sovereign immunity to former foreign officials in cases of torture would place us out of step with our closest allies.

A decade ago, for example, the British House of Lords denied the claim of General Augusto Pinochet, as the former head of state of Chile, to sovereign immunity from prosecution for torture.[43] The Law Lords relied on the Convention Against Torture.[44] That treaty applies only to torture committed by or with the acquiescence of public officials.[45] The Lords reasoned that the treaty could not simultaneously have been intended to strengthen legal accountability for former foreign officials accused of torture, while also cloaking them all in sovereign immunity:

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[42] *Id*. at 15.

[43] *R v. Bow Street Magistrate, ex parte Pinochet*, [2000] 1 AC 147, [1999] 2 All ER 97, [1999] 2 WLR 827. The Law Lords also stated that, if General Pinochet remained the current head of state of Chile, he would be entitled to sovereign immunity. *E.g*., Judgment of Lord Browne-Wilkinson. But at the time of the judgment the General remained a foreign official of Chile in the sense that he was still a Senator.

[44] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, *entry into force*, June 26, 1987, G.A. Res. 39/46, Annex, U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (1984).

[45] Article 1 defines torture under the Convention to include only torture "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

> Under the convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the state of Chile is prepared to waive its right to its officials' immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention – to provide a system under which there is no safe haven for torturers – will have been frustrated. In my judgment all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.[46]

If this Court were to allow former foreign officials sovereign immunity from suit for torture, the result would thus place the United States (also a party, as is Somalia, to the Convention Against Torture[47]) out of step with the sound reasoning of the Law Lords in *Pinochet*. It would similarly cripple the capacity of

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[46] *R v. Bow Street Magistrate*, note 43 *supra* (Browne-Wilkinson, J.).

[47] The United States became a State Party to the Convention Against Torture on October 21, 1994, and Somalia became a State Party on January 24, 1990. See ratification table at http://treaties.un.org (last visited Jan. 6, 2010).

the Torture Victim Protection Act to achieve its legislative purpose. Like the Convention, the Act applies to torture and extrajudicial executions *only* when committed by individuals acting "under actual or apparent authority, or color of law, of any foreign nation . . . "[48] If all former foreign officials were shielded by sovereign immunity, practically no one could be sued under the Act.

Not only would such expansive immunity frustrate the purposes of both the Convention and the Act, it would make the United States stand out as an anachronism in today's world. In our judgment, such an extension of sovereign immunity would undermine our nation's vital foreign policy claim to stand for human rights and accountability.

Finally, concerns have been raised that if former foreign officials do not enjoy sovereign immunity in our courts, then neither do we in their courts.[49] But where charges of torture and extrajudicial execution are well-founded, former American officials should not be immunized from suit abroad. On the other hand, where such charges are dubious or unfounded, former American officials already have significant protection in foreign courts, even without an across-the-board shield of sovereign immunity. While in office, of course, American diplomats are protected by

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[48] Pub. L. 102-256, 106 Stat. 73, § 2(a).

[49] Amici A.G. at 9-13.

diplomatic immunity.[50] Former officials are protected under international law, where appropriate, by the act of state doctrine.[51] And as a practical matter, they are protected where appropriate by American diplomacy. Most strikingly, when laws in Belgium and Spain authorized their courts to exercise jurisdiction over former American officials, beyond that required by international treaties, American diplomacy succeeded in securing the repeal of the overreaching aspects.[52]

Finally, in the event this Court denies sovereign immunity to former foreign officials in the narrow and discrete context of cases of alleged torture and extrajudicial executions, considerations of reciprocity would provide a further diplomatic argument that

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[50] Vienna Convention on Diplomatic Relations, 18 April 1961, *entry into force*, 24 April 1964, 500 U.N.T.S. 95, art. 31.1 (a diplomat is immune from criminal jurisdiction, and from civil and administrative jurisdiction except in cases involving private real estate, private inheritance, or professional or commercial activities "outside his official functions").

[51] *See, e.g.*, discussion of the act of state doctrine in Britain in *Kuwait Airways Corp. v. Iraqi Airways Co.*, [2002] UKHL 19, pars. 138-40.

[52] J. Yoldi, *Las Cortes recortan la jurisdicción universal ["Congress restricts universal jurisdiction"],* EL PAIS, Oct. 16, 2009 (Spanish Congress restricts universal jurisdiction after government decision, following human rights complaints against the United States over Guantanamo and CIA flights); L. Hurst, *Belgium reins in war crime law; U.S. threats finally sink 'universal jurisdiction' suits; Anti-war activists used court to sue American leaders*, THE TORONTO STAR, June 29, 2003, p. F04.

foreign courts should similarly respect the immunity of our former officials.

In short, former American officials are significantly protected from suit abroad without the categorical extension of an inflexible shield of sovereign immunity for former foreign officials sued in our courts for alleged torture and extrajudicial executions.

CONCLUSION

For all these reasons, *amici* respectfully suggest to the Court that the national interest does not require and indeed would be impaired by extending sovereign immunity to shield former foreign officials from all suits in our courts for alleged torture and extrajudicial executions.

Respectfully submitted,

DOUGLASS CASSEL
Counsel of record
SEAN O'BRIEN
AMY GRIFFIN
CENTER FOR CIVIL AND HUMAN RIGHTS
NOTRE DAME LAW SCHOOL
2160 Eck Hall of Law
Notre Dame, Indiana 46556
(574) 631-8555
Counsel for Amici Curiae

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