15-1831

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the undersigned counsel for *amici* hereby discloses that *amici* have no parent corporations and that no corporation directly or indirectly holds 10% or more of the ownership interest in any of the *amici*.

TABLE OF CONTENTS

Other Authorities

INTEREST OF *AMICI CURIAE*

Amici

in *El ïMasri v. United States*, 479 F.3d 296 (4th Cir. 2007), and *Lebron v.*

victims.

ARGUMENT

To *amici*'s knowledge, aside from the district court in this case, no U.S. court has stated that it lacks manageable standards to determine whether particular conduct meets the recognized definition of torture. That is no surprise, as torture has

finding that it could not adjudicate the plaintiffs' war crimes claims, based on its mistaken belief that

Irala, 630 F.2d 876, 890 (2d Cir. 1980). Just as "[t]orture has long been illegal" in the United States, 151 Cong. Rec. 30,756 (2005) (statement of Sen. Graham), it has also long been prohibited under international law. For decades, this fundamental prohibition has been recognized by U.S. courts as a *jus cogens* norm.[2] *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004); *Filartiga*, 630 F.2d at 880

611 F.3d 783, 802 (11th Cir. 2010) (recognizing that "CAT became the law of the land on November 20, 1994"). In light of the web of prohibitions against torture, "a violation of the international law of human rights is (at least with regard to torture) *ipso facto* a violation of U.S. domestic law." *Yousuf v. Samantar*, 699 F.3d 763, 777 (4th Cir. 2012) (quoting *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir.2000) (quotation marks omitted).

The prohibition on CIDT is also firmly established. This principle is recognized in the authoritative Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987), which provides that CIDT

Court has cited authority recognizing the prohibition on CIDT as *jus cogens.* *See Yousuf*, 699 F.3d at 775 (citing Evan J. Criddle & Evan Fox–Decent, *A Fiduciary Theory of Jus Cogens*, 34 Yale J. Int'l L. 331, 331 (2009) (explaining that "jus cogens . . . include[s], at a minimum, the prohibitions against . . . torture or other cruel, inhuman, or degrading treatment or punishment")); *see also* Restatement (Third) of Foreign Relations Law § 702 and cmt. n (same).[4]

Torture and cruel, inhuman, and degrading treatment are specifically barred in the context of wartime detention under the Geneva Conventions and the War Crimes Act. Common Article 3 of the Geneva Conventions requires that detainees "shall in all circumstances be treated humanely," and prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 287. From 1997, when the War Crimes Act was enacted, to 2006, any violation of Common Article 3 was a crime under U.S. law. *See* Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1998, Pub. L. No. 105–118, 111 Stat. 2386 (1997) (codified at 18 U.S.C. § 2441(c) (2000W W 0 1 235.3/119asETBTzaf34.03 Tm[(11E063(()8(c) (27t)-3(of45 2006(.)] T

§ 2441(c)(3). That amendment specifically maintained the longstanding criminalization of "torture" and "cruel or inhuman treatment." *See id.* §§ 2441(d)(1)(A–B).[5]

Torture is clearly defined in both the Convention Against Torture and domestic law. Article 1.1 of the Convention defines torture as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

As the Senate Committee on Foreign Relations noted in recommending the ratification of the Convention, this definition "correspond[s] to the common understanding of torture as an extreme practice which is universally condemned." S. Exec. Rep. No. 101–30, at 13 (1990). Similarly, the Torture Act proscribes "any act committed by a person acting under the color of law specifically intended to

[5] Non-grave breaches of Common Article 3 remain unlawful, even if they are not prosecutable under the War Crimes Act. *See e.g.*, 152 Cong. Rec. S10,409, (daily ed. Sept. 28, 2006) (statement of Sen. Biden) ("First, our colleagues did the right thing by rejecting the attempt by the administration to reinterpret, by statute, Common Article III of the Geneva Conventions."); 152 Cong. Rec. S10,399, (daily ed. Sept. 28, 2006) (statement of Sen. Levin: "And would the Senator from Arizona agree with my view that section 8(a)(3) does not make lawful or give the President the authority to make lawful any technique that is not permitted by Common Article 3 or the Detainee Treatment Act?" Sen. McCain: "I do agree." Sen. Warner: "I agree with both of my colleagues.").

inflict severe

protection under the Convention Against Torture. *See, e.g.*, *Avendano-Hernandez v. Lynch*, — F.3d –, No. 13-73744, 2015 WL 5155521, at *5 (9th Cir. Sept. 3, 2015) ("Rape and sexual abuse due to a person's gender identity or sexual orientation, whether perceived or actual, certainly rises to the level of torture for CAT purposes."); *Tchemkou v. Gonzales*, 495 F.3d 785, 795 (7th Cir. 2007) (finding torture definition satisfied by conduct including "a beating and a detention under deplorable conditions," and an "abduction and beating" that "only could be described as the intentional infliction of severe pain or suffering"). Likewise, international courts and tribunals regularly apply the definition of torture to claims of particular abuses. *See, e.g.*, *Maritza Urrutia v. Guatemala*, Judgment of November 27, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 103 (2003) (finding that the victim suffered physical violence amounting to torture); *Selmouni v. France*, Application No. 25803/94, Judgment of 28 July 1999 (abuse amounted to torture); *Aydin v. Turkey*, 1997-V Eur. Ct. H.R. 1866, 1873-74, 1891 (same).

Courts also regularly determine whether particular conduct constitutes cruel, inhuman, and degrading treatment. Courts "focus[ ] on the particular conduct in question to decide whether the customary international norm against cruel, inhuman, and degrading treatment is sufficiently specific, universal and obligatory as applied to that conduct." *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1023 (S.D. Ind. 2007). Although the contours of the definition develop on a case-

by-case basis, this does not undermine the status of the prohibition on CIDT, nor render violations non-justiciable under the Alien Tort Statute. *See Xuncax v. Gramajo*, 886 F.Supp. 162, 187 (D. Mass. 1995) (explaining that "[i]t is not necessary for every aspect of what might comprise a standard" for CIDT to "be fully defined and universally agreed upon before a given action meriting the label is clearly proscribed under international law"). The district court's concern that it "would have a difficult time instructing a jury on the distinction between torture and CIDT," A1404, cannot support its abdication of the judiciary's essential role:

> 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 classifiel1 14.0wr( )] TJETBT1 0 0 13009.12 401.35 Tm3( )] T

what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). A lack of complete clarity in the law is not a license to abdicate courts' role in deciding controversies.[7]

Yet the district court did not even consider whether the defendant violated the prohibition on torture. It held instead that "the lack of clarity as to the definition of torture during the relevant time period creates enough of a cloud of ambiguity to conclude that the court lacks judicially manageable standards to adjudicate the merits of Plaintiffs' ATS torture claim." A1403. The district court based its conclusion on the Ninth Circuit's qualified immunity decision in *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012). *Amici* respectfully submit that *Padilla* is wrongly decided, as articulated

reasoning about the ostensible uncertainty it thought existed between 2001 and 2003. As the Department of Justice Office of Professional Responsibility concluded, the "debate" around torture was largely a manufactured one, created by the Executive Branch in an attempt to justify torture. *See* Dep't of Justice, Office of Prof'l Responsibility, Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists (July 29, 2009) ("OLC Investigation") 226 (memoranda purporting to objectively evaluate torture "were drafted to provide the client with a legal justification for an interrogation program that included the use of certain" coercive techniques).

The Executive Branch's attempt to generate a legal fiction of ambiguity where the courts and Legislature have adopted clear standards undermined the absolute prohibition on tort

Executive Branch lawyers from the Office of Legal Counsel crafted memoranda that used spurious legal reasoning in an attempt to muddy the definition of and prohibition on torture. By creating "illogical" and "convoluted" justifications for the CIA's chosen torture techniques—including notoriously relying "upon the phrase 'severe pain' in medical benefits statutes to suggest that the torture statute applied only to physical pain that results in organ failure, death, or permanent injury"—they created the appearance of ambiguity where none existed. OLC Investigation at 228, 230. The resulting memoranda "had the effect of authorizing a program of CIA interrogation that many would argue violated the torture statute,

memos have been withdrawn.[8] As the President recognized, there can be no debate that "we tortured some folks."[9]

II. TORTURE AND CRUEL, INHUMAN, AND DEGRADING TREATMENT ARE UNEQUIVOCALLY PROHIBITED AT ALL TIMES.

The district court's decision misapprehended the categorical nature of the

political instability or any other public emergency, may be invoked as a justification of torture." CAT, *supra*, at art. 2(2). This prohibition was viewed by the drafters as "necessary if the Convention is to have significant effect, as public emergencies are commonly invoked as a source of extraordinary powers or as a justification for limiting fundamental rights and freedoms."

Executive was not free to unilaterally limit the ban on CIDT at Abu Ghraib, and the court's decision erred in effectively conceding that it could.[12]

The district court's belief that "the elements of an ATS war crime claim" require a determination of whether tortured prisoners "were insurgents, innocent civilians, or even innocent insurgents," A1405, is erroneous and baseless. The Geneva Conventions allow for no exceptions to the prohibition on torture and cruel, inhuman, or degrading treatment. As the Supreme Court recognized, these "minimum" protections are provided by Common Article 3 to all prisoners detained in a conflict in the territory of a signatory to the Conventions. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006). Common Article 3 prohibits subjecting any prisoner "at any time and in any place whatsoever" to "cruel treatment and torture" or "humiliating and degrading treatment." Inflicting these abuses on military detainees is a grave breach of the Geneva Conventions and

[12] Moreover, as the Ninth Circuit has explained, *jus cogens* norms are not subject to individual government's self-interested choices. *Siderman de Blake v.*

Alvarez- Machain, the Supreme Court noted that Congress enacted the Torture Victims Protection Act (TVPA) to further buttress the accountability for torture provided by the Alien Tort Statute. *See* 542 U.S at 730–731. In enacting the TVPA, Congress acknowledged that "universal condemnation of human rights abuses 'provide[s] scant comfort' to the numerous victims of gross violations if they are without a forum to remedy the wrong." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000) (quoting H.R. Rep. No. 102-367, at 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 85). The Legislature viewed the TVPA and the Alien Tort Statute as complementary, with both houses of Congress acknowledging that remedies must be available in the United States for victims of torture. *See generally* H.R. Rep. No. 102-367 (1991); S. Rep. No. 102-249 (1991).[13] The Executive has likewise recognized the critical importance of providing a civil remedy to victims of torture. When President George H.W. Bush signed the TVPA into law, he stated it was consistent with a "strong and continuing commitment to advancing respect for and protection of human rights throughout the world," and that the "United States must continue its vigorous

[13] *See also* Torture Victim Protection Act: Hearings and Markup Before the Committee on Foreign Affairs and Its Subcommittee on Human Rights and International Organizations, 100th Cong., 1 (1988) (statement of Rep. Yatron, Member, House Subcomm. on Human Rights and International Organizations) ("International human rights violators visiting or residing in the United States have formerly been held liable for money damages under the Alien Tort Claims Act. It is not the intent of the Congress to weaken this law, but to strengthen and clarify it.").

(ser. A) No. 17, at 29 (Sept. 13) (emphasis added). Since the decisions of the International Military Tribunal at Nuremberg, established in the aftermath of the Second World War, international law has required states to hold perpetrators accountable for human rights violations not only through criminal punishment, but also through redress to victims.[14]

CONCLUSION

For the reasons stated above, the judgment of the district court should be

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,332 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 28, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. All counsel for appellants and appellee in this case are registered CM/ECF users, so they will be served by the appellate CM/ECF system.

/s Dror Ladin
Dror Ladin