

No. 20-827

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In The  
**Supreme Court of the United States**

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UNITED STATES OF AMERICA,

*Petitioner,*

v.

ZAYN al-ABIDIN MUHAMMAD HUSAYN,  
aka ABU ZUBAYDAH, et al.,

*Respondents.*

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**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit**

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**AMICUS CURIAE BRIEF FOR CURRENT AND  
FORMER U.N. SPECIAL RAPORTEURS  
IN SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

	Page
I. Statement of Interest .....	1
II. Summary of Argument .....	4
III. Argument.....	6
A. Courts play a critical role in setting the bounds for executive invocations of “national security” .....	7
B. The United States’ asserted state in- terest is illegitimate and does not jus- tify dismissal .....	19
(1) The Ninth Circuit correctly viewed the government’s asserted national security interest with a “skeptical eye” .....	21
(2) The United States’ invocation of the privilege compounds ongoing violations against Mr. Husayn .....	26
(3) The United States’ position is anti- democratic, promotes impunity, and erodes respect for human rights and the rule of law .....	28
C. Conclusion .....	31

## TABLE OF AUTHORITIES

	Page
U.S. CASES	
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008) .....	30
<i>Hamdan v. Rumsfeld</i> , 548 U.S. 557 (2006) .....	30
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004) .....	6, 7, 30
<i>Husayn v. Mitchell</i> , 938 F.3d 1123 (9th Cir. 2019).....	20, 21
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).....	7
<i>Roper v. Simmons</i> , 543 U.S. 541 (2005).....	6
TREATIES	
African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) .....	11
American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978 .....	11
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex. 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984).....	11, 24
European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, 213 U.N.T.S. 222, entered into force Sept. 3, 1953 .....	11
Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, 75 U.N.T.S. 287 .....	24

## TABLE OF AUTHORITIES – Continued

	Page
Geneva Convention Relative to the Treatment of Prisoners of War, Oct. 21, 1950, 75 U.N.T.S. 135 .....	24, 25
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Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.....	11, 25
Universal Declaration of Human Rights, G.A. Res 217A (III), U.N. Doc. A/810 (Dec. 10, 1948).....	7, 11
 CASES FROM FOREIGN, REGIONAL AND INTERNATIONAL TRIBUNALS	
<i>Aslakhanova and Others v. Russia</i> , No. 2944/06, 8300/07, 50184/07, Eur. Ct. Hum. Rts. (Dec. 12, 2012).....	29
<i>Charkaoui v. Canada (Minister of Citizenship and Immigration and Solicitor General of Canada)</i> , 2008 SCC 38.....	11

## TABLE OF AUTHORITIES – Continued

	Page
<i>El-Masri v. Macedonia</i> , no. 39630/09, Eur. Ct. Hum. Rts. Judgment of 13 December 2012 (Grand Chamber).....	11, 17
<i>Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil</i> , Inter-Am. Ct. H.R. (ser. C.) No. 219 (Nov. 24, 2010).....	15
<i>Husayn (Abu Zubaydah) v. Poland</i> , No. 7511/13 (Jul. 24, 2014).....	22, 23
<i>Myrna Mack Chang v. Guatemala</i> , Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 134 (Nov. 25, 2003).....	14, 21
<i>Nasr and Ghali v. Italy</i> , No 44883/09, Eur. Ct. Hum. Rts. (Feb. 23, 2016).....	16
<i>Public Committee Against Torture v. Israel</i> , HCJ 769/02, 56(3) PD 459, ¶ 61 (2005) (Isr.).....	19
<i>R (on the application of Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth</i> , [2010] EWCA Civ 65, United Kingdom: Court of Appeal (England and Wales), 10 February 2010.....	17, 18

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## TABLE OF AUTHORITIES – Continued

	Page
Ben Emmerson (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), <i>Report on the Framework Principles for Securing the Accountability of Public Officials for Gross or Systematic Human Rights Violations Committed in the Context of State Counter-Terrorism Initiatives</i> , U.N. Doc. A/HRC/22/52 (Mar. 1, 2013).....	13, 18, 29
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Council of Europe, Committee on Legal Affairs and Human Rights, <i>Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States</i> , AS/Jur (2006) 16 Part II.....	24
Eur. Comm. for Democracy through Law (“Venice Commission”), <i>Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners</i> , No. 363/2005 (2006).....	24

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	Page
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Inter-Am. Comm’n Human Rights, Annual Report 1985-86, 193, Doc. No. OEA/Ser.L/V/II.68, Doc. 8 rev. 1 (Sept. 26, 1986) .....	14
Manfred Nowak, <i>Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i> , U.N. Doc. A/59/324 (Sept. 1, 2004) .....	22
Martin Scheinin (Special Rapporteur for the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), <i>Report to the General Assembly</i> , U.N. Doc. A/61/267 (Aug. 16, 2006) .....	8, 10
Martin Scheinin (Special Rapporteur for the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), <i>Report to the Human Rights Council on the Role of Intelligence Agencies and Their Oversight in the Fight Against Terrorism</i> , U.N. Doc. A/HRC/10/3 (Feb. 4, 2009) .....	12, 14, 15

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	Page
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Michel Forst (Special Rapporteur on the Situation of Human Rights Defenders) <i>Report on the Situation of Human Rights Defenders</i> , U.N. Doc. A/74/159 (Jul. 15, 2019).....	9
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<i>Muteba v. Zaire</i> , Decision of the U.N. Human Rights Comm., No. 124/1982, U.N. Doc. A/39/40 (1983).....	13
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## TABLE OF AUTHORITIES – Continued

	Page
Leila Zerrougui (Rapporteur of the Working Group on Arbitrary Detention), Leandro Despouy (Special Rapporteur on the Independence of Judges and Lawyers), Manfred Nowak (the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), Asma Jahangir (the Special Rapporteur on Freedom of Religion or Belief), and Paul Hunt (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), <i>Joint Report on the Situation of Detainees at Guantánamo Bay</i> , U.N. Doc. E/CN.4/2006/120, ¶¶ 17-40 (Feb. 27, 2006).....	27
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## TABLE OF AUTHORITIES – Continued

	Page
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	Page
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Amrit Singh, <i>Globalizing Torture, CIA Secret Detention and Extraordinary Rendition</i> , OPEN SOCIETY JUST. INITIATIVE (Feb. 5, 2013) .....	30
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Anthony Blinken, U.S. Sec’y of State, <i>Press Statement: U.S. Decision to Reengage with the UN Human Rights Council</i> (Feb. 8, 2021), <a href="https://www.state.gov/u-s-decision-to-reengage-with-the-un-human-rights-council/">https://www.state.gov/u-s-decision-to-reengage-with-the-un-human-rights-council/</a> .....	2
Arianna Vidaschi, <i>State Secret Privilege Versus Human Rights. Lessons from the European Court of Human Rights Ruling on the Abu Omar Case</i> , 166 EUR. CONST. L. REV. 169 (2017) .....	16

## TABLE OF AUTHORITIES – Continued

	Page
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Helen Keller & Magdalena Forowicz, <i>A New Era for the Supreme Court After Hamdan v. Rumsfeld</i> , 67 HEIDELBERG J. INT'L L. 1 (2007).....	30
Maeve McDonagh, <i>The Right to Information in International Human Rights Law</i> , 13 HUM. RIGHTS L. REV. 25 (2013).....	10
Open letter dated Nov. 6, 2014 from the Special Procedures mandate-holders of the United Nations Human Rights Council to the President of the United States of America (Nov. 6, 2014) <a href="https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15347&amp;LangID=E">https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15347&amp;LangID=E</a> [accessed Aug. 16, 2021] .....	30, 31
<i>Poland Makes Payout to Alleged Victims of CIA Renditions</i> , VOICE OF AM., May 15, 2015 .....	23
Reid Standish, <i>Poland Finally Comes Clean About Housing a Secret CIA Dungeon</i> , FOREIGN POL'Y, Dec. 10, 2014.....	23

TABLE OF AUTHORITIES – Continued

	Page
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United States Senate Select Committee on Intelligence, <i>Committee Study of the CIA’s Detention and Interrogation Program</i> (Dec. 3, 2014).....	22, 26, 28

## I. Statement of Interest<sup>1</sup>

Fionnuala Ní Aoláin, Juan Méndez, Nils Melzner, Manfred Nowak and Martin Scheinin<sup>2</sup> are current and former United Nations Special Rapporteurs and experts in the intersection between counterterrorism and human rights.<sup>3</sup> Ms. Ní Aoláin is the current U.N.

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<sup>1</sup> Counsel of record for all parties have consented to the filing of this amicus curiae brief and such consents have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the amicus or their counsel made a monetary contribution to this brief's preparation or submission.

<sup>2</sup> Amici's academic titles are included for identification purposes only. Fionnuala D. Ní Aoláin is a University Regents Professor; holder of the Robina Chair in Law, Public Policy, and Society; and faculty director of the Human Rights Center at the Law School. She is concurrently a professor of law at the Queen's University of Belfast, School of Law. Nils Melzer is the Human Rights Chair of the Geneva Academy of International Humanitarian Law and Human Rights and Professor of International Law at the University of Glasgow. Juan E. Méndez is a Professor of Human Rights Law in Residence at the American University – Washington College of Law, where he is Faculty Director of the Anti-Torture Initiative, a project of WCL's Center for Human Rights and Humanitarian Law. Manfred Nowak is Professor of International Law and Human Rights at the University of Vienna, and Director of the Ludwig Boltzmann Institute of Human Rights. Martin Scheinin is British Academy Global Professor within the Faculty of Law at Oxford University.

<sup>3</sup> Under the aegis of the Human Rights Council, a Special Rapporteur acts without remuneration as an independent expert within the scope of her mandate, which enables her to seek, receive, examine and act on information from numerous sources, including individuals, regarding issues and alleged cases concerning her mandate. See, e.g., U.N. Human Rights Council, *Resolution Concerning Special Rapporteur on Counter Terrorism and*

Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.<sup>4</sup> Under the mandate given to her by the United Nations Human Rights Council,<sup>5</sup> the

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*Human Rights*, U.N. Doc. A/HRC/RES/15/15 (Oct. 7, 2010) (establishing mandate).

<sup>4</sup> This submission to the United States Supreme Court is made on a voluntary basis. The intervention in these proceedings is without prejudice to, and should not be considered as, a waiver, express or implied, of the privileges and immunities of the United Nations or its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Authorization for this position and views to be expressed as Special Rapporteur, in full accordance with the independence afforded to this mandate, will neither be sought nor be given by the United Nations, the United Nations Human Rights Council, the Office of the United Nations High Commissioner for Human Rights, or any of the officials associated with those bodies.

<sup>5</sup> U.N. Human Rights Council, *Resolution Concerning Special Rapporteur on Counter Terrorism and Human Rights*, U.N. Doc. A/HRC/RES/15/15 (Oct. 7, 2010); U.N. Human Rights Council, *Resolution Concerning Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. A/HRC/RES/40/16 (Mar. 22, 2019) (extending mandate through 2022). Though the Trump Administration formally withdrew the United States from the Council in 2018, President Biden “instructed the Department of State to reengage immediately and robustly with the UN Human Rights Council.” Anthony Blinken, U.S. Sec’y of State, *Press Statement: U.S. Decision to Reengage with the UN Human Rights Council* (Feb. 8, 2021), <https://www.state.gov/u-s-decision-to-reengage-with-the-un-human-rights-council/> (noting that the Council “shines a spotlight on countries with the worst human rights records and can serve as an important forum for those fighting injustice and tyranny”) [last accessed Aug. 16, 2021]. In February 2021, the United States assumed observer status, which enables it “to speak in the Council, participate in negotiations, and partner with others to introduce resolutions.” *Id.*

Special Rapporteur has regularly addressed the use of secret evidence in counterterrorism and security-related cases, including in country assessments and reports to the UN Human Rights Council and General Assembly. Professor Scheinin served as the first Special Rapporteur on human rights and counterterrorism from 2005 to 2011 and in that capacity in 2007 conducted a country visit to the United States and subsequently also visited the military base at Guantánamo Bay for the purpose of observing Military Commission hearings. Mr. Melzer is currently as U.N. Special Rapporteur on the question of torture and other cruel, inhuman, or degrading treatment or punishment, a role that Professors Méndez and Nowak occupied from 2010 to 2016 and from 2004 to 2010, respectively.<sup>6</sup> All three have undertaken extensive examinations of the effects of counterterrorism policies after 2001, and U.S. policies in particular, on the right to be free from torture.

*Amici* respectfully submit this brief in order to inform the Court of the requisite interplay between human rights, transparency and national security under international law, and the United States' obligations therein. An overarching concern is courts' central role in safeguarding the rule of law and individual rights in the counterterrorism context, particularly in cases involving gross human rights violations. This brief

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<sup>6</sup> See, e.g., U.N. Human Rights Council, *Resolution Concerning Special Rapporteur on Torture, Cruel, Inhuman and Degrading Treatment or Punishment*, U.N. Doc. A/HRC/RES/16/23 (Dec. 5, 2011).

draws extensively on the work of *Amici*, who have documented how the expansion of the security state since 2001 has eroded respect for the right to be free from torture, contributed to a global culture of impunity, and emboldened authoritarian tendencies in multiple governments. Given the United States' important leadership on international counterterrorism efforts, *Amici* respectfully urge the Court to consider the United States' international legal obligations and the ramifications of its holding for the rule of law across the globe.

## **II. Summary of Argument**

National security is critical to state sovereignty and, as such, international law recognizes the state's ability to act in protection of its national security. At the same time, however, that immense power is not unfettered and must be exerted in conformity with the principles of legality, necessity and proportionality. States invoke national security to justify otherwise extraordinary encroachments on individual rights, typically outside of public view and normal processes of legislative and judicial oversight. The open-ended nature of the term "national security," paired with a presumed deference to the executive, frequently opens the door to state abuses. Of special concern is secret evidence, which is, at its essence, anti-democratic and a hallmark of authoritarian regimes. The state secrets privilege, which functions as an analog to secret evidence in civil actions, is a powerful tool that impinges on individual rights of access to justice and the right to

a remedy. When the underlying case involves gross human rights violations, the ramifications are extremely grave, and, under international law, courts must ensure that the doctrine is narrowly and properly applied to preserve the rule of law, the independence of the courts, and respect for human rights.

The United States' position in this case should raise alarm. It is undisputed that Mr. Husayn was disappeared and tortured at a secret Central Intelligence Agency (CIA) detention site in Poland. It is also undisputed that nothing in this case, which centers on actions from nearly 20 years ago, pertains to any current intelligence or threat. Even so, the United States urges that the Court must give "utmost deference" to the CIA Director's determination that secrecy is necessary to protect national security. As a starting point, given the abundant evidence that the CIA orchestrated gross and systematic human rights violations, its invocation of the privilege deserves skepticism, not deference. Further, the United States' interference with the Polish investigation into the actions of its own officers who were complicit in Mr. Husayn's torture and disappearance constitutes violations of the United States' obligation to provide redress and to guarantee non-recurrence of gross human rights violations.

More astonishing still is the plain implication that the United States resists disclosure of *past* illegal acts lest its hands be tied from seeking to engage third-party states in *future* illegal acts. That position patently embraces a logic of impunity strictly forbidden by international law and carries grave consequences

for the rule of law worldwide. The United States' position will only become more untenable as facts surrounding the CIA's actions continue to come to light. Governments across the globe will interpret a ruling in favor of the United States government as a signal that gross human rights violations – provided they are carried out in the name of “national security” – may be perpetrated with impunity. Conversely, a clear statement by this Court that the state secrets privilege is not a “blank check” for the Executive, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) will go a long distance to restoring the rule of law and mending the damage wrought by the United States' detention and torture policies over the last twenty years.

### **III. Argument**

The actions that lie at the heart of this case – the CIA's enforced disappearance, torture and arbitrary detention of Mr. Husayn – constitute egregious human rights violations in contravention of the United States' obligations under international law. Given the gravity of the violations at issue, not to mention the transnational character of counterterrorism operations and the CIA's “extraordinary rendition” program in particular, it is especially appropriate for this Court to consider international law and comparative practice while construing the metes and bounds of the state secrets privilege. See generally *Roper v. Simmons*, 543 U.S. 541, 578 (2005) (“The opinion of the world community, while not controlling our outcome, does provide

respected and significant confirmation for our own conclusions.”); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (in construing Eighth Amendment challenge to anti-sodomy law, considering European Court of Human Rights jurisprudence). International law and rulings from sister jurisdictions confirm this Court’s essential role in preserving individual liberties as well as the rule of law, particularly where, as here, gross human rights violations have occurred. *Cf. Hamdi*, 542 U.S. at 536 (“Whatever power the United States Constitution envisions for the Executive . . . in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”).

**A. Courts play a critical role in setting the bounds for executive invocations of “national security.”**

A state’s ability to defend its borders and protect its people is an essential feature of state sovereignty and recognized under international law. At the same time, respect for human rights and the rule of law are critical to guaranteeing lasting peace and security. International law has consistently viewed security and human rights as intertwined, each complimentary and necessary to the other.<sup>7</sup> Thus, international law permits certain limitations to individual rights in the pursuit of enumerated aims like protecting national

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<sup>7</sup> See, e.g., Universal Declaration of Human Rights, G.A. Res 217A (III), U.N. Doc. A/810, art. 3 (Dec. 10, 1948) [hereinafter UDHR] (“Everyone has the right to life, liberty and security of person.”).

security, so long as the limitations comply with the objective criteria of legal certainty, necessity, proportionality, and non-discrimination.

Regrettably, as employed in the post-9/11 era, “national security is increasingly being used as a generic framing” to justify unlawful state actions in a broad array of contexts.<sup>8</sup> The Special Rapporteur has documented that, absent any global consensus definition of the terms “national security,” “terrorism,” or “extremism,” States across the globe have adopted overly expansive regulatory frameworks, often targeting and undermining legitimately protected acts.<sup>9</sup> Among examples of misuse, Governments have adopted imprecise and overly broad definitions of “national security” as a tool to suppress political opponents, minorities, religious believers and human rights defenders.<sup>10</sup> The effects are devastating and far-reaching:

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<sup>8</sup> Martin Scheinin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Report to the General Assembly*, U.N. Doc. A/61/267, ¶ 20 (Aug. 16, 2006) [hereinafter *Scheinin 2006 Report*].

<sup>9</sup> See, e.g., Fionnuala Ní Aoláin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Report to the Human Rights Council on Impact of Measures to Address Terrorism and Violent Extremism on Civic Space and the Rights of Civil Society Actors and Human Rights Defenders*, U.N. Doc. A/HRC/40/52, ¶¶ 5-8 (Mar. 1, 2019).

<sup>10</sup> Ní Aoláin 2019 Report, *supra* note 9, at ¶ 8; Anne Charbord & Fionnuala Ní Aoláin, *The Role of Measures to Address Terrorism and Violent Extremism on Closing Civil Space*, UNIV. MINNESOTA HUMAN RIGHTS LAB (2018), <https://www.law.umn.edu/>

Rooted in the primacy of security imperatives, sustained measures to silence and even choke civil society have been taken. It is essential to grasp the serious impact of the cumulative sustained effect that such measures, which have proliferated under the internationalized security framework, have had across civil society, locally and globally, individually and collectively, and how they have undermined civil society and civic space.<sup>11</sup>

The steady creep of the national security state, along with the accompanying constriction of judicial oversight, have contributed to the global “accountability vacuum” that has grown since 2001.<sup>12</sup>

States are vulnerable to such misuse in part because they perceive “national security” to be “accompanied by a *presumption of deference to the assessment of threat*.”<sup>13</sup> In this manner, executive invocations of

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sites/law.umn.edu/files/2019/04/30/civil\_society\_report\_-\_final\_february\_rev2-reduced.pdf. Recent years have witnessed a disturbing trend towards the persecution of religious minorities under the guise of counterterrorism. See Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *Interim Report to the Human Right Council*, U.N. Doc. A/73/362 (Sept. 9, 2018).

<sup>11</sup> Ní Aoláin 2019 Report, *supra* note 9, at ¶ 9. See also Michel Forst (Special Rapporteur on the Situation of Human Rights Defenders), *Report on the Situation of Human Rights Defenders*, U.N. Doc. A/74/159 (Jul. 15, 2019).

<sup>12</sup> Ní Aoláin 2019 Report, *supra* note 9, at ¶ 59.

<sup>13</sup> Special Rapporteur has also documented how “terrorism” and “extremism” are underdefined terms that enable government misappropriation; “national security” is even more ripe for abuse. *Id.* at ¶¶ 3-4.

“national security” have an almost talismanic power, as they often carry a “presumed judicial deference [that] provides a regulatory shortcut and allows for the use of exceptional legal measures that would otherwise not be permitted by domestic or international law.” *Id.* Recognizing the threat posed by judicial forbearance, the Special Rapporteur has urged that the “onus is on the Government to prove that a threat to one of the grounds for limitation exists and that the measures are taken to deal with the threat.”<sup>14</sup> In particular, courts play a vital role in protecting the rule of law and trial processes from abuse.

The state secrets privilege, like other invocations of state secrecy, elevates executive power at the expense of judicial oversight. As such, the privilege is essentially anti-democratic<sup>15</sup> and stands in basic tension with individual rights and the rule of law. An individual’s right to access justice is foundational to the very logic of the rule of law and firmly established under

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<sup>14</sup> *Scheinin 2006 Report*, *supra* note 8 at ¶ 20.

<sup>15</sup> For a broader discussion of the importance of evidentiary transparency to a democratic society, see Fionnuala Ní Aoláin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), Amici Curiae Brief, *Muhammad and Muhammad v. Romania*, No. 80982/12, Eur. Ct H.R., available at [https://www.ohchr.org/Documents/Issues/Terrorism/SR/Submission\\_SR\\_CT\\_Muhammad\\_and\\_Muhammad\\_v\\_Romania.pdf](https://www.ohchr.org/Documents/Issues/Terrorism/SR/Submission_SR_CT_Muhammad_and_Muhammad_v_Romania.pdf) [accessed Aug. 16, 2021]. Over the last thirty years, international bodies have also recognized a “right to information” as fundamental to democratic participation and an outgrowth of the right to freedom of expression. See generally Maeve McDonagh, *The Right to Information in International Human Rights Law*, 13 HUM. RIGHTS L. REV. 25 (2013).

international human rights and humanitarian law.<sup>16</sup> The right to fair trial in particular calls for robust, transparent, and rebuttable evidence. Judicial scrutiny is critical to protecting against any abuse and “strengthening confidence in public institutions and hence the rule of law.”<sup>17</sup> In this manner, the state secrets privilege must be viewed as exceptional, for it “compromises the very function of judicial review.”<sup>18</sup>

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<sup>16</sup> See UDHR, art. 8; European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, 213 U.N.T.S. 222, entered into force Sept. 3, 1953; International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter “ICCPR”]; American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 91, June 8, 1977, 1125 U.N.T.S. 3; African [Banjul] Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987 [hereinafter “CAT”].

<sup>17</sup> *El-Masri v. Macedonia*, no. 39630/09, Eur. Ct. Hum. Rts. Judgment of 13 December 2012 (Grand Chamber), available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-115621%22%7D> [accessed Aug. 16, 2021] (concurring opinion, Judges Tulkens, Spielmann, Sicilianos and Keller).

<sup>18</sup> *Charkaoui v. Canada (Minister of Citizenship and Immigration and Solicitor General of Canada)*, 2008 SCC 38, 61-62 (expulsion case where government resisted the disclosure of secret evidence against asylee; that evidence was later found to be consequence of torture).

Where the privilege operates to shield matters of state wrongdoing – and especially gross human rights violations – the privilege has far-reaching implications for democracy and the rule of law.<sup>19</sup> Recognizing the danger that systemic human rights violations pose to society as a whole, international law imposes on states an obligation “to conduct independent investigations . . . , to bring to justice those responsible for such acts, and to provide reparations where they have participated in such violations.”<sup>20</sup> Survivors of torture and enforced disappearance have the right to redress,<sup>21</sup>

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<sup>19</sup> Martin Scheinin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Report to the Human Rights Council on the Role of Intelligence Agencies and Their Oversight in the Fight Against Terrorism*, ¶ 64, U.N. Doc. A/HRC/10/3 (Feb. 4, 2009) [hereinafter *Scheinin 2009 Report*] (expressing concerns about “the increasing use of State secrecy provisions and public interest immunities . . . to conceal illegal acts from oversight bodies or judicial authorities, or to protect itself from criticism, embarrassment and – most importantly – liability.”).

<sup>20</sup> *Scheinin 2009 Report*, *supra* note 19, at 6. See generally U.N. General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147 (Mar. 21, 2006) [hereinafter “U.N. Basic Principles”].

<sup>21</sup> States are obligated to (a) conduct “thorough and effective investigation[s]” of disappearances, (b) provide relatives with “detailed information about the results of its investigation,” (c) release persons held incommunicado immediately, (d) prosecute and punish those responsible for the disappearance, and (e) provide adequate compensation. *Mehalli v. Algeria*, Decision of the U.N. Human Rights Comm., No. 1900/2009, ¶¶ 6.4, 9, U.N. Doc. CCPR/C/110/D/1900/2009 (2014). Similar obligations exist with

which has both procedural and substantive dimensions, including restitution, rehabilitation, compensation and guarantees of non-repetition, as well as the right to truth.<sup>22</sup> Victims should be entitled to “seek and obtain information” on the “causes and conditions pertaining to gross violations of international human rights law” and to “learn the truth in regard to these violations.”<sup>23</sup> In addition to vindicating individual rights, judicial proceedings serve the common good, for “[e]very society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts

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respect to torture. *Muteba v. Zaire*, Decision of the U.N. Human Rights Comm., No. 124/1982, ¶ 13, U.N. Doc. A/39/40 (1983).

<sup>22</sup> See generally Ben Emmerson (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), *Report on the Framework Principles for Securing the Accountability of Public Officials for Gross or Systematic Human Rights Violations Committed in the Context of State Counter-Terrorism Initiatives*, U.N. Doc. A/HRC/22/52 (Mar. 1, 2013); U.N. Human Rights Committee, General Comment No. 31, ¶ 15; U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004).

<sup>23</sup> U.N. Basic Principles, *supra* note 20, at ¶ 24. See also U.N. Working Group on Enforced and Involuntary Disappearances, *Report of the Working Group on Enforced or Involuntary Disappearances*, ¶ 39, U.N. Doc. A/HRC/16/48 (Jan. 26, 2011) (“The right to truth in relation to enforced disappearances means the right to know about the progress and results of an investigation, the fate or whereabouts of the disappeared persons, and the circumstances of the disappearance, and the identity of the perpetrator(s).”); U.N. Office of the High Commissioner for Human Rights, *Study on the Right to Truth*, n. 31, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006) [hereinafter “Study on the Right to Truth”].

in the future.”<sup>24</sup> For that reason, “judges must be the ultimate arbitrators in assessing the merits of the State secrecy claim when serious human rights violations are at stake.”<sup>25</sup> Where courts overly defer to executive claims, the state secrets privilege “renders the right to a remedy illusory”<sup>26</sup> and undermines the independence and autonomy of the courts.

A number of international and comparative judicial decisions affirm the exceptional nature of the state secrets privilege and the requisite procedural safeguards under international law to prevent abuse. In the watershed case *Myrna Mack Chang v. Guatemala*, the Inter-American Court of Human Rights considered state responsibilities to victims of gross human rights violations.<sup>27</sup> Ms. Chang Mack had been a prominent critic of state-led mass atrocities against indigenous communities throughout the 1980s. In 1990, under orders from the state, Guatemalan security officials conducted a covert operation to execute her. A subsequent criminal investigation by Guatemalan authorities into Ms. Mack Chang’s murder was confounded by executive claims of state secrets as well as repeated acts of retaliation and intimidation against witnesses.<sup>28</sup> As a result, the only person who faced conviction was the

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<sup>24</sup> Inter-Am. Comm’n Human Rights, Annual Report 1985-86, 193, Doc. No. OEA/Ser.L/V/II.68, Doc. 8 rev. 1 (Sept. 26, 1986).

<sup>25</sup> *Scheinin 2009 Report*, *supra* note 19, at ¶ 63.

<sup>26</sup> *Id.* at ¶ 60.

<sup>27</sup> *Myrna Mack Chang v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 134 (Nov. 25, 2003).

<sup>28</sup> *Id.*

agent who directly participated in her murder; the higher-level officials who ordered her murder and orchestrated the cover up escaped accountability. A decade later, following the end of the conflict, the successor Guatemalan government officially accepted “institutional responsibility” for Ms. Mack Chang’s extrajudicial killing.<sup>29</sup> Even so, the Inter-American Court found that Guatemala continued to violate Ms. Mack Chang’s rights to judicial protection and an effective remedy, due in part to the withholding of secret evidence.<sup>30</sup> The court recognized the Government’s obligation to “safeguard official secrets,” but held that there must exist some mechanism for independent scrutiny of such claims.<sup>31</sup> In the absence of such controls, executive assertions of the state secret privilege “may be considered an attempt to privilege the clandestinity of the Executive branch and to perpetuate impunity.”<sup>32</sup>

The European Court of Human Rights (ECHR) has followed suit, rejecting the blanket application of

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<sup>29</sup> Id. at ¶ 65.

<sup>30</sup> Id. at ¶ 181.

<sup>31</sup> Id.

<sup>32</sup> Id. at ¶ 181. Another critical case in the development of the collective dimensions of the right to truth is *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Inter-Am. Ct. H.R. (ser. C.) No. 219 (Nov. 24, 2010) (“It is essential that, in order to guarantee the right to information, the public powers act in good faith and diligently carry out the necessary actions to assure the effectiveness of this right, particularly when it deals with the right to the truth of what occurred in cases of gross violations of human rights such as those of enforced disappearances and the extrajudicial execution in this case.”). See generally Study on the Right to Truth, *supra* note 23.

the state secrets privilege in challenges arising out of European nations' participation in the CIA extraordinary rendition program. The recent decision in *Nasr and Ghali v. Italy* provides a useful illustration.<sup>33</sup> In 2003, U.S. and Italian agents abducted Hassan Mustafa Osama Nasr, an Egyptian citizen who was living in Italy as a refugee, and forcibly returned him to Egypt, where he was held incommunicado and tortured for over a year. Upon the filing of a criminal complaint by the Mr. Nasr's wife, the Public Prosecutor charged six Italian intelligence officers for having facilitated the United States' enforced disappearance of Mr. Nasr. In response, the prime minister invoked the state secrets privilege on the ground that the prosecution would unearth documents related to relationships between Italian and U.S. intelligence agencies. After lengthy domestic proceedings, the Constitutional Court ultimately held that the invocation of the privilege was absolute and precluded judicial review. In a careful decision, the ECHR found that by preventing any "effective" criminal proceedings and foreclosing subsequent civil actions for compensation, Italy violated the victim's procedural right to be free from torture (Article 3) – which includes the right to truth – and his right to a remedy (Article 13).<sup>34</sup> As the court

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<sup>33</sup> *Nasr and Ghali v. Italy*, No 44883/09, Eur. Ct. Hum. Rts. ¶¶ 268-74 (Feb. 23, 2016), <http://hudoc.echr.coe.int/eng?i=001-162280> [accessed Aug. 16, 2021]. See also Arianna Vidaschi, *State Secret Privilege Versus Human Rights. Lessons from the European Court of Human Rights Ruling on the Abu Omar Case*, 166 EUR. CONST. L. REV. 169 (2017).

<sup>34</sup> *Id.* ¶¶ 335-36.

observed in another challenge arising out of the CIA's extraordinary rendition program, undue deference to executive assertions of the privilege undermines the court's role in "maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts."<sup>35</sup>

Domestic courts have likewise asserted the judicial prerogative in the face of state secrets claims. In *Mohamed, R v. Secretary of State for Foreign & Commonwealth Affairs*,<sup>36</sup> the Court of Appeal for England and Scotland ordered the release of documents over the objection of the British government. Binyam Mohammed had been disappeared and tortured by CIA operatives at various "black sites" and eventually in Morocco, where he was subjected to abhorrent abuse for more than two years.<sup>37</sup> Mohammed argued that the British secret services had been complicit in his abduction and thus he was entitled to documents in the custody of the U.K. government concerning his mistreatment. Under court order, the state agreed to the release of certain documents, but Mohamed appealed the redaction of several key paragraphs from the

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<sup>35</sup> *El-Masri*, *supra* note 17, at ¶ 192 (concurring opinion, Judges Tulkens, Spielmann, Sicilianos and Keller).

<sup>36</sup> *R (on the application of Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth*, [2010] EWCA Civ 65, United Kingdom: Court of Appeal (England and Wales), 10 February 2010, available at [https://www.refworld.org/cases,GBR\\_CA\\_CIV,4ba8c30e8.html](https://www.refworld.org/cases,GBR_CA_CIV,4ba8c30e8.html) [accessed Aug. 16, 2021].

<sup>37</sup> *Id.* at ¶ 61. The United States ultimately transferred Mohamed to Guantánamo Bay, Cuba, where he was held without charge until his release in 2009 back to the United Kingdom. *Id.*

public version of those documents. Significantly, those redactions did not go to the underlying facts of Mohamed's disappearance and torture, *which were already public*.<sup>38</sup> The government conceded that nothing in the redacted paragraphs would harm national security but nonetheless argued that disclosure was inappropriate as it would jeopardize future intelligence cooperation with the U.S. government. The court, unimpressed, wrote that "the confidentiality principle is . . . subject to the clear limitation that the government and the intelligence services can never provide the country which provides intelligence with an unconditional guarantee that the confidentiality principle will never be set aside if the courts conclude that the interests of justice make it necessary and appropriate to do so."<sup>39</sup> Ultimately, the court held that "[r]equirements of open justice, the rule of law and democratic accountability" necessitated disclosure, "particularly given the constitutional importance of the prohibition against torture."<sup>40</sup>

In sum, in cases involving State-sanctioned, systematic human rights violations, courts can and must exercise particular care to ensure that the executive does not abuse the state secrets privilege to cover up wrongdoing or avoid embarrassment.<sup>41</sup> In the words of Justice Aaron Barak of the Supreme Court of Israel:

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<sup>38</sup> *Id.* at ¶ 46.

<sup>39</sup> *Id.* at ¶ 57.

<sup>40</sup> *Id.* at ¶ 52.

<sup>41</sup> Emmerson, *supra* note 22, at ¶ 40.

“[T]he State’s struggle against terrorism is not conducted ‘outside the law. It is conducted ‘*inside*’ the law, with tools that the law places at the disposal of democratic states.”<sup>42</sup> As discussed below, the United States’ ill-considered position in this case would place state-sponsored torture and enforced disappearance “outside the law,” a result that cannot be tolerated in a democratic and free society.

**B. The United States’ asserted state interest is illegitimate and does not justify dismissal.**

The United States takes an extreme position that this Court must give “utmost deference” (Gov’t Br. at 22) to the CIA Director’s assertion that the nation’s security will be harmed upon release of documents showing Polish involvement in Mr. Husayn’s disappearance and torture nearly 20 years ago. In the words of Mike Pompeo, the former CIA director, the United States government cannot formally acknowledge foreign cooperation in the operation of secret detention sites even if “time passes, media leaks occur, or the political and public opinion winds change” because “if the CIA appears unable or unwilling to keep its clandestine liaison relationships secret, relationships with other foreign intelligence or security services could be jeopardized.” Gov’t Br. at 13. As the government argues, the CIA must have unilateral authority to retain

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<sup>42</sup> *Public Committee Against Torture v. Israel*, HCJ 769/02, 56(3) PD 459, ¶ 61 (2005) (Isr.) (emphasis added).

secrecy “‘years down the line’ even if, for instance, new ‘officials come to power in those foreign countries’ who wish ‘to publicly atone or exact revenge for the alleged misdeeds of their predecessors.’” *Id.*

That astonishing position must be rejected for three reasons. First, the Ninth Circuit was correct to view the CIA’s privilege claim with a “skeptical eye.” *Husayn v. Mitchell*, 938 F.3d 1123, n.14 (9th Cir. 2019). The matters at issue in this case are not, in the words of Secretary Pompeo, the subject of “political and public opinion winds.” Gov’t Br. at 13. To the contrary, the underlying actions – enforced disappearance, torture, and arbitrary detention – constitute *jus cogens* violations that are universally banned in all circumstances. As such, international law plainly requires vigorous judicial scrutiny of any privilege claim. Second, the United States’ invocation of the state secrets privilege must be evaluated in light of its contravening obligation to provide redress for violations it perpetrated against Mr. Husayn. From that vantage, invoking the privilege – and thereby impeding Poland’s investigation into the role of its own officials in Mr. Husayn’s disappearance and torture – violates Mr. Husayn’s right to redress. Moreover, that stance places the United States in the uncomfortable position of interfering with another sovereign nation’s efforts to meet its own obligations under international law. Finally, taken at face value, the United States seeks to suppress evidence of *past* unlawful acts so that it may assure potential allies that *future* unlawful schemes will not be revealed. That position is

profoundly anti-democratic and strikes at the heart of the separation of powers principles, respect for the rule of law, and the furtherance of human rights.

**(1) The Ninth Circuit correctly viewed the government’s asserted national security interest with a “skeptical eye.”**

The government criticizes the Ninth Circuit for declining to give “utmost deference” to the CIA director’s assertion of the state secrets privilege. Gov’t Br. at 22. But the Ninth Circuit’s “skeptical eye,” *Husayn*, 938 F.3d at n.14, was entirely appropriate under these circumstances. Assertions of state secrecy, particularly in cases involving gross human rights violations, must meet a high burden to demonstrate that withholding is the least restrictive means to protect bona fide security interests.<sup>43</sup> Where, as here, years have passed and the disputed information is already broadly known, courts are correct to look askance at privilege claims, especially in the context of government efforts to suppress accountability and protect perpetrators.<sup>44</sup>

That the United States subjected Mr. Husayn to enforced disappearance, arbitrary detention, and torture is at this point – nearly twenty years later – a matter of public record. The U.S. Senate Select Committee on Intelligence produced a detailed description of the techniques used against Mr. Husayn, findings

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<sup>43</sup> Ní Aoláin 2019 Report, *supra* note 9.

<sup>44</sup> See Myrna Mack Chang, *supra* note 27.

echoed by the European Court of Human Rights.<sup>45</sup> The contours of the United States’ so-called “extraordinary rendition” program are well-versed, but it bears emphasizing that the so-called “enhanced interrogation techniques” perpetrated against Mr. Husayn and others unquestionably constituted torture.<sup>46</sup>

It is also “beyond reasonable doubt,”<sup>47</sup> that the United States perpetrated these violations against Mr. Husayn as part of a state-sponsored program with the assistance of numerous governments around the world,<sup>48</sup>

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<sup>45</sup> United States Senate Select Committee on Intelligence, *Committee Study of the CIA’s Detention and Interrogation Program* (Dec. 3, 2014) [hereinafter “SSCI Report”]; *Husayn (Abu Zubaydah) v. Poland*, No. 7511/13 (Jul. 24, 2014), available at <http://hudoc.echr.coe.int/eng?i=001-146047> [accessed Aug. 16, 2021].

<sup>46</sup> Committee Against Torture, *Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture, United States of America*, U.N. Doc. CAT/C/USA/CO/2, ¶ 24 (July 25, 2006); Manfred Nowak, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/59/324, ¶ 17 (Sept. 1, 2004).

<sup>47</sup> *Husayn (Abu Zubaydah) v. Poland*, *supra* note 46, at ¶ 234.

<sup>48</sup> Martin Scheinin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), Manfred Nowak (Special Rapporteur on Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment), Shaheen Sardar Ali (Vice-Chair of the Working Group on Arbitrary Detention), & Jeremy Sarkin (Chair of the Working Group on Enforced or Involuntary Disappearances), *Joint Study on the Global Practices in Relation to Secret Detention in the Context of Countering Terrorism Presented to the Human Rights Council*, U.N. Doc. A/HRC/13/42, ¶¶ 105-107 (Feb.

including Poland.<sup>49</sup> The European Court of Human Rights has already found that Poland participated in the CIA's unlawful program and, specifically, the court held that Poland was complicit in Mr. Husayn's torture and enforced disappearance.<sup>50</sup> Poland does not contest these facts; indeed, it has already compensated victims who were tortured at the CIA black site on its soil.<sup>51</sup>

Finally, whatever intelligence value the information Mr. Husayn seeks may have once had, it is severely diminished nearly twenty years later. The Special Rapporteur in her unique position at the intersection of oversight on counterterrorism and human rights, underscores the transformed context of terrorist threat and contemporary challenge and would caution the Court that claims about dated 20 year old

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19, 2010) [hereinafter "U.N. Joint Study"]; SSCI Report, *supra* note 45.

<sup>49</sup> Poland's former president Aleksandr Kwasniewski has admitted on several occasions that Poland housed a CIA black site. See *Husayn (Abu Zubaydah) v. Poland*, *supra* note 47, at ¶ 234 ("The President and the Prime Minister agreed to the intelligence co-operation with the Americans, because this was what was required by national interest . . . The decision to cooperate with the CIA carried a risk that the Americans would use inadmissible methods."); see also Reid Standish, *Poland Finally Comes Clean About Housing a Secret CIA Dungeon*, FOREIGN POL'Y, Dec. 10, 2014.

<sup>50</sup> *Husayn (Abu Zubaydah) v. Poland*, *supra* note 48.

<sup>51</sup> In May 2015, following the ECHR's order, the Polish government compensated victims of the program, although it did not compensate Mr. Husayn, who is still held at Guantánamo Bay. *Poland Makes Payout to Alleged Victims of CIA Renditions*, VOICE OF AM., May 15, 2015.

intelligence information should be viewed with particular skepticism.

It is deeply regrettable that all these many years later, the U.S. government still appears not to appreciate the gravity of the violations it perpetrated against Mr. Husayn and others. The illegality of the United States' so-called "extraordinary rendition program" has been repeatedly and emphatically denounced as unlawful by multiple international and regional bodies and by allies of the United States.<sup>52</sup> No government or court now accepts the legitimacy or necessity of the acts perpetrated. To be clear, the United States subjected terrorism suspects to enforced disappearance, arbitrary detention, and torture, violations that are proscribed by multiple treaties that the United States has ratified.<sup>53</sup> Those rights have also reached *jus*

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<sup>52</sup> U.N. Joint Study, *supra* note 48; see also U.N. General Assembly, *Resolution Concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/Res. 60/148 (Feb. 21, 2006); Council of Europe, Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States*, AS/Jur (2006) 16 Part II; Eur. Comm. for Democracy through Law ("Venice Commission"), *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, No. 363/2005 (2006).

<sup>53</sup> See ICCPR art. 6 (right to life), art. 7 (torture), art. 9 (liberty and security), art. 10 (dignity for persons deprived of liberty), art. 14 (right to fair trial), art. 16 (right to recognition before the law); CAT art. 2 ("No exceptional circumstances whatsoever . . . may be invoked as a justification of torture."); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, 75 U.N.T.S. 287, art. 3 (torture); Geneva

*cogens* status, meaning that they are among the most fundamental and universally recognized rights, on par with genocide and crimes against humanity, and may not be derogated from, even for security reasons.<sup>54</sup> The Ninth Circuit understood the gravity of the context for Mr. Husayn’s requests and appropriately concluded

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Convention Relative to the Treatment of Prisoners of War, Oct. 21, 1950, 75 U.N.T.S. 135, art. 3 (torture); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, art. 75 (prohibiting “outrages upon personal dignity, in particular humiliating and degrading treatment”). Enforced disappearance constitutes a number of violations under the ICCPR, including of Article 6 (right to life), Article 9 (liberty and security), Article 10 (dignity for persons deprived of liberty), Article 16 (right to recognition before the law), as well as Article 2 (right to an effective remedy). See generally U.N. General Assembly, *Resolution Concerning the Protection of All Persons from Enforced Disappearance*, U.N. Doc. A/Res. 47/133 (Dec. 1, 1992); U.N. Human Rights Council Working Group on Enforced or Involuntary Disappearances, *General Comment on the Definition of Enforced Disappearance*, pmb., U.N. Doc. A/HRC/7/2 (Jan. 10, 2008) (defining enforced disappearance as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law”).

<sup>54</sup> RESTATEMENT (THIRD) ON FOREIGN RELATIONS LAW OF THE UNITED STATES §702 (Am. L. Inst. 1987). See also U.N. Human Rights Committee, *ICCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11 (“[T]he absolute nature of these prohibitions [against enforced disappearance], even in times of emergency, is justified by their status as norms of general international law.”).

that judicial scrutiny was feasible and appropriate in these circumstances.

**(2) The United States' invocation of the privilege compounds ongoing violations against Mr. Husayn.**

The United States' invocation of the state secrets privilege in this case is part of a broader pattern of disregarding its obligations under international law to Mr. Husayn and other victims of the extraordinary rendition program. Mr. Husayn has a right to remedy, which includes a right to truth.<sup>55</sup> For its part, the United States has a concomitant obligation to investigate the violations it perpetrated and to provide redress.<sup>56</sup>

To date, the United States has utterly failed in its obligations to hold perpetrators of the extraordinary rendition program to account or to provide Mr. Husayn and others like him access to justice. An inquiry by the U.S. Senate Select Committee on Intelligence documented the horrific abuses perpetrated against Mr. Husayn and others as well as the systemic nature of those violations.<sup>57</sup> Yet no person has been held accountable for Mr. Husayn's torture, and he has never received any form of redress, let alone reparations. To the contrary, when victims have brought claims before U.S. courts, the government has

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<sup>55</sup> See *supra* at pp. 12-13.

<sup>56</sup> See *supra* at pp. 12-13.

<sup>57</sup> SSCI Report, *supra* note 46.

invoked various defenses based on national security, including the state secrets privilege, to prevent a full airing of facts.<sup>58</sup> And when victims have turned to international and foreign tribunals, the United States has refused to cooperate in those proceedings. C.A. E.R. 633-644.

From his cell at Guantánamo Bay, Mr. Husayn is barred from exercising even the bare minimum of access to justice: testifying to a judicial body about how he was wronged. The United States persists in holding Mr. Husayn without charge and outside of regular civilian processes at Guantánamo Bay, Cuba, where he has been nearly twenty years. Those actions constitute arbitrary detention and are themselves illegal.<sup>59</sup> He has been arbitrarily deprived of his access to family and dignified life for over two decades. The United States has not disclosed its reasons for refusal to charge or release Mr. Husayn all these many years later, but the unmistakable and regrettable implication is that the United States ultimately seeks to bury

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<sup>58</sup> See generally U.N. Joint Study, *supra* note 48.

<sup>59</sup> Leila Zerrougui (Rapporteur of the Working Group on Arbitrary Detention), Leandro Despouy (Special Rapporteur on the Independence of Judges and Lawyers), Manfred Nowak (the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), Asma Jahangir (the Special Rapporteur on Freedom of Religion or Belief), and Paul Hunt (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), *Joint Report on the Situation of detainees at Guantánamo Bay*, U.N. Doc. E/CN.4/2006/120, ¶¶ 17-40 (Feb. 27, 2006).

Mr. Husayn, along with the information he holds about the CIA's illegal actions, out of public view.<sup>60</sup>

**(3) The United States' position is anti-democratic, promotes impunity, and erodes respect for human rights and the rule of law.**

Most fundamentally, the United States' demand for "utmost deference" misapprehends the proper role of secrecy in counterterror operations among democratic states. At base, by invoking the state secrets privilege, the United States seeks to shield co-perpetrators in gross human rights violations from judicial oversight, including by their own domestic authorities. That position does not advance current national security interests; rather, it constitutes an astonishing assertion that the United States must be able to guarantee impunity for allies who facilitate gross human rights violations. Such hostility to the rule of law undermines the security of all in the long term.<sup>61</sup>

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<sup>60</sup> See SSCI Report, *supra* note 46, at 35 ("[I]n light of the planned psychological pressure techniques to be implemented, we need to get reasonable assurances that [Abu Zubaydah] will remain in isolation and incommunicado for the remainder of his life."); *id.* ("[Abu Zubaydah] will never be placed in a situation where he has any significant contact with others and/or has the opportunity to be released . . . all major players are in concurrence that [Abu Zubaydah] will remain incommunicado for the remainder of his life.").

<sup>61</sup> U.N. Development Programme, JOURNEY TO EXTREMISM IN AFRICA: DRIVERS, INCENTIVES AND THE TIPPING POINT FOR RECRUITMENT, at 6, 65-66 (2017), available at <https://journey-to-extremism.undp.org/content/downloads/UNDP-JourneyToExtremism-report->

“Legitimate national security considerations do not include governmental interests and activities that constitute grave crimes under international human rights law, let alone policies that are precisely calculated to evade the operation of human rights law.”<sup>62</sup> To the contrary, “the confines of a democratic society governed by the rule of law cannot allow” an unlawful program like the extraordinary rendition “to operate in conditions of guaranteed impunity for the abuses committed by its agents.”<sup>63</sup>

In 2014, Juan Méndez, former UN Special Rapporteur on Torture, was joined by other UN mandate-holders to urge then-President Obama to release the Senate Select Intelligence Committee Report, commonly referred to as “the Torture Report.” They noted the United States’ critical role on setting international norms:

Based on our work in many countries around the world, we believe that other States are

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2017-english.pdf [accessed Aug. 16, 2021] (reporting “startling new evidence of just how directly counter-productive security-driven responses can be when conducted insensitively. . . . Going forward, it is essential to long-term outcomes that international commitments – such as those shared across United Nations member states – to human rights and rule of law, citizens’ participation and protection, and accountability of state security forces be actively upheld by all.”).

<sup>62</sup> Emmerson, *supra* note 22.

<sup>63</sup> *Aslakhanova and Others v. Russia*, No. 2944/06, 8300/07, 50184/07, Eur. Ct. Hum. Rts. (Dec. 12, 2012), at ¶ 114, available at <http://hudoc.echr.coe.int/fre?i=002-7336> [accessed Aug. 16, 2021].

watching your actions on this issue closely. Victims of torture and human rights defenders around the world will be emboldened if you take a strong stand in support of transparency. On the contrary, if you yield to the CIA's demands for continued secrecy on this issue, those resisting accountability will surely misuse this decision to bolster their own agenda in their countries.<sup>64</sup>

Acceding to the U.S. government's demand for "utmost deference" will embolden other governments, particularly authoritarians, to further expand the scope of what may be defended in the name of national security, concluding – correctly – that they may operate with impunity.<sup>65</sup> Conversely, as it has in the past,<sup>66</sup> this Court can send a plain message against security expansionism and impunity. As in 2014, we hope the United States "will recognize the historic nature of

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<sup>64</sup> Open letter dated Nov. 6, 2014 from the Special Procedures mandate-holders of the United Nations Human Rights Council to the President of the United States of America (Nov. 6, 2014) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15347&LangID=E> [accessed Aug. 16, 2021].

<sup>65</sup> Amrit Singh, *Globalizing Torture, CIA Secret Detention and Extraordinary Rendition*, OPEN SOCIETY JUST. INITIATIVE (Feb. 5, 2013).

<sup>66</sup> See generally *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Boumediene v. Bush*, 553 U.S. 723 (2008); Helen Keller & Magdalena Forowicz, *A New Era for the Supreme Court After Hamdan v. Rumsfeld*, 67 HEIDELBERG J. INT'L L. 1 (2007). ("It is a rather rare incident that a decision of the Supreme Court makes its way to the daily newspapers all over the world and has such tremendous international resonance.").

your decision and side with those in the United States and around the world who are struggling to reveal the truth and to bring an end to the use of torture.”<sup>67</sup>

### C. Conclusion

For the foregoing reason, the Special Rapporteur respectfully urges the Court to uphold the Ninth Circuit decision and remand for further proceedings.

Respectfully submitted,

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<sup>67</sup> Open Letter, *supra* note 64.