No. 15-1831

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

and

SA'AD HAMZA HANTOOSH AL-ZUBA'E,
Plaintiff,

v.

CACI PREMIER TECHNOLOGY, INC.,
Defendant-Appellee,

And

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

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

BRIEF OF *AMICUS CURIAE* JUAN E. MÉNDEZ, U.N. SPECIAL RAPPORTEUR ON TORTURE, IN SUPPORT OF PLAINTIFFS-APPELLANTS AND SEEKING REVERSAL

William J. Aceves
California Western School of Law
225 Cedar Street
San Diego, CA 92101
(619) 515-1589

Deena R. Hurwitz
International Human Rights Law Clinic
American University
Washington College of Law
4801 Massachusetts Ave., NW
Washington, D.C. 20016
(202) 274-4286

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

TREATIES AND INTERNATIONAL AGREEMENTS

Other International Authorities

Other Authorities

INTEREST OF *AMICUS CURIAE*

This Brief of *Amicus Curiae* is respectfully submitted by Juan E. Méndez, the current U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[1] This brief is submitted pursuant to Federal Rule of Appellate Procedure 29.[2] It is filed in support of the Plaintiffs-Appellants and seeks the reversal of the district court's decision.[3]

Amicus Juan E. Méndez is the U.N. Special Rapporteur on Torture, a position that was first established by the United Nations in 1985 to examine questions relating to torture and other cruel, inhuman, or degrading treatment or punishment.[4] *See* U.N. Commission on Human Rights, Resolution Regarding Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.

---

[1] This submission is provided by Mr. Méndez on a voluntary basis for the Court's consideration without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials, and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

[2] No party or party's counsel authored this Brief in whole or in part. No party or party's counsel contributed money that funded the preparation or submission of this Brief. No person other than *Amicus* and their counsel contributed money that funded the preparation and submission of this Brief.

[3] Both parties have consented to the filing of this Brief of *Amicus Curiae*.

[4] The U.N. Special Rapporteur's mandate was most recently renewed by the Human Rights Council of the United Nations in April 2014. *See* U.N. Human Rights Council, Resolution Regarding Mandate of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/HRC/RES/25/13 (Apr. 15, 2014).

Doc. E/CN.4/Res/1985/33 (1985). The U.N. Special Rapporteur's mandate includes transmitting appeals to states with respect to individuals who are at risk of torture as well as submitting communications to states with respect to individuals who were previously tortured. The U.N. Special Rapporteur has consistently emphasized the importance of promoting accountability for human rights abuses and providing redress for victims.

Mr. Méndez has served as the U.N. Special Rapporteur on Torture since his initial appointment in 2010. Previously, Mr. Méndez served as Co-Chair of the Human Rights Institute of the International Bar Association (London) in 2010 and 2011; and Special Advisor on Crime Prevention to the Prosecutor, International Criminal Court, The Hague, from mid-2009 to late 2010. Until May 2009, Mr. Méndez was the President of the International Center for Transitional Justice. Concurrently, he was Kofi Annan's Special Advisor on the Prevention of Genocide from 2004 to 2007. Between 2000 and 2003, he was a member of the Inter-American Commission on Human Rights of the Organization of American States, and served as its President in 2002. He directed the Inter-American Institute on Human Rights in San Jose, Costa Rica (1996-1999) and worked for Human Rights Watch (1982-1996). Mr. Méndez teaches human rights at American University, Washington College of Law and at Oxford University. In the past, he has also taught at Notre Dame Law School, Georgetown, and Johns Hopkins.

In his capacity as *Amicus Curiae*, Mr. Méndez believes this case raises important issues concerning the prohibitions against torture and other human rights abuses as well as the right to a remedy under international law. He has significant concerns regarding the district court's ruling in *Al Shimari v. CACI Premier Tech., Inc.*, 2015 WL 4740217 (E.D. June 18, 2015). In particular, the district court's determination that torture, cruel, inhuman, or degrading treatment, and war crimes lack judicially manageable standards is contrary to established principles of international law and countless decades of state practice. Numerous national and international tribunals have applied these standards to hold perpetrators accountable. In his own work, the *Amicus Curiae* is regularly called upon to apply these international standards. More broadly, the decision ensures these victims of torture, cruel, inhuman, and degrading treatment, and war crimes are unable to seek redress for their injuries. Such an outcome is contrary to well-established international law, both with respect to the lack of accountability as well as the right to a remedy. Accordingly, *Amicus Curiae* would like to provide this Court with his perspective on these issues. He believes this submission will assist the Court in its deliberations.

SUMMARY OF ARGUMENT

This case involves one of the most notorious incidents of torture in recent memory.[5] The Plaintiffs are civilians who were subjected to numerous atrocities and indignities while detained at the Abu Ghraib detention center in Iraq. They were beaten, shocked with electrical weapons, subjected to mock executions, stripped naked, kept in cages, threatened with guard dogs, and forced to perform sexual acts. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 521 (4th Cir. 2014). Plaintiffs allege the Defendants authorized this abusive treatment and are complicit in its perpetration.[6]

In *Al Shimari v. CACI Premier Tech., Inc.*, the district court applied the political question doctrine to dismiss Plaintiffs' claims of torture, cruel, inhuman, or degrading treatment, and war crimes. For each claim, the court asserted it lacked "judicially manageable standards" that would allow it to adjudicate the

---

[5] *See* Human Rights Council, U.N. Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, ¶ 137–39, U.N. Doc. A/HRC/13/42 (Feb. 19, 2010); U.N. Special Rapporteur on Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Study on the Phenomenon of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, Including an Assessment of Conditions of Detention, ¶¶ 167–73, U.N.Doc. A/HRC/13/39/Add.5 (Feb. 5, 2010).

[6] The atrocities committed by military personnel and private contractors at Abu Ghraib are well documented. According to the Department of Defense, "numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees . . . ." *Al Shimari*, 758 F.3d at 521 (citations omitted). Investigations conducted by the Department of Defense determined CACI interrogators participated in some of the abuses. *Id.*

claims. *Al Shimari*, 2015 WL 4740217, at *13-16. This was plain error. The international norms pertaining to torture, cruel, inhuman, or degrading treatment, and war crimes are clearly defined and unambiguously set forth in numerous international instruments, including several that have been ratified by the United States. These norms are also found throughout customary international law, and have been recognized for decades. Indeed, the level of international support for these fundamental norms is overwhelming.

It is well-established that torture, cruel, inhuman, or degrading treatment, and war crimes are "specific, universal, and obligatory," thereby meeting the criteria for ATS claims set forth by the U.S. Supreme Court in both *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) and *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013). Furthermore, these norms are clear and present judicially manageable standards, thereby making the political question doctrine inapplicable. For these reasons, the Plaintiffs have the right to an effective remedy for their injuries.

ARGUMENT

I. TORTURE, CRUEL, INHUMAN, OR DEGRADING TREATMENT, AND WAR CRIMES ARE CLEARLY DEFINED, FIRMLY ESTABLISHED, AND OFFER JUDICIALLY MANAGEABLE STANDARDS FOR ADJUDICATION

While detained at the Abu Ghraib prison in Iraq, Plaintiffs were beaten and abused. Such acts violate the prohibitions against torture and cruel, inhuman, or degrading treatment. They also constitute war crimes. These international norms are clearly defined and firmly established under international law. As such, they contain judicially manageable standards for adjudication.

A. THE PROHIBITIONS AGAINST TORTURE AND CRUEL, INHUMAN, OR DEGRADING TREATMENT ARE AMENABLE TO JUDICIAL REVIEW

Few international norms are more firmly established than the prohibitions against torture and other cruel, inhuman, or degrading treatment. *See* Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(1), Dec. 10, 1984, 1465 U.N.T.S. 85 ("CAT") ("[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction").[7] Torture is defined as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining

[7] As of September 21, 2015, there are 158 States Parties to the Convention against Torture, including the United States, which ratified the treaty in 1994.

> 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.

Id., at art. 1(1). Cruel, inhuman, or degrading treatment is defined as acts:

> which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Id., at art. 16(1). The prohibitions against torture and cruel, inhuman, and degrading treatment are absolute and widely recognized as *jus cogens* norms, which are binding on all states and not subject to derogation. *See generally* Manfred Nowak & Elizabeth McArthur, The United Nations Convention against Torture: A Commentary (2009); Sir Nigel Rodley & Matt Pollard, The Treatment of Prisoners Under International Law (2009); J.H. Burgers & Hans Danelius, The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1988).

Significantly, the United States ratified the Convention against Torture in 1994. It has reaffirmed its commitment to the Convention in various reports to the Committee against Torture, which was established by the Convention to monitor state compliance. *See, e.g.*, Initial Report of the United States of America to the

Committee against Torture (Feb. 9, 2000), *available at* http://2001-2009.state.gov/documents/organization/100296.pdf; Second Periodic Report of the United States of America to the Committee against Torture (May 6, 2005), *available at* http://www.state.gov/documents/organization/62175.pdf; Third Periodic Report of the United States of America to the Committee against Torture (Aug. 12, 2013), *available at* http://www.state.gov/documents/organization/213267.pdf. At no time has the United States questioned its obligation to comply with the Convention against Torture or the non-derogable status of the prohibitions against torture and other cruel, inhuman, or degrading treatment.

The prohibitions against torture and other cruel, inhuman, or degrading treatment are recognized in every major human rights instrument. *See, e.g.*, Universal Declaration of Human Rights, art. 5, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st Plen. Mtg., U.N. Doc. A/810 at 71 (Dec. 12, 1948) ("UDHR") ("[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"); International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 ("ICCPR") ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").[8] The Human Rights

[8] As of September 21, 2015, there were 168 States Parties to the International Covenant on Civil and Political Rights, including the United States, which ratified the treaty in 1992.

Committee, established by the ICCPR to interpret and monitor compliance, has condemned torture and other cruel, inhuman, or degrading treatment on countless occasions. *See, e.g.*, Human Rights Committee, General Comment No. 20 on Article 7: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994).

The prohibition against torture and cruel, inhuman, or degrading treatment is also codified in regional human rights agreements. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 222 ("European Convention") ("[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment")[9]; American Convention on Human Rights, art. 5(2), Nov. 22, 1969, 1144 U.N.T.S. 123 ("American Convention") ("[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person")[10]; Inter-American Convention to Prevent and Punish Torture, art. 6, Feb. 28, 1987, O.A.S.T.S. No. 67 ("the States Parties shall take effective measures to

[9] As of September 21, 2015, there were 47 States Parties to the European Convention.

[10] As of September 21, 2015, there were 23 States Parties to the American Convention. The United States has signed, but not ratified, the American Convention.

prevent and punish torture within their jurisdiction")[11]; African Charter on Human and Peoples' Rights, art. 5, June 27, 1981, OAU Doc. CAB/LEG/67/3/rev.5 ("[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited").[12]

The U.N. Special Rapporteur on Torture has issued countless pronouncements condemning torture and other cruel, inhuman, or degrading treatment. *See, e.g.*, U.N. Special Rapporteur on Torture, Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/69/387 (Sept. 23, 2014); U.N. Special Rapporteur on Torture, Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/68/295 (Aug. 9, 2013).

In sum, the prohibitions against torture and other cruel, inhuman, or degrading treatment are absolute. These norms are specific, universal, and obligatory.

[11] As of September 21, 2015, there were 18 States Parties to the Inter-American Convention.

[12] As of September 21, 2015, there were 53 States Parties to the African Charter.

B. THE PROHIBITION AGAINST WAR CRIMES IS AMENABLE TO JUDICIAL REVIEW

The prohibition against war crimes appears in numerous international instruments. Significantly, torture and cruel, inhuman, or degrading treatment can also constitute war crimes.

For example, Common Article 3 of the four Geneva Conventions of 1949 contains explicit and detailed descriptions of minimum standards that must be provided by States Parties in times of non-international armed conflict.

> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Fourth Geneva Convention").[13] In addition, grave breaches of the Geneva Conventions, which

[13] *See also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 35 Stat. 1885, 75 U.N.T.S. 31 ("First Geneva Convention"); Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 ("Second Geneva Convention"); Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Third Geneva Convention"). As of September 21, 2015, there were 196 States Parties

give rise to personal liability in times of international armed conflict, are clearly defined in each treaty and include: willful killing, torture or inhuman treatment, and willfully causing great suffering or serious injury to body or health.[14] Fourth Geneva Convention, *supra*, at art. 147. Significantly, the United States has signed and ratified each of the Geneva Conventions. The Geneva Conventions have received extensive commentary and analysis by the International Committee of the Red Cross. *See, e.g.*, International Committee of the Red Cross, Commentary: I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1952); International Committee of the Red Cross, Commentary: II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1960); International Committee of the Red Cross, Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War (1960); International Committee of the Red Cross, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1958). These documents provide detailed information on how war crimes are defined under international law.

---

to the each of the 1949 Geneva Conventions, including the United States, which ratified the treaties in 1955. In *Hamdan v. Rumsfeld*, 548 U.S. 557, 625 (2006), the U.S. Supreme Court acknowledged that Common Article 3 applied to the United States and that it regulated U.S. treatment of detainees.

[14] *See also* First Geneva Convention, *supra*, at art. 50; Second Geneva Convention, *supra*, at art. 51; Third Geneva Convention, *supra*, at art. 130.

Additional Protocols I and II to the 1949 Geneva Conventions offer similar provisions regarding war crimes. For example, Additional Protocol I, which addresses victims of international armed conflicts, prohibits torture of all kinds, whether physical or mental, corporal punishment, and mutilation. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75(2)(a), June 8, 1977, 1125 U.N.T.S. 3 ("Additional Protocol I").[15] It also prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault." *Id*. at art. 75(2)(b). Similarly, Additional Protocol II, which addresses the protection of victims of non-international armed conflicts, prohibits cruel treatment such as torture, mutilation or any form of corporal punishment, outrages upon personal dignity, including humiliating and degrading treatment, rape, any form of indecent assault, and threats to commit any of these acts. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4(2), June 8, 1977, 1125 U.N.T.S.

[15] As of September 21, 2015, there are 174 States Parties to Protocol I. While the United States has not ratified Protocol I, it considers many provisions to constitute customary international law.

609 ("Additional Protocol II").[16] Article 5(1) of Additional Protocol II adds the following protections to individuals who are deprived of their liberty:

> (a) The wounded and the sick shall be treated in accordance with Article 7;
> (b) The persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict;
> (c) They shall be allowed to receive individual or collective relief;
> (d) They shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions; . . .

The International Committee of the Red Cross has provided extensive commentary on Additional Protocols I and II. *See e.g.*, International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987).

War crimes are also codified in various international criminal tribunals. *See, e.g.*, Statute of the International Criminal Tribunal for the Former Yugoslavia, arts. 2 and 3, May 25, 1993, U.N. Doc. S/RES/827; Statute of the International Criminal Tribunal for Rwanda, art. 4, Nov. 8, 1994, U.N. Doc. S/RES/955; Statute of the Special Court for Sierra Leone, arts. 3 and 4, Jan. 16, 2002, *available at* http://www.rscsl.org/Documents/scsl-statute.pdf; Law on the Establishment of the

[16] As of September 21, 2015, there are 168 States Parties to Protocol II. While the United States has not ratified Protocol II, it considers many provisions to constitute customary international law.

Extraordinary Chambers in the Courts of Cambodia, art. 6, Oct. 27, 2004, *available at* http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

Finally, the 1998 Rome Statute of the International Criminal Court offers equally clear and detailed descriptions of war crimes. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 ("Rome Statute").[17] For example, Article 8(a) of the Rome Statute defines war crimes to include the following acts:

> (i) Wilful killing;
> (ii) Torture or inhuman treatment, including biological experiments;
> (iii) Wilfully causing great suffering, or serious injury to body or health;
> (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
> (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
> (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
> (vii) Unlawful deportation or transfer or unlawful confinement;

Article 8(b) adds the following acts as war crimes:

> (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
> (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy . . . enforced sterilization, or any other form of sexual violence

[17] As of September 21, 2015, there are 123 States Parties to the Rome Statute. While the United States has not ratified the Rome Statute, it considers many provisions to constitute customary international law.

See generally Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court 275-504 (2d ed. 2008). The elements of war crimes in the Rome Statute have been examined in extraordinary detail by the International Committee of the Red Cross. *See* Knut Dormann, Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary (2003). *See also* II Customary International Humanitarian Law (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

Recognizing the existence of judicially manageable standards, several international tribunals have prosecuted and convicted individuals for torture, cruel, inhuman, or degrading treatment, and war crimes. *See, e.g.*, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06 (Pre-Trial Chamber) (June 9, 2014) (addressing torture, cruel treatment, and war crimes); *Prosecutor v. Naletilic & Martinovic*, Case No. IT-98-34-A (Appeals Chamber) (May 3, 2006) (addressing torture, cruel treatment, and war crimes); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T (Trial Chamber) (Dec. 10, 1998) (addressing torture and war crimes).

Significantly, these norms – the prohibitions against torture, cruel, inhuman, or degrading treatment – are now codified in U.S. law. *See, e.g.*, 28 U.S.C. §1350 (Notes) (establishing civil liability for torture); 18 U.S.C. §2340A (establishing criminal liability for torture); 18 U.S.C. §2441 (establishing criminal liability for war crimes). And, these norms have been litigated in U.S. courts. *See, e.g.*,

Filartiga v. Pena-Irala, 630 F.2d. 876 (2d Cir. 1980) (addressing claims of torture); *In re Estate of Ferdinand Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994) (addressing claims of torture); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (addressing cruel, inhuman, or degrading treatment); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (addressing war crimes); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (addressing claims of torture); *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010) (addressing claims of torture). To suggest there are no judicially manageable standards for considering claims of torture, cruel, inhuman, or degrading treatment, or war crimes is contrary to longstanding U.S. practice.

II. VICTIMS OF HUMAN RIGHTS ABUSES ARE ENTITLED TO A REMEDY UNDER INTERNATIONAL LAW

The principle of *ubi ius ibi remedium* – "where there is a right, there is a remedy" – is a well-established principle of international law. The leading international formulation of the "no right without a remedy" principle comes from the 1928 holding of the Permanent Court of International Justice (PCIJ) in the *Factory at Chorzów* case. "[I]t is a principle of international law, and even a general conception of law, that *any breach of an engagement involves an obligation to make reparation*." *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13) (emphasis added). The remedial principles

governing human rights law are heavily influenced by the *Factory at Chorzów* case. *See* Dinah Shelton, Remedies in International Human Rights Law 99 (2d ed. 2005) ("institutions applying [human rights law] return to the law of state responsibility to assess the nature and extent of the remedies"). Significantly, remedies must be *effective* to be consistent with international law. *Id*. at 9. *See generally* Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 American Journal of International Law 833, 834-36 (2002).

The ICCPR and CAT obligate States Parties such as the United States to provide effective remedies for violations. *See* ICCPR, *supra*, at arts. 2(3), 9(5), 14(6); CAT, *supra*, at art. 14(1) ("Each State Party shall ensure in its legal system that the victim...obtains redress and has an enforceable right to fair and adequate compensation..."); *see also* UDHR, *supra*, art. 8 ("[e]veryone has the right to an effective remedy...for acts violating the fundamental rights granted him...").

The Human Rights Committee emphasizes that under Article 2(3) of the ICCPR, remedies must not just be available in theory but that "States Parties must ensure that individuals…have *accessible and effective remedies* to vindicate" their rights. Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, ¶15, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) (emphasis added). Specifically,

> 16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated.

> Without [this], the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged . . . . The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.
>
> 17. In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant.

Id. at ¶¶16-17.

The Committee against Torture has explained that "redress" required under Article 14 of the CAT "encompasses the concept of 'effective remedy' and 'reparation.'" Committee against Torture, General Comment No. 3 on Implementation of Article 14 by States Parties, ¶2, U.N. Doc. CAT/C/GC/3 (Nov. 19, 2012). To be effective, a remedy must provide "fair and adequate compensation for torture or ill-treatment" and "should be sufficient to compensate for any economically assessable damage resulting from torture or ill-treatment, whether pecuniary or non-pecuniary." *Id.* at ¶10. An effective remedy should also include "verification of the facts and full and public disclosure of the truth," "an official declaration or judicial decision restoring the dignity, the reputation and the rights of the victim," and "judicial and administrative sanctions against persons liable for violations." *Id.* at ¶16. The Committee has emphasized the importance of judicial remedies in victims achieving full rehabilitation: "*Judicial remedies*

must always be available to victims, irrespective of what other remedies may be available, and should enable victim participation." *Id.* at ¶30 (emphasis added).

The importance of the right to a remedy was further acknowledged by the U.N. General Assembly in 2005 in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. G.A. Res. 60/147, U.N. GAOR 60th Sess., U.N. Doc. A/RES/60/147 (Mar. 21, 2006) ("Basic Principles"). The Basic Principles note that states shall provide victims of gross violations of international human rights law with "(a) [e]qual and effective access to justice; (b) [a]dequate, effective and prompt reparation for harm suffered; [and] (c) [a]ccess to relevant information concerning violations and reparation mechanisms." *Id*. at ¶11. Victims must have "equal access to an effective judicial remedy as provided for under international law." *Id*. at ¶12. Full and effective reparations include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. *Id.* at ¶18. Remedies are also crucial to provide "[v]erification of the facts and full and public disclosure of the truth." *Id.* at ¶22. The failure to provide a remedy promotes impunity, which in turn promotes further human rights abuses.

Regional human rights institutions have also recognized the right to a remedy. The American Convention provides that "[e]veryone has the right to

simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention . . . ."[18] American Convention, *supra*, at art. 25(1). Similarly, the European human rights system recognizes the right to a remedy for human rights violations. European Convention, *supra*, at art. 13 ("[e]veryone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity"). Finally, the African system of human rights offers similar protections. Protocol to the African Charter on Human and Peoples' Rights, art. 27, June 9, 1998, CAB/LEG/665 ("[i]f the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation").

[18] In *Velásquez Rodríguez v. Honduras* Inter-Am. Ct. H.R. (ser. C) No. 7, at ¶10 (July 21, 1989), the Inter-American Court of Human Rights issued a seminal decision on the right to a remedy. According to the Inter-American Court, "every violation of an international obligation which results in harm creates a duty to make adequate reparation." Although the Court acknowledged that compensation was the most common means, it also held that *restitutio in integrum* was the starting point to counter the harm done. *See also Garrido & Baigorria*, Inter-Am. Ct. H.R. (ser. C) No. 39, at ¶¶39-45 (Aug. 27, 1998); *accord Durand & Ugarte*, Inter-Am. Ct. H.R. (ser. C) No. 89, at ¶24 (Dec. 3, 2001) ("any violation of an international obligation carries with it the obligation to make adequate reparation").

The U.N. Special Rapporteur on Torture has also recognized the importance of reparations for victims of human rights violations. *See*, *e.g.*, U.N. Special Rapporteur on Torture, Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶91, U.N. Doc. A/65/273 (Aug. 10, 2010).

The United States has explicitly acknowledged its obligations under international law to provide a remedy in a case such as this. In 2006, the U.S. State Department, responding to questions from the Committee against Torture about U.S. compliance with its obligations to provide redress under Article 14 of the CAT, specifically stated that victims of torture could sue federal officials directly for damages. *See* United States Written Responses to Questions Asked by the United Nations Committee against Torture, ¶5 (Apr. 28, 2006), *available at* http://www.state.gov/documents/organization/68662.pdf. The availability of such remedies was reaffirmed in the most recent periodic report by the United States to the Committee. *See* Third Periodic Report, *supra*, at ¶147. In 2014, the United States candidly acknowledged to the Committee past lapses in its obligations under the CAT and committed itself to full compliance going forward. Specifically, the United States told the Committee that it remains bound by the terms of the CAT for actions committed domestically or by its agents overseas, whether during a time of armed conflict or not. The Committee against Torture acknowledged the

U.S. statements with approval. Committee against Torture: Concluding Observations on the Third to Fifth Periodic Reports of United States of America, ¶6, U.N. Doc. CAT/C/USA/CO/3-5 (Nov. 20, 2014) (commending U.S. position that war or armed conflict does not suspend operation of the CAT); ¶10 (noting U.S. commitment before Committee that the U.S. must "abide by the universal prohibition of torture and other ill-treatment everywhere," including overseas). In sum, the United States has pledged to provide the precise remedy that the district court held unavailable in this case.

The right to a remedy is a fundamental principle of international law. Victims of torture, cruel, inhuman, or degrading treatment, and war crimes have a right to seek redress for their injuries. This obligation is all the more significant in light of the fundamental and non-derogable nature of these obligations. A right without a remedy is no right at all.

CONCLUSION

International law prohibits torture, cruel, inhuman, or degrading treatment, and war crimes. These norms are clearly and unambiguously set forth in numerous international instruments and established in customary international law. Accordingly, the district court's decision finding no judicially manageable

standards to adjudicate the claims in this case was in error. For the foregoing reasons, the district court's decision should be reversed.

Dated: September 28, 2015

Respectfully submitted,

By: /s/ Deena R. Hurwitz

Deena R. Hurwitz
International Human Rights Law Clinic
American University
Washington College of Law
4801 Massachusetts Ave., NW
Washington, DC 20016
(202) 274-4286

William J. Aceves
California Western School of Law
225 Cedar Street
San Diego, CA 92101
(619) 515-1589

Counsel for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

I hereby certify, pursuant to Fed.R.App.P. 32(a)(7)(C), that the foregoing brief is proportionally spaced, has a typeface of 14 point, and contains 5,459 words, (which does not exceed the applicable 7,000 word limit).

Dated: September 28, 2015 By: /s/ Deena R. Hurwitz

Counsel for *Amicus Curiae*

Deena R. Hurwitz
International Human Rights Law Clinic
American University
Washington College of Law
4801 Massachusetts Ave., NW
Washington, DC 20016
(202) 274-4286

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief was filed upon the following counsel for Plaintiffs-Appellants and Defendants-Appellees via this Court's electronic filing system on this 28th day of September 2015:

John Frederick O'Connor, Jr.
Steptoe & Johnson, LLP
1330 Connecticut Avenue, NW
Washington, DC 20036

Baher Azmy
Katherine Gallagher
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012

In addition, paper copies of the foregoing Brief were sent by U.S. mail to the following counsel:

Robert P. Lobue
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036

Shereef Hadi Akeel
Akeel & Valentine, P.C.
888 West Big Beaver Road
Troy, Michigan 48084

Jeena Shah
Constitutional Rights & International Human Rights Clinic
Rutgers School of Law
123 Washington Street
Newark, New Jersey 07102

By: /s/ Deena R. Hurwitz

Counsel for *Amicus Curiae*

Deena R. Hurwitz
International Human Rights Law Clinic
American University
Washington College of Law
4801 Massachusetts Ave., NW
Washington, DC 20016
(202) 274-4286