13-1937 (L), 13-2162

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,

– v. –

CACI PREMIER TECHNOLOGY, INC., CACI INTERNATIONAL, INC., Defendants-Appellees,

And

TIMOTHY DUGAN, L-3 SERVICES, INC. Defendants.

On Appeal from the United States District Court for the Eastern District of Virginia, Alexandria Division
Case No. 08-cv-0827, Judge Gerald Bruce Lee

BRIEF OF THE UNITED NATIONS SPECIAL RAPPORTEURS ON TORTURE, JUAN E. MÉNDEZ, MANFRED NOWAK, SIR NIGEL RODLEY AND THEO VAN BOVEN AS *AMICI CURIAE* IN SUPPORT OF THE PLAINTIFFS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT'S DECISION

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November 5, 2013

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STATEMENT OF INTEREST

This brief of *amici curiae* is respectfully submitted pursuant to Federal Rule of Appellate Procedure 29 in support of the Plaintiffs-Appellants. All parties to this appeal have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a).[*]

Amici curiae **Juan E. Méndez**, **Manfred Nowak**, **Theo van Boven**, and **Sir Nigel Rodley** are the current and three living former United Nations Special Rapporteurs on the question of torture and other cruel, inhuman, or degrading treatment or punishment, pursuant to U.N. General Assembly resolution 60/251 and to U.N. Human Rights Council resolution 16/23. The U.N. Special Rapporteur acts under the aegis of the Human Rights Council without remuneration as an independent expert within the scope of his mandate. This enables him to seek, receive, examine and act on information from numerous sources, including individuals, regarding issues and alleged cases concerning torture and or other cruel, inhuman or degrading treatment or punishment. This submission is drafted on a voluntary basis for the Court's consideration without

[*] 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 his counsel made a monetary contribution to this brief's preparation or submission.

prejudice, 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.

Amici have an interest in this case because of their years of expertise and their role in monitoring global accountability on the prohibition of torture. *Amici* write to call attention to the important international legal obligations of every sovereign to provide a remedy for victims and ensure that any act of torture is adjudicated. *Amici* note that there has been little meaningful accountability with respect to the notorious instances of torture and serious abuse at the U.S.-run Abu Ghraib prison, and are concerned about the lack of access to a remedy and resulting immunity enjoyed by the perpetrators in this case brought against a U.S. defendant alleged to have conspired to torture the plaintiffs. We are further concerned that the impact of such impunity undermines the anti-torture framework that the Office of the U.N. Special Rapporteur is charged to oversee, and to which the United States has committed itself on becoming a party to the Convention Against Torture .

* * *

Juan Méndez is the current Special Rapporteur on Torture. He was 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. Prior to that, he was the President of the International Center for Transitional Justice (ICTJ). Concurrently, Mr. Méndez was Kofi Annan's Special Advisor on the Prevention of Genocide from 2004–2007. 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 the Commission's President in 2002. Juan Méndez currently teaches human rights at American University/Washington College of Law and at Oxford University (U.K.). In the past, he has taught at Notre Dame Law School (USA), Georgetown, and Johns Hopkins. He worked for Human Rights Watch from 1982–1996 and directed the Inter-American Institute on Human Rights in San Jose, Costa Rica from 1996–1999.

Manfred Nowak served as Special Rapporteur on Torture from 2004–2010. He is currently Professor of International Law and Human Rights at Vienna University, co-director of the Ludwig Boltzmann Institute of Human Rights, and Vice-Chair of the European Union Agency for Fundamental Rights (Vienna). He served as U.N. Expert on Enforced Disappearances from 1993–2006, and Judge at the Human Rights Chamber of Bosnia and Herzegovina in Sarajevo (1996–2003). Professor Nowak has written extensively on the subject of torture, including THE UNITED NATIONS CONVENTION AGAINST TORTURE—A COMMENTARY (with

Elizabeth McArthur, Oxford University Press, 2008), *Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment,* 23 Neth. Q. Hum. Rts. 674 (2005) and *What Practices Constitute Torture? U.S. and U.N. Standards,* 28 Hum. Rts Qtrly 809 (2006).

Sir Nigel Rodley, KBE, served as Special Rapporteur on Torture from 1993–2001. He is Professor of Law and Chair of the Human Rights Centre at the University of Essex (U.K.). Since 2001, has been a member of the Human Rights Committee, the treaty monitoring body for the International Covenant on Civil and Political Rights, and currently serves as its Chair. He is also President of the International Commission of Jurists (Geneva). Professor Rodley's honors include knighthood for services to human rights and international law (1998), and the American Society of International Law 2005 Goler T. Butcher Medal for distinguished contribution to international human rights law. His many scholarly publications include THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW, now in its third edition (with Matt Pollard, Oxford University Press, 2009).

Theo van Boven served as Special Rapporteur on Torture from 2001–2004. He is currently Professor of Law at the University of Maastricht (The Netherlands), where he was Dean of the Faculty of Law from 1986–1988. He has served as Director of the Division of Human Rights of the United Nations (1977–1982). As a member of the U.N. Sub-Commission on the Rights to Restitution,

Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms (1990–1993), he drafted the original 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. From 1992-1999 Professor van Boven served on the Committee on the Elimination of Racial Discrimination, the treaty body charged with monitoring the Race Convention. He was also the first Registrar of the International Criminal Tribunal for the former Yugoslavia (1994). He served as the Head of the Netherlands delegation to the U.N. Diplomatic Conference for the Establishment of an International Criminal Court (Rome, 1998).

SUMMARY OF ARGUMENT

This case involves one of the most notorious incidents of torture of the last decade.[1] Applying the Supreme Court's principle from *Kiobel v. Royal Dutch Petroleum Co.*, the case "touches and concerns" United States obligations under domestic and international law. 133 S. Ct. 1659, 1673 (2013). The torture alleged

[1] 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); 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).

occurred at Abu Ghraib, the detention center in Iraq was run by the United States. The defendants are U.S. contractors, and under the terms of the U.S.-led Coalition Provisional Authority Order 17, contractors could not be held liable in Iraqi courts. Further, the United States is a party to the Convention Against Torture (CAT). As such, we respectfully aver that the District Court below erroneously granted CACI's Motion to Dismiss.

Torture is prohibited under international law, and victims of torture have a right to an effective remedy. The treaty obligations of the United States require the State to provide an effective remedy to victims of torture. These obligations include meaningful access to the judicial system. Failure to provide a forum for effective remedies would create *de facto* immunity for the perpetrators of torture.

At a minimum, victims of torture must be allowed access to justice in United States courts. Where there is no alternative forum for a hearing, denying a torture victim access to the courts is a violation of State obligations under international law. Because barring the victims from access to the courts on a jurisdictional pretext would violate the United States' obligations under international law to provide an effective remedy, this case must be allowed to proceed on the merits.

ARGUMENT

I. TORTURE IS PROHIBITED UNDER INTERNATIONAL LAW

Few international norms are more firmly established than the prohibition

against torture. This prohibition is recognized in every major international human rights and international humanitarian law instrument, including treaties ratified by the United States.[2] It is also codified in regional human rights agreements applying across the globe.[3] Each of these international instruments makes clear that the prohibition against torture is universal and absolute. For example, the 1949 Geneva Conventions prohibit torture per se and torture as a war crime "at any time and in any place whatsoever."[4] The Convention Against Torture asserts that

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[2] *See, e.g.*, Universal Declaration of Human Rights, art. 5, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, S. Treaty Doc. 95-20 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR] (ratified by the United States on June 8, 1992); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, Dec. 10, 1984, S. Treaty Doc. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT] (ratified by the United States on October 21, 1994); Geneva Convention Relative to the Treatment of Prisoners of War, arts. 3, 13, 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III] (ratified by the United States on August 2, 1955); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 3, 32, 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV] (ratified by the United States on August 2, 1955).

[3] *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights art. 5(2), Nov. 22, 1969, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights art. 5, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5.

[4] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, arts. 3, 50, Aug. 12, 1949, 35 Stat. 1885, 75 U.N.T.S. 31[hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, arts. 3, 51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; GC III, *supra* note 2, arts. 3, 130; GC IV, *supra* note 2, arts. 3, 147.

“[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” CAT, *supra* note 2, art. 2(2). According to the U.S. State Department, this blanket prohibition was viewed by the drafters of the Convention Against Torture as necessary if the treaty is to have significant effect, as public emergencies are commonly invoked as a source of extraordinary powers or as a justification for limiting fundamental rights and freedoms.[5] As one of us has written elsewhere, the

> unconditional recognition by the international community justifies the view that torture is prohibited by customary international law and even ranks as *jus cogens* under international law, pursuant to Article 53 of the Vienna Convention on the Law of Treaties (VCLT). This exceptional status is usually explained by the fact that torture, as slavery, constitutes a direct attack on the core of the human dignity and personality.

Manfred Nowak, *Challenges to the Absolute Nature of the Prohibition of Torture*

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[5] President’s Message to Congress Transmitting the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, May 23, 1988, S. Treaty Doc. No. 100-20, *reprinted in* 13857 U.S. Cong. Serial Set at 3 (1990) [hereinafter State Dept. Summary]. *See, e.g.*, *Filártiga v. Peña-Irala*, 630 F.2d 876, 880-85 (2d Cir. 1980) (listing numerous sources, including an opinion of the State Department, supporting the proposition that torture is prohibited as a matter of international law, and noting that despite the continued practice of torture by many countries, virtually all have denounced its use, including through international declarations and agreements); Restatement (Third) of the Foreign Relations Law of the United States § 702, note 5(d) (1987).

and Ill-Treatment, 23 Neth. Q. Hum. Rts. 674, 674 (2005) (footnote omitted). No State may waive the prohibition for any reason, for itself or another actor, and torture may not be authorized by any treaty or contract. *Certain Underwriters at Lloyds London v. Great Socialist People's Libyan Arab Jamahiriya*, 2007 U.S. Dist. LEXIS 49032 (D.D.C. July 9, 2007).

II. STATES ARE OBLIGATED TO PROVIDE, AND VICTIMS OF TORTURE HAVE THE RIGHT, TO AN EFFECTIVE REMEDY UNDER INTERNATIONAL LAW

A. The Right to an Effective Remedy is Fundamental Under International Law

It is a well established principle under international law that where there is a right, there is a remedy—*ubi ius ibi remedium.* This principle was laid out by the Permanent Court of International Justice (PCIJ) in a 1928 decision in which the Court wrote, "[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." *Chorzów Factory* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13). The right to an effective remedy is firmly established by nearly every major human rights treaty,[6] numerous court decisions[7] and scholarly works.[8]

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[6] *See, e.g.*, UDHR, *supra* note 2, art. 8 ("Everyone has the right to an effective remedy . . . for acts violating the fundamental rights granted him . . . ."); CAT, *supra* note 2, art. 14; ICCPR, *supra* note 2, arts. 2(3), 9(5), 14(6) (ensuring remedies and compensation for wrongful convictions and imprisonment);

The Convention Against Torture requires each State party to "ensure in its

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International Convention on the Elimination of All Forms of Racial Discrimination, art. 6, Mar. 7, 1966, S. Treaty Doc. 95-18 (1978), 660 U.N.T.S. 195 ("State Parties shall assure to everyone within their jurisdiction effective protection and remedies"); *see also,* Int'l Comm'n of Jurists, Written Statement to the Ad-Hoc Committee on the Disability Rights Convention, *Need for an Effective Domestic Remedy in the Disability Rights Convention*, Jan. 2005, *available at* http://www.un.org/esa/socdev/enable/rights/ahc5docs/ahc5icj.rtf. ("The right to an effective remedy is so firmly enshrined . . . that any credible modern human rights treaty has to incorporate it.").

[7] In addition to *Chorzów Factory* (Ger. v. Pol.), PCIJ, *Velásquez-Rodríguez v. Hond.*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶¶ 62-64 (July 21, 1989); *see also*, *Garrido & Baigorria v. Arg.*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 39, ¶ 40 (Aug. 27,1998); *accord Durand & Ugarte v. Peru*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 89, ¶ 24 (Dec. 3, 2001) ("[A]ny violation of an international obligation carries with it the obligation to make adequate reparation."). *Al-Adsani v. United Kingdom,* 2001-XI Eur. Ct. H.R. 79, 101.

[8] Christopher Keith Hall, *The Duty of States Parties to the Convention Against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad*, 18 Eur. J. of Int'l L. 921 (2007); Juan E. Méndez, *Accountability for Past Abuses*, 19 Hum. Rts. Q. 255 (1997); Manfred Nowak, et al., *The Obama Administration and Obligations Under the Convention Against Torture*, 20 Trans. L. & Contemp. Problems 33 (2011); Rainer Hofmann, Int'l Law Assoc., Reparation for Victims of Armed Conflict (Substantive Issues), 2 (2010) (preliminary remarks on the *Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict*) (noting that the Committee based its work on legally binding instruments, e.g., the Geneva Conventions and Additional Protocols and international human rights treaties, as well as significant non-binding instruments, e.g., *International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts* (Annex to General Assembly Resolution 56/83 U.N. Doc. A/56/49 (Vol. I)/Corr.4) (*ILC Articles on State Responsibility)*, and 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* (UN Doc.A/RES/60/147) [hereinafter, Basic Principles]. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Rep. of the Int'l Law Comm'n, 53rd Sess., Nov. 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001).

legal system that the victim of an act of torture obtains redress and has an *enforceable* right to fair and adequate compensation including the means for as full rehabilitation as possible." CAT, art. 14 (emphasis added). According to the U.N. Committee Against Torture (CAT Committee), "the term 'redress' in article 14 encompasses the concept of 'effective remedy.'" U.N. Comm. Against Torture, General Comment 3, Implementation of Article 14 by States Parties, U.N. Doc. CAT/C/GC/3, ¶ 2 (2012) (CAT Comm., Gen. Cmt 3); *see also,* Hall, *supra* n. 8, 923–26.

Additionally, the International Covenant on Civil and Political Rights (ICCPR), article 2(3), requires States parties to establish remedies for any violation of its provisions, including the right to bring a claim and to have that claim heard. "The duty to ensure means that states are obliged to take specific steps to redress the wrong committed by each violation of a right." Méndez, *supra* n.8, 259. Article 2(3) further requires States parties to ensure that the competent authorities enforce such remedies when granted. "Without reparation for individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of Article 2, paragraph 3, is not discharged." Human Rights Committee (HRC), General Comment 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 16 (Mar. 29, 2004). The HRC has emphasized that "[a] failure by a State Party to investigate allegations of violations could in and of

itself give rise to a separate breach of the Covenant." *Id.*, at ¶ 15.

The 1949 Geneva Conventions similarly require States parties, which includes the United States, to search for and prosecute or extradite persons suspected of having committed grave breaches of the Conventions. GC I, *supra* note 4, art. 49; GC II, *supra* n. 4, art. 50; GC III, *supra* n. 2, art. 129; GC IV, *supra* n. 2, art. 146; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 85, June 8, 1977, 1125 U.N.T.S. 3. *See also,* Report, Analysis of the Punishments Applicable to International Crimes (War Crimes, Crimes Against Humanity and Genocide) in Domestic Law and Practice, 90 Int'l Rev. of the Red Cross, 461, 462 (2008) [hereinafter ICRC Analysis]. A grave breach specifically includes "torture or inhuman treatment." GC I, *supra* n. 4, arts. 3, 50; GC II *supra* n. 4, arts. 3, 51; GC III, *supra* n. 2, arts. 3, 130; GC IV, *supra* n. 2, arts. 3, 147. International humanitarian law imposes on States the obligation to take specific measures in response to grave breaches. This includes enacting national laws that prohibit the proscribed conduct, and provide for prosecution and punishment of grave breaches committed both inside and outside the State's own territory. GC I, *supra* n. 4, art. 49; GC II, *supra* n. 4, art. 50; GC III, *supra* n. 2, art. 129; GC IV, *supra* n. 2, art. 146; and Additional Protocol I, art. 85. *See also,* ICRC Analysis, at 462 (noting that, among other things, States must institute a responsibility on the

part of their military commanders to prevent the perpetration of grave breaches, to stop them when they occur, and to take measures against persons under their authority who perpetrate such offences).

The U.N. General Assembly further emphasized the importance of the right to an effective remedy 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 (U.N. Basic Principles), *supra* n. 8. The U.N. Basic Principles affirm that States shall provide victims with "equal access to an effective judicial remedy as provided for under international law." *Id.*, ¶ 12. Elaborating on the scope of the international legal obligation to provide an effective remedy, the U.N. Basic Principles make clear that the obligation includes the duty to investigate violations effectively, promptly and impartially; respond with appropriate measures including punishment of those responsible; and provide victims with equal access to justice, "irrespective of who may ultimately be the bearer of responsibility for the violation . . . ." *Id.*, ¶ 3 (b-c).

B. The Nature of States' Obligation to Ensure *Effective* Remedies for Torture is Manifest Under International and Domestic Law

The "ordinary meaning" of CAT article 14, considered in light of the treaty's object and purpose, calls for States to provide a mechanism for redress and

restitution within their domestic legal systems for acts of torture. As noted, the term 'redress' in article 14 encompasses the concept of effective remedy. CAT Comm., Gen. Cmt 3, *supra,* ¶ 2. *See also,* Hall, *supra* n. 8, 923–26.

The CAT Committee's General Comment 3 further specifies that an effective remedy is both procedural and substantive. Procedurally, States parties must establish judicial bodies capable of determining the right to redress for a victim of torture, awarding such redress, and ensuring that these forums are accessible to all victims. CAT Comm., Gen. Cmt 3, *supra,* ¶ 5. The CAT Committee also emphasizes that "[j]udicial remedies must always be available to victims, irrespective of what other remedies may be available." *Id.*, ¶ 30. Substantively, States must provide restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition to victims of torture. *Id.*, ¶ 6.

In particular, the Committee notes that "[a] State's failure to investigate, criminally prosecute, or to allow civil proceedings related to allegations of acts of torture in a prompt manner, may constitute a de facto denial" of an effective remedy. *Id.*, ¶ 17. Where there is no alternative forum for a hearing, denying a torture victim access to judicial remedies is a violation of State obligations under article 14 of the CAT. As a party to the CAT, the United States is thus obligated to investigate where "there is reasonable ground to believe that an act of torture has been committed," to ensure that a victim of torture will have his case examined by

the competent authorities, and to afford such individuals "an enforceable right to fair and adequate compensation." CAT, arts. 12–14.

In its General Comment 31, *supra*, the Human Rights Committee (of the ICCPR), stressed the importance of judicial and administrative mechanisms in providing remedies under the ICCPR. In its jurisprudence on individual communications, the HRC has frequently and consistently reiterated the need for judicial remedies in cases of serious violations of the ICCPR. *See, Bithashwiwa & Mulumba v. Zaire*, ¶ 14, Communication 241/1987, U.N. Doc, CCPR/C/37/D/241/1987 (1989) (stating that the State must provide applicants with an effective remedy under art. 2(3), and "in particular . . . ensure that they can effectively challenge these violations before a court of law").

While the obligation to provide effective sanctions can be implemented through a variety of measures, including criminal and civil litigation, access to the judicial system is essential to effect any measure. Further, the Geneva Conventions explicitly articulate access to the courts as a discrete obligation. Together, these principles impose a duty on the United States to provide for a right to an effective remedy for torture under its treaty obligations.

At a minimum, victims of torture must be allowed access to justice in United States courts. Where there is no alternative forum for a hearing, denying a torture victim access to the courts is a violation of State obligations under international

law. There is universal acceptance for providing this remedy. In *Kiobel v. Royal Dutch Petroleum*, the Supreme Court expressed concern that providing a right to a remedy in U.S. courts where there is a violation of the prohibition of torture causes diplomatic strife and international discord. 133 S. Ct. 1659, 1668–69 (2013). Quite the opposite is true; *failure* to provide a remedy where there is a violation is out of step with international comity and the international legal framework.

Indeed, U.S. law recognizes the right of torture victims to seek redress for their injuries. In 1991, for example, Congress adopted the Torture Victim Protection Act (TVPA) to comply with the Convention Against Torture, which the United States signed in 1988 and ratified in 1994.[9] The Supreme Court recognized in *Sosa v. Alvarez-Machain* that the TVPA was promulgated to complement the Alien Tort Statute, not to replace it. "Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute." 542 U.S. 692, 724–25 (2004). *See also,* 18 U.S.C. § 2340A (2011) (enacted to criminalize

[9] Torture Victim Protection Act (TVPA), Pub. L. 105-256, 12 March 1992, 106 Stat. 73 28 U.S.C. § 1350 note (2012). Both the House and Senate reports on the TVPA acknowledged that remedies should be available in the United States for victims of torture. *See generally,* H.R. Rep. No. 102-367, 3 (1991) (noting that the CAT obligates states "to provide means of civil redress to victims of torture"); S. Rep. No. 102-249 (1991). During debates over the TVPA, Congressman Dante Fascell, Chairman of the House Committee on Foreign Affairs, stated, "If international human rights are to be given legal effect, we and other nations must provide domestic remedies to victims of torture." 135 Cong. Rec. H6423-01 (Oct. 2, 1989) (statement of Rep. Fascell).

acts of torture occurring outside its territorial jurisdiction).

In addition, the United States has indicated that the Alien Tort Statute is a tool through which it discharges its international legal obligation to punish torturers and provide a remedy to victims of torture.[10] Thus, allowing the case to proceed on the merits would be consistent with the United States' domestic and international law obligations.

C. Denying a Remedy for Torture is Prohibited Under International Law

Under traditional principles of customary international law, the duty to make reparation for an injury is inseparable from the concept of State responsibility for an internationally wrongful act. *See* Rep. of the Int'l Law Comm'n, 53rd Sess., April 23 – 1 June, July 23 – Aug. 10, 2001, ¶ 77, art. 31, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001); F. V. García-Amador et al., *Recent Codifications of the Law of State Responsibility for Injuries to Aliens* 8–9 (1974). Thus, a State can be held liable both for the underlying breach of an international

[10] *See, e.g.*, U.S. Dep't of State, Second, Third, Fourth and Fifth Periodic Reports of the United States to the Comm. Against Torture, ¶ 147, U.N. Doc. CAT/C/USA/3-5 (Aug. 12, 2013) (reporting that "U.S. law provides various avenues for seeking redress in cases of torture" including the Alien Tort Statute and Torture Victims Protection Act, 28 U.S.C. 1350 and note, as provided in the State Department Common Core Document ¶ 158, *available at:* http://www.state.gov/j/drl/rls/179780.htm); U.S. Dep't of State, Fourth Periodic Report of the United States to the Human Rights Comm., ¶ 185, U.N. Doc. CCPR/C/USA/4 (May 22, 2012).

human rights obligation and for the failure to provide an effective remedy for that breach. Failure to provide meaningful access to the judicial system (i.e., on the merits of the case) creates *de facto* immunity for alleged perpetrators of acts of torture. *De facto* immunity for torture on jurisdictional pretexts represents a failure to provide an effective remedy. CAT Comm., Gen. Cmt 3, *supra,* ¶ 17, CAT/C/GC/3 (2012). Any form of immunity must be founded upon a rational theory that validates the exception from prosecution or redress. It cannot depend upon a deliberate attempt by the State or perpetrator to exploit an apparent loophole in the law.

We have consistently emphasized the inherent relationship between the right of torture victims to obtain redress and the prevention or non-repetition of further violations.[11] The primary purpose of reparation is to relieve the suffering of victims, and afford them justice by removing or redressing, to the extent possible, the consequences of the wrongful acts. It also has an important, inherent

[11] *See, e.g.,* Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report of Sir Nigel Rodley*, ¶ 28, UN Doc. A/55/290 (August 11, 2000); Statement by Mr. Juan E Méndez, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the 16th Session of the Human Rights Council, 2–3 (Mar. 7, 2010), http://www.ohchr.org/Documents/Issues/SRTorture/StatementHRC16SRTORTURE_March2011.pdf; Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Statement of Mr. Manfred Nowak to the 61st Session of the General Assembly,* ' I (Oct. 23, 2006), http://www.unhchr.ch/Huricane/Huricane.nsf/60a520ce334aaa77802566100031b4bf/f6750e3e4de6e39bc1257218002eab80?OpenDocument.

preventive and deterrent aspect, which policymakers have recognized, e.g., in passing legislation. S. Rep. No. 102-249, at 3–4 (1991).

It is particularly important for deterrence of torture to allow victims of human rights abuses who have no alternative forum to meaningfully access the judicial system. The Committee of Ministers of the Council of Europe has formally acknowledged the link between impunity for torture and its continuing occurrence. Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on Eradicating Impunity for Serious Human Rights Violations* (Mar. 30 2011), http://www.coe.int/t/dghl/standardsetting/hrpolicy/dh-i/default_EN.asp (*follow* "Guidelines" hyperlink). Dismissing a plaintiff's claim in the absence of an adequate alternate forum undermines the international community's commitment to eliminating torture.

D. International Law Requires States to Perform Due Diligence in Providing a Remedy to Victims Tortured by Non-State Actors

It is the responsibility of the State to prosecute and provide an effective remedy even where a non-State actor violates international law.[12] For example, the

[12] Regional human rights courts have found states in breach of their duties where they fail to investigate acts of violence. *See*, *e.g.*, *Mahmut Kaya v. Turkey*, No. 22535/93, ECHR 2000-III, §§ 101, 108-109; *Velásquez-Rodríguez*, *supra* n. 7, ¶¶ 176-178; *Godínez-Cruz v. Honduras*, Judgment, Inter-Am. Ct. H. R. (ser. C), No. 5, ¶¶ 175, 182, 187-198 (Jan. 20, 1989); *Trujillo-Oroza v. Bolivia*, Judgment, Inter-Am. Ct. H. R. (ser. C), No. 92, ¶ 99 (Jan. 26, 2000); and *Del Caracazo v. Venezuela*, Judgment, Inter-Am. Ct. H. R. (ser. C),, No. 95, ¶¶ 115-119 (Aug. 22,

case law of the International Criminal Tribunal for the former Yugoslavia makes clear that accountability for torture as a war crime does not depend on State involvement.[13] In the *Furundžija* case, the Trial Chamber indicated that torture could be perpetrated by persons "acting in a non-private capacity" including any "authority-wielding entity." *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, ¶ 162 (Int'l Crim. Trib. for the former Yugoslavia Dec. 10, 1998). It is the responsibility of the State to perform due diligence to investigate, prosecute, and punish torturers who are citizens of that State.[14] It is permissible for the role of the State to be discharged by a court sitting in judgment of a civil suit, if the State's judicial machinery supports that remedy. To deny a remedy for victims

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2002).

[13] *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, ¶ 162 (Int'l Crim. Trib. for the former Yugoslavia Dec. 10, 1998); *see also Prosecutor v. Kunarac*, Case No. IT-96-23-T, Trial Judgment, ¶ 493 (Int'l Crim. Trib. for the former Yugoslavia Feb. 22, 2001) (noting "[w]ith or without the involvement of the state, the crime committed remains of the same nature and bears the same consequences"); *Prosecutor v. Delalić*, Case No IT–96–21–T (Int'l Crim. Trib. for the former Yugoslavia Nov. 16, 1998) [459]; Int'l Law Assoc., Declaration of International Law Principles on Reparations for Victims of Armed Conflict, Art. 5 (2010), http://www.ila-hq.org/en/committees/index.cfm/cid/1018 (follow "Resolution 2010" hyperlink) (in addition to international organizations bearing international law obligations applicable in armed conflict, responsible parties may also include non-State actors).

[14] Report of the Expert Meeting on Private Military Contractors (2005), http://www.geneva-academy.ch/docs/expert-meetings/2005/2rapport_compagnies_privees.pdf; Harold Koh, *Signing Ceremony for International Code of Conduct for Private Security Service Providers*, 2 (Nov. 9, 2010), http://www.state.gov/documents/organization/179307.pdf.

of torture on the basis of non-State status would be to violate treaty obligations under international human rights and humanitarian law.[15]

In his report, *Protect, Respect and Remedy: a Framework for Business of Human Rights*, the former Special Representative of the U.N. Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, affirmed that "States have a duty to protect against human rights abuses by non-State actors, including by business, affecting persons within their territory or jurisdiction."[16] That framework also affirms the imperative nature of access to remedies, including judicial remedies, for abuses by businesses.

III. DENYING JURISDICTION IS DENYING A REMEDY

To be consistent with international law, remedies must be effective. Dinah Shelton, *Remedies in International Human Rights Law* 173 (2d ed. 2005).

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[15] Additionally, the Montreux Document, supported by 47 states including the United States, lays out a series of obligations for States that contract with or are home to private military contractors, including "tak[ing] appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel." Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations and Private Military and Security Companies During Armed Conflict, art. 4, Sep. 17, 2008, U.N. Doc. A/63/467-S-S/2008/636.

[16] Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: a Framework for Business of Human Rights*, ¶ 18, UN Doc A/HRC/8/5 (2008); *see also, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, ¶ 6, UN Doc. A/HRC/17/31 (Mar. 21, 2011).

Inasmuch as the State is obligated by treaty to provide an effective remedy, it may not bar victims from its courts if doing so would deny them an appropriate remedy. The Office of the U.N. Special Rapporteur on Torture has condemned practices where "victims have only been awarded formal rights. . . but these rights are often modest and peripheral to the justice system," *Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of Juan E. Méndez*, ¶ 48, U.N. Doc. A/HRC/16/52 (3 February 2011), and noted that "a common problem is that victims and relatives of victims often do not enjoy legal standing in relation to allegations of torture and are therefore prevented from claiming reparation." *Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Report of Manfred Nowak*, ¶ 58, U.N. Doc. A/HRC/13/39 (Feb. 9, 2010). Where a court, as representative of the State, denies access to justice on the basis of overly restrictive jurisdictional limitations, the right to an effective remedy is implicated. By imposing those restrictions, the court risks violating the international obligations of the State.

Under no circumstances may the right to an effective remedy be extinguished by procedural restrictions. It is well established that the failure to provide any remedy in judicial proceedings is considered a disproportionate restriction and a violation of the right to an effective remedy. The European Court of Human Rights has held that any limitations on judicial review "must not restrict

the access left to the individual in such a way or to such an extent that the very essence of the right is impaired." *Cordova v. Italy (No. 1)*, Case No. 40877/98, Eur. Ct. H.R. 2003-I, §54. To do so would violate the right to an effective remedy. *See also Waite and Kennedy v. Germany*, Case No. 26083/94, 30 Eur. Ct. H.R. Rep. 261 (1999). The Inter-American Commission on Human Rights has also stressed that procedural rules cannot be used to create a blanket ban on the exercise of the right to an effective remedy. *See,* Inter-Am. Comm'n H.R., *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr. ¶ 261 (2002).[17]

A court may not deny a remedy for human rights violations by purporting to transfer jurisdiction to a forum where, if due to the legal, political, or structural limitations of the new forum, the petitioners will be functionally denied access to justice. The Inter-American Court reiterated that the right to a remedy must be effective:

> Those recourses that are illusory, owing to the general conditions in the country or to the particular circumstances of a specific case, shall not be considered effective. Recourses are illusory when it is shown that they are ineffective in practice, when the Judiciary lacks the necessary independence to take an impartial decision, or in the absence of ways of executing the respective decisions that are delivered. They are

[17] As a member of the OAS, the United States has accepted the jurisdiction of the Inter-American Commission on Human Rights, and officially participates in Commission proceedings.*See* Member States, Organization of the Americas, 2013, *available at*: http://www.oas.org/en/member_states/default.asp.

> illusory when justice is denied, when there is an unjustified delay in the decision and when the alleged victim is impeded from having access to a judicial recourse.

"*Five Pensioners" v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 98, ¶ 136 (Feb. 28, 2003). *See also, Barrios Altos Case* (*Chumbipuma Aguirre et al. v. Peru*), Judgment on the Merits, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶¶ 3, 41, 43 (Mar. 14, 2001).

The Inter-American Commission on Human Rights has made similar determinations. *See, e.g., Carranza v. Argentina*, Case 10.087, Report No. 30/97, OEA/Ser.L/V/II.95, Doc. 7 (Inter-Am. Comm'n. H.R. 1997);[18] *Herrera v. Argentina*, Case No. 10.147, Report No. 28/92, OEA/Ser.L/V/II.83, Doc. 14 (Inter-Am. Comm'n. H.R. 1992). If all other jurisdictions concerning a case are merely ineffective in practice, or incapable of executing the respective decisions, then it follows that to deny jurisdiction in an alternate and well-functioning legal forum is to deny victims the right to an effective remedy.

It must be underscored that, for these plaintiffs, it is not a question of an

[18] "[T]he absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances in a given case, cannot be considered effective." *Carranza v. Argentina*, at ¶ 74.

ineffective alternate jurisdiction, i.e., Iraq. The U.S.-led Coalition Provisional Authority (CPA) determined that private contractors should not be held liable in Iraqi tribunals. By its terms, CPA Order No. 17 expressly provides for immunity from Iraqi legal process, and states that they "shall be subject to the exclusive jurisdiction of their Parent States." Coalition Provisional Auth., *Coalition Provision Authority Order Number 17, Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors*, § 2, ¶¶ 1, 3, 4; § 3, ¶¶ 1, 2 (CPA/ORD/26 June 2003/17), *available at:* http://www.usace.army.mil/Portals/2/docs/COALITION_PROVISIONAL.pdf. *See also,* Dan Eggen & Josh White, *Memo: Laws Didn't Apply to Interrogators*, Wash. Post, Apr. 2, 2008, at A01.

A country that is obligated to provide an effective remedy under international treaties to which it has committed itself may not deny victims access to its courts, if doing so denies the remedy. Where a country has significant ties to the litigation and there is no other effective judicial forum in which the case may proceed, the court cannot bar the victims based on jurisdictional pretext.

CONCLUSION

The United States is compelled by treaty to provide an effective remedy for victims of torture. International law requires meaningful remedies to include access to the judicial system. Considering the many ways that this case touches

and concerns the United States, dismissing it on jurisdictional grounds would be to grant *de facto* immunity to perpetrators of torture. The treaty obligations of the United States place a duty on the court to hear this case on the merits.

We respectfully urge that the decision below be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 2013, I caused a true copy of the foregoing Brief of the United Nations Special Rapporteurs on Torture, Juan E. Méndez, Manfred Nowak, Theo van Boven, and Sir Nigel Rodley as *Amici Curiae* in Support of Plaintiffs-Appellants and Reversal of the District Court's Decision to be filed through the Court's electronic case filing system and served through the Court's electronic filing system. I also caused a copy of the same Brief to be served by U.S. Mail on the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief of *Amici Curiae* complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief (as indicated by word processing program, Microsoft Word) contains 6,776 words, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because this brief has been prepared in the proportionally spaced typeface of 14-point Times New Roman.

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