No. 15-1461

IN THE
SUPREME COURT OF THE UNITED STATES

AMIR MESHAL,

Petitioner,

v.

CHRIS HIGGENBOTHAM, FBI SUPERVISING SPECIAL AGENT, IN HIS INDIVIDUAL CAPACITY, ET AL.,

Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE U.N. SPECIAL RAPPORTEURS ON TORTURE AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

INTERNATIONAL AUTHORITIES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

This Brief of *Amici Curiae* is respectfully submitted by the current and former U.N. Special Rapporteurs on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[1] This brief is submitted pursuant to Supreme Court Rule 37(2). It is filed in support of the Petition for Writ of Certiorari.

Juan E. Méndez is the current United Nations 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.[2] *See* U.N. Commission on Human Rights, Res. Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/Res/1985/33 (1985). The U.N. Special Rapporteur's mandate includes transmitting

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[1] 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 person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. Both Petitioner and Respondents were provided more than 10 days notice, and both consented to the filing of this Brief of *Amici Curiae.*

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

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 to victims.[3]

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 of the International Criminal Court, from mid-2009 to late 2010. Until May 2009, Mr. Méndez was the President of the International Center for Transitional Justice. Concurrently, he was the U.N. Secretary-General'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

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[3] This brief 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, including Mr. Méndez, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

Rights in San Jose, Costa Rica (1996-1999) and worked for Human Rights Watch (1982-1996). Mr. Méndez currently 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.

Manfred Nowak served as the United Nations Special Rapporteur on Torture from 2004 to 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 the U.N. Expert on Enforced Disappearances from 1993 to 2006, and Judge at the Human Rights Chamber of Bosnia and Herzegovina in Sarajevo from a 1996 to 2003. Professor Nowak has written extensively on the subject of torture, including THE UNITED NATIONS CONVENTION AGAINST TORTURE—A COMMENTARY (with Elizabeth McArthur), *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 the United Nations Special Rapporteur on Torture from 1993 to 2001. He is currently Emeritus Professor and Chair of the Human Rights Centre at the University of Essex School of Law (U.K.). Since 2001, he has been a member of the Human Rights Committee, the treaty-monitoring body for the

International Covenant on Civil and Political Rights, and has served as its Chair. He is also President of the International Commission of Jurists (Geneva). Professor Rodley's honors include a knighthood for services to human rights and international law (1998), and the American Society of International Law's 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).

Theo van Boven served as the United Nations Special Rapporteur on Torture from 2001 to 2004. He is currently Professor of Law at the University of Maastricht, where he was Dean of the Faculty of Law from 1986 to 1988. He has served as Director of the Division of Human Rights of the United Nations (1977-1982). As a Special Rapporteur of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, he drafted the first version of 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. From 1992 to 1999, Professor van Boven served on the Committee on the Elimination of Racial Discrimination, the treaty body charged with monitoring the Convention on the Elimination of All Forms of Racial Discrimination. 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 (1998).

Amici believe this case raises important issues concerning the U.S. obligation to provide a remedy for violations of international human rights law. The D.C. Circuit's divided ruling in *Meshal v. Higgenbotham*, 804 F.3d 417 (D.C. Cir. 2015) is startling and deeply troubling. This decision ensures that victims of torture and other gross human rights abuses are unable to seek redress for their injuries through *Bivens* actions against U.S. government officials. Such an outcome is contrary to well-established international law, both with respect to accountability as well as the right to a remedy. *Id.* at 438-439 (Pillard, J., dissenting). *Amici* would like to provide the Court with their perspective on these issues. They believe this submission will assist the Court in its deliberations.

SUMMARY OF ARGUMENT

Both the district court and D.C Circuit acknowledged that the facts alleged in this case and the legal questions presented are deeply troubling. *Meshal v. Higgenbotham*, 47 F.Supp.3d 115, 116 (D.D.C. 2014); *Meshal v. Higgenbotham*, 804 F.3d at 418. Amir Meshal alleges he was interrogated and abused by U.S. government officials while detained in Kenya, Somalia, and Ethiopia. According to the Second Amended

Complaint, Mr. Meshal was detained at the direction of the United States for months without access to counsel or presentation before a judicial body. He was detained incommunicado and often in solitary confinement. During his detention, he was accosted and threatened by U.S. government officials with further imprisonment, torture, disappearance, and death. He was also told that his family was at risk because of his actions. Mr. Meshal was subsequently released without ever being charged.

Upon his return to the United States, Mr. Meshal sought relief for his injuries and suffering through a *Bivens* action. Without questioning the veracity of his claims, the D.C. Circuit dismissed the case in a 2-1 ruling, holding that Mr. Meshal could not even litigate these claims under the *Bivens* doctrine because they implicated national security considerations and the underlying conduct occurred outside the borders of the United States. *Id.* at 426-427.

This decision, which leaves Mr. Meshal with no remedy for the pain and suffering he endured, places the United States in violation of its international obligations. It is well-established that torture and other cruel, inhuman, or degrading treatment are prohibited under international law. It is equally well-established that arbitrary detention and forced disappearance violate international law. Each of these international norms is extraterritorial in scope and applies to U.S. conduct committed outside the United States.

Under international law, victims of human rights abuses have the right to effective remedies. The United States has acknowledged its obligation to provide such remedies. Indeed, a *Bivens* lawsuit offers the very mechanism by which the United States fulfills this obligation. For these reasons, the Court should grant the petition for certiorari and reverse the D.C. Circuit's decision.

ARGUMENT

I. THE NORMS AT ISSUE IN THIS CASE – THE PROHIBITIONS AGAINST TORTURE, CRUEL, INHUMAN, OR DEGRADING TREATMENT, ARBITRARY DETENTION, AND FORCED DISAPPEARANCE – ARE WELL-ESTABLISHED UNDER INTERNATIONAL LAW AND APPLY TO THE UNITED STATES

Few international norms are more firmly established than the absolute prohibitions against torture and other cruel, inhuman, or degrading treatment. *See* Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), art. 2(1), Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 ("[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its

jurisdiction").[4] 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 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). *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 (2d ed. 2009); J.H. Burgers & Hans Danelius, THE UNITED

[4] As of June 30, 2016, there were 159 States Parties to the Convention against Torture, including the United States, which ratified the CAT in 1994.

NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (1988).

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 ("UDHR"), 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) ("[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"); International Covenant on Civil and Political Rights ("ICCPR"), art. 7, Dec. 16, 1966, S. EXEC. DOC. C, D, E, F, 95-2 (1978), 999 U.N.T.S. 171 (same); [5] Geneva Convention Relative to the Treatment of Prisoners of War, arts. 3, 13, 17, 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (prohibiting cruel treatment and torture)[6]; Geneva

[5] As of June 30, 2016, there were 168 States Parties to the International Covenant on Civil and Political Rights, including the United States, which ratified the ICCPR in 1992. The Human Rights 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 (1992).

[6] As of June 30, 2016, there were 196 States Parties to the Third Geneva Convention, including the United States, which ratified the Convention in 1955.

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 (prohibiting cruel treatment and torture).[7]

These prohibitions are also codified in several regional human rights agreements. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), art. 3, Nov. 4, 1950, 213 U.N.T.S. 222 ("[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment")[8]; American Convention on Human Rights ("ACHR"), art. 5(2), Nov. 22, 1969, S. TREATY DOC. NO. 95-21 (1969), 1144 U.N.T.S. 123 ("[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person")[9]; 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 prevent and punish torture within their jurisdiction")[10];

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[7] As of June 30, 2016, there were 196 States Parties to the Fourth Geneva Convention, including the United States, which ratified the Convention in 1955.

[8] As of June 30, 2016, there were 47 States Parties to the European Convention.

[9] As of June 30, 2016, there were 23 States Parties to the American Convention. The United States has signed, but not ratified, the American Convention.

[10] As of June 30, 2016, there were 18 States Parties to the Inter-American Convention.

African Charter on Human and Peoples' Rights ("ACHPR"), art. 5, June 27, 1981, 21 I.L.M. 58 (1982), 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"). [11] Each of these international instruments makes clear that the prohibitions against torture and other cruel, inhuman, or degrading treatment are absolute. They allow for no derogation.[12]

The prohibition against arbitrary detention is also recognized in numerous international instruments.[13] *See, e.g.*, UDHR, *supra,* at art. 9

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[11] As of June 30, 2016, there were 53 States Parties to the African Charter.

[12] Notably, the ICCPR permits States Parties to take limited "measures derogating from their obligations" under the treaty in cases of a "public emergency, which threatens the life of the nation." ICCPR, *supra*, at art. 4(1). However, certain prohibitions, such as those against torture and other cruel, inhuman, or degrading treatment, are inviolate and permit no derogation. *Id.* at art. 4(2).

[13] In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 (2004), the Supreme Court considered a claim of arbitrary detention under the Alien Tort Statute and found that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." The

("[n]o one shall be subjected to arbitrary arrest, detention or exile"); ICCPR, *supra*, at art. 9(1) ("[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law"). This prohibition is further codified in regional agreements. *See, e.g.*, ECHR, *supra*, at art. 5(1) ("[e]veryone has the right to liberty and security of person"); ACHR, *supra*, at art. 7(3) ("[n]o one shall be subjected to arbitrary arrest or detention"); ACHPR, *supra*, at art. 6 ("[e]very individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained"). The 2015 U.N. Basic Principles and Guidelines on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court reaffirm the universality and non-derogability of this norm. *See* Report of the Working Group on Arbitrary Detention, U.N. Doc. WGAD/CRP.1/2015 (2015).

While forced disappearance is a form of arbitrary detention, it is also recognized as a distinct violation of international law. *See, e.g.,* International Convention for the Protection of All

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egregious facts in *Meshal*, which involve months of detention and mistreatment, go far beyond the limited nature of the detention in *Sosa*.

Persons from Enforced Disappearance, Dec. 20, 2006, art. 1(1), 2716 U.N.T.S. 3 ("[n]o one shall be subjected to enforced disappearance").[14] Forced disappearance is defined as:

> [T]he 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 place such a person outside the protection of the law.

Id. at art. 2. *See generally* Marthe Lot Vermeulen, ENFORCED DISAPPEARANCE: DETERMINING STATE RESPONSIBILITY UNDER THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE (2012). *See also* Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, art. I, 33 I.L.M. 1529 ("[t]he States Parties to this Convention undertake...[n]ot to practice, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual

[14] As of June 30, 2016, there were 51 States Parties to the International Convention for the Protection of All Persons from Enforced Disappearance.

guarantees.").[15]

The Committee against Torture, a body of independent experts charged with interpreting and monitoring implementation of the CAT, has explicitly instructed the United States that forced disappearance is a "per se . . . violation of the Convention." Committee against Torture, Conclusions and Recommendations to the United States, U.N. Doc. CAT/C/USA/CO/2, ¶ 18 (2006) ("2006 Conclusions and Recommendations"). The Committee against Torture has also stated that indefinite detention constitutes a *per se* violation of the CAT. *See, e.g.*, Committee against Torture, Concluding Observations on the Third and Fifth Periodic Reports of United States of America, U.N. Doc. CAT/C/USA/CO/3-5, ¶ 14 (2014) ("2014 Concluding Observations").

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 (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.

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[15] As of June 30, 2016, there were 15 States Parties to the Inter-American Convention on Forced Disappearance of Persons.

A/68/295 (2013). The Special Rapporteur has also denounced situations where individuals are detained incommunicado and without access to counsel or legal process. Indeed, the Special Rapporteur has identified a clear relationship between arbitrary detention, forced disappearance, and instances of torture and other cruel, inhuman, or degrading treatment. "With respect to indefinite detention of detainees the mandate finds that the greater the uncertainty regarding the length of time, the greater the risk of serious mental pain and suffering to the inmate that may constitute cruel, inhuman or degrading treatment or punishment or even torture." U.N. Special Rapporteur on Torture, Statement of the United Nations Special Rapporteur on Torture at the Expert Meeting on the Situation of Detainees Held at the U.S. Naval Base at Guantanamo Bay, (Oct. 3, 2013), *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13859&LangID=E.

In sum, it is well-established that torture and other cruel, inhuman, or degrading treatment are prohibited under international law. It is equally well-established that arbitrary detention and forced disappearance violate international law.[16] These

[16] It is not surprising that torture and cruel, inhuman, or degrading treatment often occur in cases of arbitrary detention and forced disappearance. *See, e.g.*, G.A. Res. 67/161, ¶ 23 U.N. Doc. A/RES/67/161 (2013) ("prolonged incommunicado detention or detention in secret places can facilitate the perpetration of torture and other cruel, inhuman

international norms apply to the United States as both treaty obligations and customary international law. The allegations set forth in the Second Amended Complaint fall within the parameters of prohibited conduct under international law.

II. THESE INTERNATIONAL NORMS ARE EXTRATERRITORIAL IN SCOPE AND, THEREFORE, THEY APPLY TO CONDUCT OUTSIDE THE UNITED STATES

To be effective, human rights obligations must apply to the conduct of states anywhere in the world where they exercise power or effective control. In such situations, the extraterritorial reach of human rights obligations is a settled principle under international law.

For example, the ICCPR provides that its scope of application should extend to "all individuals within its territory and subject to its jurisdiction." ICCPR, *supra*, at art. 2(1). The Human Rights Committee has indicated that this provision requires States Parties to "respect and ensure the

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or degrading treatment or punishment and can itself constitute a form of such treatment..."); Human Rights Committee, General Comment No. 35 on Article 9: Liberty and Security of Person, ¶ 56 U.N. Doc. CCPR/C/GC/35 (2014) ("[a]rbitrary detention creates risks of torture and ill-treatment, and several of the procedural guarantees in article 9 serve to reduce the likelihood of such risks").

rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." Human Rights Committee, General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13, ¶ 10 (2004) ("HRC, GC 31"). In *Lopez Burgos v. Uruguay*, Communication No. 52/199, ¶ 12(3) U.N. Doc. CCPR/C/13/D/52/1979 (1981), the Human Rights Committee explained the rationale for such an interpretation, stating, "[i]t would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."

The International Court of Justice ("ICJ") has affirmed this interpretation regarding the extraterritorial application of the ICCPR. In a 2004 Advisory Opinion, the Court indicated that Article 2(3) of the ICCPR "did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory." *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 131, ¶ 109. Thus, the ICJ held that the ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory." *Id.* at ¶ 111.

Similarly, the Convention against Torture provides that "[e]ach State Party shall take effective legislative, administrative, judicial or

other measures to prevent acts of torture in any territory under its jurisdiction." CAT, *supra*, at art. 2(1). The Committee against Torture "has recognized that 'any territory' includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law." Committee against Torture, General Comment No. 2 on Implementation of Article 2 by States Parties, ¶ 16 U.N. Doc. CAT/C/GC/2 (2008). This interpretation of Article 2 regarding the extraterritorial application of the Convention against Torture is well-established. "States have an obligation to take measures to prevent torture in their territory (land and sea), but also under any other territory under their jurisdiction, such as…occupied territories or other territories where civilian or military authorities of the State exercise jurisdiction, whether lawful or not." Nowak & McArthur, *supra*, at 117.

The U.N. Special Rapporteur has also recognized the extraterritorial reach of the prohibitions against torture and cruel, inhuman, or degrading treatment. U.N. General Assembly, Interim Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/70/303 (2015). According to the Special Rapporteur, state acts or omissions can have a significant impact on the fundamental rights of individuals even when these individuals are located extraterritorially. *Id.* at ¶ 12. Such scenarios also implicate state responsibility under human rights law. To hold

otherwise would create incentives for states to avoid their legal obligations and would be contrary to the spirit of the law. *Id.* at ¶ 13.

The United States recognized the extraterritorial reach of the Convention against Torture in its most recent submissions to the Committee against Torture. *See* Consideration of Reports Submitted by States Parties Under Article 19 of the Convention Pursuant to the Optional Reporting Procedure: United States of America, U.N. Doc. CAT/C/USA/3-5, ¶ 13 (2013) ("Under U.S. law, officials of all government agencies are prohibited from engaging in torture, at all times, and in all places, not only in territory under U.S. jurisdiction."). *See also* 2014 Concluding Observations, *supra*, at ¶ 10 ("[t]he Committee welcomes the State party's unequivocal commitment to abide by the universal prohibition of torture and ill-treatment everywhere, including Bagram and Guantanamo Bay detention facilities, as well as the assurances that U.S. personnel are legally prohibited under international and domestic law from engaging in torture or cruel, inhuman or degrading treatment or punishment at all times, and in all places").

In sum, the prohibitions against torture, cruel, inhuman, or degrading treatment, arbitrary detention, and forced disappearance apply to regulate U.S. conduct overseas. As set forth in the Second Amended Complaint, the overseas conduct of the United States implicates its international obligations and falls within the parameters of prohibited conduct under international law.

III. THE D.C. CIRCUIT'S DECISION, WHICH DENIES A REMEDY TO VICTIMS OF GROSS HUMAN RIGHTS ABUSES, MERITS REVERSAL BECAUSE IT PLACES THE UNITED STATES IN VIOLATION OF ITS INTERNATIONAL OBLIGATIONS

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 seminal formulation of the "no right without a remedy" principle comes from the 1928 holding of the Permanent Court of International Justice ("PCIJ") in the *Chorzów Factory* 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*." *Chorzów Factory* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (emphasis added). The remedial principles governing human rights law are heavily influenced by the *Chorzów Factory* case. *See* Dinah Shelton, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 377 (3d ed. 2015).

The U.N. Special Rapporteur on Torture has 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 (2010). *See also* U.N. Human Rights Council, Joint Study on

Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, U.N. Doc. A/HRC/13/42 (2010).

The ICCPR and CAT obligate States Parties, including 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*, at 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 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. HRC, GC 31, *supra*, at ¶ 15 (emphasis added). The Committee has indicated that States Parties must provide reparations "to individuals whose Covenant rights have been violated." *Id.* at ¶ 16. The failure to provide such reparations is itself a violation of the ICCPR.

The Committee against Torture has explained that redress as 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 (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. The Committee has especially 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 2006 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 (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 providing "[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.

Further, 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...."[17] ACHR, *supra*, at art. 25(1). The European human rights system recognizes the right to a remedy for human rights violations. ECHR*, 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

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[17] In *Velásquez Rodríguez v. Honduras* Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 10 (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, ¶¶ 39-45 (1998); *accord Durand & Ugarte*, Inter-Am. Ct. H.R. (ser. C) No. 89, ¶ 24 (2001) ("any violation of an international obligation carries with it the obligation to make adequate reparation").

the African Charter on Human and Peoples' Rights, art. 27, June 9, 1998, CAB/LEG/665 ("If 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").

The United States has explicitly indicated to several international bodies that *Bivens* lawsuits are an appropriate remedial mechanism for addressing human rights abuses.

In 2005, the U.S. State Department, responding to questions from the Human Rights Committee about U.S. compliance with its obligation to provide remedies for arbitrary detention, stated that "[t]he Constitution of the United States prohibits unreasonable seizures of persons, and the Supreme Court has allowed the victims of such unconstitutional seizures to sue in court for money damages." Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Third Periodic Report: United States of America, ¶ 478 U.N. Doc. CCPR/C/USA/3 (2005). In its response, the State Department specifically cited *Bivens* with approval. *Id.* The State Department reaffirmed this position in its 2012 response to the Human Rights Committee. Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Fourth Periodic Report: United States of America, ¶ 660 U.N. Doc. CCPR/C/USA/4 (2012).

In 2006, the U.S. State Department, responding to questions from the Committee against Torture

about U.S. compliance with its obligation to provide redress under Article 14 of the CAT, specifically stated that victims of torture could "[s]u[e] federal officials directly for damages under provisions of the U.S. Constitution for 'constitutional torts,'" citing *Bivens*. Committee Against Torture, List of Issues to be Considered During the Examination of the Second Periodic Report of the United States: Response of the United States of America, ¶ 5 U.N. Doc. CAT/C/USA/Q/2 (2006). The availability of *Bivens* remedies was reaffirmed by the United States in its 2013 report to the Committee.[18] Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention Pursuant to the Optional Reporting Procedure, Third to Fifth Periodic Reports of States Parties: United States of America ¶147 U.N. Doc. CAT/C/USA/3-5 (2013). And, 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 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 acknowledged the U.S. position with approval. 2014 Concluding Observations, *supra*, at ¶ 6

[18] *See also* Common Core Document Forming Part of the Reports of States Parties: United States of America, ¶ 158 U.N. Doc. HRI/CORE/USA/2011 (2011).

(commending U.S. position that war or armed conflict does not suspend operation of the CAT); *Id.* at ¶ 10 (noting U.S. statement that it 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 D.C. Circuit held unavailable in this case.

By rejecting Mr. Meshal's ability to pursue a *Bivens* lawsuit, the D.C. Circuit has placed the United States in violation of its international obligations. The right to a remedy is a fundamental principle of domestic and international law. Victims of torture, cruel, inhuman, or degrading treatment, arbitrary detention, and forced disappearance 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 the underlying norms at issue in this case.

CONCLUSION

While acknowledging that the allegations of mistreatment were "quite troubling," the D.C. Circuit declined to provide Mr. Meshal with the opportunity to pursue a *Bivens* action for the systematic abuse he suffered. *Meshal v. Higgenbotham*, 804 F.3d at 418.

This outcome is contrary to established principles of international law that the United States has accepted and is obligated to follow. For the foregoing reasons, the Supreme Court should grant certiorari to review and reverse the D.C. Circuit's decision.

Respectfully submitted, July 1, 2016

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