NO. 14-5194
ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMIR MESHAL,

Plaintiff-Appellant,

v.

CHRIS HIGGENBOTHAM, ET AL.,

***Defendants-Appellees*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, THE HONORABLE EMMET G. SULLIVAN

BRIEF OF *AMICI CURIAE* U.N. SPECIAL RAPPORTEURS ON TORTURE IN SUPPORT OF PLAINTIFF-APPELLANT SEEKING REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28.1, *Amici* certify the following:

A. PARTIES APPEARING BEFORE THE DISTRICT COURT

All parties, intervenors, and *Amici* appearing before the district court and this Court are listed in the Brief for Plaintiff-Appellant.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief for Plaintiff-Appellant.

C. RELATED CASES

Counsel are not aware of any related cases.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel makes the following disclosure:

None of the *Amici* are a publicly held entity. None of the *Amici* are a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity. No parent companies or publicly held companies have a 10% or greater ownership in any of the *Amici*.

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CERTIFICATE AS TO SINGLE BRIEF REQUIREMENT

Pursuant to Circuit Rule 29(d), Counsel make the following declaration:

Amici are the current U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as well as three former Special Rapporteurs. Because of their expertise, this brief solely addresses the role of international law in this litigation. These issues are beyond the scope of the issues addressed by other *amici* supporting Plaintiff-Appellant.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

CASES

TREATIES AND DECLARATIONS

* Authorities upon which *amici* chiefly rely are marked with asterisks

OTHER AUTHORITIES

GLOSSARY OF ABBREVIATIONS

ACHPR:	**African Charter on Human and Peoples' Rights**
ACHR:	**American Convention on Human Rights**
CAT:	**Convention against Torture**
ECHR:	**European Convention on Human Rights and Fundamental Freedoms**
IACHR:	**Inter-American Court of Human Rights**
ICCPR:	**International Covenant on Civil and Political Rights**
ICJ:	**International Court of Justice**
UDHR:	**Universal Declaration of Human Rights**

INTEREST OF *AMICI CURIAE*

This Brief of *Amici Curiae* is respectfully submitted by Juan Méndez,[1] the current U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as well as three former U.N. Special Rapporteurs, Manfred Nowak (2004-2010), Theo van Boven (2001-2004), and Sir Nigel Rodley (1993-2001).[2] This brief is submitted pursuant to Federal Rule of Appellate Procedure 29 and District of Columbia Circuit Rule 29.[3] It is filed in

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[1] *Amicus curiae* Juan Méndez is the United Nations Special Rapporteur on Torture pursuant to Human Rights Council resolution 25/13. *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). This submission is provided by him on a voluntary basis for the Court's consideration without prejudice to, 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] A complete description of the *Amici* appears in the Appendix. Sir Nigel Rodley is the current Chair of the U.N. Human Rights Committee, but submits this brief in his personal capacity. Manfred Nowak and Theo van Boven also submit this brief in their personal capacities. All *amici* submit this brief on a voluntary basis for the Court's consideration without prejudice to, and without 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.

[3] 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 *Amici* and their counsel contributed money that funded the preparation and submission of this Brief.

support of the Plaintiff-Appellant and seeks the reversal of the district court's decision.[4]

The U.N. Special Rapporteur on Torture was first established by the United Nations in 1985 to examine questions relating to torture and other cruel, inhuman, or degrading treatment or punishment.[5] *See* Comm. on Human Rights, Resolution regarding 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 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.

Amici believe this case raises important issues concerning human rights law and the right to a remedy under international law. They believe the district court's ruling in *Meshal v. Higgenbotham*, __ F.Supp.2d __, 2014 WL 2648032 (D.D.C. June 13, 2014), is startling and deeply troubling. Essentially, the decision ensures

[4] The Plaintiff-Appellant has consented to the filing of this Brief of *Amici Curiae*. The Defendants-Appellees have stated they do not oppose the filing of the Brief.

[5] 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).

that victims of torture and other human rights abuses are unable to seek redress for their injuries through the U.S. legal system. Such an outcome is contrary to well-established international law, both with respect to a lack of accountability as well as the right to a remedy. Accordingly, *Amici* would like to provide this Court with their perspective on these issues. They believe this submission will assist the Court in its deliberations.

SUMMARY OF ARGUMENT

As the district court correctly noted, "[t]he facts alleged in this case and the legal questions presented are deeply troubling." *Meshal v. Higgenbotham*, __ F.Supp.2d __, __, 2014 WL 2648032, at *1. Amir Meshal alleges he was interrogated, tortured, and abused by U.S. government officials while detained in Kenya and Ethiopia. According to the Second Amended Complaint, Mr. Meshal was detained 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. Mr. Meshal was subsequently released without ever being charged. Equally regrettable, however, is the district court's decision dismissing these claims. This decision promotes impunity and effectively precludes Mr. Meshal from seeking redress for his injuries.

It is well-established that torture and other cruel, inhuman, or degrading treatment are prohibited under international law. It is equally well-established that forced disappearance and arbitrary detention violate international law. Each of these international norms is extraterritorial in nature when the state exercises power or effective control overseas. Victims of such human rights abuses have the right to an effective remedy under international law. The United States has

acknowledged its obligation to provide effective remedies for violations domestically or abroad, and yet it fails to provide such a remedy in this case.

ARGUMENT

I. TORTURE, CRUEL, INHUMAN, OR DEGRADING TREATMENT, FORCED DISAPPEARANCE, AND ARBITRARY DETENTION ARE FIRMLY PROHIBITED BY INTERNATIONAL LAW

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 ("CAT"), art. 2(1), Dec. 10, 1984, S. Treaty Doc. 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").[6] 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:

[6] As of December 10, 2014, there were 156 States Parties to the Convention against Torture, including the United States, which ratified the CAT in 1994.

> 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 (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).

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);[7] Geneva Convention Relative to the Treatment of Prisoners of War, arts. 3,

[7] As of December 10, 2014, 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 Comm., General Comment No. 20 on Article 7: Prohibition of Torture, or Other

13, 17, 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (prohibiting cruel treatment and torture)[8]; 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 (prohibiting cruel treatment and torture).[9] The prohibition is 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")[10]; American Convention on Human Rights ("ACHR"), art. 5(2), Nov. 22, 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")[11]; Inter-American Convention to Prevent and Punish Torture, art. 6, Feb. 28, 1987, O.A.S.T.S. No. 67

Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. HRI/GEN/1/Rev.1 (1992).

[8] As of December 10, 2014, there were 196 States Parties to the Third Geneva Convention, including the United States, which ratified the Convention in 1955.

[9] As of December 10, 2014, there were 196 States Parties to the Fourth Geneva Convention, including the United States, which ratified them in 1955.

[10] As of December 10, 2014, there were 47 States Parties to the European Convention.

[11] As of December 10, 2014, there were 23 States Parties to the American Convention. The United States has signed, but not ratified, the American Convention.

("the States Parties shall take effective measures to prevent and punish torture within their jurisdiction")[12]; African Charter on Human and Peoples' Rights ("ACHPR"), 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").[13] 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.[14]

Customary international law also prohibits torture under all circumstances. Indeed, the prohibition of torture is so universally recognized as to be considered *jus cogens*, a peremptory norm of customary international law of "superior status" to which all nations are considered to have assented and to which they are bound. *See, e.g.*, Restatement (Third) of Foreign Relations Law of the United States §331

[12] As of December 10, 2014, there were 18 States Parties to the Inter-American Convention.

[13] As of December 10, 2014, there were 53 States Parties to the African Charter.

[14] It is notable that 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). Certain prohibitions, however, such as those against torture and other cruel, inhuman, or degrading treatment, are inviolate and permit no derogation. *Id.*, at art. 4(2).

cmt. e (1987) (explaining the "superior status" of peremptory norms under international law); *id.*, §702(d) & cmt. n (recognizing the *jus cogens* status of the prohibition of torture). Torture is included in the ranks of the most heinous offenses rejected by all civilized nations, such as slavery, genocide, and piracy. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762-63 (2004) (Breyer , J., concurring in part and concurring in the judgment) (discussing international consensus condemning piracy, genocide, and torture); *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) ("the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind"); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (acknowledging "*jus cogens* norm of international law condemning official torture").

The prohibitions against forced disappearance and arbitrary detention are also recognized in numerous international instruments. *See, e.g.*, UDHR, *supra*, at art. 9 ("[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"). These prohibitions are 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").

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 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").[15] 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* Martha 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,

[15] As of December 10, 2014, there were 43 States Parties to the International Convention for the Protection of All Persons from Enforced Disappearance.

permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees;...").[16]

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." Comm. against Torture, Conclusions and Recommendations to the United States, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) ("2006 Conclusions and Recommendations"), at ¶18. The Committee against Torture has also stated that indefinite detention constitutes a *per se* violation of the Convention. *See, e.g.*, Comm. 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 (Nov. 20, 2014) ("2014 Concluding Observations"), at ¶14.

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,

[16] As of December 10, 2014, there were 15 States Parties to the Inter-American Convention on Forced Disappearance of Persons.

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 forced disappearance and arbitrary detention violate international law. It is not surprising that torture and cruel, inhuman, or degrading treatment often occur in cases of forced disappearance and arbitrary detention. *See, e.g.*, U.N. General Assembly Resolution 67/161, U.N. Doc. A/RES/67/161 (Mar. 7, 2013), at ¶23 ("prolonged incommunicado detention or detention in secret places

can facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can itself constitute a form of such treatment...");
Human Rights Comm., General Comment No. 35 on Article 9: Liberty and Security of Person, U.N. Doc. CCPR/C/GC/35 (Oct. 28, 2014), at ¶56 ("[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").

II. THE PROHIBITIONS AGAINST TORTURE, CRUEL, INHUMAN, OR DEGRADING TREATMENT, FORCED DISAPPEARANCE, AND ARBITRARY DETENTION ARE EXTRATERRITORIAL IN NATURE

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 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 Comm., 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 (May

26, 2004) ("HRC, GC 31"). In *Lopez Burgos v. Uruguay*, Communication No. 52/199, ¶12(3), U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981), the Human Rights Committee explained the rationale for such an interpretation, stating, "It 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 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 offered a detailed explanation regarding this provision and has confirmed its extraterritorial reach:

> Article 2, paragraph 1, requires that each State party shall take effective measures to prevent acts of torture not only in its sovereign territory but also "in any territory under its jurisdiction." The Committee 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. The reference to "any territory" in article 2, like that in articles 5, 11, 12, 13 and 16, refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control. The Committee notes that this interpretation reinforces article 5, paragraph 1 (b), which requires that a State party must take measures to exercise jurisdiction "when the alleged offender is a national of the State." The Committee considers that the scope of "territory" under article 2 must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention.

Comm. against Torture, General Comment No. 2 on Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008), at ¶16. This interpretation of Article 2 and 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.

In its most recent submissions to the Committee against Torture in November 2014, the United States recognized the extraterritorial reach of the Convention against Torture. *See* 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, forced disappearance, and arbitrary detention apply to regulate U.S. conduct overseas in situations where the United States exercises power or effective control in such locations.

III. IN THIS CASE, U.S. GOVERNMENT OFFICIALS HAVE VIOLATED THE PROHIBITIONS AGAINST TORTURE, CRUEL, INHUMAN OR DEGRADING TREATMENT, FORCED DISAPPEARANCE, AND ARBITRARY DETENTION

The facts set forth in the complaint are deeply disturbing. They reference numerous violations of U.S. obligations under international law, including the ICCPR and CAT. Mr. Meshal alleges that he was subjected to severe physical and mental pain and suffering throughout his detention. For example, over the course of prolonged interrogation, Mr. Meshal was threatened with disappearance and made to fear for his life. Compl., ¶86. Agents threatened Mr. Meshal that he would be thrown into prison and tortured if he did not cooperate during the investigation. *Id.*, ¶88. He was subjected to inhumane confinement, including

confinement in a "cave" lacking light, ventilation, and toilets. *Id.*, ¶112. These acts plainly contravene the prohibitions against torture and cruel, inhuman, and degrading treatment and would, alone, call for a remedy.

Furthermore, Mr. Meshal alleges that he was detained for months without charge, without access to counsel, and at times wholly incommunicado. Mr. Meshal alleges that he was rendered from Kenya to Somalia and Ethiopia in order for the United States to evade judicial process. *Id.*, ¶¶108-14, 116-19. The threat of rendition to Somalia, combined with threats of the agents interrogating him, made Mr. Meshal fear for his life because of the violence and other abuses he knew to occur there. *Id.*, ¶110. He further alleges that he was threatened with rendition to Israel or Egypt, where agents threatened that he would be disappeared or tortured. *Id.*, ¶¶86-88. The international community has long recognized and emphasized that such practices violate international prohibitions of arbitrary detention and forced disappearance. Indeed, incommunicado detention creates the threat of ill-treatment and can, in its own right, constitute cruel, inhuman, or degrading treatment.[17]

[17] In its 2006 Conclusions and Recommendations to the United States, the Committee against Torture specifically noted that enforced disappearances are a per se violation of the CAT, and the Committee indicated that U.S. practices of rendition of suspects without judicial process may violate the CAT's *non-refoulement* guarantee. 2006 Conclusions and Recommendations, *supra*, at ¶21.

In sum, the conduct alleged by Mr. Meshal violates international law, which is reflected in both customary international law as well as U.S. treaty obligations.

IV. 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 *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 (Sept. 13) (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 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 Am. J. Int'l L. 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. HRC, GC 31, ¶15 (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., ¶¶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.'" Comm. 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.*, ¶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.*, ¶16. 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.*, ¶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.*, ¶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] ACHR, *supra*, at art. 25(1). Similarly, the European human rights system recognizes the right to a remedy for human rights violations. ECHR, *supra*, at art.

[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").

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").

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 "[s]u[e] federal officials directly for damages under provisions of the U.S. Constitution for 'constitutional torts,'" citing *Bivens* and *Davis v. Passman*.[19] The availability of such remedies was reaffirmed in the most recent periodic report by the United States to the

[19] *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/j/drl/rls/68554.htm.

Committee.[20] 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. 2014 Concluding Observations, at ¶6 (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.[21] Victims of torture, cruel, inhuman, or degrading treatment, forced disappearance,

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[20] *See* Periodic Report of the United States of America to the Comm. against Torture, ¶147 (Aug. 12, 2013), *available at* http://www.state.gov/documents/organization/213267.pdf (incorporating by reference Common Core Document of the United States of America, submitted to the Human Rights Committee, ¶158 (Dec. 30, 2011), *available at* http://www.state.gov/j/drl/rls/179780.htm, which notes the availability of constitutional tort remedies, citing *Bivens*).

[21] 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, U.N. Doc. A/65/273 (Aug. 10, 2010), at ¶91. *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 (Feb. 19, 2010).

and arbitrary detention 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, forced disappearance, and arbitrary detention and provides that victims of such human rights abuses have the right to seek redress for their injuries. While acknowledging the "'appalling (and candidly, embarrassing) allegations' of mistreatment by the United States of America," the district court declined to provide Mr. Meshal with any access to such remedies. *Meshal v. Higgenbotham*, __ F. Supp. 2d at __, 2014 WL 2648032, at *12 (citations omitted). This decision is contrary to firmly established principles of international law. And, as the district court acknowledged, it "undermines our essential constitutional protections in the circumstances when they are often most necessary." *Id*. For the foregoing reasons, the district court's decision should be reversed.

Dated: December 22, 2014

Respectfully submitted,

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APPENDIX:
LIST OF *AMICI CURIAE*

Juan Méndez is the current United Nations 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. Until May 2009, 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). 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.

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).

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 member 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).

Sir Nigel Rodley, KBE, served as the United Nations Special Rapporteur on Torture from 1993 to 2001. He is currently Professor of Law and Chair of the Human Rights Centre at the University of Essex (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 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's 2005 Goler T. Butcher Medal for distinct 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).

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

I hereby certify, pursuant to Fed.R.App.P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point, and contains 6,433 words, (which does not exceed the applicable 7,000 word limit).

Dated: December 22, 2014

By: /s/ William J. Aceves
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief was filed upon counsel for Plaintiff-Appellant and Defendants-Appellees via this Court's electronic filing system on this 22nd day of December 2014.

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