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Amicus Curiae by The John Marshall Law School International Human Rights Clinic in support of Plaintiff-Appellant, Jawad v. Gates, No. 15-5250 (U.S. Court of Appeals, District of Columbia Circuit 2015)

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ORAL ARGUMENT NOT YET SCHEDULED

No. 15-5250

**United States Court of Appeals
For the District of Columbia Circuit**

Mohammed Jawad, also known as Saki bacha,

Plaintiff-Appellant,

v.

Robert M. Gates, Former Secretary of Defense, et al.,

Defendants-Appellees.

On appeal from the U.S. District Court for the District of Columbia

**Brief of Amicus Curiae The John Marshall Law School
International Human Rights Clinic
In Support of Plaintiff-Appellant and Urging Reversal**

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GLOSSARY OF ABBREVIATIONS

FTCA.....Federal Tort Claims Act

ICCPR.....International Covenant on Civil and Political Rights

TVPA.....Torture Victims Protection Act

STATEMENT OF AMICUS

Pursuant to FRAP 29(c), amicus states as follows:

The John Marshall Law School International Human Rights Clinic (“IHRC”) is a student-practice legal clinic that seeks to promote human rights in the United States and around the world. Students who work in the IHRC are supervised by practicing attorneys who are faculty and staff at The John Marshall Law School. The IHRC has a particular interest in this case in order to promote the international human right to an effective judicial remedy.

All parties consented to the IHRC filing this amicus curiae brief.

No party’s counsel authored this brief in whole or in part. No party or party’s counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

THE DISTRICT COURT'S RULING VIOLATES MR. JAWAD'S RIGHT TO AN EFFECTIVE REMEDY FOR TORTURE AND SHOULD BE REVERSED.

The right to a remedy for violations of human rights is a bedrock principle of international human rights law. It is protected by every major international human rights instrument.¹ It is universally recognized by international and regional human rights tribunals.² And it is an established principle of customary international law.³

¹ See, e.g., The Universal Declaration of Human Rights art. 8, Dec. 10, 1948 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”); International Covenant on Civil and Political Rights art. 2(3), Dec. 16, 1966 (“Each State Party to the present Covenant undertakes [t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”) (hereinafter “ICCPR”); the European Convention on Human Rights (formerly the “Convention for the Protection of Human Rights and Fundamental Freedoms”) art. 13, Nov. 4, 1950 (“Everyone whose rights and freedoms as 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”); the African Charter on Human and Peoples’ Rights arts. 7(1) and 26, Oct. 21, 1986 (“Every individual shall have the right to have his cause heard,” and “State parties . . . shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter”); American Declaration of the Rights and Duties of Man art. XVIII, May 2, 1948 (“Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”) (hereinafter “American Declaration”); American Convention on Human Rights art. 25, Nov. 20, 1969 (“Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent

Moreover, the right to a remedy is robust. It includes a right to an *appropriate* remedy.⁴ It includes a right to an *effective* remedy.⁵ It includes a right to a *judicial* or *judicially enforced* remedy.⁶ And it includes a right to a remedy against the state, or the responsible individual, or both.⁷ Importantly, the right to a remedy is absolute, categorical, and non-derogable.⁸

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, even though such violation may have been committed by persons acting in the course of their official duties.”) (hereinafter “American Convention”); Arab Charter on Human Rights art. 23, May 22, 2004 (“Each State party to the present Charter undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”).

² See, e.g., Human Rights Committee, General Comment 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004); *Cordova v. Italy* (No. 1), App. No. 40877/98, 40 Eur. Ct. H.R. Rep. 974, 984 (2003); *Velasquez Rodriguez v. Honduras*, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 25 (July 21, 1989).

³ United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 ¶ 1 (Dec. 16, 2005) (adopted by consensus, including by the United States) (hereinafter “Basic Principles”).

⁴ See, e.g., Basic Principles ¶¶ 11 and 18 (stating that the right to a remedy includes a right to access to justice; reparations, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition; and relevant information).

⁵ See, e.g., *id.* ¶ 11 (“Remedies . . . include . . . [a]dequate, effective and prompt reparation for harm suffered.”)

⁶ See, e.g., *id.* ¶ 12 (“A victim . . . shall have equal access to an effective judicial remedy . . .”).

⁷ See, e.g., *id.* ¶ 15 (“In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the

The U.S. is bound to honor the right to a remedy under the Convention Against Torture, the International Convention on Civil and Political Rights, and the American Declaration of the Rights and Duties of Man. The right applies through these instruments to the actions of the U.S. government and its officers and agents wherever they operate, including at the detention facility at the Guantanamo Bay Naval Base. In particular, the right applies to victims of torture at Guantanamo Bay. It means that the U.S. must provide an effective judicial remedy for Mohammed Jawad.

Yet the United States District Court for the District of Columbia rejected Mr. Jawad's claims and dismissed his complaint. *Jawad v. Gates*, 2015 WL 4113336 (D.D.C. 2015). The court rejected every legislative remedy that is available to Mr. Jawad, and it declined to extend a judicial remedy. *Id.* The district court's action thus left Mr. Jawad entirely without a remedy and so violates Mr. Jawad's international right to an effective judicial remedy for torture.

victim or compensate the State if the State has already provided reparation to the victim.”).

⁸ See, e.g., Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 ¶ 14 (Aug. 31, 2001) (“Even if a State party, during a state of emergency . . . may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation . . . of the Covenant to provide a remedy that is effective.”).

I. The U.S. Must Provide a Judicial Remedy for Victims of Torture Under International Human Rights Law.

A. The Convention Against Torture Requires the United States to Provide a Judicial Remedy for Victims of Torture.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “CAT”), which the U.S. ratified on October 21, 1994, categorically bans torture at Guantanamo Bay. It also requires the U.S. to provide an effective judicial remedy for victims of torture.

1. The CAT Applies to U.S. Acts at Guantanamo Bay.

By its plain terms, the CAT requires the United States to ban torture categorically in any location under its jurisdiction. Article 2 of the CAT provides:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture *in any territory under its jurisdiction*.
2. No 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 art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 (emphasis added). The Committee Against Torture, which implements the CAT, clarified the scope of its application and wrote that “any territory under its jurisdiction” really sweeps as broadly as that phrase suggests:

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” . . . 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 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.

Committee Against Torture General Comment 2, U.N. Doc. CAT/C/GC/2 ¶

16 (Jan. 24, 2008). *See also id.* ¶ 7.

The United States recognized this broad scope on the prohibition against torture and on a victim’s right to a remedy when it ratified the CAT. Upon ratification, the United States included this reservation, echoing the Committee’s General Comment 2:

That it is the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in *territory under the jurisdiction of that State Party.*

Sen. Exec. Rpt. 101-30, Resolution on Advice and Consent to Ratification § II.3. (1990) (emphasis added). President Obama reiterated that domestic bans on torture apply to “the treatment and interrogation of individuals detained in any armed conflict . . . whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.” Ensuring Lawful Interrogations, Exec. Order No. 13,491 (January 22, 2009). And more recently the U.S. reaffirmed its

commitment to apply the categorical ban on torture in the CAT to “any territory under its jurisdiction” and to any acts of any government agency or official. In its periodical report to the CAT Committee, the U.S. repeatedly acknowledged that the CAT applies at Guantanamo Bay. The U.S. wrote:

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. Under the Detainee Treatment Act of 2005 . . . every U.S. official, wherever he or she may be, is also prohibited from engaging in acts that constitute cruel, inhuman or degrading treatment or punishment. This prohibition is enforced at all levels of U.S. government.

Committee against Torture, United States of America Periodic Report, U.N. Doc. CAT/C/USA/3-5 ¶ 13 (Dec. 4, 2013). *See also id.* ¶¶ 36, 39, 105 (“The prohibition on torture under U.S. law *is absolute* and, as provided in the Detainee Treatment Act of 2005, no individual in the custody or under the physical control of the U.S. government, *regardless of nationality or physical location*, shall be subject to cruel, inhuman, or degrading treatment or punishment.”) (emphasis added).

The CAT Committee validated this acknowledgment by “welcom[ing] 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 the United States 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.” Committee against Torture, Concluding observations on the combined third to fifth periodic reports of the United States of America, U.N. Doc. CAT/C/USA/CO/3-5 ¶ 10 (Dec. 19, 2014).

Because the CAT’s categorical ban on torture applies at Guantanamo Bay and Bagram, then so too does its right to a judicial remedy.

2. The CAT Includes an Effective Right to a Judicial Remedy for Victims of Torture.

The plain language of the CAT requires the U.S. to provide an effective judicial remedy for victims of torture, including prompt, fair, and adequate compensation for acts of torture. This includes an obligation to enact legislation that provides a victim of torture with an effective remedy, including full restitution and compensation, enforceable through the courts. And when legislation proves ineffective at providing a remedy, the U.S. nevertheless must provide an effective *judicial* remedy for victims of torture.

Article 14 of the CAT provides:

Each State Party shall ensure *in its 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). This right to an effective judicial remedy includes full restitution and compensation, and more. The CAT Committee clarified the scope of Article 14 in its General Comment 3:

As stated in paragraph 2 above, redress includes the following five forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The Committee recognizes the elements of full redress under international law and practice as outlined 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 (Basic Principles and Guidelines). Reparation must be adequate, effective and comprehensive. State parties are reminded that in the determination of redress and reparative measures provided or awarded to a victim of torture or ill-treatment, the specificities and circumstances of each case must be taken into consideration and redress should be tailored to the particular needs of the victim and be proportionate to the gravity of the violations committed against them. The Committee emphasizes that the provision of reparation has an inherent preventive and deterrent effect in relation to future violations.

Committee against Torture, General Comment No. 3, U.N. Doc. CAT/C/GC/3 ¶ 6 (Dec. 13, 2012). *See also id.* ¶ 8 (“Restitution is a form of redress designed to re-establish the victim’s situation before the violation of the Convention was committed, taking into consideration the specificities of each case.”); *id.* ¶ 9 (“The Committee emphasizes that monetary compensation alone may not be sufficient redress for a victim of torture and ill-treatment. The Committee affirms that the provision of monetary compensation only is inadequate for a State party to comply with its obligations under article 14.”); *id.* ¶ 10 (describing the full scope of

“prompt, fair and adequate compensation for torture or ill-treatment under article 14”).

In order to comply with Article 14, state parties have an obligation to enact domestic legislation to enforce and to provide an effective remedy to victims of torture. *Id.* ¶ 20 (“To give effect to article 14, States parties shall enact legislation specifically providing a victim of torture and ill-treatment with an effective remedy and the right to obtain adequate and appropriate redress, including compensation and as full rehabilitation as possible.”) Moreover, state parties must provide for the enforcement of this domestic legislation through the courts. *Id.* (“Such legislation must allow for individuals to exercise this right and ensure their access to a judicial remedy. While collective reparation and administrative reparation programmes may be acceptable as a form of redress, such programmes may not render ineffective the individual right to a remedy and to obtain redress.”).

When domestic legislation fails to provide an effective remedy, the CAT nevertheless requires state parties to provide an effective remedy through the judiciary. Indeed, the CAT Committee specifically identified “inadequate national legislation” as an obstacle to the full realization of the right to an effective remedy:

States parties to the Convention have an obligation to ensure that the right to redress is effective. Specific obstacles that impede the enjoyment of the right to redress and prevent effective implementation of article 14 include, but are not limited to: inadequate national legislation . . . state secrecy laws, evidential burdens and procedural

requirements that interfere with the determination of the right to redress; statutes of limitations, amnesties and immunities

Id. ¶ 38. *See also id.* ¶ 32 (“The principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention. States parties shall ensure that access to justice and to mechanisms for seeking and obtaining redress are readily available and that positive measures ensure that redress is equally accessible to all persons regardless of . . . reason for which the person is detained, including persons accused of political offences or terrorist acts”). In other words, a torture victim’s right to an effective remedy exists with or without national legislation; and when national legislation is ineffective, the CAT nevertheless requires the courts to provide a remedy.

The CAT Committee specifically recognized that the obligations under Article 14 applied to U.S. torture overseas. Thus, for example, the CAT Committee urged the United States to “[p]rovide effective remedies and redress to victims, including fair and adequate compensation, and as full rehabilitation as possible, in accordance with the Committee’s general comment No. 3 (2012) on the implementation of article 14 of the Convention by State parties.” Committee against Torture, Concluding observations on the combined third to fifth periodic reports of the United States of America, U.N. Doc. CAT/C/USA/CO/3-5 ¶ 12(c) (Dec. 19, 2014). It also urged the U.S. to “[e]nsure . . . that effective reparation,

including adequate compensation, is granted to every victim” and to “ensure effective redress” for victims of detainee abuse, including torture, at Guantanamo Bay and Bagram. *Id.* ¶ 14(c). And “[t]he State party should ensure that all victims of torture are able to access a remedy and obtain redress, wherever acts of torture have occurred, and regardless of the nationality of the perpetrator or the victim.”

Id. ¶ 15.

Finally, the CAT Committee wrote,

The Committee urges the State party to take immediate legal and other measures to ensure that all victims of torture and ill-treatment obtain redress and have an enforceable right to fair and adequate compensation . . . in particular . . . terror suspects claiming abuse The Committee draws the State party’s attention to its general comment No. 3 (2012) on the implementation of article 14 by State parties, in particular paragraphs 3, 4, 11-15, 19, 32, and 39, in which it elaborates on the nature and scope of State parties’ obligations to provide full redress”

Id. ¶ 29.

In conclusion, Article 14 requires the U.S. to provide an effective judicial remedy for victims of torture, including prompt, fair, and adequate compensation for acts of torture. This means that the U.S. must enact legislation that provides a victim of torture with an effective remedy, including full restitution and compensation, enforceable through the courts. But if that legislation proves ineffective, the U.S. nevertheless must provide an effective *judicial* remedy for victims of torture.

B. The ICCPR Requires the United States to Provide an Effective Judicial Remedy for Victims of Torture.

Like the CAT, the ICCPR requires the U.S. to provide an effective judicial remedy for victims of torture. The U.S. ratified the ICCPR on June 8, 1992, including its provisions that ban torture and that require state parties to provide an effective judicial remedy for victims of torture and other rights within the Covenant. (The U.S. included no reservations to the ban on torture or the right to a remedy that are relevant here when it ratified the ICCPR.) Like the CAT, the ICCPR requires the U.S. to provide an effective *judicial* remedy for victims of torture, if legislative or administrative remedies do not exist.

The plain text of the ICCPR prohibits “torture [and] cruel, inhuman or degrading treatment or punishment.” ICCPR art. 7. This ban on torture is categorical and non-derogable. ICCPR art. 4(2). The U.S. has acknowledged its obligation to prohibit torture under this provision, including torture at Guantanamo Bay. Human Rights Committee, Fourth periodic report of the United States of America, U.N. Doc. CCPR/C/USA/4 ¶ 171 (May 22, 2012) (“In addition to U.S. obligations under the ICCPR, torture is absolutely prohibited by the [CAT], by customary international law, and by U.S. domestic law, which prohibits acts of torture both inside and outside the United States . . .”).

In order to enforce the ban on torture, the ICCPR provides a right to an effective remedy for victims of torture. Article 2(3) of the ICCPR states:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

ICCPR art. 2(3) (emphasis added). *See also id.* art. 9(5) (“Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”). This means that a state party must provide a victim of torture an “accessible, effective, and enforceable” remedy. Human Rights Committee Communication No. 2018/2010, U.N. Doc. CCPR/C/112/D/2018/2012 ¶¶ 11.3, 11.6, 13 (Jan. 25, 2015) (stating that Article 2(3) requires “full reparation and appropriate measures of satisfaction” for violations and concluding that Nepal failed to provide an “adequate remedy” when it provided only modest interim compensation for torture and extrajudicial killing).

If the “administrative or legislative authorities,” or any other authority of the state, does not or cannot provide a remedy, then it falls upon the judiciary to do so. *See* Human Rights Committee, General Comment 31, U.N. Doc.

CCPR/C/21/Rev.1/Add.13 ¶ 4 (Mar. 29, 2004) (stating that the obligations under the ICCPR “are binding on every State Party as a whole,” and that “[a]ll branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level—national, regional or local—are in a position to engage the responsibility of the State Party.”). The rights in the ICCPR “can be effectively assured by the judiciary in many different ways, including direct applicability of the [ICCPR], application of comparable constitutional or other provisions of law, or the interpretive effect of the [ICCPR] in the application of national law.” *Id.* ¶ 15. But “[w]itout reparation to 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.” *Id.* ¶ 16. In particular, domestic law, including domestic constitutional law, cannot “justify a failure to perform or to give effect to obligations under the [ICCPR],” *id.* ¶ 4, or to absolve officials of responsibility for violations. *Id.* ¶ 18 (stating that “the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties . . . and prior legal immunities and indemnities” and that “no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility.”).

The right to a remedy in the ICCPR applies even when a state party had no direct involvement in the underlying violation, so long as it failed to determine

whether there was a “substantial risk” of a violation. Thus, the Committee wrote in

Mansour Ahani v. Canada:

In light of the circumstances of the case, the State party, having failed to determine appropriately whether a substantial risk of torture existed such as to foreclose the author’s deportation, is under an obligation (a) to make reparation to the author if it comes to light that torture was in fact suffered subsequent to deportation, and (b) to take such steps as may be appropriate to ensure that the author is not, in the future, subjected to torture as a result of the events of his presence in, and removal from, the State party.

Human Rights Committee, *Mansour Ahani v. Canada*, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002 ¶ 12 (2004).

The Human Rights Committee concluded that the right to a remedy in the ICCPR applies to victims of torture at Guantanamo Bay. In its most recent Concluding observations on the fourth periodic report of the United States of America, the Committee expressed concern about accountability for past human rights violations, including “the use of torture or other cruel, inhuman or degrading treatment or punishment of detainees in United States custody, including outside its territory, as part of the so-called ‘enhanced interrogation techniques’.” Human Rights Committee, Concluding observations on the fourth periodic report of the United States of America, U.N. Doc. CCPR/C/USA/CO/4 ¶ 5 (Apr. 23, 2014). The Committee concluded that “[t]he State party should ensure that all cases of . . . torture or other ill-treatment, unlawful detention or enforced disappearances . . . are effectively, independently and impartially investigated . . . and that victims are

provided with effective remedies.” *Id.* See also Human Rights Committee, General Comment No. 20, U.N. Doc. HRI/GEN/1/Rev.1 ¶ 14 (1994) (stating that “[t]he right to lodge complaints against maltreatment prohibited by article 7 [the ban on torture] must be recognized in domestic law.”).

The Committee also expressed concern about barriers to the full realization of the right to a remedy, especially barriers related to constitutional privileges that would shield the government from accountability in the courts and immunities that would shield individual officials from liability. Thus, the Committee expressed concern “about the inability of torture victims to claim compensation from the State party and its officials due to the application of broad doctrines of legal privileges and immunity.” Human Rights Committee, Concluding observations on the fourth periodic report of the United States of America, U.N. Doc. CCPR/C/USA/CO/4 ¶ 12 (Apr. 23, 2014). The Committee concluded that “[t]he State party should ensure the availability of compensation to victims of torture.” *Id.*

In conclusion, the U.S. has an obligation under the ICCPR to provide an effective judicial remedy to victims of torture at Guantanamo Bay. If a legislative remedy does not exist or is unavailable, the courts have an obligation to provide a remedy.

C. The American Declaration of the Rights and Duties of Man Requires the United States to Provide an Effective Judicial Remedy for Victims of Torture.

Like the CAT and the ICCPR, the American Declaration, too, requires the U.S. to provide an effective judicial remedy for victims of torture.

The U.S. has been a member of the Organization of American States since 1951, when it deposited the instrument of ratification of the OAS Charter. The U.S. is therefore subject to the obligations in the American Declaration. *See*

Interpretation of the Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. ¶¶ 35-45 (ser. A) No. 10 (July 14, 1989) (“According to the well-established and long-standing jurisprudence and practice of the inter-American system, however, the American Declaration is recognized as constituting a source of legal obligation for OAS member states, including in particular those States that are not parties to the American Convention on Human Rights.”). *See also Jessica Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm’n H.R. Report No. 80/11 ¶¶ 115 and 117 (July 21, 2011).

The American Declaration bans torture and cruel, inhuman, and degrading treatment at Guantanamo Bay. American Declaration, Articles I and XXV. *See also* Inter-Am. Comm’n on Human Rights, *Toward the Closure of Guantanamo*, OAS/Ser.L/V/II, Doc. 20/15 ¶¶ 120-136 (June 3, 2015) (stating that the conditions

at Guantanamo Bay constitute cruel, inhuman or degrading treatment in violation of the American Declaration). And like the CAT and the ICCPR, the American Declaration provides a right to an effective judicial remedy for this torture. Article XVIII of the American Declaration provides:

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

American Declaration art. XVIII. *See also* American Declaration art. XXIV (“Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.”). This right is similar in scope to the right in Article 25 of the American Convention on Human Rights, which says,

Everyone 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, even though such violation may have been committed by persons acting in the course of their official duties.

American Convention art. 25. *See also* *Jessica Lenahan (Gonzales) v.*

United States, Case 12.626, Inter-Am. Comm’n H.R. Report No. 80/11 ¶¶ 171 and 172 (July 21, 2011).

This right includes the right of a victim to go to a tribunal when his or her rights have been violated, and the corresponding right to obtain

reparations for the harm suffered. *Id.* See also *Velasquez Rodriguez v. Honduras*, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 25 (July 21, 1989) (“[E]very violation of an international obligation which results in harm creates a duty to make adequate reparation.”); *Raquel Marti de Mejia v. Peru*, Case 10.970, Inter-Am. Comm’n H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc. 7 ¶ 157 (March 1, 1996) (The right to a remedy “must be understood as the right of every individual to go to a tribunal when any of his rights have been violated (whether a right protected by the Convention, the constitution or the domestic laws of the State concerned), to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not a violation has taken place and will set, when appropriate, adequate compensation.”).

The right to a remedy must be “available and effective,” which means, among other things, that the U.S. must hold the responsible individuals to account. *Jessica Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm’n H.R. Report No. 80/11 ¶ 173 (July 21, 2011). See also Inter-Am. Comm’n on Human Rights, *Toward the Closure of Guantanamo*, OAS/Ser.L/V/II, Doc. 20/15 ¶¶ 158 (June 3, 2015) (“The State’s duty to provide effective judicial remedies is not served merely by their formal existence; that recourse must also be adequate and effective in remedying the human rights violations denounced.”). The remedy

must also be “suitable,” that is, appropriate to the violation. *Velasquez Rodriguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 64 (July 29, 1988) (“Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance.”). “[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.” *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 24 (Oct. 6, 1987).

The Inter-American Commission could not be clearer that the right to an effective judicial remedy in the American Declaration applies to victims of torture at Guantanamo Bay. In its Guantanamo Report, the Commission wrote,

The IACHR also reminds the United States that the right to reparation for victims of torture is a well-established principle of international law and, according to the ICRC, a rule that is applicable in any type of armed conflict. . . . The IACHR reiterates the call to the United States to provide integral reparations to the victims, including restitution, compensation, rehabilitation, satisfaction and measures of non-repetition, pursuant to international standards.

Inter-Am. Comm’n on Human Rights, *Toward the Closure of Guantanamo*, OAS/Ser.L/V/II, Doc. 20/15 ¶ 119 (June 3, 2015). This means that the U.S. must provide an effective judicial remedy for victims of torture at Guantanamo Bay.

* * *

The U.S. has a legal obligation under the CAT, the ICCPR, and the American Declaration to provide an effective judicial remedy to victims of torture at Guantanamo Bay. This obligation is categorical and non-derogable. It means that the U.S. must provide full reparations, including full compensation, to victims. The remedy may be a creation of the legislative, executive, or judicial branch, but if the legislature and executive fail to provide an effective remedy, the judiciary must. In any event, whether the remedy is legislative, executive, or judicial, the remedy must be enforceable through the courts.

This right to an effective judicial remedy under the CAT, the ICCPR, and the American Declaration applies with full force to Mr. Jawad. Mr. Jawad has a right to an effective judicial remedy for his torture at the hands of U.S. officials, and the district court's action dismissing his case violated that right.

II. The District Court Violated Mr. Jawad's Right to an Effective Judicial Remedy.

Despite Mr. Jawad's right to an effective judicial remedy for his torture under three separate instruments, the district court rejected his claims and dismissed his case. *Jawad v. Gates*, 2015 WL 4113336 (D.D.C. 2015). The district court rejected Mr. Jawad's statutory claims under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. Sec. 1350, the Federal Tort Claims Act ("FTCA"), 28 U.S.C. Sec. 2671 *et seq.*, and the Torture Victim Protection Act ("TVPA"), 28 U.S.C. Sec. 1350. *Id.* at *3 to *7. Then the district court rejected Mr. Jawad's Fifth

and Eighth Amendment claims by declining to apply a *Bivens* remedy. *Id.* at *7 (citing *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)).

By rejecting Mr. Jawad’s claims and dismissing his case, the district court violated Mr. Jawad’s right to an effective judicial remedy for his torture under the CAT, the ICCPR, and the American Declaration. Mr. Jawad’s right to an effective judicial remedy in these instruments requires the courts to interpret statutes in favor of an effective remedy for Mr. Jawad, when possible. *See generally supra* Part I. And when the courts cannot interpret statutes in favor of an effective remedy, the courts have an obligation under these instruments to provide one. *Id.* By reading the statutes to deny a remedy, and by declining to provide a judicial remedy, the district court violated Mr. Jawad’s right to an effective judicial remedy.

First, the district court erred by holding that the Military Commissions Act (“MCA”), 28 U.S.C. Sec. 2241(e)(2), barred Mr. Jawad’s claims, despite his minority at the time of his torture. *Jawad*, 2015 WL 4113336 at *8 - *9. The obligations of the U.S. to provide an effective judicial remedy are heightened when the victim is a minor. The CAT Committee described the heightened duty this way:

The Committee furthermore underlines the importance of appropriate procedures being made available to address the needs of children, taking into account the best interests of the child and the child’s right to express his or her views freely in all matters affecting him or her, including judicial and administrative proceedings, and of the views of the child being given due weight in accordance with age and maturity

of the child. States parties should ensure the availability of child-sensitive measures for reparation which foster the health and dignity of the child.

Committee against Torture, General Comment No. 3, U.N. Doc. CAT/C/GC/3 ¶ 36 (Dec. 13, 2012). *See also* Committee Against Torture, Concluding observations on the combined third to fifth periodic reports of the United States of America, U.N. Doc. CAT/C/USA/CO/3-5 ¶ 29 (Dec. 19, 2014) (“The [CAT] Committee is further concerned about the situation of certain individuals and groups who have been made vulnerable by discrimination or marginalization and who face specific obstacles that impede the enjoyment of their right to redress.”). Similarly, the Human Rights Committee wrote: “Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of persons, including in particular children.” Human Rights Committee, General Comment 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 ¶ 15 (Mar. 29, 2004). And with especial attention to child-detainees at Guantanamo Bay, the Inter-American Commission wrote:

According to international law, children and adolescents who have been recruited or used in armed conflicts are understood to be in a special situation. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, ratified by the United States in 2002, explicitly requires the rehabilitation of former child soldiers, including “all appropriate assistance for their physical and psychological recovery and their social reintegration.”

Inter-Am. Comm'n on Human Rights, *Toward the Closure of Guantanamo*, OAS/Ser.L/V/II, Doc. 20/15 ¶ 234 (June 3, 2015). Under this heightened duty to provide an effective judicial remedy for victims who are minors, the district court should have read the MCA differently, that is, not to bar a remedy for Mr. Jawad. As Mr. Jawad argues in his principal brief, such a reading is not only possible, but it is preferable to a reading that bars a remedy. *Jawad Brief* at 12-28. By declining to read the MCA with an eye to Mr. Jawad's age at the time of his torture—and by reading the MCA to bar Mr. Jawad's claims—the district court violated its heightened duty to provide an effective judicial remedy.

Next, the district court erred by substituting the U.S. for the individual defendants under the Westfall Act, 28 U.S.C. Sec. 1346(b)(1), at least insofar as substitution then denied Mr. Jawad an effective remedy. *Jawad*, 2015 WL 4113336 at *3 - *5. The district court had an obligation to read the Westfall Act consistent with its duty to provide Mr. Jawad with an effective remedy, that is, not to require substitution, if substitution would then deny Mr. Jawad an effective remedy. (After holding that the Westfall Act compelled substitution, the district court held that the U.S. enjoyed sovereign immunity, and that it did not waive that immunity. *Id.* This two-step deprived Mr. Jawad of available statutory remedies under the ATCA and FTCA. The district court also erred in holding that the U.S. did not waive its immunity under the FTCA, insofar as sovereign immunity would deny Mr. Jawad

an effective remedy. *Id.*) As Mr. Jawad explains, a reading of the Westfall Act that does not compel substitution squares better with his allegations, anyway. Jawad Brief at 33-44. The district court erred by failing to read the Westfall Act consistent with its duty to provide an effective remedy.

Third, the district court erred by holding that the TVPA failed to provide Mr. Jawad with an effective remedy. *Jawad*, 2015 WL 4113336 at *7. The district court held that the remedies in the TVPA applied only against “individuals acting pursuant to the authority of a foreign nation.” But this reading by the district court, along with its other holdings in the case, deprives Mr. Jawad of an effective remedy for his torture. As Mr. Jawad argues in his principal brief, the district court could have read the TVPA to create an effective remedy, not to deny one. Jawad Brief at 53-56. That reading would be consistent with the court’s duty to provide Mr. Jawad with an effective remedy. But by reading the TVPA to deny an effective remedy, along with its other holdings in the case, the district court violated Mr. Jawad’s right to an effective remedy.

Finally, the district court erred by declining to apply a *Bivens* remedy. The district court held that “special factors counsel against the judiciary’s involvement in the treatment of detainees held at Guantanamo.” *Id.* (quoting *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 111-12 (D.D.C. 2010)). But this holding, along with the court’s other holdings in the case, deprives Mr. Jawad of an effective

remedy for his torture. As Mr. Jawad explains in his principal brief, the district court erred in ruling that special factors counseled against a *Bivens* remedy in this case. Jawad Brief at 44-50. Mr. Jawad's position squares with the district court's obligation to provide him with an effective judicial remedy. In particular, under the right to an effective judicial remedy, when statutory remedies fail to provide an effective remedy, the courts must provide one. In our system, that remedy is *Bivens*. By failing to apply a *Bivens* remedy in this case, when all other remedies failed, the district court violated Mr. Jawad's right to an effective judicial remedy.

* * *

By rejecting Mr. Jawad's claims and dismissing his case, the district court violated Mr. Jawad's right to an effective judicial remedy. First, the district court violated its duty to read Mr. Jawad's statutory claims in favor of a remedy. Next, when the court concluded that Mr. Jawad's statutory claims failed to provide a remedy, the court violated its duty to apply a *Bivens* remedy. Taken as a whole, the district court's ruling denies Mr. Jawad an effective remedy and thus violates his well-settled right to an effective judicial remedy under international human rights law. The district court's ruling should be reversed.

CONCLUSION

U.S. courts have an obligation under the CAT, the ICCPR, and the American Declaration to interpret federal statutes to provide an effective remedy for Mr. Jawad, or to apply a *Bivens* remedy, or both. Because the district court rejected Mr. Jawad's claims and failed to provide an effective remedy, the district court's ruling should be reversed.

Respectfully Submitted,

/s/

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December 28, 2015

STATEMENT OF COMPLIANCE

This brief complies with the type-volume limitation of 7,000 words in FRAP 32. It contains 6,875 words, including footnotes, but excluding those portions of the brief exempted by FRAP 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6). It has been prepared in a proportionally spaced typeface, Times New Roman, in 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2015, a copy of the foregoing brief was filed with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit using the Court's ECF electronic filing system. Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that pursuant to D.C. Circuit Rules eight true and correct copies of the foregoing will be sent via First Class U.S. Mail to the Clerk of the Court and two true and correct copies via First Class U.S. Mail to the following:

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