

2016

Brief of Amicus Curiae The John Marshall Law School International Human Rights Clinic In Support of Plaintiff - Appellant and Urging Reversal, Ahmed Salem Bin Ali Jaber, et al v. USA, et al, Docket No. 16-05093 (D.C. Cir. 2016)

Steven D. Schwinn

John Marshall Law School, 7schwinn@jmls.edu

John Marshall Law School International Human Rights Clinic

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No. 16-5093

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

Ahmed Salem bin Ali Jaber, *et al.*,

Plaintiffs-Appellants,

v.

United States of America, *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**

Steven D. Schwinn
Professor of Law and
Director, Clinical Program
The John Marshall Law School
315 South Plymouth Court
Chicago, Illinois 60604
(312) 386-2865
sschwinn@jmls.edu
D.C. Circuit Bar No. 56466

Counsel for Amicus Curiae

August 29, 2016

RULE 26.1 DISCLOSURE STATEMENT

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GLOSSARY OF ABBREVIATIONS

CAT.....Convention Against Torture

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.

This separate brief is necessary, because it contains arguments that are different and distinct from the arguments in the Appellants’ brief and the briefs of other *amici*.

ARGUMENT

THE DISTRICT COURT’S RULING VIOLATES THE APPELLANTS’ INTERNATIONAL HUMAN RIGHT TO AN EFFECTIVE JUDICIAL REMEDY AND SHOULD BE REVERSED.

By dismissing the Appellants’ case as a political question, the United States District Court for the District of Columbia violated international law. In particular, the District Court violated the Appellants’ well-settled international human right to a remedy. In order to comply with international law and to respect the Appellants’ international human right to a remedy, this Court should reverse the District Court’s ruling, remand the case, and instruct the District Court to proceed to the Appellants’ claims on the merits.

The right to a remedy for victims of 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

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.”); the European Convention on Human Rights 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

and regional human rights tribunals.² And it is an established principle of customary international law.³

The international human right to a remedy includes a right to an *appropriate* remedy.⁴ It includes a right to an *effective* remedy.⁵ It includes a right to a *judicial*

(“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.”); 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 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.”); 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 – 24 (stating that the right to a remedy includes a right to access to justice; reparations, including restitution,

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

The international human right to a remedy includes several components: a right to equal access to justice; a right to reparations, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition; and a right to relevant information about the underlying human rights violation.⁹ As most relevant here, it includes “[a]n official declaration or a *judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely*

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 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.”).

⁹ See, e.g., Basic Principles ¶¶ 11 – 24 (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).

*connected with the victim*¹⁰ In other words, it includes a judicial declaration that a victim’s rights were violated.

The U.S. is specifically bound to honor the right to a remedy under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “CAT”); the International Covenant on Civil and Political Rights (the “ICCPR”); and the American Declaration of the Rights and Duties of Man (the “American Declaration”). The right applies through these instruments to the actions of the U.S. government and its officers and agents in conducting the drone strike that killed Salem and Waleed bin Ali Jaber—a violation of the right to life and the right against extrajudicial killing under these instruments. This means that the U.S. must provide an effective judicial remedy to the Appellants for the claimed violation of international human rights law, including equal access to the courts and a judicial declaration that Salem’s and Waleed’s human rights were violated.¹¹

Yet the United States District Court for the District of Columbia rejected the Appellant’s claims and dismissed his complaint. *Bin Ali Jaber v. U.S.*, 155 F. Supp. 3d 70 (D.D.C. 2016). The court ruled that it lacked jurisdiction, because the

¹⁰ *Id.* ¶ 22(d) (emphasis added).

¹¹ The Appellants sought only declaratory relief that the drone strike constituted an extrajudicial killing in violation of customary international law, the Alien Tort Statute, and the Torture Victim Protection Act. The international human right to a remedy includes a right to this kind of judicial relief, a judicial declaration that a victim’s human rights were violated. *Id.* ¶ 22(d).

Appellants' claims presented non-justiciable political questions. *Id.* at 77 – 81. In so ruling, the District Court's action thus left the Appellants entirely without a remedy, in particular, those components of the right to a remedy that require equal access to justice and a judicial declaration that a victim's rights were violated.

This Court should reverse the District Court and instruct the court to proceed to the merits pursuant to its obligations under well-settled international human rights law. In this way, and only this way, this Court can ensure that the District Court complies with the international human right to a remedy.

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

The District Court, as an arm of the U.S. government, is obliged to comply with the international human right to a remedy for violations of human rights law. Here, the Appellants have alleged that the U.S. and its agents violated international human rights law by authorizing and executing the unlawful extrajudicial killing of Salem and Waleed bin Ali Jaber in violation of customary international law and the Torture Victim Protection Act of 1991. The underlying rights are also protected by the right to life and the right against torture, among other rights, in the CAT, the ICCPR, and the American Declaration.

Because these instruments protect the underlying rights of the Appellants, they also protect the Appellants' right to an effective judicial remedy, including a

right to equal access to justice and a right to a judicial declaration that their underlying rights have been violated.

A. The CAT Requires the United States to Provide a Judicial Remedy for Victims of Extra-Judicial Killings.

The CAT, which the U.S. ratified on October 21, 1994, categorically bans torture, including the extra-judicial killing of innocents by drone strike. It also requires the U.S. to provide an effective judicial remedy for victims of torture.

1. The CAT Bans the Extra-Judicial Killing of Innocents by Drone Strike.

The CAT categorically bans “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed or is suspected of having committed” CAT art. 1(1).

This ban applies wherever U.S. officials act. 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. Moreover, “States parties are obligated to adopt effective measures to prevent public authorities and other

persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined by this Convention. . . .” *Id.* ¶ 17.

The U.S. acknowledged the sweep of the CAT in its most recent periodic report to the CAT Committee. In its report, the U.S. stated that “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.” 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 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).

The CAT’s ban on torture applies to the U.S. government’s drone-killing of Salem and Waleed bin Ali Jaber. The killing inflicted “severe pain and suffering”

for the purpose of punishment. CAT art. 2. Moreover, the killing was committed by U.S. government officials acting in their official capacities, thus falling within the CAT's jurisdictional sweep. 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.

Because the CAT's categorical ban on torture applies to the U.S. government's drone killing, so too does the CAT's right to an effective judicial remedy.¹²

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. This includes an obligation to enact legislation that provides a victim 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

¹² The Appellants also pleaded that the Torture Victim Protection Act was implemented pursuant to the U.S. government's obligations under the CAT. This pleading alone is enough to trigger the CAT's right to a remedy.

adequate compensation, including the means for as full rehabilitation as possible. . . .

CAT art. 14 (emphasis added). The CAT Committee clarified the scope of Article 14 in its General Comment 3:

[R]edress 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 Reparation must be adequate, effective and comprehensive.

Committee against Torture, General Comment No. 3, U.N. Doc. CAT/C/GC/3 ¶ 6 (Dec. 13, 2012). “Satisfaction” includes exactly the kind of judicial declaratory relief that the Appellants seek here: “an official declaration or judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim” *Id.* ¶ 16.

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. 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.”).

When domestic legislation fails to provide an effective remedy, the CAT 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 (“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 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 wrote that “[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

Id. ¶ 29.

In conclusion, the CAT requires the U.S. to provide an effective judicial remedy for victims, including prompt, fair, and adequate compensation for acts, like extrajudicial killings, that violate the CAT. This means that the U.S. must enact legislation that provides a victim with an effective remedy, including equal access to the courts and a judicial declaration that the victim’s rights have been violated. But if that legislation proves ineffective, the U.S. nevertheless must provide an effective *judicial* remedy for victims.

B. The ICCPR Requires the U.S. to Provide an Effective Judicial Remedy for Victims of a Violation of the Right to Life.

The ICCPR, which the U.S. ratified on June 8, 1992, categorically protects the right to life. ICCPR art. 6. And like the CAT, it also requires the U.S. to

provide an effective judicial remedy for violations, if legislative and administrative remedies do not exist.

1. The ICCPR Bans the Arbitrary Deprivation of Life by Drone Strikes.

Article 6(1) of the ICCPR says that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” ICCPR Art. 6(1). The right to life is categorical and non-derogable. ICCPR Art. 2.

The right to life and other provisions of the ICCPR apply “to anyone within the power or effective control” of a state party, “even if not situated within the territory of the State Party.” Human Rights Committee, General Comment 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 ¶ 10 (Mar. 29, 2004). “This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained” *Id.* See also *Burgos/Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 at 88 (July 29, 1981), (“[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.”); *Advisory Opinion on Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory*, 43 International

Legal Materials 1009 (Int'l Ct. of Justice July 9, 2004) (endorsing the extraterritorial application of the ICCPR).¹³

The right to life protects individuals against arbitrary deprivation of life by drone strikes. Thus, in its observations on the most recent periodic report of the United States, the Committee expressed concern “about the State party’s practice of targeted killings in extraterritorial counter-terrorism operations using unmanned aerial vehicles (UAV), also known as “drones,” the lack of transparency regarding the criteria for drone strikes, including the legal justification for specific attacks, and the lack of accountability for the loss of life resulting from such attacks.”

Human Rights Committee, Concluding observations on the fourth periodic report of the United States of America, CCPR/C/USA/CO/4 ¶ 9 (April 23, 2014).

[T]he Committee remains concerned about the State party’s very broad approach to the definition and geographical scope of “armed conflict,” including the end of hostilities, the unclear interpretation of what constitutes an “imminent threat,” who is a combatant or a

¹³ The U.S. skirted this conclusion when it wrote in its Fourth Periodic Report that it was “mindful” that the Human Rights Committee, the ICJ, and other state parties all opine that the ICCPR applies extra-territorially. Human Rights Committee, Fourth period report, United States of America, U.N. Doc. CCPR/C/USA/4 ¶ 505 (May 22, 2012). In response, the Committee recommended that the U.S. should “[i]nterpret the Covenant in good faith, in accordance with the ordinary meaning . . . including subsequent practice, and in light of the object and purpose of the Covenant, and review its legal position so as to acknowledge the extraterritorial application of the Covenant under certain circumstances, as outlined, inter alia, in the Committee’s general comment No. 31” Human Rights Committee, Concluding Observations on the four periodic report of the United States of America, CCPR/C/USA/CO/4 ¶ 4(a) (April 23, 2014).

civilian taking direct part in hostilities, the unclear position on the nexus that should exist between any particular use of lethal force and any specific theatre of hostilities, as well as the precautionary measures taken to avoid civilian casualties in practice”

Id. The Committee wrote that the U.S. should “[e]nsure that any use of armed drones complies fully with its obligations under article 6 of the Covenant” and “take all feasible measures to ensure the protection of civilians in specific drone attacks and to track and assess civilian casualties, as well as all necessary precautionary measures in order to avoid such casualties” *Id.*

Because the ICCPR’s provision protecting the right to life applies to the U.S. government’s drone killing, so too does the ICCPR’s provision requiring a right to an effective judicial remedy.

2. The ICCPR Includes an Effective Right to a Judicial Remedy for Victims.

In order to enforce the protection of the right to life and other rights, 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). This means that a state party must provide a victim with 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), which includes “reparation to individuals whose Covenant rights have been violated.” Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add. 13 ¶ 16 (May 26, 2004). “Reparation” includes “rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practice, as well as bringing to justice the perpetrators of human rights violations.” *Id.*

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 id.* ¶ 4 (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 . . . 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, and it cannot 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 Human Rights Committee has been clear that the ICCPR’s right to a remedy applies to victims of U.S. government drone strikes. Thus, the Committee wrote that the U.S. government should “[p]rovide victims [of drone strikes] or their families with an effective remedy where there has been a violation, including adequate compensation, and establish accountability mechanisms for victims of allegedly unlawful drone attacks who are not compensated by their home governments.” Human Rights Committee, Concluding observations on the fourth periodic report of the United States of America, CCPR/C/USA/CO/4 ¶ 9 (April 23, 2014). At the same time, 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.” *Id.* ¶ 12. The Committee concluded that “[t]he State party should ensure the availability of compensation to victims of torture.” *Id.*

In conclusion, Article 2(3) requires the U.S. to provide an effective judicial remedy when it deprives a victim of his or her right to life under Article 6. If a legislative remedy does not exist or is unavailable, the courts have an obligation to provide a remedy.

C. The American Declaration Requires the U.S. to Provide an Effective Judicial Remedy for Victims of a Violation of the Right to Life.

Like the ICCPR, the American Declaration protects the right to life and requires the U.S. to provide an effective judicial remedy for victims.

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. U.S.*, Case 12.626, Inter-Am. Comm’n H.R. Report No. 80/11 ¶¶ 115 and 117 (July 21, 2011).

The Declaration protects the right to life, and it provides for a right to an effective judicial remedy for violations of the right to life.

1. The American Declaration Bans the Arbitrary Deprivation of Life by Drone Strikes.

The American Declaration states that “[e]very human being has the right to life, liberty and the security of his person.” Am. Decl. art. I. Because the American Declaration contains no territorial or jurisdictional limitation, this right to life applies, by its plain terms, to every action by the U.S. government, wherever it occurs, to a person “subject to its authority and control.” *Coard v. U.S.*, Case 10.951, Inter-Am. Comm’n H.R., Report No. 109/99, OEA/Ser.L/V/II.106 doc. 6 rev. (1999).

Because a victim of a U.S. government drone strike is under the government’s “authority and control,” the American Declaration’s right to life applies to victims of U.S. government drone strikes. And because the American Declaration’s right to life applies, so, too, does its right to a remedy.

2. The American Declaration Includes an Effective Right to a Judicial Remedy for Victims.

Like the CAT and the ICCPR, the American Declaration provides a right to an effective judicial remedy for victims. Article XVIII of the American Declaration reads:

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.

Am. Decl. art. XVIII. This right is similar in scope to the right in Article 25 of the American Convention on Human Rights. Am. Con. art. 25. *See also Jessica Lenahan (Gonzales) v. U.S.*, 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 every individual to go to a tribunal when his or her rights have been violated; *to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that establishes whether or not a violation has taken place*; and the corresponding right to obtain reparations for the harm suffered.” *Id.* ¶ 172 (emphasis added). *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. U.S.*, Case 12.626, Inter-Am. Comm'n H.R. Report No. 80/11 ¶ 173 (July 21, 2011). 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).

Thus, the U.S. government has an obligation under the American Declaration to provide an effective judicial remedy to a victim of a drone strike, in particular, a right “to go to a tribunal when his or her rights have been violated” and a right to “a judicial investigation conducted by a competent, impartial and independent tribunal that establishes whether or not a violation has taken place” *Jessica Lenahan (Gonzales) v. U.S.*, Case 12.626, Inter-Am. Comm’n H.R. Report No. 80/11 ¶ 172 (July 21, 2011).

* * *

The U.S. has a legal obligation under the CAT, the ICCPR, and the American Declaration to provide an effective judicial remedy to a victim of a drone strike. This obligation is categorical and non-derogable. It means that a victim must have equal access to the courts and a right to a judicial declaration that his or her rights have been violated. 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 provide one. 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 Salem and Waleed bin Ali Jaber. The Appellants therefore have a right to an effective judicial remedy for Salem's and Waleed's deaths by drone strike, and the District Court's action dismissing his case violated that right.

II. The District Court Violated the Appellant's Right to an Effective Judicial Remedy.

Despite the Appellants' right to an effective judicial remedy, the District Court failed to account for this right and flatly dismissed his case. *Bin Ali Jaber v. U.S.*, 155 F. Supp. 3d 70 (D.D.C. 2016). In particular, the District Court ruled that it lacked jurisdiction over the Appellants' claims, because the claims raised nonjusticiable political questions. *Id.* at 77 – 81. But by failing even to consider the Appellants' right to an effective judicial remedy (much less to grant it), the District Court violated the Appellants' right to a remedy under binding international law.

In *Carranza v. Argentina*, the Inter-American Commission on Human Rights unequivocally rejected the government's argument that a political question excuses the government's responsibility to provide an effective judicial remedy. Report No. 30/97, Case 10.087, OEA/Ser.L/V/II.98 (Int.-Am. Comm. H.R. April 13, 1998). In that case, an Argentine judge challenged his dismissal from office in the domestic courts. The courts ruled that they lacked jurisdiction to hear the case,

because they “were not competent to rule on the fairness, wisdom or efficacy of the measures ordering the removal of magistrates . . . as these were eminently political acts of a *de facto* government.” *Id.* ¶ 3. When the plaintiff brought his case to the Inter-American Commission on Human Rights, arguing (among other things) that the courts’ denial of jurisdiction violated his right to a remedy, the government countered that there was no violation, because the political question doctrine, as developed and applied in the United States, barred the domestic courts from hearing the case. *Id.* ¶¶ 44 – 59.

The Commission concluded that the government violated the plaintiff’s right to a remedy, because the case did not raise a political question, and the domestic courts declined jurisdiction in error. *Id.* ¶ 59. But the Commission went on to say that the government’s position (that the domestic courts’ denial of jurisdiction based on the political question doctrine did not violate the plaintiff’s right to a remedy) “made it impossible for the petitioner to have an effective judicial remedy that would protect him against alleged violations of his right” *Id.* ¶ 72. “If there is no legal jurisdiction and if it is not appropriate to decide, then there can be no protection. Consequently there is no effective legal remedy under the terms of Article 25 of the American Convention.” *Id.* ¶ 75. The Commission concluded that Argentina, through its domestic courts’ application of the political question doctrine, violated the petitioner’s right to an effective judicial remedy. *Id.* ¶ 83.

In other cases involving similar restrictions on access to domestic courts, international tribunals have similarly concluded that those restrictions violated a victim's right to an effective judicial remedy. *See, e.g., Barrios-Altos v. Peru*, Inter-Am. Ct. of H.R. ¶ 41 – 44 (March 14, 2001) (concluding that “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations,” and thus violate a victim's “right to judicial protection embodied in Article 25”).¹⁴

¹⁴ International tribunals have also concluded that restrictions on access to justice for reasons related to national security violate the victim's right to an effective judicial remedy. In a series of cases, authorities in Algeria, during a period of significant domestic unrest and under a state of emergency, detained, tortured, and disappeared individuals who they believed belonged to terrorist groups that posed a threat to the state. In the aftermath, the Algerian legislature enacted an ordinance (supposedly to implement the Charter for Peace and National Reconciliation) that foreclosed any judicial action against members of the Algerian defense and security services arising out of this treatment. The Human Rights Committee repeatedly concluded that the ordinance violated the victims' right to a remedy under Article 2(3) of the ICCPR. *See, e.g.,* Human Rights Committee, Communication No. 1884/2009 ¶ 7.14 (Nov. 27, 2013); Human Rights Committee, Communication No. 1899/2009 ¶ 9 (June 5, 2014); Human Rights Committee, Communication No. 1931/2010 ¶ 8.11 (Aug. 22, 2014). *Cf.* Committee Against Torture, Communication No. 514/2012 ¶ 8.6 (Jan. 13, 2015) (finding a violation of the right to a remedy under Article 14 of the CAT, where state authorities “fail[ed] to conduct a thorough, prompt and impartial investigation” of the victim's complaint that he had been tortured by the state's intelligence service).

These cases lead to an inescapable result: Just as the Argentine courts' application of the political question doctrine violated the petitioner's right to a remedy in *Carranza*, and just as the Peruvian immunity violated the petitioner's right to a remedy in *Barrios-Altos*, the District Court's ruling applying the political question doctrine violated the Appellants' right to an effective judicial remedy here.

But even if this Court adopts a less categorical approach to the right to an effective judicial remedy, we come to the same result. For example, in *Cordova v. Italy*, the Court applied a "proportionality" test when the government raised a constitutional defense against the petitioner's claim of a right to an effective judicial remedy. Application No. 40877/98 (Jan. 30, 2003). In *Cordova*, the petitioner, Cordova, a prosecutor, sued a former Italian President, Cossiga, for defamation. *Id.* ¶ 12. An Italian District Court dismissed the case, ruling that Cossiga, as a Senator for life under the Constitution, enjoyed Parliamentary immunity under the Constitution. *Id.* ¶¶ 17 – 18. The public prosecutor declined to appeal, *Id.* ¶ 20, and Cordova took the case to the European Court.

The European Court ruled that Italian constitutional Parliamentary immunity violated Cordova's right to an effective judicial remedy. The Court held that a limitation (like constitutional Parliamentary immunity) on access to a court must be proportional to a legitimate "aim sought to be achieved." *Id.* ¶ 54. The Court

concluded that immunity in this case was not proportionate, because Cossiga’s communications were not connected with his Parliamentary functions and the purpose of Parliamentary immunity. *Id.* ¶ 62. Therefore, the Italian District Court’s ruling dismissing the case violated Cordova’s right to access the courts. *Id.* ¶ 66. The Court explained why even a domestic constitutional limitation on access can violate the fundamental international right to access the courts:

It would be incompatible with the purpose and object of the Convention, however, if the Contracting States, by adopting a particular system of parliamentary immunity, were thereby absolved from their responsibility under the Convention in relation to parliamentary activity.

Id. ¶ 58.

Under the “proportionality” approach, just as the limitation on access in *Cordova* (constitutional Parliamentary immunity) resulted in a violation of the right to access to the courts, the limitation on access here (the political question doctrine) results in a violation of the right to an effective judicial remedy. For one thing, the District Court mis-applied the political question doctrine, as explained by the Appellants and other *amici*. For another, even if the District Court properly applied the political question doctrine, that doctrine does not rise to the same constitutional level of importance as the text-based Parliamentary immunity in *Cordova*. And for yet another, the underlying rights in this case—the right to life and the right against extrajudicial killing—far outweigh the underlying right to

reputation in *Cordova*. In short, the limitation on access in this case is far less proportional to any legitimate aim even than the limitation on access in *Cordova*. Under the proportionality approach, the District Court’s application of the political question doctrine violated the Appellants’ right to an effective judicial remedy.

Under either approach—the categorical approach that says that any application of the political question doctrine violates the right to an effective judicial remedy, or the “proportionality” approach that looks to the relationship between the limitation on access and the aim of that limitation—the District Court’s ruling dismissing the Appellants’ case based on the political question doctrine violates the Appellants’ right to an effective judicial remedy.

CONCLUSION

For the foregoing reasons, the District Court ruling violated the Appellants' right to an effective judicial remedy, under well-settled international law. *Amicus* respectfully requests that this Court reverse the District Court's ruling and remand the case, with instructions to consider the Appellants' case on the merits.

Respectfully Submitted,

/s/ _____
Steven D. Schwinn
Professor of Law and
Director, Clinical Program
The John Marshall Law School
315 South Plymouth Court
Chicago, Illinois 60604
(312) 386-2865
sschwinn@jmls.edu
D.C. Circuit Bar No. 56466

Counsel for Amicus Curiae
The John Marshall Law School
International Human Rights Clinic

August 29, 2016

STATEMENT OF COMPLIANCE

This brief complies with the type-volume limitation of 7,000 words in FRAP 32. It contains 6,942 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.

/s/ _____
Steven D. Schwinn

Counsel for Amicus Curiae
The John Marshall Law School
International Human Rights Clinic

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2016, 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:

Katherine Twomey Allen
H. Thomas Byron III
Attorneys, Appellate Staff
Civil Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

/s/ _____
Steven D. Schwinn

Counsel for Amicus Curiae
The John Marshall Law School
International Human Rights Clinic