No. 11-88

IN THE

# Supreme Court of the United States

ASID MOHAMAD, ET AL.,

*Petitioners*,

v.

PALESTINIAN AUTHORITY AND PALESTINE LIBERATION ORGANIZATION,

*Respondents*.

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

## BRIEF OF AMICUS CURIAE PROFESSOR JUAN MÉNDEZ, U.N. SPECIAL RAPPORTEUR ON TORTURE, IN SUPPORT OF PETITIONERS

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# STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae Juan E. Méndez is the United Nations Special Rapporteur on the question of torture and other cruel, inhuman, or degrading treatment or punishment pursuant to General Assembly resolution 60/251 and to Human Rights Council resolution 16/23.[1]

This submission is drafted on a voluntary basis to the Supreme Court of the United States in the case of *Mohamad v. Palestinian Authority & Palestine Liberation Organization* for the Court's consideration without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

Pursuant to U.N. Human Rights Council 16/23 (A/HRC/RES/16/23), Méndez acts under the aegis of the Human Rights Council without remuneration as an independent expert within the scope of his mandate which enables him to seek, receive, examine

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[1] Counsel of record for all parties have consented to the filing of this amicus curiae brief and such consents have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the amicus or his counsel made a monetary contribution to this brief's preparation or submission.

and act on information from numerous sources, including individuals, regarding issues and alleged cases concerning torture and or other cruel, inhuman or degrading treatment or punishment.

Professor Méndez is the author, with Marjory Wentworth, of *Taking A Stand* (New York: Palgrave-MacMillan, October 2011), which examines the uses of arbitrary detention, torture, disappearances, rendition and genocide in countries around the world.

He was Co-Chair of the Human Rights Institute of the International Bar Association, London in 2010 and 2011; and Special Advisor on Crime Prevention to the Prosecutor, International Criminal Court, The Hague from mid-2009 to late 2010. Until May 2009, Méndez was the President of the International Center for Transitional Justice (ICTJ). Concurrently, he was Kofi Annan's Special Advisor on the Prevention of Genocide (2004 to 2007). Between 2000 and 2003 he was a member of the Inter-American Commission on Human Rights of the Organization of American States, and its President in 2002.

He teaches human rights at American University in Washington D.C. and at Oxford University (U.K.). In the past, he has taught at Notre Dame Law School (USA), Georgetown and Johns Hopkins. He worked for Human Rights Watch (1982-1996) and directed the Inter-American Institute on Human Rights in San Jose, Costa Rica (1996-1999).

# SUMMARY OF ARGUMENT

The prohibition against torture is a bedrock principle of international law. All nations are obliged to prevent, investigate, and punish its commission, and to provide effective redress to victims. Narrowly reading the Torture Victim Protection Act of 1991 ( hereinafter "TVPA"), 28 U.S.C. § 1350 as limited to flesh and blood perpetrators, while rendering organizations and other entities immune from suit, would put the United States at odds with both its domestic and international obligations, and contribute to a culture of impunity wherein entities could quite literally get away with murder.

I. International law forbids official torture under all circumstances and by all actors. The prohibition is reflected in the Universal Declaration of Human Rights and the Geneva Conventions and is so widely accepted that it has become customary international law. Instruments to which the United States is a Party, such as the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture, or CAT) make clear that a State may not derogate its responsibility to punish, deter and redress torture under any circumstances. CAT, Dec. 10, 1984.

The prohibition extends to all actors who participate or are complicit in torture. This includes not only natural persons who inflict physical or psychological pain, but also the legal persons or entities that direct and support them. Traditional governments are subject to international laws

against torture, as are armed rebel groups and quasi-governmental entities like the Palestinian Authority, which "have set up quasi-governmental institutions" in areas that lack a central or formal government. *Sadiq Shek Elmi v. Australia*, ¶ 6.5, U.N. Doc. CAT/C/22/D/120/1998, (May 25, 1999).

II. States are required to do more than simply criminalize torture. The CAT, ICCPR, customary international law, and regional human rights bodies all require States to provide victims with an effective remedy against perpetrators. To hold, as the D.C. Circuit did, that non-State entities can evade this liability simply by virtue of their organizational status, would deny victims their right to an effective remedy.

Across the globe, States fulfill their obligation to implement domestic mechanisms for recourse against torturers. Many nations provide criminal liability against legal entities that violate international human rights law. The United Kingdom, to which American legal tradition traces its roots, provides corporate liability for torture under its common law torts and other domestic legislation. Nations from New Zealand to South Africa provide criminal liability for legal entities directly in their constitutions. Most Latin American nations reach the same result through *amparo* procedures that allow torture victims to vindicate their rights in domestic civil courts, in addition to damage remedies: many of these countries permit suits against legal entities.

III. States' international law obligation to prevent, punish and redress torture requires a victim-centered approach. The duty to provide redress must encompass entity liability, otherwise an

entire class of victims would be deprived of access to justice. Torture is an abomination no matter who commits it. Exempting corporations or unincorporated groups from liability would be akin to providing an impermissible amnesty for acts that are unquestionably illegal.

In sum, international law, the practice of nations that implement it, and their obligations to provide effective redress, all compel the conclusion that legal entities must be subject to the prohibition against torture to the same extent as natural persons.

# ARGUMENT

## I. International law prohibits participation or complicity in official torture by all actors and entities, in all circumstances.

The prohibition against official torture in international law is clear. Multilateral treaties, statements by the U.N. General Assembly, and statements and national laws worldwide demonstrate that torture is universally prohibited and that this norm is non-derogable. To reinforce this norm, international law likewise prohibits participation in torture by all actors, including organizations and corporations that either abet State actors or themselves act in an official capacity.

### A. While purely private acts of torture and ill-treatment do not always implicate international law, all torture during wartime or under official authority is prohibited, without exception.

The prohibition against torture was among the rights recognized in the Universal Declaration of Human Rights in 1948: "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Universal Declaration of Human Rights, Art. 5, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st Plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948). This prohibition has been consistently expressed in both humanitarian law, which applies during armed conflict, and international human rights law. Torture was among the practices forbidden in *all* armed conflicts – international or internal – by Common Article 3 of the 1949 Geneva Conventions. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516.

The prohibition on official torture was enshrined in the International Covenant on Civil and Political Rights (ICCPR) in 1966 which repeats the language of the Universal Declaration. International Covenant on Civil and Political Rights (ICCPR), art. 7, Dec. 16, 1966. Indeed, this prohibition is so fundamental is as to be included among those principles that may never be derogated from under the ICCPR. *Id.* art. 4(2).

The prohibition on torture finds its most detailed expression in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. CAT, Dec. 10, 1984.

Not only does the CAT reiterate that "[n]o exceptional circumstances whatsoever . . . may be invoked as a justification of torture," *id.* art. 2(2), it also requires States to criminalize torture, and to prosecute any torturer who remains in their territory. *Id.* arts. 4(1), 5(2) & 7(1).

The U.N. Security Council further recognized the prohibition on torture when it created the

International Criminal Tribunals for the former Yugoslavia and the International Criminal Tribunal for Rwanda. The statutes of both tribunals, which are intended to implement customary international law, recognize that torture can constitute both a war crime and a crime against humanity. *See* U.N. Secretary-General, Report submitted pursuant to paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, § 34 (noting that the ICTY "should apply rules of international humanitarian law which are beyond any doubt part of customary law").[2]

### B. The prohibition against torture extends to participation in torture by all actors and entities cloaked in official authority, including organizations and corporations.

The international law prohibition against torture extends to all actors, including organizations, who participate in torture cloaked in official authority. As the Committee against Torture, the body authorized to interpret the Convention has noted: "The State's obligation to prevent torture also applies to all persons who act, de jure or de facto, in the name of, in conjunction with, or at the behest of the State Party." Comm. Against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading

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[2] Customary international (criminal) law does not require state action for torture as a crime against humanity or war crime; *Prosecutor v. Semanza* (ICTR-97-20), Appeals Chamber, 20 May 2005, § 248 (no state action requirement for torture in international criminal law).

Treatment or Punishment, General Comment No. 2, ¶ 7, Jan. 24, 2008. Moreover, where State authorities or others acting in an official capacity know or have reason to believe that torture is being committed by non-State or private actors, and fail to exercise due diligence, they are responsible for acquiescing in such impermissible acts. Committee against Torture, Gen. Cmt. No. 2, ¶ 18, Jan. 24, 2008.

The CAT requires State parties to criminalize any act "by *any person* which constitutes complicity or participation in torture." CAT, Art. 4(1) (emphasis added). This prohibition is deliberately written in the broadest language conceivable. Commentary on the Convention indicates the centrality of this provision: "It is important, in particular, that different forms of complicity or participation are punishable, since the torturer who inflicts pain and suffering often does not act alone, but his act is made possible by the support or encouragement which he receives from other persons." J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture, A Handbook on the Convention against Torture and other cruel, inhuman, or degrading treatment or Punishment*, 129-30 (1988). Given the strength of the international prohibition on torture, there is no reason to believe that such "other persons" should exclude entities. *See*, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (finding unrecognized Bosnian Serb authorities bound by torture prohibitions).

Thus, de-facto regimes and organizations can qualify as official entities within the meaning of Article 1 of the Convention. The Committee against Torture recognized, in particular, that private groups with de facto control over a territory

practicing torture in the absence of a recognized state government are in effect "acting in an official capacity" in the area in question. *Sadiq Shek Elmi v. Australia*, ¶ 6.5, U.N. Doc. CAT/C/22/D/120/1998, (May 25, 1999); *see also,* U.N. Comm. against Torture, Gen. Cmt No. 2, Implementation of Article 2 by States Parties, ¶ 15, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) (under CAT, States bear international responsibility for acts and omissions of their officials and others, including agents, and private contractors); *Y.H.A. v. Australia*, ¶ 6.2, U.N. Doc. CAT/C/27/D/162/2000, (April 14, 2000) (State liability for torture includes acquiescence or non-enforcement against non-State parties known to be committing torture).

With regard to the State's due diligence obligations to prevent and punish acts of torture by non-State actors of which they are reasonably aware, the Committee focused in one opinion on the impunity of non-State actors in persecuting members of the Roma ethnic minority and the unwillingness of officials to intervene or prosecute. The Committee concluded that State actors' refusal to set up effective measures for the punishment of non-State acts of torture would itself be a violation of Art. 16 of the CAT. *See generally Hajrizi Dzemajl et al. v. Yugoslavia*, U.N. Doc. CAT/C/29/D/161/2000, §9.2 and *Concluding Observations: Third Periodic Report of the Czech Republic*, U.N. Doc. CAT/C/CR/32/2, § D(1)-(6) (June 3, 2004).

In short, the Committee Against Torture has consistently found private groups are capable of violating the international prohibition of torture, and must not be allowed to do so with impunity. Thus,

international law must "give effect to the *realities* of administrative action in a territory" rather than adhering to legal formalisms. *Sadiq Shek Elmi v. Australia*, ¶ 5.4, U.N. Doc. CAT/C/22/D120/1998 (May 25, 1999).

## II. The CAT, other treaties, and customary international law, require States to provide effective remedies, including against private natural and legal persons who participate in torture.

The right to a remedy "is one of the fundamental pillars . . . of the very rule of law in a democratic society …". *Castillo Páez v. Peru*, Merits Judgment of November 3, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 34 (1997) ¶ 82. The CAT, arts. 13 and 14; ICCPR, art. 2(1); American Convention on Human Rights ("ACHR"), arts. 8(1) and 25; and European Convention on Human Rights (hereinafter "ECHR"), art. 13, all provide a right to an effective remedy where a right is alleged to have been breached in the territory or under the effective control or custody of the state concerned. Human Rights Committee, "General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant," U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 24, 2004) ¶¶ 15 – 16; *Velasquez Rodriguez v. Honduras,* Merits Judgment of July 29, 1988 (Series C No. 4), ¶¶ 62, 64-66. Article 14 (1) of the ICCPR and Article 6 of the ECHR guarantee access to court proceedings that satisfy the right to a fair trial. *See, e.g.,* Human Rights Committee, General Comment 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32

(2007); Comm. against Torture, Draft Gen. Comment on Article 14, (*hereinafter,* "Draft Gen. Comment. on art. 14") ¶ 27 ("Judicial proceedings regarding remedies for victims should comply with fair trial guarantees to ensure effective access to justice.").

In accord with article 14, each State party to the CAT is required to "ensure in its legal system that the victim of torture obtains redress and has an *enforceable* right to fair and adequate compensation, including the means for as full rehabilitation as possible" (emphasis added). Article 14 applies to all victims of torture without discrimination of any kind.[3] Draft General Comment: Working Document on article 14 for Comments, Committee against Torture, 46th Session, 9 May-3 June 2011, ¶ 1.[4]

Article 14 is victim oriented—neither locus, nor form or identity of the perpetrator is determinative of the right to redress. As such, its scope is even

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[3] The United States deposited a reservation upon ratifying the CAT asserting the intent to apply article 14 legal remedies only to torture committed within U.S. controlled territory. Nevertheless, the U.S. government has applied the TVPA extraterritorially, in accord with the statute's object and purpose, and that of the CAT, *See* Brief for Petitioners in this case, at 36, n. 9.

[4] General Comments are non-binding, but authoritative interpretive statements of the U.N. treaty bodies, which give rise to normative consensus on the meaning and scope of particular human rights contained in the treaty. *See* Conway Blake, *Normative Instruments in International Human Rights Law: Locating the General Comment*, Center for Human Rights and Global Justice Working Paper No. 17 (2008), available at www.chrgj.org/

broader than other human rights treaties proscribing torture. The CAT has clarified that

> obligations of States parties under article 14 are not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party. The Committee has praised the efforts of States parties for providing civil remedies for victims who were subjected to torture or ill-treatment outside their territory. This is particularly important when a victim is unable to exercise his or her rights guaranteed under article 14 in the territory where the violation took place. Indeed, article 14 requires States to ensure that all victims of torture are able to access remedy and obtain redress.

Draft Gen. Cmt. on Art. 14, ¶ 20.

The Human Rights Committee (hereinafter "HRC"), responsible for monitoring State compliance with the ICCPR, has also elaborated on the due diligence principle with respect to all persons or entities that participate in torture.

> [T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of

> Covenant rights in so far as they are amenable to application between private persons or entities.

Human Rights Committee, General Comment 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, ¶ 8, May 26, 2004.

Like the Committee against Torture, the HRC also interprets State failure to exercise due diligence to prevent, punish, or redress harms caused by private persons or entities as giving rise to violations by the State Party itself. The HRC highlights the "interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3". *Id.* Indeed,

> [i]t is also implicit in article 7 [of the ICCPR] that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. . . .

*Id.*

Due diligence entails a duty on States "to afford everyone protection through legislative and other measures as may be necessary against torture, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity." U.N. Human Rights Committee, General Comment No.20: concerning prohibition of torture and cruel treatment or punishment (Art. 7), ¶ 2 (October 3, 1992), U.N. Doc. CPPR 03/10/1992. Such

measures include legislation affording effective protection in practice and ensuring criminal and civil accountability of non-State actors responsible for torture.

### A. States have implemented these obligations through domestic legislation that includes allowing remedies against legal persons.

Article 2 of the CAT requires States parties to implement the right to redress by enacting "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Similarly, article 2(2) of the ICCPR obligates States "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." Further, as noted above, this article establishes an obligation to provide redress for violations by private parties as well as State agents.

In 2005, the U.N. General Assembly adopted its Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[5] These Principles represent a "restatement of existing State obligations" under international law. Basic Principle 3(c). Significantly, the Principles note that States must provide "access to justice" for victims of serious abuses, specifically contemplating

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[5] G.A. Res. 60/147, U.N. Gaor. 60th Sess., U.N. Doc. A/RES/60/147 (March 21, 2006).

"reparation" from "a legal person, or other entity." Basic Principle 15.

Application of these general principles regarding remedies entails the conclusion that the CAT requires that redress be provided against entities or organizations as well as human beings.

### 1. The CAT and ICCPR require criminal remedies against all parties who torture or are complicit in torture, and States have implemented these provisions by allowing prosecution of juristic persons, including non-State entities and corporations.

As noted above, Article 4(1) of the CAT requires each State Party to criminalize torture, attempt, complicity or participation in torture *by any person* in its domestic law.

With regard to the ICCPR's obligation to provide a remedy against torture, the Human Rights Committee emphasizes that "States parties should indicate when presenting their reports the provisions of their criminal law which penalize torture. . . specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, *or by private persons*. Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible." HRC, Gen. Cmt. No. 20, ¶ 13 (emphasis added).

Moreover, the Committee considers such prohibition merely a first step, requiring States

parties to report on the legislative, administrative, judicial and other measures they take to prevent and punish torture in any territory under their jurisdiction. HRC Gen. Cmt. No. 20, ¶ 8.

A 2006 survey of 16 countries found that it is prevailing practice to apply criminal liability to legal persons in the private sector for grave breaches of international law. Ramasastry, Anita, and Robert C. Thompson. *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law. A Survey of Sixteen Countries, Executive Summary*, Fafo Report 536, p. 16 (September 2006) (". . . most of the countries that have incorporated ICL [international criminal law] into their domestic statutes also do not make a distinction between natural and legal persons. . . " ), *available* http://www.fafo.no/pub/rapp/536/536.pdf (*hereinafter*, "Fafo Report, Legal Remedies for Private Sector Liability"). [6]

In particular, the decisive factor in the recognition of criminal liability of legal persons for torture and other violations is whether the country recognizes the criminality of legal persons as a general matter. Those countries that generally allow for corporate criminal liability also tend to apply such sanctions to legal entities.[7] For example, the explanatory

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[6] The 16 countries are Argentina, Australia, Belgium, Canada, France, Germany, India, Indonesia, Japan, the Netherlands, Norway, South Africa, Spain, Ukraine, the United Kingdom and the United States.

[7] A handful of countries recognize some form of corporate criminality and do *not* apply penal sanctions to legal entities for violations of international law, but these are special cases. In

memorandum accompanying the Netherlands' International Crimes Act notes that, although the Rome Statute of the International Criminal Court excludes jurisdiction over non-natural persons, legal persons could be prosecuted in Dutch courts for international crimes because the Criminal Code provides for corporate criminal liability. Explanatory Memorandum, Kamerstuk 28337 nr.3, Tweede Kamer (03-05-2002), at 26 (original in Dutch).[8] *See*

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Spain and Argentina, for example, corporate criminality is quite new and is applied on a statute by statute basis; consequently, it still applies only to a handful of offenses. *See* Survey Response, Laws of Argentina (Tomás Ojea Quintana), 'Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions' Fafo AIS, [accessed Dec. 15, 2011] (2006); Ley Orgánica Número 5/2010. (B.O.E., 2010, 54811, 54814) (criminal liability established for offenses based on international instruments that clearly require criminal liability for juridical entities)

[8] See also Jan Wouters & Leen De Smet, De strafrechtelijke verantwoordelijkheid van rechtspersonen voor ernstige schendingen van internationaal humanitair recht in het licht van de Belgische genocidewet 5-6, Katholike Universiteit Leuven, Faculteit Reichtsgleerheid, Instituut voor Internationaal Recht Working Paper Nr. 39 (Jan. 2003) (Belgian law would recognize criminality of legal entities for international crimes); Criminal Justice Act, 1988, c. 33, § 134 (U.K.) (any "person" acting in official capacity, or at the instigation of or with the consent and acquiescence of a public official or person acting official capacity may be criminally liable for torture); C. Pén. arts. 121-2 & 222-1 (Fr.) (French law holds legal entities criminally liable for acts committed on their behalf by their legal representatives; all torture is a criminal offense); Criminal Code 1995, §§ 12.1(2) (Aus.) ("A body corporate may be found guilty of any offence, including one punishable by imprisonment.") & 274.2 (establishing crime of official torture); International Crimes Act, 2008, c. 16, §§2, 6 (Kenya) (defining "person" to include "a company or association or body of persons

*also,* e.g., *R. v Zardad* Judgment and rulings pursuant to first preparatory hearing, Case No. T2203 7676; ILDC 95 (UK [2004) (U.K. High Court, 2005) (recognizing that Section 134 of the Criminal Justice Act 1988 was enacted to create criminal liability for torture and that the statutory language "closely follows the wording of Article 1 [of the CAT]").

That there is universal criminal jurisdiction over torture is evidenced by the "extradite or punish" provisions in the CAT, Articles 5, 7 and 8. Further, as Justice Breyer noted in his concurrence in *Sosa v. Alvarez-Machain*, "universal criminal jurisdiction" includes jurisdiction over torture and "necessarily contemplates a significant degree of civil tort recovery as well." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762-63, 124 S. Ct. 2739, 2783, 159 L. Ed. 2d 718 (2004) (Breyer, J., concurring in part and concurring in the judgment).

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corporate or unincorporated," and establishing criminal penalties for a "person" who commits genocide, crimes against humanity or war crimes); Schweizeres Strafgesetzbuch [STGB], Code pénale suisse [CP] Dec. 21, 1937, SR 311.0, arts. 102, 264-264h (Switz.) (establishing criminal liability of legal persons for all felonies and misdemeanors, where such liability cannot be attributed to a natural person due to the "inadequate organization" of the legal person, and criminalizing genocide, war crimes, and crimes against humanity); International Criminal Court Act, Act 11 of 2008, arts. 7-9 (Uganda) (establishing criminal offense where a "person" commits genocide, crimes against humanity, or war crimes); Interpretation Act, 1976, ch. 3, §2 (Uganda) (definition of "person" includes "any company or association or body of persons corporate or unincorporated").

### 2. The CAT and ICCPR require civil remedies for torture victims, which States provide either through civil remedies in a criminal process or a freestanding civil remedy.

The treaties' requirements include providing civil remedies. CAT arts. 2 and 14; ICCPR arts. 2 and 7. The Committee against Torture expressly contemplates civil proceedings and reparations in addition to criminal proceedings. Indeed, if domestic law requires the exhaustion of criminal proceedings before civil compensation can be sought, "then the absence or delay of those criminal proceedings constitute a failure on behalf of the State party to fulfill its obligations under the Convention." CAT Draft General Comment on article 14, ¶ 24.

Countries' domestic laws provide for various types of civil remedies. The form follows the trend in domestic criminal liability of juridical persons, as well as the country's attitude towards corporate legal personality in general.

Under the Netherlands' civil law, for example, corporations have legal personality, and consequently, claims can be filed against them. International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations – The Netherlands*, (2010) at 9, *citing* Burgerlijk Wetboek (Bw) [Dutch Civil Code], art. 2:3. Under the Dutch Civil Code, a person who commits a tortious act must repair the harm suffered by the other person. *Id., citing* Burgerlijk Wetboek (BW) [Dutch Civil Code], art. 6:162(1). Unlawful acts are

defined as: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct. The violation of a right refers to specific rights of the person harmed, such as the rights to life, physical integrity and freedom. *Id*. at 9-10, *citing* A.G. Castermans and J.A. van der Weide. *De juridische verantwoordelijkheid van Nederlandse moederbedrijven voor de betrokkenheid van dochters bij schendingen van fundamentele, internationaal erkende rechten*. Report for the Ministry of Economic Affairs, Leiden (15 December 2009) at 17 (describing legal liability of Dutch parent companies for involvement of subsidiaries in violations of internationally recognized human rights).

In many countries, civil liability applies to juridical persons as a subsidiary of criminal liability. The Spanish Penal Code, for example, recognizes civil liability for juridical persons for the crimes committed by their employees, agents, representatives, and managers in carrying out their professional duties. Codigo Penal (Penal Code) [C.P.] art. 120. This accords with the general principle in Spanish law that criminal liability carries with it the obligation to reparation, restitution, and material and moral damages. C.P. art. 110.[9]

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[9] Spanish law recognizes "illicit associations" that have been constituted to commit a crime; that promote the commission of crimes, discrimination or hatred; those that employ violent means or that are paramilitary organizations. C.P. art. 515 (Sp.). The directors of these organizations may be prosecuted, *id.* art. 517, and the organizations themselves fined, suspended, disbanded, among other sanctions. *Id. art.* 520

Some countries, like France, allow victims to participate in criminal proceedings as *parties civiles*, allowing their claims for damages and in some cases, restitution, to be joined against any defendant.[10] Fafo Report on Private Sector Liability, p. 23.

Numerous countries apply ordinary tort liability against legal entities for harms caused by torture. In 15 of 16 countries surveyed recently, ordinary common law claims or civil law delicts can be brought against corporate entities for violations of international criminal and international humanitarian law. Fafo Report on Private Sector Liability p. 22.

In the United Kingdom, for example, where there is no specific civil cause of action for torture, a corporation may be held responsible for torture using common law torts like assault and battery. *Guerrero and others v Monterrico Metals plc and another*, [2009] EWHC 2475 (QB); [2009] All ER (D) 191 (Oct) 16 October 2009 ("The alleged facts as to Monterrico's

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(referring to C.P. arts. 129, which refers to sanctions listed in C.P. art. 33.7). Spain has also ratified the Rome Statute of the International Criminal Court. War crimes and crimes against humanity, including torture, are criminalized under Ley Orgánica 15/2003, de 25 de noviembre.

[10] Italian law also provides for the participation of victims in criminal prosecution, Codice di procedura penale [C.p.p.] art. 90, para. 1., and gives them the right to include civil claims in the criminal prosecution. *Id.* art. 74. Italy, which is party to the Rome Statute, recognizes a form of quasi-criminal administrative liability for legal persons in whose interest or for whose benefit a representative or agent committed a crime. Decreto Legislativo June 8, 2001, Gazz. Uff. n.140, June 19, 2001..

responsibility and participation in the alleged brutality against the protesters would appear to be sufficient to found a cause of action.)

Further, as a State Party to the ECHR, the United Kingdom incorporates its international obligations into its domestic law through the Human Rights Act 1988. Section 8(1)-(4) creates remedies for acts of public authorities, and instructs the domestic courts to consider "the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention." Further, the HRA expressly authorizes courts to hear actions against "public authorities," which includes some non-state actors. *HRA* at § 6(3)(b), (5) (defining a public authority as "any person certain of whose functions are functions of a public nature," but excluding private acts).[11]

There is no barrier in Germany to suing a legal entity for damages, provided the entity has a seat or place of establishment in Germany. Zivilprozessordnung [ZPO] [Code of Civil Procedure Statute] Dec. 5, 2005, Bundesgesetzblatt, Teil I [BGBl. I] §§ 17, 21. (F.R.G.) This would include damages for torture.

Another form of civil liability for juridical persons is found in the constitutional law of various countries such as South Africa and New Zealand. There is a

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[11] *See, e.g., Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (QB) (upholding a claim for breach of privacy against a private corporation, finding the HRA requires U.K. courts to interpret its privacy law in light of the European Convention).

constitutional right in South Africa to "appropriate relief" for violations of the Bill of Rights, provisions of which bind juridical entities directly where "applicable, taking into account the nature of the right and the nature of any duty imposed by the right." Constitution of the Republic of South Africa (1996) arts. 8(2) & 38. The Bill of Rights includes the right not to be tortured or subjected to a deprivation of physical integrity, id. art. 12.1.d, and the South African courts have found that constitutional damages may be available when appropriate for violations of the Bill of Rights. *See, e.g.*, *Fose v Minister of Safety and Security*, 1997 (3) SA 786 (CC) ¶ 1, 57, 59 (authorizing constitutional remedy of reparations for torture and noting that the South African constitution guarantees certain rights "applicable to relationships governed by 'private law'.") Victims of torture (and others acting in their name) have standing before the Constitutional Court. Constitution art. 38.

The New Zealand Bill of Rights Act 1990 includes the right not to be tortured (sec. 9), and its provisions apply for the benefit of all legal and natural persons. Sec. 29. The Act also applies to any acts by the government, any person, *or body*, performing a public function, power or duty conferred or imposed by or pursuant to law (sec. 3, emphasis added). Further, the right to justice protected in section 27 confers standing on individuals to bring civil proceedings before the courts.

In a majority of Latin American countries, the *amparo* action (or *tutela* in Colombia) provides a judicial mechanism to redress violations of human

rights, civil rights and other freedoms, in addition to civil and monetary remedies.[12]

This provision of a domestic remedy for vindication of substantive rights is consistent with Article 25 of the ACHR. That article calls for signatory countries to provide citizens with a right to "effective recourse before a competent court or tribunal for the protection against acts that violate his fundamental rights recognized by the constitution or laws of the State or *by this Convention* [emphasis added]." Art. 25, ACHR (1969); *See also* Inter-American Court Advisory Opinion OC-8/87, of January 1987, para. 32.

While the source (constitutional or legislative) for the *amparo* and procedures for its implementation vary, in many countries, *amparo* actions are permitted against juristic persons and private

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[12] The *amparo* action has existed in Latin America at least since the 19th century, and originated as a mechanism akin to a "writ" that provided for judicial protection (often injunctive) of fundamental rights—usually those rights protected by the state's constitution. During the latter half of the 20th century, Latin American states began to expressly stipulate that the amparo could also provide a mechanism for redress of violations of internationally protected human rights. *See* Brewer-Carias, Allan R. "Mecanismos Nacionales de Proteccion de Los Derechos Humanos," (2005) Instituto Interamericano de Derechos Humanos, San Jose, Costa Rica, at 84-85. Available: http://www.iidh.ed.cr/BibliotecaWeb/Varios/Documentos/BD_157895943/Mecanismos%20Nacionales%20de%20Proteccion.pdf?url=%2FBibliotecaWeb%2FVarios%2FDocumentos%2FBD_157895943%2FMecanismos+Nacionales+de+Proteccion.pdf.

entities, as well as individuals and public actors.[13] This is so because

> the constitutional judicial protection guaranteed in the American Convention by means of the *amparo*, is against any act, omission, fact or action that violates human rights and, of course, which threatens to violate them, without specifying the origin or the author of the harm or threat. This implies that the recourse of "*amparo*" can be brought before the courts against any persons in the sense that it must be admitted not only against the State or public authorities, but also against private individuals and corporations.

Brewer-Carías, *Some Aspects of the "Amparo" Proceedings* at 20.

As an example, Article 43 of the Constitution of Argentina provides that any person may file a proceeding against any act or omission of public authorities or individuals for the protection of rights

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[13] Brewer-Carias, Allan R., Some Aspects of the "Amparo" Proceeding in Latin America as a Constitutional Judicial Mean Specifically Established for the Protection of Human Rights, paper presented at the Colloquium in International and Comparative Law, University of Maryland School of Law, Baltimore, October 2007, at page 10. Available http://www.allanbrewercarias.com/ Content/449725d9-f1cb-474b-8ab2-41efb849fea2/Content/ I,1,%20965.%20Some%20aspects%20of%20the%20Latin%20 American%20Amparo%20Proceeding.%20University%20of%20 Maryland,%20Oct.%202007.pdf.

recognized by the constitution, international human rights treaties, or statutes. *See* Article 43 of the Constitución Nacional de Argentina. The Supreme Court of Argentina established over 50 years ago that the term "individuals" here includes corporations. *Samuel Kot*. Judgment of Sept. 5, 1958, S.R.L. *Samuel Kot*, CSJN, 241 Fallos 291 (1958) (Arg.) (*amparo* action against a textile company, Kot S.R.L, for violations of constitutionally and internationally protected labor rights).

Similarly, Colombia has a vigorous *tutela* procedure[14] that has been frequently invoked against corporations for the protection of human and fundamental rights. *See Defensor del Pueblo, doctor Jaime Córdoba Triviño*, Constitutional Court of Colombia in plenum, February 3, 1997; Constitution, Art. 93 (1991) (Colombia) (Constitutional Court of Colombia, 1997) (*tutela* action filed against Occidental Petroleum for violations of rights protected by international treaty) [15] Article 86 of the

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[14] Since 1991, more than 1.5 million *tutela* actions have been brought in Colombia for violations of human rights. *See* Rodrigo Uprimny Yepes, "La constitución y la protección judicial de los derechos," Dejusticia, Julio 23 de 2006, available: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.dejusticia.org%2Findex.php%3Fmodo%3Dinterna%26tema%3Destado_de_derecho%26publicacion%3D139&ei=FmrvToe3No3jggfM7s3hCA&usg=AFQjCNHCDPD1hGNgz7ZLjsqgGI-zrKXb0Q&sig2=eoRVSJ5yyhfRFwf3bmh6CQ.

[15] *See also* Corte Constitucional Sentencia T-247/10 (2010) (tutela action against corporation Ecopetrol S.A for violation of right against discrimination); Corte Constitucional Sentencia T-083/10 (2010) (tutela action against the corporation Sociedad

Colombian Constitution (1991) permits *tutela* actions against private or juridical entities, "entrusted with providing a public service or whose conduct may affect seriously and directly the collective interest" or when the petitioner finds himself placed "in a state of subordination or vulnerability" by the private actor.[16]

Article 12 of the Colombian Constitution explicitly recognizes the prohibition against torture as a fundamental right. *See* Constitution of Colombia (1991) at Title II, Chapter 1, Concerning Fundamental Rights, Art. 12, Because clause 9 of Decreto Nº 2.591 de 1991 (art. 42), explicitly permits *tutela* actions against private parties, including corporations, for violations of fundamental rights, torture should also be actionable.

The Bolivian Constitution (2009), article 128, also permits an *amparo* action "against illegal or undue acts or omissions, of public officials or of individual *or collective actors* that restrict, deny or threaten to restrict or deny the rights and guarantees of the person recognized by the Constitution and laws."

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Portuaria Regional de Buenaventura y COOPORTUARIA S.A. for violation of labor and due process rights);

[16] Decreto Nº 2.591 de 1991 (clause 9 of art. 42); Corte Constitucional Sentencia T-166/09 (2009) (tutela action brought against a church for violation of fundamenta right of to personal privacy)(interpreting Decreto 2.591; *Accord* Corte Constitucional, Sentencia T-495-10 (2010) (action against a private party for violations of fundamental right to live with dignity, and to decent housing). Subordination" been interpreted broadly by the Constitutional Court to include situations in which there is a "factual impossibility of a defense against the unjust aggression of a private party."

Constitution, Art. 128 (2009) (Bolivia) (emphasis added).

Other countries that permit *amparo* suits against private entities include Chile, Constitution, Art. 20 (1980) (Chile), Ecuador,[17] the Dominican

[17] Constitution, Art. 88 (2008) (Ecuador) (*amparo* actions permissible against private parties if theye parties cause "severe damage" or if the affected person is in a status of subordination, defenselessness or discrimination.

Republic,[18] Paraguay,[19] Peru,[20] Uruguay,[21] Venezuela,[22] Guatemala and Costa Rica.[23]

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[18] *See Productos Avon S.A. case*, February 24, 1999, Dominican Republic; Article 1, Ley 437-06, Dominican Republic.

[19] Art. 134 (1992) (Paraguay) (*amparo* action permissible against private parties for violations of rights secured by the constitution or by law). The *amparo* is also regulated by the law "Ley 1337/1988" in the Código Procesal Civil.

[20] Constitution, Art. 200 (1993) (Peru) (permits *amparo* action against private actors. Human rights treaties can be claimed in *amparo* actions because Article 55 of the Peruvian Constitutional grants legal status to international treaties; *see also* Sentencia 03343-2007-AA-Tribunal Constitucional Perú (2009) (action against Occidental Petroleum in Peru for violations of the "right to life" and the "right to a healthy environment"); Sentencia 4635-2004-AA/TC-Tribunal Constitucional Perú (2006) (workers brought suit against Southern Peru Copper corporation for violations of human rights protected by international treaties).

[21] Ley No. 16.011 de Amparo (1988) (Uruguay) (permits *amparo* actions against "any act, omission or event of state or parastatal authorities, as well as private actors who currently or imminently injure, alter or threaten to restrict, in any manifest illegitimacy, rights and freedoms expressed or implied by the Constitution.").

[22] Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales (1988) (Venezuela) (permits *amparo* actions for any "event, act or omission caused by citizens, legal persons, groups or private organizations that have violated, violate or threaten to violate any of the securities or rights" under the law.).

[23] *Ley de Amparo*, Art. 9 (1988) (Guatemala) permits suits against private entities that must, by law, register themselves by legal mandate or whose legal existence is otherwise recognized by law, such as political parties, associations, companies unions, cooperatives and other similar entities).

### B. Regional law and customary international law require States to provide remedies for abuse, including torture, including remedies against entities.

#### 1. The Inter-American Human Rights system has established the right to an effective remedy, and the absence of such a remedy is itself a violation of the Convention.

The American Convention on Human Rights, to which the United States is a signatory,[24] requires States Parties to provide domestic legislation giving legal effect to Convention rights. *See,* ACHR, Art. 2 . Torture is strictly prohibited by Articles 5(2) and 27. As noted above, Article 25 of the ACHR calls for States Parties to provide prompt and effective

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In Costa Rica, "subjects of private law" (interpreted as companies or individuals) may be proper defendants in *amparo* actions when they provide public services or find themselves in positions of power where common remedies prove insufficient for guaranteeing and protecting constitutional rights and liberties those and duties recognized by controlling international law in Costa Rica. Constitution, Art. 48 (1949 (Costa Rica); *Ley de la Jurisdicción Constitucional*, Art. 57 (1989) (Costa Rica).

[24] Although it has not ratified the ACHR, as a signatory, the U.S. "is obliged to refrain from acts which would defeat the object and purpose of [the] treaty." Vienna Convention on the Law of Treaties, Article 18, 1155 U.N.T.S. 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1969).

judicial recourse to victims of violations of the rights under State law or the Convention. The ACHR asserts that State Parties undertake to "develop the possibilities of judicial remedy" and to ensure that the competent authorities shall enforce such remedies when granted," but does not direct the States as to how to implement the remedies.

As further evidence of the universality of the obligation to provide remedies, the European Convention on Human Rights unequivocally prohibits torture, Article 3 and 15(2) (no derogation permitted), and requires State Parties to provide effective domestic remedies for violations of the rights contained within Article 13 of the European Convention.

In the same way, the Inter-American Court on Human Rights recognizes that State Parties are responsible for providing domestic legislation giving legal effect to rights under the ACHR. *Velásquez Rodríguez Case*, Judgment of June 26, 1987, Inter-Am. Ct. H.R. (Ser. C) No. 1 (1987) ("The lack of effective domestic remedies renders the victim defenseless and explains the need for international protection."); *see also, Caesar v. Trinidad and Tobago*, Judgment of March 11, 2005, Inter-Am Ct. H.R., ¶2 (Ser. C) No. 123 (2005) (State Party in contravention of the ACHR for failing to "give domestic legal effect to the rights guaranteed under [certain articles] of the ACHR"); *accord, Cantoral Benavides Case*, Judgment of August 18, 2000, Inter-Am Ct. H.R. (Ser. C) No. 69 (2000) (holding the State violated numerous provisions of the ACHR).

## III. Remedies against all entities that support or participate in torture are necessary for the effective eradication of torture worldwide.

States are required to prevent, prosecute and punish, and redress torture in order to meet their obligations under the CAT, Arts. 2 (prevention), 4-7 (punishment), 13-14 (redress). Providing an effective civil remedy to victims of torture and cruel, inhuman, and degrading treatment serves all three of these goals, as it compensates and rehabilitates victims, financially penalizes perpetrators, and deters future abuse by raising the cost of violations. Immunity for corporations and other entities would undermine all three aspects of the state obligation to provide civil remedies by allowing torturers to hide assets and escape accountability merely by collectivizing or privatizing their operations.

### A. Civil remedies fulfill States' requirement to take measures necessary to prevent, punish and redress torture.

As the Human Rights Committee has noted, a state does not fulfill its obligations under the ICCPR unless it takes steps to "prevent, punish, investigate or redress" the harms caused by private persons and entities, singling out torture as a particular area in which states have an obligation to prevent abuse. HRC Gen. Cmt. No. 31. The reports of the U.N. Special Rapporteur on Torture to the Human Rights Council consistently emphasize that only a victim-centered perspective that allows for adequate and

integrated compensation and rehabilitation for victims and their families can successfully fulfill international standards on redress and reparation. See, e.g., Juan E. Méndez, Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment ¶¶ 47-49, submitted to the Human Rights Council, U.N. Doc. A/HRC/16/52 (Feb. 3, 2011); Statement of Juan E Méndez, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2, delivered to the Human Rights Council, 16th Sess., agenda item 3 (Mar. 7, 2010).

### B. Remedies against entities are necessary for the effective prevention of torture, because deterring torture requires punishment of all actors that contribute to its commission.

As a general matter, international human rights law requires the provision of remedies against entities, including for participation in torture. The Human Rights Committee, charged with interpreting the ICCPR, has declared that States must "provide effective remedies" and "redress the harm caused . . . by private persons *or entities*." HRC Gen. Cmt. No. 31, ¶ 8 (Mar. 29, 2004).

To provide effective redress and reparation, domestic civil remedies purporting to implement a state's international obligations regarding torture must provide for the liability of entities that are ultimately responsible. Thus, the Basic Principles and Guidelines on the Right to a Remedy, which have been adopted by the U.N. General Assembly, envision reparations by legal persons and other entities where

they are found to be liable for human rights abuses. *See* Basic Principles, *supra* at note 14..

Regrettably, instances in which collective entities have subjected natural persons to torture under color of state law are not infrequent. In fact, groups – incorporated or otherwise – may be particularly well-suited to carrying out state-sponsored torture due their ability to pool and marshal assets and increase the geographical and physical reach of their sponsors. These groups may take many different forms. Torturers may act on behalf of entities like the Serb forces during the Bosnian War, which have many of the attributes of states, including the control of territory, the formation of governing bodies, and the organization of armed forces, but which espouse a policy and practice of torture. *See, e.g.*, *Prosecutor v. Kunarač*, Case No. IT-96-23 & IT-96-23/1-T, Judgment, ¶¶ 570-79 (Feb. 22, 2001). State-sponsored terrorist groups like Hezbollah have acquired funds and material resources as a collectivity in order to carry out the political aims of a sovereign government, and have benefited from acts of torture and extra-judicial killing carried out by individual operatives.[25] It is well documented that Colombian government forces have cooperated with private paramilitary "self-defense groups" that have

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[25] *See generally*, *Taylor v. Islamic Republic of Iran*, No. 10-cv-844, 2011 U.S. Dist. LEXIS 96238 (D.D.C. Aug. 29, 2011) (Hezbollah founded and supported by Iran in order to carry out, *inter alia*, extrajudicial killings); *see also Stern v. Islamic Republic of Iran*, 271 F. Supp. 2d 286, 298-99 (D.D.C. 2003) (Hamas' suicide bombing attack would have been impossible "without . . . [financial] support and training" from Iran).

been responsible for a significant proportion of the acts of torture and ill-treatment in that country's civil war.[26] And, unfortunately, some corporations have allegedly aided and abetted official torture as an illegitimate tool to advance their business interests, including Unocal Corp. in Myanmar, *see John Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (finding evidence of complicity), Royal Dutch Petroleum in Nigeria, *see Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377 (S.D.N.Y. 2009); Talisman Energy in Sudan, *see Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

As a practical matter, it is unlikely that a victim of torture by a collective entity will be able to obtain the complete remedy required by the CAT if her civil action is only against the particular natural persons who physically committed the act of torture. A victim is more likely to be obtain enforceable compensation against an entity than a single natural person for the range of injuries specified by the Basic Principles, which include physical and mental harm; lost employment, education, and other social benefits; material damages and loss of earnings and earning

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[26] See Joint report of the U.N. Special Rapporteur on the question of torture, Sir Nigel S. Rodley, and the Special Rapporteur on extrajudicial, summary or arbitrary executions Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights resolutions 1994/37 and 1994/82, ¶¶ 10, 24, 36, 38, 42, 43, 46, 60, 65, 69, 72, 103, 104, 105, submitted to the Commission on Human Rights, U.N. Doc. E/CN.4/1995/111 (Jan. 16, 1995); Manfred Nowak, Report of the Special Rapporteur on torture, Addendum, ¶¶ 101, 102, 152, submitted to the Human Rights Council, U.N. Doc. A/HRC/7/3/Add.2 (Feb. 18, 2008).

potential, moral damages, and past and future professional services. CAT, Basic Principles, *supra* note 14, ¶ 20-21. Absent corporate liability, an entity could shield the ill-gotten gains of torture from a civil remedy merely by pooling its assets and holding them collectively. While a human torturer may flee the jurisdiction to evade legal process, an entity with assets and operations in a given country is much less likely to be able to do so. Moreover, precluding a civil remedy against an entity that abets or participates in torture is inconsistent with the idea of integrated, victim-centered reparation and rehabilitation. That would include identification of the responsible parties and a full truth-telling of the abuses as part of the victim's process of overcoming trauma and reintegrating into society. *Id.* art. 22; Méndez Statement, *supra* at 33.

A civil remedial scheme that excludes liability for collectivities also inadequately punishes and deters torture. Civil remedies can be punitive as well as compensatory in that they impose monetary sanctions on a liable defendant–particularly in countries that authorize punitive damages like the United States. *See Dodge v. Islamic Republic of Iran*, CIV.A.03 252 TPJ, 2004 WL 5353873 (D.D.C. Aug. 25, 2004($2,920,000.00 punitive damages award against Iran for instigating Hezbollah to take hostage, an action that served Iranian objectives).

Further, immunity vitiates the deterrent effect of civil liability, violating the principle that an effective remedy entails guarantees of non-repetition. CAT, Basic Principles, *supra* note 14, ¶ 23. For example, in the mid-1990s, many illegal Colombian paramilitary either reorganized as legal corporate

entities known as *convivires* or began to work closely with *convivires*, which were able to legally purchase weapons and funnel money to the illegal groups. The *convivir* thus became the legitimate veneer for paramilitary activity, an essential part of the culture of impunity that allowed those ultimately responsible to organize forces to commit consolidate their power and commit atrocities again and again. See Maria Clemencia Ramirez, Between the Guerillas and the State: The Cocalero Movement, Citizenship, and Identity in the Colombian Amazon 51 (2011); Amnesty Int'l, Colombia: The Paramilitaries in Medellín: Demobilization or Legalization?, AI Index AMR 23/019/2005, Aug. 31, 2005; see also documents archived at National Security Archive, "Documents Implicate Colombian Government in Chiquita Terror Scandal," (Mar. 29, 2007), at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB217/index.htm.

### C. Exempting entities such as corporations or unincorporated groups from liability for torture is akin to an impermissible amnesty.

By immunizing the financial and intellectual authors of torture, exempting collective entities from liability could serve, at best, as an encouragement to future torture by allowing torturers to hide assets in various forms of collectivity, and as a form of amnesty for torture.

International law prohibits amnesty for torture. The Human Rights Committee has stated:

> Amnesties [for torture] are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their

> jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.

HRC, Gen. Cmt. No. 20, ¶ 15. Similarly, the Committee against Torture interprets amnesties as inconsistent with Article 14, Draft Gen. Cmt. on art. 14, ¶ 36. Yet exempting from liability a category of entities otherwise recognized by the law – entities that have sometimes had a significant role in perpetrating, encouraging, and funding torture, and that hold significant assets – would be akin to just such an impermissible amnesty.

# CONCLUSION

For these reasons, this Court should find the Torture Victim Protection Act provides a remedy for torture against legal entities and other defendants who are not natural persons, and reverse the court of appeals judgment below.

Respectfully submitted,

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