

**UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT**

ANGEL ENRIQUE VILLEDA ALDANA, et al.,

Plaintiffs-Appellants

v.

FRESH DEL MONTE PRODUCE, et al.,

Defendants-Appellees

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
THE HONORABLE FEDERICO A. MORENO**

No. 04-10234-HH

**BRIEF OF *AMICI CURIAE*
INTERNATIONAL LAW AND HUMAN RIGHTS SCHOLARS and
THE CENTER FOR JUSTICE AND ACCOUNTABILITY
IN SUPPORT OF PLAINTIFFS' APPEAL OF THE DISTRICT COURT'S ORDER
GRANTING MOTION TO DISMISS FOR LACK OF SUBJECT MATTER
JURISDICTION**

Matthew J. Eisenbrandt, Esq.*
The Center for Justice & Accountability
870 Market St., Suite 684
San Francisco, CA 94102

Beth Van Schaack, Esq.
Kimberly N. Pederson, Law Student
Santa Clara University School of Law
500 El Camino Real
Santa Clara, CA 95053

William J. Aceves, Esq.
California Western School of Law
225 Cedar Street
San Diego, CA 92101

**Counsel of Record*

IDENTITY AND INTEREST OF *AMICI CURIAE*

Pursuant to Fed. R. App. Proc. 29(b), *amici curiae* the Center for Justice and Accountability and international law and human rights scholars have filed a motion for leave to file this brief with the court. *Amici curiae* respectfully submit this brief on their own behalf and not as representatives of their respective institutions.

The Center for Justice and Accountability (“CJA”) is a human rights legal services organization founded in 1998 with initial support from Amnesty International USA and the United Nations Voluntary Fund for Victims of Torture. CJA works to stop torture and other serious human rights abuses around the world by holding perpetrators accountable for their actions. CJA files civil lawsuits in United States federal courts under the Alien Tort Claims Act and related statutes. CJA pursues cases in order to promote accountability and to benefit survivors, as well as their communities, to the fullest extent possible.

Michael J. Bazylar is Professor of Law at Whittier Law School.

Carolyn Patty Blum is Clinical Professor of Law, *emeritus*, at the University of California at Berkeley, Boalt Hall and Adjunct Professor, Columbia University Law School.

Roger S. Clark is Board of Governors Professor of Law at Rutgers University School of Law, Camden.

Arturo Carrillo is Visiting Associate Professor of Clinical Law, and Director, International Human Rights Clinic, George Washington University School of Law.

Sarah H. Cleveland is Marrs McLean Professor of International Law at the University of Texas School of Law.

Robert Drinan, S.J. is Professor of Law at Georgetown University Law Center.

Stephanie Farrow is Professor of Law at the Pennsylvania State University, Dickinson School of Law.

Laurel Fletcher is Acting Clinical Professor of Law, University of California at Berkeley, Boalt Hall.

Dr. Menno Kamminga is Professor of International Law and Co-Director of the Maastricht Centre for Human Rights, Faculty of Law, Maastricht University, the Netherlands.

Bert B. Lockwood is Distinguished Service Professor and Director of the Urban Morgan Institute for Human Rights at the University of Cincinnati College of Law.

Jenny S. Martinez is Assistant Professor of Law, Stanford University Law School.

Jane G. Rocamora is Supervising Attorney, Harvard University Immigration and Refugee Clinic at Greater Boston Legal Services.

Naomi Roht-Arriaza is Professor of Law at the University of California Hastings College of the Law.

William A. Schabas is Professor of Human Rights Law and Director of the Irish Centre for Human Rights at the National University of Ireland, Galway. Professor Schabas is also a member of the Sierra Leone Truth and Reconciliation Commission.

Ronald C. Slye is Associate Professor, Seattle University School of Law.

James Silk is Executive Director, Orville H. Schell, Jr. Center for International Human Rights at Yale University Law School.

Beth Stephens is Professor Law at Rutgers University School of Law, Camden.

Rick Wilson is Professor of Law and founding Director, International Human Rights Clinic at Washington College of Law, American University.

Amici curiae are deeply concerned with the District Court's dismissal of plaintiffs' allegations in this case for lack of subject matter jurisdiction and for failure to state a claim. Torture; cruel, inhuman or degrading treatment or punishment; and arbitrary detention are explicitly prohibited by international law and therefore actionable under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, and Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note. In dismissing plaintiffs' claims, the District Court required a heightened pleading standard that is not supported by the established definitions of torture; cruel, inhuman or degrading treatment or punishment; and arbitrary detention under either international law or domestic precedent. If affirmed, this opinion will create a dangerous precedent by requiring heightened pleading standards for these torts under the ATCA or TVPA. This brief of *amici curiae* explains the established international and domestic standards for raising claims of torture; cruel, inhuman or degrading punishment or treatment; and arbitrary detention. It concludes that plaintiffs have properly stated a claim for torture; cruel, inhuman or degrading treatment or punishment; and arbitrary detention. Accordingly, their claims should not have been dismissed at this preliminary stage.

**DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A
DIRECT FINANCIAL INTEREST IN LITIGATION**

Pursuant to Fed. R. App. Proc. 26.1, *amici curiae* make the following disclosures:

1. Is the party a publicly held corporation or other publicly held entity?

NO.

2. Is the party a parent, subsidiary, or affiliate of, or trade association representing, a publicly held corporation, or other publicly held entity?

NO.

3. Is there any other publicly held corporation, or publicly-held entity, that has a direct financial interest in the outcome of the litigation?

NO.

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AUTHORITY TO FILE BRIEF

Pursuant to Fed. R. App. Proc. 29(b), *amici curiae* have filed a motion for leave to file this brief with the court.

STATEMENT OF ISSUES

This brief of *amici curiae* presents the following three issues:

1. Whether, for the purposes of the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, and Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note, pleading torture requires a showing of extreme physical mistreatment or permanent physical damage;
2. whether a plaintiff's claim of torture may establish an alternative claim of cruel, inhuman or degrading treatment or punishment; and
3. whether a claim of arbitrary detention requires a prolonged detention or abusive treatment of the detainee.

SUMMARY OF ARGUMENT

This brief of *amici curiae* argues that plaintiffs' allegations of torture, cruel, inhuman or degrading treatment or punishment, and arbitrary detention should not be examined under the heightened pleading standards applied by the District Court in its Order Granting Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction (December 12, 2003). Rather, when faced with a motion to dismiss for failure to state a claim, courts should analyze allegations of torture; cruel, inhuman or degrading treatment or punishment; and arbitrary detention pursuant to the well-established international and domestic definitions of these international law torts.

Under international and U.S. law, a plaintiff has fully pled all of the elements of torture if he or she alleges that (1) s/he was subjected to severe pain or suffering, whether physical or mental, (2) at the instigation, or with the consent or acquiescence, of a public official or other

person acting in an official capacity, and (3) the pain or suffering was intentionally inflicted for the purpose of punishment, intimidation, coercion, or obtaining information. International, regional and domestic tribunals and the international instruments defining torture all recognize that torture may be solely mental, and does not have to be accompanied by the infliction of physical pain or suffering or permanent damage to be actionable.

Furthermore, international and U.S. law recognize the interrelationship between a plaintiff's allegations of torture and cruel, inhuman and degrading treatment or punishment. Courts have recognized that a plaintiff's evidence of a claim of torture may establish an alternative claim of cruel, inhuman or degrading treatment or punishment. The distinction between torture and cruel, inhuman or degrading treatment or punishment derives principally from the difference in the intensity of suffering inflicted, as well as the intent of the perpetrator. Thus, when faced with allegations of physical mistreatment or mental abuse, triers of fact must undertake a factual analysis to determine whether the challenged conduct constitutes torture or cruel, inhuman or degrading treatment of punishment.

Lastly, pleading a claim of arbitrary detention under the ATCA does not require allegations of prolonged detention or abusive treatment of the detainee. The prohibition of arbitrary detention is firmly established in international and domestic law as independently actionable, and courts have not required a temporal element or aggravating factors such as harsh treatment. Rather, the unlawful deprivation of liberty in and of itself constitutes a violation of international law actionable under the ATCA.

ARGUMENT

I. FOR THE PURPOSES OF THE ATCA AND TVPA, PLEADING TORTURE DOES NOT REQUIRE A SHOWING OF EXTREME PHYSICAL MISTREATMENT OR PERMANENT PHYSICAL DAMAGE.

A. International Law Defines Torture In Terms Of Severe Physical Or Mental Pain And Suffering.

The prohibition against torture, whether physical or mental, has long been recognized in international law.¹ See, e.g., Universal Declaration of Human Rights, Dec. 10, 1948, art. 5, G.A. Res 217A (III), U.N. Doc. A/810, at 71 (1948) (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); International Covenant on Civil and Political Rights (“ICCPR”), Dec. 16, 1966, art. 7, 999 U.N.T.S. 171 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”). More than 147 countries, including the United States, have ratified the ICCPR. According to the authoritative RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702(d) (1987) (“RESTATEMENT (THIRD)”), a state violates international law if it practices, encourages, or condones torture as a matter of state policy.

Torture may result from either physical or mental pain or suffering. The most definitive definition of torture is found in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention against Torture”). Convention against

¹ Regional human rights agreements also recognize the international prohibition against torture. Most notably, the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”), which has been ratified by 43 states, provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221. See also European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, E.T.S. No. 126. The European Court of Human Rights, which reviews compliance with the European Convention, has indicated that the prohibition against torture is one of the most fundamental values of a democratic society. Additionally, the African Charter on Human and Peoples’ Rights (“African Charter”) provides that “[a]ll forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.” See African Charter on Human and Peoples’ Rights, June 27, 1981, art. 5, OAU Doc. CAB/LEG/67/3/Rev. 5 (1981).

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465

U.N.T.S. 85. The United States, along with 130 other countries, is party to the Convention against Torture. The definition of torture contained in Article 1 clearly recognizes that torture can be either physical or mental:

[a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

See, e.g., J. Herman Burgers and Hans Danelius, The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 117, 118 (1988) (“The act of torture is defined as being the infliction of severe pain or suffering, whether physical or mental. The most characteristic and easily distinguishable case is that of infliction of physical pain. ... The acts inflicting severe mental pain or suffering can be of very different kinds. One category consists of acts which imply threats or which create fear in the victim”).

One of the fundamental rights guaranteed by the ICCPR is the prohibition on torture and cruel, inhuman or degrading treatment or punishment. The United Nations Human Rights Committee monitors compliance with the ICCPR and hears individual complaints dealing with violations of these rights. In General Comment No. 20, the Committee indicated that the torture prohibition is designed to “protect both the dignity and the physical and mental integrity of the individual.” Human Rights Committee, General Comment No. 20, U.N. Doc. HRI/GEN/1/Rev.5 (2001), at para. 2. The determination of whether torture has occurred requires an assessment of all the circumstances of the case, “such as the duration and manner of the treatment, its physical

or mental effects as well as the sex, age and state of health of the victim.” Vuolanne v. Finland, Communication No. 265/1987, U.N. Doc. Supp. No. 40 (A/44/40) at 249, 256 (1989). Thus, subjective factors can aggravate the effect of harsh treatment and lead to a finding that torture has occurred. In addition, a finding of torture is appropriate where death threats are made in circumstances that contribute to their credibility, such as where a plaintiff has been arbitrarily detained incommunicado or where security forces are notorious for carrying out summary executions, as was the case here.

Mental harm may rise to the level of torture when it involves threats to the victim or a loved one. For example, the Human Rights Committee has determined that “anguish and stress caused to a mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts” can rise to the level of torture for the purposes of finding a violation of the ICCPR. See Quinteros v. Uruguay, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 11 (1990). Likewise, the African Commission on Human and Peoples’ Rights, which was established to monitor compliance with the African Charter, ruled that placing detainees in small cells, soaking them with cold water, and subjecting them to mock executions constituted torture. Amnesty International et al. v. Sudan, Comm. Nos. 48/90, 50/91, 52/91, 89/93 (2000). The U.N. Special Rapporteur on Torture, established by the U.N. Commission on Human Rights, stated that the use of intimidation as a form of torture and threats to the physical integrity of the victim “can amount to cruel, inhuman or degrading treatment or even to torture, especially when the victim remains in the hands of law enforcement officials.” Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/56/156 (2001), at para. 8. This reasoning necessarily

applies in situations in which the victim remains in the hands of armed non-state actors acting in concert with law enforcement officials.

These consensus definitions of torture and authoritative adjudications of the international prohibition against torture all make plain that claims of torture may involve physical *or* mental pain and suffering. Thus, a plaintiff may state a claim for torture based solely on mental harm, such as threats of death, mock executions, games of “Russian Roulette,” threats to harm loved ones, acts of intimidation, and other forms of psychological abuse.

B. A Claim Of Torture Does Not Require A Showing Of Permanent Or Prolonged Physical Harm.

Mental injury rising to the level of torture need not be accompanied by severe or permanent physical injuries. The Human Rights Committee has identified numerous acts that give rise to torture as a violation of Article 7 of the ICCPR.² Although many of these claims involve an ingredient of physical mistreatment, such an element is not a requirement for establishing torture. *See, e.g., Cariboni v. Uruguay*, Communication No. 159/1983, U.N. Doc. CCPR/C/OP/2 at 189 (1990) (abducting petitioner, keeping him hooded, bound, and seated for extended periods of time, providing him with minimal food, and subjecting him to hallucinogenic substances and psychological abuse constituted torture); *Estrella v. Uruguay*, Communication No. 74/1980, U.N. Doc. Supp. No. 40 (A/38/40) at 150 (1983) (abducting petitioner from his home, blindfolding him, and threatening him with amputation of his hands constituted torture). Cases such as these show that establishing torture does not require a

² Regional human rights enforcement mechanisms have also recognized a number of different acts of physical or mental abuse that give rise to a claim of torture. In *Selmouni v. France*, 29 E.H.R.R. 403, 440 (1999), the European Court of Human Rights concluded that the petitioner was subject to torture as a result of police beatings that left marks on his entire body and as a result of humiliating treatment. *Id.* at 442-443. *See also Aydin v. Turkey*, 25 E.H.R.R. 251 (1997) (raping, beating, and blindfolding detainee constituted torture); *Aksoy v. Turkey*, 23 E.H.R.R. 553 (1997) (stripping detainee with arms tied behind his back and suspending him by the arms constituted torture).

showing of extraordinary physical brutality or permanent physical harm. Rather, a cause of action for torture may arise solely based upon severe mental pain or suffering or physical mistreatment that does not amount to permanent injuries.

C. United States Law Incorporates The International Definition Of Torture, Including The Prohibition Of Mental Pain And Suffering, And Does Not Require A Showing Of Permanent Or Extreme Physical Damage.

Trough legislation and judicial decisions, the United States has fully incorporated the international prohibition against torture. The United States has ratified the ICCPR and the Convention against Torture and has implemented its obligations under those treaties. In 1991, Congress enacted the Torture Victim Protection Act (TVPA), which establishes civil liability for acts of torture. See 28 U.S.C. § 1350 note. In 1994, Congress imposed criminal liability for acts of torture, regardless of where such acts occur. See 18 U.S.C. § 2340A. Lastly, in 1998, Congress enacted the Torture Victims Relief Act to provide financial assistance to victims of torture in the United States and abroad. See 22 U.S.C. § 2152 (history).

In keeping with international law, Congress defined “torture” in the TVPA as:

[a]ny act, directed against an individual in the offender’s custody or physical control by which severe pain and suffering...whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual...information or a confession, [or]...intimidating or coercing that individual.

28 U.S.C. §1350, note §3(b)(1). The TVPA further defines “mental pain or suffering” as “prolonged harm caused by...threatened infliction of severe physical pain or suffering [or] the threat of imminent death. Id., §3(b)(2). Based on this statutory definition of torture, courts have consistently determined that a claim of torture under the TVPA must involve three elements: (1) that plaintiffs were in the defendant’s custody or control; (2) that plaintiffs were subjected to severe pain or suffering, whether physical or mental; and (3) that the acts were carried out with

the purpose of coercing the plaintiffs to engage in a certain course of action or confession. The TVPA thus makes clear that credible threats of harm or imminent death as well as acts causing severe physical harm give rise to a claim of torture in the United States.

U.S. courts have repeatedly recognized the international prohibition against torture, looking to international law and the TVPA to define the tort. In Filártiga v. Peña-Irala 630 F.2d 876, 880 (2d Cir. 1980), the Second Circuit indicated that:

[i]n light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.

See, e.g. Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996) (citing Filártiga precedent that official torture is now prohibited by the law of nations). See also Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995); Trajano v. Marcos: In re Estate of Ferdinand Marcos, Human Rights Litigation, 978 F.2d 493, 499 (9th Cir. 1992); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 716 (9th Cir. 1992); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); Wiwa v. Royal Dutch, 2002 U.S. Dist. LEXIS 3293, *21 (S.D.N.Y. 2002); Doe v. Islamic Salvation Front, 993 F. Supp. 3, 8 (D. D.C. 1998); Doe v. Unocal, 963 F. Supp. 880, 890 (C.D. Cal. 1997); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995); Paul v. Avril, 901 F. Supp. 330 (S.D. Fla.1994).

In evaluating the adequacy of a claim for torture, courts have expressly recognized that death threats and resulting mental injury establish torture as a matter of law and that claims of torture need not involve lasting physical harm. For example, the plaintiffs in Mehinovic v. Vuckovic, 198 F. Supp. 2d at 1346, testified that they feared that they would be killed by the

defendant when he beat them, and each of them continued to suffer long-term psychological damage as a result of the ordeals they suffered. Accordingly, the Mehinovic court held that:

[m]ental torture consists of prolonged mental harm caused by or resulting from: the intentional infliction or threatened infliction of severe physical pain or suffering; the threat of imminent death; or the threat that another person will imminently be subjected to death, [or] severe pain or suffering.

Thus, United States precedent is in accord with international law in recognizing that a plaintiff adequately states a claim for torture when s/he alleges severe mental pain or suffering inflicted in order to coerce the plaintiff to do something. Given the established international and domestic definition of torture, plaintiffs in ATCA and TVPA cases state a claim for torture so long as they allege severe pain or suffering, whether physical or mental. Furthermore, because allegations of repeated death threats standing on their own establish a claim for mental torture, it is not necessary to allege accompanying extreme physical mistreatment or permanent physical harm.

II. A PLAINTIFF'S CLAIM OF TORTURE MAY ESTABLISH AN ALTERNATIVE CLAIM OF CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT.

The prohibition against cruel, inhuman or degrading treatment or punishment is equally recognized under international law. According to the RESTATEMENT (THIRD), supra at § 702(d), a state violates international law if, as a matter of state policy, it practices, encourages, or condones cruel, inhuman, or degrading treatment or punishment. A claim of cruel, inhuman or degrading treatment or punishment may be closely related to a claim of torture. Determination of whether torture or other cruel, inhuman or degrading treatment or punishment has occurred requires an assessment of all the circumstances surrounding the claim, including the form and duration of mistreatment, the level of suffering, the physical and mental status of the victim, and the purpose of the perpetrator.

A. International Law Recognizes The Close Relationship Between Torture And Cruel, Inhuman Or Degrading Treatment Or Punishment.

All major human rights instruments contain the international prohibition against cruel, inhuman or degrading treatment or punishment.³ For example, Article 16(1) of the Convention against Torture prohibits cruel, inhuman or degrading treatment:

[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

See also Universal Declaration of Human Rights, supra at art. 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”); ICCPR, supra at art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”).

On numerous occasions, the Human Rights Committee has affirmed the prohibition against cruel, inhuman or degrading treatment or punishment.⁴ See, e.g., Tshishimbi v. Zaire, Communication No. 542/1993, U.N. Doc. CCPR/C/53/D/542/1993 (1996) (abducting petitioner and incommunicado detention constituted cruel and inhuman treatment); Mukong v. Cameroon,

³ The prohibition against cruel, inhuman or degrading treatment is also recognized in regional human rights instruments. For example, the American Convention on Human Rights provides that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.” American Convention, supra at art. 5. The European Convention for the Protection of Human Rights and Fundamental Freedoms provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” European Convention, supra at art. 3. Furthermore, the African Charter on Human and Peoples’ Rights provides that “[a]ll forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.” African Charter, supra at art. 5.

⁴ Regional human rights enforcement mechanisms are in accord with findings of the Human Rights Committee. The Inter-American Commission on Human Rights has found several acts to constitute cruel, inhuman or degrading treatment. See, e.g., McKenzie v. Jamaica, Case No. 12.023 (2000) (keeping prisoners in overcrowded conditions for 23 hours a day with inadequate sanitation, poor lighting and ventilation constituted cruel, inhuman and degrading treatment); Valladares v. Ecuador, Case No. 11.778 (1998) (holding petitioner incommunicado for more than 22 days constituted cruel, inhuman or degrading treatment); Congo v. Ecuador, Case No. 11.427 (1998) (holding detainee in a small isolated cell constituted inhuman and degrading treatment). In addition, the African Commission on Human and Peoples’ Rights has also established that various actions constitute cruel, inhuman or degrading treatment. See, e.g., Media Rights Agenda v. Nigeria, Comm. No. 224/98 (2000) (chaining detainee to the floor day and night in solitary confinement constituted cruel, inhuman or degrading treatment); Huri-Laws v.

Communication No. 458/1991, U.N. Doc. Supp. No. 40 (A/49/40) (1994) (incommunicado detention, depriving petitioner of food, and threatening with torture and death constituted cruel, inhuman and degrading treatment). The Committee has found that physical beatings that fall short of torture can constitute cruel and inhuman treatment. See Henry v. Trinidad and Tobago, Communication No. 752/1997, U.N. Doc. CCPR/C/64/D/752/1997 (1999) (detainee beaten on the head, requiring stitches).

A close relationship exists between torture and cruel, inhuman or degrading treatment or punishment. Finders of fact measure the difference between these two violations of international law by exploring the severity of the act and the degree of suffering. “Degrading treatment” consists of actions tending to humiliate the victim, and “inhuman treatment” is the deliberate infliction of mental or physical suffering. In comparison, torture constitutes a more aggravated form of severe physical or mental suffering. See generally Nigel S. Rodley, The Treatment of Prisoners under International Law 77-78 (2d ed. 1999) (“[f]or torture to occur, a scale of criteria has to be climbed. First, the behavior must be degrading treatment; second, it must be inhuman treatment; and third, it must be an aggravated form of inhuman treatment, inflicted for certain purposes”). In addition, torture requires the specific intent to obtain information or a confession or to punish or coerce an individual. Cruel, inhuman or degrading treatment or punishment does not require this mental element. Id. at 84-85.

The European Court of Human Rights has adjudicated the distinction between torture and cruel, inhuman or degrading treatment or punishment. In so doing, it has recognized that determinations of whether torture or other inhuman or degrading treatment have occurred depend on the unique circumstances of the case and the status of the individual victim. See, e.g., Tyrer

Nigeria, Comm. No. 225/98 (2000) (detaining petitioner in a dirty cell without charges and without access to medical attention constituted cruel, inhuman or degrading treatment).

Case, 2 E.H.R.R. 1 (1978). According to its decisions, the distinction between torture and inhuman or degrading treatment derives principally from a difference in the intensity of the suffering inflicted. Ireland v. United Kingdom, 2 E.H.R.R. 25, 80 (1979). The word “torture” attaches a special stigma to deliberate treatment causing very serious and cruel suffering of particular intensity. Id. The European Court has found various acts to constitute inhuman or degrading treatment. See, e.g., Ribitsch v. Austria, 21 E.H.R.R. 573 (1996) (beatings and abuse administered by police constituted inhuman and degrading treatment); Assenov v. Bulgaria, 28 E.H.R.R. 652 (1998) (bruises received from beating would have been sufficient for article 3 violation if petitioner had proved state action); Ireland v. United Kingdom, 2 E.H.R.R. 25 (1979) (use of five interrogation techniques consisting of wall-standing, hooding, subjection to noise, sleep deprivation, and deprivation of food and water constituted inhuman and degrading treatment).

B. The United States Recognizes The International Prohibition Against Cruel, Inhuman And Degrading Treatment Or Punishment, As Well As Its Close Relationship To Torture.

Through legislation and judicial decisions, the United States has fully implemented the international prohibition against cruel, inhuman or degrading treatment or punishment. Congress has adopted legislation that recognizes the prohibition against cruel, inhuman or degrading treatment or punishment as a human right. See 22 U.S.C. § 262d(a)(1) (stating U.S. policy is to channel international assistance away from countries that practice cruel, inhuman or degrading treatment); 22 U.S.C § 2151(n) (prohibiting development assistance to countries that practice cruel, inhuman or degrading treatment); 22 U.S.C. § 2304 (prohibiting security assistance to countries that practice cruel, inhuman or degrading treatment); 7 U.S.C. § 1733 (prohibiting agricultural commodities to countries that practice cruel, inhuman or degrading treatment).

In addition, U.S. courts have also recognized the international prohibition against cruel, inhuman or degrading treatment or punishment. See, e.g., Mehinovic, 198 F. Supp. 2d at 1344 (cruel, inhuman or degrading treatment is well-recognized violation of customary international law). See also Wiwa, 2002 U.S. Dist. LEXIS at *21; Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1362 (S.D. Fla. 2001); Jama v. U.S. Immigration and Naturalization Service, 22 F. Supp.2d 353, 363 (D.N.J. 1998); Doe v. Islamic Salvation Front, 993 F. Supp. at 8; Xuncax, 886 F. Supp. at 187; Paul, 901 F. Supp. at 330.

U.S. courts have expressly recognized the close relationship between torture and cruel, inhuman and degrading treatment or punishment. For example, in Mehinovic, 198 F. Supp. 2d at 1348 n.33, the court stated that “[c]ruel, inhuman or degrading treatment includes acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which do not rise to the level of ‘torture,’ or do not have the same purposes as torture.” There, the court found a cause of action for cruel, inhuman and degrading treatment or punishment based on a plaintiff’s allegations that he was subjected to a game of “horse,” in which anti-Muslim sentiments were shouted at him as he was beaten and forced to carry a co-plaintiff on his back. Id.

Furthermore, the court in Tachiona v. Mugabe, 234 F. Supp. 2d 401, 437 (S.D.N.Y. 2002), explained that, “various authorities and international instruments make clear that this prohibition is conceptually linked to torture by shades of misconduct discernable as a continuum. The gradations of the latter are marked only by the degrees of mistreatment the victim suffers, by the level of malice the offender exhibits and by evidence of any aggravating or mitigating considerations.” In Tachiona, the court found a cause of action based on plaintiffs’ allegations that they were bound and gagged and forced to ride around in a vehicle for hours, being dragged

down the street in front of loved ones and neighbors, and being placed in fear of impending death. Id. at 435.

Based on this established link between the two offenses and the fact that the two causes of action often entail similar factual allegations, federal district courts cannot neglect to assess a plaintiff's claim for cruel, inhuman or degrading treatment or punishment, even if the court finds that the plaintiff has not established a claim for torture. A claim of cruel, inhuman or degrading treatment or punishment exists independently of a claim of torture, and a plaintiff states such a claim if s/he alleges that s/he has been subjected to humiliating or dehumanizing treatment, or has been inflicted with mental or physical suffering falling short of a claim of torture.

III. A CLAIM OF ARBITRARY DETENTION DOES NOT REQUIRE A PROLONGED DETENTION OR ABUSIVE TREATMENT OF THE DETAINEE.

Few concepts are more fundamental to the principle of ordered liberty than the right to be free from arbitrary detention. This basic human right has been recognized by almost every multilateral and regional human rights agreement of the twentieth century and has also been affirmed in both national and international fora. According to the RESTATEMENT (THIRD), arbitrary detention constitutes a violation of customary international law. RESTATEMENT (THIRD), supra at § 702(e). Detention is arbitrary “if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person.” Id. at § 702 cmt. (h).

In statements before international tribunals, the United States has recognized that arbitrary detention is a violation of international law. For example, in the case involving the seizure of the U.S. embassy in Tehran, the United States argued before the International Court of Justice that arbitrary detention is contrary to fundamental international norms. The International Court of Justice agreed, ruling that, “[t]o deprive human beings of their freedom and to subject

them to physical constraint...is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.” Case Concerning United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 42, at para. 91 (1980).

A. Under International Law, The Prohibition Of Arbitrary Detention Does Not Contain A Temporal Element.

The International Covenant on Civil and Political Rights provides that “[e]veryone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” ICCPR, supra at art. 9(1). Significantly, Article 9(5) adds that “[a]nyone who has been the victim of an unlawful arrest or detention shall have an enforceable right to compensation.” The Human Rights Committee has stated that Article 9 is applicable to all unlawful deprivations of liberty. Human Rights Committee, General Comment No. 8 (1982).

The prohibition against arbitrary detention is not limited by any temporal component. The Working Group on Arbitrary Detention does not focus on the length of the detention in determining whether a deprivation of liberty is “arbitrary.” Rather, it solely considers whether the detention falls within one of the three categories set forth in its mandate. See, e.g., Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2002/77/Add.1 (2001). These three categories include: (1) when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty; (2) when the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by international human rights agreements; and (3) when the total or partial non-observance of international norms relating to the right to a fair trial is of such gravity as to give the deprivation of liberty an arbitrary character. See Report of the Working Group on

Arbitrary Detention, U.N. Doc. E/CN.4/1998/44 (1997).

Based on these standards, claims of arbitrary detention may be established even in cases of detention lasting less than 24 hours. The Human Rights Committee, for example, has identified violations of Article 9 of the ICCPR in cases where the petitioner was detained for a relatively “short” period of time. See, e.g., Spakmo v. Norway, Communication No. 631/1995, U.N. Doc. CCPR/C/67/D/631/1995 (1999) (detention of approximately 8 hours); Tshionga a Minanga v. Zaire, Communication No. 366/1989, U.N. Doc. CCPR/C/49/D/366/1989 (1993) (detention of approximately 18 hours).

Regional tribunals have made similar findings. In Quinn v. France, 21 E.H.R.R. 529 (1995), for example, the petitioner was detained by French authorities for a period of 11 hours in the absence of lawful authority. The European Court determined that this detention was in violation of Article 5 of the European Convention. See also Litwa v. Poland, 33 E.H.R.R. 1267 (2000) (detention of six hours and thirty minutes constituted a violation of Article 5 even where detention was a “lawful” option under domestic law, but unnecessary under the circumstances). The Inter-American Commission on Human Rights has made similar determinations. In Loren Laroye Riebe Star v. Mexico, three individuals residing in Mexico were detained without access to a lawyer or judicial remedies, each for periods of less than 24 hours. They were then summarily removed from Mexico. According to the Inter-American Commission, these detentions were arbitrary and in violation of Article 7 of the American Convention. Loren Laroye Riebe Star v. Mexico, Case 11.610, Inter-Am. C.H.R. Report No. 49/99 (1999), at para. 41.

B. United States Precedent Recognizes The International Prohibition Against Arbitrary Detention And Acknowledges That It Is Not Dependent On A Temporal Element.

U.S. courts have repeatedly held that arbitrary detention violates international law and is therefore actionable under the ATCA. See, e.g. Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998) (stating that “there is a clear international prohibition against arbitrary arrest and detention.”). See also Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001); Mehinovic, 198 F. Supp. 2d at 1349; Wiwa, 2002 U.S. Dist. LEXIS at *17; Xuncax, 886 F. Supp. at 184; Paul, 901 F. Supp. at 330; Siderman de Blake, 965 F.2d at 717; Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988); Forti v. Suarez-Mason, 672 F. Supp. at 1541; Fernandez-Roque v. Smith, 622 F. Supp. 887, 903 (D.C. Ga. 1985).

While most cases before U.S. courts have involved claims of extended arbitrary detention, the courts have not established a rigid temporal requirement in keeping with international law standards. Recently, the Ninth Circuit, while assessing whether arbitrary detention contains a mandatory temporal element, stated that, “[w]e can divine no such requirement in our precedent or in the applicable international authorities. Rather, as the language of the international instruments demonstrates, the norm is universally cited as one against “arbitrary” detention and does not include a temporal element.” Alvarez-Machain v. United States, 331 F.3d 604, 621 (9th Cir. 2003) (*en banc*), *cert. granted*, 124 S. Ct. 821 (2003). The court in Alvarez found that, at most, the length of detention is but one factor in evaluating whether a plaintiff has stated an actionable violation of international law. See id. at 622. Consistent with international law, this jurisprudence establishes that there is no freestanding temporal requirement, nor any “magical time period” that triggers a violation of the prohibition on arbitrary detention. Id.

Similarly, other U.S. courts have recognized that claims of arbitrary detention may arise, even if a plaintiff is detained for periods of less than 24 hours. For example, the court in Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1094 (S.D. Fla. 1997), declined to determine whether international law requires arbitrary detention to be “prolonged,” and noted the difficulty in applying such a standard. That court stated that, “[i]t would be preposterous to imagine that the success or failure of [a] tort claim should depend upon how long a [plaintiff] waited.” Id. Furthermore, in Paul, 901 F. Supp. at 330, the district court awarded compensatory and punitive damages to an individual who was detained for less than ten hours.

While the RESTATEMENT (THIRD) § 702(e) indicates that “prolonged” arbitrary detention is a violation of international law, the subsequent commentary, which simply states that, “[d]etention is arbitrary if it is unlawful or unjust,” indicates that a single, brief arbitrary detention may give rise to a violation. See id. at cmt. 6. Given the unambiguous nature of the relevant treaty provisions as well as the various tribunal rulings on this matter, no basis exists for adding a temporal component to arbitrary detention as was done by the District Court in this case.

C. Arbitrary Detention Alone Is Independently Actionable And Is Not Dependent On Aggravating Factors Such As Physical Mistreatment.

Arbitrary detention, standing on its own, violates the law of nations. Thus, in order to state a claim for arbitrary detention, plaintiff need only allege that s/he was detained without legal basis. A plaintiff need not also allege physical mistreatment or abject conditions of detention. None of the above-mentioned cases requires plaintiffs to demonstrate abusive treatment or another accompanying human rights violation as a required element of an arbitrary detention claim under the ATCA. The gravamen of the violation is not an amorphous set of aggravating factors, but rather the unlawful deprivation of liberty standing on its own.

Accordingly, courts must undertake an independent assessment of a plaintiff's claim of arbitrary detention. Such an evaluation must include an examination of whether the detention was pursuant to law, as well as other factors including whether the detention was accompanied by notice of charges, whether the person detained was given the opportunity to communicate with family or consult counsel, or whether he was brought to trial within a reasonable time. See Martinez, 141 F. 3d at 1384.

CONCLUSION

For all of the foregoing reasons, *amici curiae* respectfully urge the court to reverse the Order Granting Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction. In order to sufficiently plead claims of torture; cruel, inhuman or degrading treatment or punishment; or arbitrary detention, plaintiffs need not meet the heightened standards applied by the District Court. Rather, plaintiffs must state facts that meet the well-established international and domestic definitions of those torts, as they have here.

Respectfully submitted this 31st day of March, 2004 on behalf of the Center for Justice and Accountability and law professors named above by:

Matthew J. Eisenbrandt, Esq.
The Center for Justice and Accountability
870 Market Street, Suite 684
San Francisco, CA 94102
(415) 544-0444

Beth Van Schaack, Esq.
Kimberly N. Pederson, Law Student
Santa Clara University School of Law
500 El Camino Real
Santa Clara, CA 95053
(408) 554-2349

William J. Aceves, Esq.
California Western School of Law
225 Cedar St.
San Diego, CA 92101
(619) 515-1589

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. Proc. 32(a)(7)(B). This brief contains 5,543 words.

I further certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

March 31, 2004

Matthew J. Eisenbrandt, Esq.
The Center for Justice and Accountability
870 Market Street, Suite 684
San Francisco, CA 94102
(415) 544-0444

Beth Van Schaack, Esq.
Kimberly N. Pederson, Law Student
Santa Clara University School of Law
500 El Camino Real
Santa Clara, CA 95053
(408) 554-2349

William J. Aceves, Esq.
California Western School of Law
225 Cedar St.
San Diego, CA 92101
(619) 515-1589

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury that:

On March 31, 2004, I served a true copy of the following document:

**BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' APPEAL OF THE
DISTRICT COURT'S ORDER GRANTING MOTION TO DISMISS FOR LACK
OF SUBJECT MATTER JURISDICTION**

by first class mail on the following persons:

Thomas K. Kahn, Clerk
United States Court of Appeals for the Eleventh Circuit
56 Forsyth St. N.W.
Atlanta, GA 30303

Attorney for Defendant:

Brian J. Stack, Esq.
Stack Fernandez Anderson & Harris, P.A.
1200 Brickell Avenue, Suite 950
Miami, FL 33131

Executed in San Francisco, CA on March 31, 2004.

Matthew J. Eisenbrandt, Esq.
The Center for Justice and Accountability
870 Market Street, Suite 684
San Francisco, CA 94102
(415) 544-0444