No. 12-976

IN THE

Supreme Court of the United States

DONALD VANCE AND NATHAN ERTEL,

Petitioners,

v.

DONALD RUMSFELD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* JUAN E. 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 *Vance v. Rumsfeld* 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, and act on information from numerous sources, including individuals, regarding issues and alleged cases concerning torture and other cruel, inhuman, or degrading treatment or punishment.

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1. Counsel of record for all parties have consented to the filing of this *amicus curiae* brief. 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.

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 directed the Inter-American Institute on Human Rights in San Jose, Costa Rica (1996-1999) and worked for Human Rights Watch (1982-1996).

He teaches human rights at American University in Washington D.C. and at Oxford University in the United Kingdom. He previously taught at Notre Dame Law School, Georgetown, and Johns Hopkins.

SUMMARY OF THE ARGUMENT

Petitioners in this case are American citizens who allege that they were detained, held incommunicado, and tortured by agents of the United States government. Torture is among the gravest crimes imaginable, and no justification or excuse may permit its use. The United States has voluntarily undertaken to be bound by

international instruments, including the International Covenant on Civil and Political Rights ("ICCPR") and the Convention against Torture ("CAT"), both of which forbid the use of torture and other cruel, inhuman, or degrading treatment (commonly called and hereinafter, "other ill-treatment") and require adequate remedies to redress harm to victims. The United States in fact has recognized its obligations to provide redress under international law by affording civil remedies to victims of torture who are aliens. In stark contrast, the denial of any possibility of a remedy to petitioners in this case violates the United States' international obligations and is out of step with the practices of both the international community and the United States itself.

I. The unconditional prohibition against torture is a universally recognized precept of international law. Like the prohibitions against piracy, slavery, and genocide, no circumstances may justify its use. The United States is a party to multiple, binding agreements—including the ICCPR and the CAT—that forbid torture under all circumstances, and require parties to them to prohibit its use and provide redress to victims. Independent of treaty obligations, torture is a universally condemned crime that is contrary to peremptory norms of international law. International humanitarian law, which is embodied in the Geneva Conventions and governs in cases of armed conflict, also prohibits torture without exception.

II. The United States must provide adequate remedies to victims of torture and other ill-treatment in order to satisfy its obligations under international law, including the ICCPR and CAT. These treaties require adequate redress to victims of torture and other ill-treatment—

including, where necessary, compensation through damages remedies. Such remedies are necessary to deter acts of torture and make victims whole. The truth-telling function of civil review also helps prevent future harms and empower and rehabilitate victims. To comply with its international obligations, the United States must ensure that official acts amounting to torture or other ill-treatment cannot be committed with impunity. Such impunity is especially dangerous when possessed by high government officials. Yet the rule of immunity created by the court below is in fact a rule of impunity, effectively precluding any review of the decisions of American officials to subject American citizens to torture.

This failure to provide a remedy is anomalous. Other nations provide adequate remedies for victims of torture, including, in some instances, significant damages against those responsible for its commission. Furthermore, in other arenas the United States has recognized the need to provide review of alleged torture and redress to victims. In particular, the United States permits damages remedies to aliens tortured by other governments, and arguably recognizes a remedy to aliens for torture or other ill-treatment committed by agents of the United States itself. In short, contrary to pledges made by the United States to the United Nations regarding available remedies for torture, the decision below creates an unusual patchwork of remedies in the United States, one that carves out a unique category of victims for whom the U.S. courts will provide no relief: American citizens tortured by their own government. This decision is inconsistent with international agreements and international norms, and should not stand.

ARGUMENT

I. INTERNATIONAL LAW ABSOLUTELY FORBIDS TORTURE IN ALL CIRCUMSTANCES

Torture is unequivocally prohibited by international law, and no exceptional circumstances may justify its use. This is reflected in numerous multilateral treaties and instruments to which the United States is a party; universal, peremptory norms of customary international law; and international humanitarian law (the law of armed conflict).

A. Numerous International Instruments to Which the U.S. is a Signatory Prohibit Torture

The unconditional prohibition against torture and ill-treatment is recognized in a host of international instruments. This prohibition has been clear since the earliest statements of the United Nations on the subject. The Universal Declaration of Human Rights of 1948 provides, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[2]

The aspirational Universal Declaration was subsequently reinforced in binding, multilateral agreements to which the United States is a party. The 1966 International Covenant on Civil and Political Rights ("ICCPR"), to which the United States is a party,

2. Universal Declaration of Human Rights, art. 5, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., 1st Plen. Mtg. U.N. Doc. A/810 (Dec. 12, 1948).

repeats the language of the Universal Declaration.[3] The ICCPR makes clear that the rule forbidding torture is fundamental and inviolate. Indeed, although the ICCPR's Article 4 permits signatories to the ICCPR to take limited "measures derogating from their obligations" under the treaty in cases of "public emergency which threatens the life of the nation,"[4] the prohibition of torture is listed as one of few obligations from which derogation is never permitted, regardless of the circumstances.[5]

The Convention against Torture ("CAT"), to which the United States is also a party, further expounds upon the duty of states to refrain from, prohibit, and deter torture. The CAT reiterates that torture is absolutely forbidden and that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[6] The CAT requires that

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3. International Covenant on Civil and Political Rights, art. 7, *opened for signature* Dec. 16, 1966, S. Exec. Doc. C, D, E, F, 95-2 (1978), 999 U.N.T.S. 171 ("ICCPR").

4. *Id.* art. 4(1)

5. *Id.* art. 4(2). The other non-derogable obligations listed in Article 4(2) of the ICCPR are its prohibitions of arbitrary executions and deprivations of the right to life; slavery; the use of debtors' prisons; the imposition of ex post facto laws; and its guarantees that everyone has a right to be recognized as a person before the law and to exercise freedom of thought, conscience, and religion. *Id.*

6. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(2), *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, ("CAT").

each party to the Convention "ensure that education and information regarding the prohibition against torture" are provided to all civilian and military personnel "involved in a custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment."[7] Furthermore, the CAT obligates parties to criminalize torture, prosecute any torturer within their territory, and provide redress and compensation to victims.[8] Although upon ratification of the ICCPR and CAT, the United States entered certain reservations, understandings, and declarations, none of them affected its obligation to absolutely prohibit torture or other ill-treatment and to provide effective remedies.[9]

Other international and regional instruments reflect the international community's unequivocal denunciation of torture. Among such agreements are the American Convention on Human Rights,[10] the European Convention on for the Protection of Human Rights and Fundamental

7. *Id.* art. 10(1).

8. *Id.* arts. 4(1), 5(1)-(2), 7(1) & 14(1).

9. U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992); U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).

10. American Convention on Human Rights, art. 5.2, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, ("ACHR"). The United States has signed, but not ratified, the ACHR.

Freedoms,[11] and the African Charter on Human and Peoples' Rights.[12] None of these treaties allow signatory nations to justify or excuse torture or other ill-treatment based on exceptional circumstances.[13]

B. Customary International Law and International Humanitarian Law Prohibit Torture

Customary international law also prohibits torture under all circumstances. Indeed, the prohibition of torture is so universally recognized as to be considered *jus cogens*, a peremptory norm of customary international law of "superior status" to which all nations are considered to have assented and to which they are bound.[14] In this respect, torture is included in the ranks of the gravest and most heinous offenses rejected by all civilized nations, such

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11. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, *entered into force* Sept. 3, 1953, 213 U.N.T.S. 222 ("ECHR").

12. African [Banjul] Charter on Human and Peoples' Rights, art. 5, *opened for signature* June 27 1981, 1520 U.N.T.S. 217.

13. Like the ICCPR, the ECHR allows parties to derogate from their obligations in times of war or public emergency, but does not permit derogation from certain obligations, like those to refrain from torture or slavery. ECHR art. 15.

14. *See, e.g.*, Restatement (Third) of Foreign Relations Law of the United States § 331 cmt. e (1987) (explaining the "superior status" of peremptory norms under international law); *id.* § 702(d) & cmt. n (recognizing the *jus cogens* status of the prohibition of torture).

as slavery, genocide, or piracy.[15] The Committee against Torture, a body of independent experts charged with interpreting and monitoring implementation of the CAT,[16] confirms that the CAT reflects existing peremptory norms of international law: "Since the adoption of the Convention against Torture, the absolute and non-derogable character of this prohibition has become accepted as a matter of customary international law. The provisions of [CAT] article 2 reinforce this peremptory *jus cogens* norm against torture …."[17]

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15. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762-63 (2004) (Breyer , J., concurring in part and concurring in the judgment) (discussing international consensus condemning piracy, genocide, and torture); *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) ("[T]he torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind."); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (acknowledging "*jus cogens* norm of international law condemning official torture"); *Regina v. Bow Street Metro. Stipendiary Magistrate Ex Parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147, 198 (H.L.) ("The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed."); Restatement (Third) of Foreign Relations Law of the United States § 702 (listing human rights offenses under customary international law, including genocide, slavery, forced disappearances, and torture or other ill-treatment).

16. *See* Office of the United Nations High Commissioner for Human Rights, Committee against Torture, http://www2.ohchr.org/english/bodies/cat (last visited Feb. 20, 2013).

17. Comm. against Torture, General Comment No. 2: Implementation of article 2 by States parties, ¶ 1, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) ("CAT, GC 2").

International humanitarian law, which governs in cases of armed conflict, unequivocally forbids torture as well. Each of the four Geneva Conventions[18] prohibits torture. Common Article 3, which appears identically in each of the four Geneva Conventions, provides that torture "shall remain prohibited at any time and any place whatsoever." Acts of torture committed against protected individuals are deemed to be a "grave breach" of the Conventions. Such a grave breach may be punished as a war crime under international law.[19] This prohibition is also reflected in the War Crimes Act of 1996, which provides that grave breaches of Common Article 3, including torture, are war crimes under U.S. law.[20]

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18. The United States is a party to all four Geneva Conventions. The four Geneva Conventions respectively concern wounded and sick combatants on land, wounded and sick combatants at sea, prisoners of war, and civilians in wartime. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 12, Aug. 12 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, art. 12, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 32, Aug. 12, 1949; 6 U.S.T. 3516, 75 U.N.T.S. 287.

19. Rome Statute of the International Criminal Court, art. 8(2)(a)(ii), 8(2)(c)(i), July 17, 1998, 2187 U.N.T.S. 90.

20. Pub. L. 104-192, § 2(a), 110 Stat. 2104 (codified as amended at 18 U.S.C. § 2441).

II. CIVIL REMEDIES ARE NECESSARY TO FULFILL THE UNITED STATES' OBLIGATIONS WITH RESPECT TO TORTURE AND OTHER ILL-TREATMENT

Official prohibitions and even criminal sanctions of torture are insufficient to fulfill the United States' obligations under international law. Civil remedies that are effective and available in practice, including adequate compensation to victims of torture or ill-treatment, are necessary to ensure that the United States complies with international law. Only by providing such remedies can states ensure that the legal prohibition against torture and other ill-treatment is a practical reality. Other nations recognize this fact by providing a full panoply of review mechanisms and civil remedies to victims of alleged torture. In other contexts the United States, too, affords civil remedies to non-citizens who are victims of torture. The decision below is anomalous in that it denies a remedy to American citizens that other nations provide and that the United States provides in its courts for non-citizens.

A. International Law Requires Adequate Remedies, Including Damages, to Ensure the Prevention of Torture

Both the ICCPR and the CAT require States Parties to provide adequate remedies for violations of their provisions. The ICCPR provides that each State Party to the Covenant must undertake:

> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities … and to develop the possibilities of judicial remedy; [and]
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.[21]

Similarly, the CAT provides:

> Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.[22]

The obligation to provide an adequate remedy reflects the practical reality that the prevention and deterrence of torture and the rehabilitation of victims is only possible through review and adequate redress.

1) Civil remedies deter torture, make victims whole, and serve a valuable truth-telling function

The right to redress enshrined in the ICCPR and the CAT serves several important purposes. The Committee against Torture has noted that the "redress" for victims required by Article 14 of the CAT "encompasses the

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21. ICCPR art. 2(3).

22. CAT art. 14(1).

concept of 'effective remedy' and 'reparation.'"[23] Effective civil remedies are needed for several reasons.

First, civil remedies serve an important function in deterring future violations. In 2005, the U.N. General Assembly adopted 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 ("Basic Principles"), which represent "existing legal obligations under international human rights law and international humanitarian law."[24] These Basic Principles emphasize the importance of deterrence and provide that remedies to redress gross violations must include "[e]ffective measures aimed at the cessation of continuing violations."[25]

Second, civil remedies are necessary to make victims of torture and other ill-treatment whole. The Committee against Torture has instructed parties to the CAT that the right to redress under Article 14 includes "fair and adequate compensation for torture or other ill-treatment" and "should be sufficient to compensate for any

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23. Comm. against Torture, General Comment No. 3: Implementation of Article 14 by States Parties, ¶¶ 2, U.N. Doc. CAT/C/GC/3 (Nov. 19, 2012) ("CAT, GC 3").

24. G.A. Res. 60/147, U.N. Gaor. 60th Sess., U.N. Doc. A/RES/60/147 (Mar. 21, 2006) ("Basic Principles").

25. *Id.* ¶ 22(a). *See also Gates v. Syrian Arab Republic*, 580 F. Supp. 2d 53, 74-75 (D.D.C. 2008) (awarding $150M in punitive damages to estates of men tortured and murdered by terrorist group supported by Syrian government "[i]n hopes that substantial awards will deter further Syrian sponsorship of terrorists").

economically assessable damage resulting from torture or ill-treatment, whether pecuniary or non-pecuniary."[26] The Basic Principles similarly emphasize the importance of monetary compensation to remedy "Physical or mental harm; Lost opportunities, including employment, education and social benefits; Material damage and loss of earnings, including loss of earning potential; [and] Moral damage."[27] Such remedies must be available not just in theory but in practice, and "States Parties [to the ICCPR] must ensure that individuals … have *accessible and effective remedies* to vindicate" their rights.[28]

Third, civil remedies, particularly judicial remedies, serve an important truth-telling function, facilitating both the restoration of the dignity of the victim and the guarantee of non-repetition. The Basic Principles call on nations to provide "[v]erification of the facts and full and public disclosure of the truth."[29] The denial of a remedy in many cases serves to shield the truth from the victim and the public. When acts of torture or other ill-treatment are brought to light, it helps educate the public, prevent future violations, and make the victim

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26. CAT, GC 3 ¶ 10.

27. Basic Principles ¶ 20.

28. Human Rights Comm., General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 15, U.N. Doc. No. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (emphasis added). The Human Rights Committee provides guidance and monitors compliance with the ICCPR. *See* Human Rights Comm., http://www2.ohchr.org/english/bodies/hrc/ (last visited Feb. 20, 2013).

29. Basic Principles, ¶ 22 (b).

whole. The Committee against Torture has emphasized the importance of "[s]atisfaction and the right to truth" as a part of redress to victims, including the possibility of "an official declaration or judicial decision restoring the dignity, the reputation and the rights of the victim" and "judicial and administrative sanctions against persons liable for the violations."[30] Only by bringing practices to light can nations ensure that victims receive "as full rehabilitation as possible," as required by the CAT,[31] and guarantee non-repetition.

Judicial remedies in particular help to ensure impartiality and empower the victim in the process of redress and rehabilitation. Reports of the Special Rapporteur on Torture consistently emphasize the importance of a victim-centered perspective that allows adequate recourse to the judicial process.[32] The ability of victims to actively participate in the remedial process is necessary for their full rehabilitation: "*Judicial remedies must always be available to victims*, irrespective of what other remedies may be available, and should enable victim participation."[33] "[T]he restoration of the dignity of the victim is the ultimate objective in the provision of

30. CAT, GC 3 ¶ 16.

31. CAT, art. 14(1).

32. *See* Juan E. Méndez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Statement to 16th session of the Human Rights Council, Agenda Item 3, at 2-3 (Mar. 7, 2010), *available at* http://www.ohchr.org/Documents/Issues/SRTorture/StatementHRC16SRTORTURE_March2011.pdf.

33. CAT, GC 3 ¶ 30 (emphasis added).

redress,"[34] and States Parties to the CAT fall short of their obligations by failing to provide victims the opportunity to be heard.

2) Remedies against supervisory officials are required to ensure that the prohibition against torture is effective

Remedies against high government officials for torture and other ill-treatment are critical to the prevention of such unlawful conduct. The Committee against Torture has emphasized that under the CAT, States Parties must ensure that supervisory officials are held accountable for acts of torture or other ill-treatment for which they are responsible:

> [T]hose exercising superior authority—including public officials—cannot avoid accountability ... for torture or other ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventative measures. *The Committee considers it essential that the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial prosecutorial and judicial authorities.*[35]

34. *Id.* ¶ 4.

35. CAT, GC 2 ¶ 26 (emphasis added).

A State Party's failure to hold responsible officials, including supervisory officials, accountable for culpable acts leading to torture or other ill-treatment undermines the strict prohibition against torture. A previous Special Rapporteur on Torture has noted with concern, "Impunity for the perpetrators of torture is one of the root causes for its widespread practice worldwide. To fight impunity it is important that States establish a legal framework that unambiguously prohibits and sanctions torture."[36] Such a legal framework must recognize that "[s]uperior officials who knew or should have known about torture practices of their personnel are guilty of complicity and/or acquiescence."[37] Deterrence requires that "superiors and the authorities directly responsible should be held accountable to bear the costs for as full rehabilitation as possible."[38] The Rapporteur noted that as a practical matter "the prevalence of impunity is the most common obstacle to the realization of the right to a remedy and adequate reparation of torture victims. *I am particularly concerned about laws and other measures that limit the legal responsibility of State officials for torture and other forms of ill-treatment of detainees* …."[39] For the same reasons, the Committee against Torture has noted,

36. Manfred Nowak, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including assessment of conditions of detention, ¶ 140, U.N. Doc. No. A/HRC/13/39/Add.5 (Feb. 5, 2010).

37. *Id.* ¶ 142.

38. *Id.* ¶ 167.

39. *Id.* ¶ 175 (emphasis added).

"To guarantee non-repetition of torture or ill-treatment, States parties should undertake measures to combat impunity for violations of the Convention."[40]

Similarly, the Human Rights Committee has noted that the failure to provide an effective remedy for human rights violations can amount to an amnesty for such violations. Such "[a]mnesties are generally incompatible with the duty of States to investigate [prohibited] 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 their right to an effective remedy, including compensation…."[41] The decision below insulates high government officials from liability for acts of torture for which they may be responsible, amounting to an amnesty.

Furthermore, as a practical matter, a lack of remedies against supervisory officials, including high government officials, frustrates the purposes of providing redress. In certain cases, particularly cases where the victim is held incommunicado, it may not be possible to identify the individual who physically inflicted torture or other ill-treatment on the victim, but supervisory officials who directed or acquiesced in such acts may be identifiable. In many cases, the valuable truth-seeking and truth-telling function of post hoc review may only be fully served in

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40. CAT, GC 3 ¶ 18.

41. Human Rights Comm., General Comment No. 20 concerning prohibition of torture and cruel treatment or punishment, ¶ 15 (Mar. 10, 1992), *available at* http://www2.ohchr.org/english/bodies/hrc/comments.htm; *see also* CAT, GC 3 ¶ 41 ("The Committee considers that amnesties for torture and ill-treatment pose impermissible obstacles to a victim in his or her efforts to obtain redress and contribute to a climate of impunity.").

an action or investigation against the supervisor rather than the subordinate. Proceedings against individual, subordinate torturers alone may not reveal the full scope of practices that violate international norms.

B. The Failure to Provide a Remedy to Petitioners in this Case is Anomalous

Given the United States' obligations to provide a forum to be heard and remedies to victims of torture and other ill-treatment, the decision of the Seventh Circuit to foreclose any path of relief for petitioners in this case is a derogation of the United States' obligations. Furthermore, it is contrary to the practice of other nations, international courts, and human rights commissions. The anomalous nature of the decision below is even more striking when compared to U.S. practices with regard to non-citizen victims of torture. Through the Alien Tort Statute and the Torture Victim Protection Act, the United States provides its courts as forums for aliens to seek damages for torture suffered at the hands of other governments, and the Detainee Treatment Act demonstrates congressional recognition of civil actions by aliens for torture committed by the U.S. government. Yet the decision below carves out one class of individuals for whom the United States will provide no protection or redress: American citizens tortured by the United States government.

1) The decision below is out of step with international practice

Other nations have incorporated the international obligation to refrain from, prohibit, and redress torture into their domestic laws, providing relief in the form of compensation to victims. Although the specific practices

of nations vary considerably, the process of inquiring into allegations of torture and other ill-treatment and providing monetary compensation to victims is not uncommon. The examples of the means by which other nations fulfill their obligation to provide redress for victims of torture and other ill-treatment listed herein are representative and not exhaustive.

The United Kingdom, for instance, incorporates such obligations through its Human Rights Act of 1988.[42] Section 8(1)-(4) creates civil damages remedies against public authorities, and specifically directs courts to take into account Article 41 of the ECHR, which calls for just satisfaction to the injured party.[43] The Constitutional Court of South Africa has authorized a constitutional civil damages remedy for victims of torture.[44] The New Zealand Bill of Rights Act of 1990 prohibits acts of torture,[45] and provides standing to individuals to seek judicial review through civil proceedings.[46] In many Latin American countries, the *amparo* action is a means of judicial review to redress human rights violations and provide remedies to

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42. Human Rights Act, 1988, c. 42 (U.K.).

43. Civil cases brought on behalf of six men allegedly detained and mistreated in Guantanamo Bay were allowed to proceed by the U.K. courts, which recognized the complicity of the U.K. in their treatment. The cases settled, with at least one victim receiving over one million pounds. *See* Patrick Wintour, "Guantanamo Bay Detainees to be Paid Compensation by U.K. Government," THE GUARDIAN, Nov. 15, 2010.

44. *See Fose v. Minister of Safety & Security*, 1997 (3) SA 786 (CC) ¶¶ 57-61.

45. Bill of Rights Act of 1990, § 9 (N.Z.).

46. *Id.* § 27

victims. Such *amparo* actions "against individuals ha[ve] been broadly admitted in Latin America."[47]

International practice reveals numerous examples of substantial monetary remedies to victims of torture. The Canadian government, for instance, has employed the findings of a Commission of Inquiry into the responsibility of Canadian officials with respect to allegations of torture and ill-treatment in the case of Maher Arar, a Canadian citizen. The Commission investigated and found substantiated allegations that Arar had been detained and sent to Syria, where he was tortured.[48] After the Commission's findings, Prime Minister Stephen Harper issued a public apology to Arar and his family for Canada's responsibility for his treatment, and announced that the government had arrived at a settlement of $10.5 million, plus legal costs, to compensate Arar for his injuries.[49] Other nations and international tribunals have similarly provided substantial monetary compensation

47. *See* Allan R. Brewer-Carias, *Aspects of the "Amparo" Proceeding in Latin America as a Constitutional Judicial Mean Specifically Established for the Protection of Human Rights*, at 20, Paper presented at the Colloquium in International and Comparative Law, University of Maryland School of Law, Baltimore, October 2007, *available at* http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1001&context=iclc_papers.

48. Comm. of Inquiry, *Report of the Events Relating to Maher Arar* (2006), *available at* http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf.

49. Stephen Harper, Prime Minister of Canada, "Prime Minister releases letter of apology to Maher Arar and his family and announces completion of mediation process" (Jan. 26, 2007), *available at* http://www.pm.gc.ca/eng/media.asp?id=1509 (last visited Feb. 20, 2013).

for substantiated allegations of torture or other ill-treatment.[50]

2) Under the decision below, the United States courts deny relief to American citizens who are victims of torture that is provided to aliens

The United States, through the Torture Victim Protection Act of 1991 ("TVPA"),[51] permits damages actions in U.S. courts against a person acting under the authority or color of law of a foreign nation who commits torture, if no adequate remedy is available in the nation where the torture occurred. Additionally, the Alien Tort Statute[52] has frequently been invoked by victims of torture overseas to hold perpetrators accountable in damages actions in the U.S. federal courts.[53] In enacting

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50. *See, e.g.*, *El-Masri v. Macedonia*, (Eur. Ct. on H.R. Dec. 13, 2012) (awarding 60,000 Euros to victim of extraordinary rendition and torture), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621; *Velasquez Rodriguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 52 (Jul. 21, 1989) (ordering payment of 250,000 lempiras to next of kin of victim of torture); Comm. against Torture, *Kepa Urra Guridi v. Spain*, ¶¶ 2.3, 6.8, U.N. Doc. CAT/C/34/D/212/2002 (2005) (Spanish government ordered compensation of 500,000 pesetas to victim of torture).

51. Pub. L. 102-256, 106 Stat. 73 (1992) (codified as note to 28 U.S.C. § 1350).

52. 28 U.S.C. § 1350.

53. *See, e.g.*, *Filartiga*, 630 F.2d at 889-90; *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1472-76 (9th Cir. 1994); *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995);

the TVPA, Congress unambiguously endorsed the practice of federal courts hearing claims of foreign nationals for civil damages arising out of torture committed overseas.[54] Indeed, the TVPA was enacted in part to ensure that the United States fulfilled its obligation under the CAT to "adopt measures to ensure that torturers are held legally accountable for their acts" through "civil redress."[55]

Furthermore, the Detainee Treatment Act of 2005[56] grants a limited, good faith immunity to U.S. officers and employees in civil actions or criminal prosecutions "that involve detention and interrogation of aliens" believed to pose a threat of terrorist activity.[57] Although the availability of such a remedy has not been recognized by

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Abebe-Jira v. Negewo, 72 F.3d 844, 846-48 (11th Cir. 1996); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250-53 (11th Cir. 2005).

54. *See* H.R. Rep. No. 367, 102d Cong., 2d Sess. 3, *reprinted in* 1992 U.S.C.C.A.N. 84, 86 ("The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act), which permits Federal district courts to hear claims by aliens for torts committed 'in violation of the law of nations.'").

55. *Id.* at 85-86.

56. Pub. L. 109-148, 119 Stat. 2680, 2740-44.

57. 42 U.S.C. § 2000dd-1(a). Such immunities are disfavored by the Committee against Torture to the extent they provide impunity for acts of torture. CAT, GC 3, ¶ 42. Whether the Detainee Treatment Act creates impunity in practice is not at issue here. The relevant consideration is that by providing such immunity, Congress recognized the availability of civil remedies to aliens alleging mistreatment by U.S. officials.

U.S. courts, Congress's decision to provide an immunity for a civil action by aliens implies its understanding that the right to bring a civil action exists in the first place, and that civil remedies are available to aliens who suffer torture or other ill-treatment while detained by the United States.

The United States has thus opened the doors of its courts to foreign nationals who have been victims of torture. This practice is laudable and consistent with its obligations under international law. The relief provided by U.S. law is incomplete, however, due to the failure to provide a remedy to *all* victims of torture or other ill-treatment within the United States. A patchwork of remedies that leaves out whole classes of victims—in this case, American citizens—falls short of providing adequate redress as required by international law.

The United States has pledged to the international community that it will uphold its obligations with respect to the prohibition against torture and other ill-treatment. On September 23, 2009, President Barack Obama affirmed the United States' commitment to the prohibition of torture: "On my first day in office, I prohibited—without exception or equivocation—the use of torture by the United States of America. . . . Every nation must know: America will live its values, and we will lead by example."[58] Additionally, the U.S. State Department, responding to questions from the Committee against Torture regarding how the United States would comply with its obligations to provide redress under Article 14 of the CAT, specifically

58. Barack Obama, Responsibility for Our Common Future, Address to the United Nations General Assembly (Sept. 23, 2009), *available at* http://www.un.org/ga/64/generaldebate/pdf/US_en.pdf.

stated that victims of torture could "[s]u[e] federal officials directly for damages under provisions of the U.S. Constitution for 'constitutional torts,'" citing *Bivens* and *Davis v. Passman*.[59] The failure to provide any remedy to petitioners in this case is a violation of the United States' international obligations and is deeply troubling, particularly when considered in light of the United States' stated commitment to provide redress, and its willingness to open its courts to any victim of torture without a remedy, but close them to its own citizens.

CONCLUSION

For the foregoing reasons, this Court should grant petitioners' petition for a writ of certiorari.

Respectfully submitted,

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59. *See* United States Written Responses to Questions Asked by the United Nations Committee against Torture, ¶ 5 (Apr. 28, 2006), (citing *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228 (1979)) *available at* http://www.state.gov/j/drl/rls/68554.htm.