

# 06-4216-cv

---

United States Court of Appeals  
*for the*  
Second Circuit

---

MAHER ARAR,

*Plaintiff-Appellant,*

– v. –

JOHN ASHCROFT, Attorney General of the United States, LARRY D. THOMPSON, formerly Acting Deputy Attorney General, TOM RIDGE, Secretary of State of Homeland Security, J. SCOTT BLACKMAN, formerly Regional Director of the Regional Office of Immigration and Naturalization Services, PAULA CORRIGAN, Regional Director of Immigration and Customs Enforcement,

*(For Continuation of Caption See Next Page)*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

---

**BRIEF OF AMICI CURIAE IN SUPPORT OF THE PLAINTIFF-  
APPELLANT**

---

KRISTINE A. HUSKEY, ESQ.  
AKBAR SIDDIQUI, LAW STUDENT  
SABRINA BALGAMWALLA, LAW STUDENT  
AMERICAN UNIVERSITY  
WASHINGTON COLLEGE OF LAW  
INTERNATIONAL HUMAN RIGHTS LAW  
CLINIC  
4801 Massachusetts Ave. NW, Suite 417  
Washington, DC 20016-8184  
(202) 274.4147  
*(Counsel for Amici Curiae)*

---

JOHN DOE 1-10, FEDERAL BUREAU OF INVESTIGATION and/or  
IMMIGRATION AND NATURALIZATION SERVICE AGENTS, JAMES W.  
ZIGLAR, formerly Commissioner for Immigration and Naturalization Services,  
UNITED STATES,

*Defendants-Appellees.*

---

*AMICI CURIAE*

Center for Justice and Accountability

International Federation for Human Rights

Minnesota Advocates for Human Rights

World Organization Against Torture

David M. Crane

Scott Horton

Michael P. Scharf

Leila Nadya Sadat

David Weissbrodt

## TABLE OF CONTENTS

LIST OF AMICI.....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iv
INTEREST OF AMICI.....	1
ISSUE PRESENTED .....	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT .....	1
ARGUMENT .....	2
I. U.S. INTERNATIONAL OBLIGATIONS PROHIBIT TORTURE UNDER ALL CIRCUMSTANCES .....	2
A. The United States Played a Vital Role in Establishing International Obligations Not to Torture .....	3
B. The United States has Consistently Undertaken International Obligations Prohibiting Torture Under All Circumstances .....	5
II. CUSTOMARY INTERNATIONAL LAW PROHIBITS TORTURE UNDER ALL CIRCUMSTANCES .....	8
A. State Practices are Evidence of the Customary International Legal Prohibition Against Torture .....	9
1. The Prohibition Against Torture is Evident in Domestic Practice Worldwide .....	9
2. The Prohibition Against Torture is Evident in U.S. Policy and Law .....	10
B. <i>Opinio Juris</i> Evidences the Customary International Legal Prohibition Against Torture .....	15

1. The Prohibition Against Torture is Evident in Domestic and International Judicial Opinions and Statements .....	15
2. The Prohibition Against Torture is Evident in U.S. Court Opinions .....	16
C. Customary International Legal Prohibitions Against Torture are Peremptory Norms .....	17
1. Regional and International Courts Recognize that Torture Violates <i>Jus</i> <i>Cogens</i> Norms .....	17
2. U.S. Courts Recognize that Torture Violates <i>Jus Cogens</i> Norms .....	19
CONCLUSION .....	21

## TABLE OF AUTHORITIES

### Federal Cases

<i>Abebe-Jira v. Negewo</i> , 72 F.3d 844 (11th Cir. 1996) .....	20
<i>Arar v. Ashcroft</i> , 414 F.Supp.2d 250 (E.D.N.Y. 2006).....	2
<i>Arce v. Garcia</i> , 434 F.3d 1254 (11th Cir. 2005).....	21
<i>Benitez v. Garcia</i> , 449 F.3d 971 (9th Cir. 2006).....	3
<i>Chubb &amp; Son, Inc. v. Asiana Airlines</i> , 214 F.3d 301 (2d Cir. 2000) .....	3
<i>Doe v. Rafael Saravia</i> , 348 F.Supp.2d 1112 (E.D.Cal., 2004) .....	21
<i>Filartiga v. Pena-Irala</i> , 630 F.2d 876 (2d Cir. 1980).....	2, 20
<i>Hilao v. Marcos</i> , 25 F.3d 1467 (9th Cir. 1994) .....	20
<i>Kadic v. Karadzic</i> , 70 F.3d 232 (2d Cir. 1995).....	20
<i>The Paquete Habana</i> , 177 U.S. 677 (1900).....	16
<i>Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet</i> <i>Ugarte</i> (No. 3), [2000] 1 A.C. 137 .....	19
<i>Siderman de Blake v. Republic of Argentina</i> , 965 F.2d 699 (9th Cir. 1992) .....	20
<i>Sosa v. Alvarez-Machain</i> , 542 U.S. 692 (2004).....	16, 17, 20
<i>Tachiona v. Mugabe</i> , 169 F.Supp.2d 259 (S.D.N.Y., 2001).....	21
<i>Whitney v. Robertson</i> , 124 U.S. 190, 194, 8 S.Ct. 456, 458, 124 U.S. 190 (1888) ..	3

Constitution

Art. VI, U.S.

Constitution.....3

Federal Statutes

Detainee Treatment Act, 199 Stat. 3136 (2006) ..... 13

Federal Anti-Torture Statute, 18 U.S.C.A. § 2340A(a-c) (2001) ..... 8, 13

Judiciary Act, 28 U.S.C. § 1350 (1789)..... 17

Military Commissions Act, 120 Stat. 2600 (2006) ..... 7, 14

Military Extraterritorial Jurisdiction Act, 18 U.S.C.A. § 3261(a)  
(2000).....7, 13

Torture Victim Protection Act, 106 Stat. 73 (1992) ..... 8

Torture Victim Relief Act, 112 Stat. 3016 (1998) ..... 7, 13

War Crimes Act 18 U.S.C.A. § 2441(a)-(b) (1996)..... 8

International Treaties, Conventions, and Declarations

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment  
or Punishment [CAT], Apr. 18, 1988, S. Treaty Doc. No. 100-20, 1465  
U.N.T.S. 85 (1994) ..... passim

Declaration on the Human Rights of Individuals Who are Not Nationals of the  
Country in Which They Live, G.A. res. 40/144, annex, 40 U.N. GAOR  
Supp. (No. 53) U.N. Doc. A/40/53 (1985) ..... 16

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) U.N. Doc. A/10034 (1975).....	passim
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (1956) .....	passim
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, 75 U.N.T.S. 85 (1950) .....	passim
Geneva Convention Relative to the Protection of Civilian Persons in Time of War Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (1955) .....	passim
Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 1949 6 U.S.T. 3317, 75 U.N.T.S. 136 (1950) .....	passim
International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, 999 U.N.T.S. 171.....	15
Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 37/194, annex, 37 U.N. GAOR Supp. (No. 51) U.N. Doc. A/37/51 (1982).....	16
Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) .....	3, 9
<u>International Authorities</u>	
<i>Aksoy v. Turkey</i> , 93 E.C.H.R. 68 (1996) .....	18



<i>Case of Cantoral-Benavides v. Peru,</i> 2000 Inter-Am. Ct. H.R. (ser. C) No. 69 (Aug. 18, 2000) .....	19
<i>Case of Lori Berenson Mejía v. Perú,</i> 2004 Inter-Am. Ct. H.R. (ser. C) No. 119 (Nov. 25, 2004) .....	19
<i>Ireland v. United Kingdom,</i> 2 E.H.R.R. 25 (1978).....	18
<i>Nicaragua v. United States,</i> 1986 I.C.J. 98 (June 27).....	10
<i>Prosecutor v. Furundzija,</i> Case No. ICTY IT-95-17/1-T, Judgment (Oct. 2, 1995) .....	19
<i>Public Committee Against Torture in Israel v. Israel,</i> HCJ 5100/94 (September 6, 1999) .....	15, 19
<i>Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte</i> (No. 3), [2000] 1 A.C. 137 .....	19
<i>Selmouni v. France,</i> 29 E.H.R.R. 403 (1999) .....	18
<i>Tomasi v. France,</i> 15 E.H.R.R. 1 (1992).....	18

Other Authorities

Committee on Human Rights, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report by the Special Rapporteur, UN Doc. E/CN4/1986/15 (Feb. 19, 1986) .....	17
Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/79/Add.50, A/50/40 (April 6, 1995) .....	4

David Hackett Fischer, <i>Washington's Crossing</i> (Oxford University Press 2004).....	11
Gen. Order No. 100, Sec. I art. 16 (Apr. 24, 1863).....	11
Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Committee on Foreign Relations, 84th Cong. 3-4 (1955).....	4
George W. Bush, Remarks for the United Nations International Day in Support of Victims of Torture (June 26, 2003).....	4
Initial Report of the United States of America to the UN Committee Against Torture, Oct. 15, 1999. ....	4
Jean-Marie Henckaerts and Louise Doswald-Beck, <i>Customary International Humanitarian Law</i> (International Committee of the Red Cross 2005)...	10
Jonathan Elliot, <i>Debates in the Several State Conventions on the Adoption of the Federal Constitution</i> (2d ed. 1876) (1863).....	11
Matthew C. Waxman, Article, Siegecraft and Surrender: The Law and Strategy of Cities as Targets, 39 Va. J. Int'l L. 353, 372 (1999).....	12
Nick Wadhams, <i>U.N. Says Human Rights Violators Cite U.S.</i> , Washington Post, Oct. 24 2006 at A04.....	14, 15
Restatement (Third) of the Foreign Relations Laws of the United States (1987). ....	9
Richard Shelly Hartigan, <i>Lieber's Code and the Law of War</i> (1983) .....	3, 11
Second and Third Periodic Report of the United States of America to the U.N. Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, Oct. 21, 2005 .....	12
Second Periodic Report of the United States of America to the Committee Against Torture, submitted May 6, 2005 .....	12
United States Army Field Manual 2-22.3 (Sept. 2006) .....	13
U.S. State Department, Country Reports on Human Rights Practices for 2005, China, Jordan, Laos, Mongolia .....	10

## **INTEREST OF AMICI**

*Amici* are scholars, experts, and organizations concerned with the protection of human rights under international law. *Amici* are disturbed about the far-reaching implications that the district court's ruling may have on the protection of human rights, specifically freedom from torture.

Specifically, the district court appears to believe the prohibition against torture is an open question, and suggests that the practice may be permissible in the interest of national security. That position violates the United States' obligations under international treaty and customary law, which prohibit the practice of torture under all circumstances. Because international law requires states to never resort to torture, even in times of conflict or national emergency, the Court should reaffirm the ban on torture and reverse the judgment of the District Court.

## **ISSUE PRESENTED**

Does international law and U.S. law incorporating international legal obligations prohibit the use of torture under all circumstances?

## **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

The district court's ruling suggests that Congress can authorize torture to prevent a terrorist attack in spite of international legal instruments

prohibiting torture, to which the United States is a party.<sup>1</sup> The United States has signed and ratified treaties with explicit language barring torture under all circumstances and has implemented these obligations domestically. Torture under any circumstance is also prohibited under customary international law, which is reflected in domestic law and practice in the United States as well as across the world. U.S., foreign and international courts have specifically recognized the ban on torture as a *jus cogens* norm from which no derogation is permitted. Congress may not pass legislation permitting torture even in extraordinary circumstances without breaching the United States' international and domestic legal obligations. Because permitting torture under any circumstances would violate every legal authority that has considered the use of torture, this Court should find that there is no circumstance under which torture would be legally permissible.

## **ARGUMENT**

### **II. U.S. INTERNATIONAL OBLIGATIONS PROHIBIT TORTURE UNDER ALL CIRCUMSTANCES.**

The United States plays a critical role in establishing and maintaining international obligations prohibiting torture under all circumstances. When

---

<sup>1</sup> *Arar v. Ashcroft*, 414 F.Supp.2d 250, 274 n.10 (E.D.N.Y. 2006) (stating that the dictum in *Filartiga v. Peña-Irala* “does not address the constitutionality of torture to prevent a terrorist attack” and wondering whether Congress can legislate contrary to international law that prohibits torture) (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980)).

the United States signs and ratifies treaties that prohibit torture under all circumstances, it willingly binds itself to this standard.<sup>2</sup> Pursuant to these obligations, Congress has passed legislation implementing domestic prohibitions against torture without exception and in all circumstances.

**A. The United States Played a Vital Role in Establishing International Obligations Not to Torture.**

The United States has led the way in establishing international legal obligations not to torture, even in times of war and conflict. The Lieber Code, drafted for the Union Army during the Civil War and recognized as the first codification of the modern laws of war, does not allow torture even for reasons of military necessity.<sup>3</sup> This prohibition was incorporated into later international treaties on the laws of armed conflict.<sup>4</sup> As the United States emerged from World War II, it played “a major role in both the

---

<sup>2</sup> Vienna Convention on the Law of Treaties [VCLT], art. 14, 18, 26, 31, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331; *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308-09 (2d Cir. 2000) (relying on the VCLT as a codification of customary international law; *see also* U.S. Const., art. VI. *Whitney v. Robertson*, 124 U.S. 190, 194, 8 S.Ct. 456, 458, 124 U.S. 190 (1888) (holding that a treaty is placed on the same footing as an act of legislation, and if a treaty and a federal statute conflict, "the one last in date will control the other"); *Benitez v. Garcia*, 449 F.3d 971, 975 (9th Cir. 2006) (“[A] duly ratified treaty entered into by the United States, is federal law pursuant to the Supremacy Clause”).

<sup>3</sup> Gen. Orders No. 100, Sec. I art. 16 (Apr. 24, 1863), reprinted in Richard Shelly Hartigan, *Lieber’s Code and the Law of War* 48 (1983).

<sup>4</sup> *Id.*, introduction.

preparatory steps and in the conference proceedings” to create the Geneva Conventions.<sup>5</sup> The United States also had representatives actively participating in the negotiation of the Convention Against Torture (“CAT”),<sup>6</sup> and publicized reports related to the International Covenant on Civil and Political Rights (“ICCPR”).<sup>7</sup> Furthermore, the United States had accepted its role in leading the world against torture by example.<sup>8</sup>

In large part because the United States played such a critical role in the codification of the prohibition against torture, many nations hold U.S. compliance with treaty obligations in high regard. Conversely, when the United States violates these obligations, it erodes international compliance with human rights standards, and weaken U.S. authority to promote

---

<sup>5</sup> *Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Committee on Foreign Relations*, 84th Cong. 3-4 (1955) (statement of Robert Murphy, Deputy Under Secretary of State).

<sup>6</sup> “Initial Report of the United States of America to the U.N. Committee Against Torture,” para. 5, submitted October 15, 1999.

<sup>7</sup> Concluding Observations of the Human Rights Committee: United States of America, para. 268-69 U.N. Doc. CCPR/C/79/Add.50, A/50/40 (April 6, 1995) (appreciating the high level delegation of human rights experts sent by the United States and the publicity generated to raise awareness of the United States’ initial report).

<sup>8</sup> George W. Bush, Remarks for the United Nations International Day in Support of Victims of Torture (June 26, 2003) (“The United States is committed to the world-wide elimination of torture and we are leading this fight by example.”).

adherence to treaty obligations.<sup>9</sup> U.S. compliance with treaty provisions prohibiting torture is therefore of great international importance.

**B. The United States has Consistently Undertaken International Obligations Prohibiting Torture Under All Circumstances.**

The United States has consistently agreed to international treaties obligations prohibiting torture under all circumstances by ratifying the Geneva Conventions, ICCPR and CAT. The United States ratified the Geneva Conventions banning the practice of torture in both international and internal conflicts with respect to both combatants and civilians.<sup>10</sup> No provision of the Geneva Conventions provides an exception to the ban on torture, even in extreme circumstances.

---

<sup>9</sup> See Maj. Gen. Thomas J. Romig, Judge Advocate General, U.S. Army, “Memorandum for General Counsel of the Department of the Air Force,” Mar. 3, 2003 (stating that “implementation of questionable techniques [for interrogation] will very likely establish a new baseline for acceptable practice in this area, putting our service personnel at far greater risk and vitiating many POW/ detainee safeguards the U.S. has worked hard to establish over the past five decades.”).

<sup>10</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [Geneva Convention I], art. 3(1)(a), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (1956); Geneva Convention For the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea [Geneva Convention II], art. 3(1)(a), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (1950); Geneva Convention Relative to the Treatment of Prisoners of War [Geneva Convention III], art. 3(1)(a), Aug. 12, 1949 6 U.S.T. 3317, 75 U.N.T.S. 136 (1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War [Geneva Convention IV], art. 32, Aug. 12, 1949 6 U.S.T. 3516, 75 U.N.T.S. 287 (1955).

In addition to the Geneva Conventions, the United States committed itself to eradicating torture in absolute terms by ratifying the ICCPR, which states that “no person shall be subject to torture.”<sup>11</sup> Congress ratified the ICCPR torture ban as an obligation that applies even in times of “public emergency which threaten[ ] the life of the nation.”<sup>12</sup> Therefore, the United States specifically undertakes the obligation not to torture in extreme circumstances.

The United States also undertook the obligation of eliminating torture under all circumstances when Congress ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Article 2(1) of CAT requires the United States to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”<sup>13</sup> Article 2(2) states 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

---

<sup>11</sup> International Covenant on Civil and Political Rights [ICCPR], Mar. 23, 1976, 999 U.N.T.S. 171, art. 7, Dec. 16, 1966, S. Treaty Doc. No. 95-2, 999 U.N.T.S. 171 (1976).

<sup>12</sup> *Id.*, art. 4(1-2).

<sup>13</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT], art. 2(1), Apr. 18, 1988, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (1994).



invoked as a justification of torture.”<sup>14</sup> This provision of CAT specifically recognizes the extreme circumstances that entice states to torture and permits no derogation. By accepting these provisions, the United States affirmed its commitment to prohibit torture, even in exceptional circumstances.

The United States already has a comprehensive scheme to prohibit torture domestically.<sup>15</sup> Congress has legislation providing civil and criminal penalties for acts of torture or conspiracy to commit acts of torture.<sup>16</sup> In 1996, Congress enacted the War Crimes Act, criminalizing grave breaches

---

<sup>14</sup> *Id.*, art. 2(2).

<sup>15</sup> “Second Periodic Report of the United States of America to the Committee Against Torture,” para. 16, submitted May 6, 2005 (“As explained in the Initial Report, it is clear that any act of torture falling within the Torture Convention definition would in fact be criminally prosecutable in every jurisdiction within the United States. Such acts may be prosecuted, for example, as assault, battery or mayhem in cases of physical injury; as homicide, murder or manslaughter, when a killing results; as kidnapping, false imprisonment or abduction where an unlawful detention is concerned; as rape, sodomy, or molestation; or as part of an attempt, or a conspiracy, an act of racketeering, or a criminal violation of an individual’s civil rights.”)

<sup>16</sup> *See*, Torture Victim Relief Act of 1998, Pub. L. No. 105-320, §2(a)(1), 112 Stat. 3016 (1998) (providing assistance to the victims of torture) (finding that “[t]he American people abhor torture by any government or person.”); TVPA, *supra* note 18; Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, §2(a), 114 Stat. 2488, 18 U.S.C.A. § 3261(a) (placing military personnel or those accompanying them within the jurisdiction of the courts for any acts of torture and other felonies); Federal Anti-Torture Statute, *supra* note 16 (punishing any acts of torture or conspiracy to commit acts of torture within the U.S. or committed by a U.S. citizen with up to 20 years in prison, or death), *amended by* Pub. L. No. 109-366, 120 Stat. 2600 (2006).

and other serious violations of the Geneva Conventions by or against U.S. citizens or armed forces personnel.<sup>17</sup> Torture is prohibited under Common Article 3 of the Geneva Conventions and therefore prohibited domestically pursuant to the War Crimes Act.<sup>18</sup>

Congress implemented CAT by passing legislation to provide civil and criminal penalties for acts of torture. For example, the Federal Anti-Torture Statute imposes criminal penalties,<sup>19</sup> and Torture Victim Protection Act provides civil liability, for acts of torture.<sup>20</sup> Both statutes prohibit torture in absolute terms and provide no exception for torture under exceptional circumstances. By enacting statutes to implement the Geneva Convention's and CAT's explicit prohibition on torture, even under exceptional circumstances, Congress provided tools for domestic enforcement of the United States' international obligation not to torture.

### **III. CUSTOMARY INTERNATIONAL LAW PROHIBITS TORTURE UNDER ALL CIRCUMSTANCES.**

---

<sup>17</sup> 18 U.S.C.A. § 2441(a)-(b) (1996).

<sup>18</sup> Geneva Conventions I-IV, art. 3(1)(a), *supra* note 11.

<sup>19</sup> Federal Anti-Torture Statute, 18 U.S.C.A. § 2340A(a-c) (2001).

<sup>20</sup> Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (“An Act ...To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.”).

Customary international law, according to Restatement (Third) of the Law of the Foreign Relations of the United States (Restatement of Foreign Relations Law), “results from a general and consistent practice of states followed from a sense of legal obligation.”<sup>21</sup> Specifically, to become a principle of customary international law, a custom must be widely evidenced in state practice, and accorded legal weight (*opinio juris*). Of the principles recognized as customary international law, some rise to the level of peremptory, or *jus cogens*, norms.<sup>22</sup> State governments and judicial systems have also acknowledged the ban against torture as a *jus cogens* norm from which no deviation is permitted.

**A. State Practices are Evidence of the Customary International Legal Prohibition against Torture.**

**1. The Prohibition Against Torture is Evident in Domestic Practice Worldwide.**

State practice, which “includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy,” is evidence of customary international law.<sup>23</sup> The prohibition against torture is widespread. At least 90 countries have passed laws that

---

<sup>21</sup> Restatement (Third) of the Foreign Relations Laws of the United States [Restatement of Foreign Relations Law] §102(2) (1987).

<sup>22</sup> VCLT, art. 53, *supra* note 3.

<sup>23</sup> Restatement of Foreign Relations Law, Comment (b), *supra* note 14.

criminalize the act of torture.<sup>24</sup> Prohibitions against torture also appear in the military manuals of 42 countries,<sup>25</sup> indicating that torture has been rejected as an acceptable practice even in times of conflict.

This customary rule is further evidenced when countries deny<sup>26</sup> or conceal<sup>27</sup> the use of torture. The International Court of Justice has recognized that where “a state acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself... the significance of that attitude is to confirm rather than weaken the rule.”<sup>28</sup> Therefore, public statements and reports denying or circumventing allegations of torture may be considered additional evidence of the customary international legal prohibition against torture.

## **2. The Prohibition against Torture is Evident in U.S. Policy and Law.**

The United States has long recognized the prohibition on torture, even under extreme circumstances. The American policy against torture began

---

<sup>24</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* 2121-36 (International Committee of the Red Cross 2005).

<sup>25</sup> *Id.*, note 42.

<sup>26</sup> *See, e.g.*, U.S. State Department, Country Reports on Human Rights Practices for 2005, China, Jordan.

<sup>27</sup> *See id.*, Laos, Mongolia.

<sup>28</sup> *Nicaragua v. United States*, 1986 I.C.J. 98 (June 27).

with the Revolutionary War, when George Washington required humane treatment for captured soldiers despite the ongoing war and the cruelties suffered by his own troops at the hands of the British.<sup>29</sup> Patrick Henry later described the differences between the U.S. government and the British Crown by stating the American ancestors “would not admit of tortures, or cruel and barbarous treatment.”<sup>30</sup> Recognizing the prohibition against torture in a time of war was thus among the defining characteristics of the United States at the time of its birth.

Prohibitions against torture also became military-wide battle procedure during the Civil War when President Lincoln issued General Orders No. 100, the Lieber Code. The Lieber Code prohibited Union troops at war from engaging in cruel practices, specifically “torture to extort confessions.”<sup>31</sup> Though the Lieber Code was drafted for all Union military

---

<sup>29</sup> David Hackett Fischer, *Washington's Crossing* 276 (Oxford University Press 2004) (noting Washington “often reminded his men that they were an army of liberty and freedom, and that the rights of humanity for which they were fighting should extend even to their enemies.”).

<sup>30</sup> Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 447-48 (2d ed. 1876) (1863).

<sup>31</sup> Gen. Orders No. 100, Sec. I art. 16 (Apr. 24, 1863), reprinted in Richard Shelly Hartigan, *Lieber's Code and the Law of War* 48 (1983).

personnel, it was used by both Union and Confederate forces.<sup>32</sup> Thus, even during the most fractious period in American history, torture would not be tolerated.

The prohibition against torture has been reaffirmed during the ongoing “war on terror.” The U.S. State Department recently reaffirmed the United States’ commitment not to torture in the strongest language possible before United Nations Committee Against Torture, submitting:

[The United States] is unequivocally opposed to the use and practice of torture. No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture. This is a longstanding commitment of the U.S., repeatedly reaffirmed at the highest levels of the U.S. Government.<sup>33</sup>

Present-day U.S. military policy also prohibits torture and provides no circumstances under which torture is permissible. In 2006, a new version of the U.S. Army field manual on interrogations continued the policy of

---

<sup>32</sup> Matthew C. Waxman, Article, *Siegecraft and Surrender: The Law and Strategy of Cities as Targets*, 39 Va. J. Int'l L. 353, 372 (1999).

<sup>33</sup> “Second Periodic Report of the United States of America to the Committee Against Torture,” para. 6, submitted May 6, 2005. *See also* “Second and Third Periodic Report of the United States of America to the U.N. Committee on Human Rights Concerning the International Covenant on Civil and Political Rights,” para. 126, submitted October 21, 2005 (reaffirming that the U.S. prohibits torture at both the state and federal level).

repeatedly prohibiting the use of torture, and recognizing that it is impractical and unlawful.<sup>34</sup>

Congress had recently mandated that this manual would serve as the standard for all interrogation techniques across the military services.<sup>35</sup> The U.S. military therefore recognizes no exception to the absolute prohibition on torture, even in the context of counter-insurgency or counter-terrorism operations.

U.S. law also reflects the prohibition against torture. As previously discussed, Congress has consistently enacted statutes providing civil and criminal penalties for acts of torture or conspiracy to commit acts of torture.<sup>36</sup> Further, Congress has not wavered in prohibiting torture in light of

---

<sup>34</sup> *Field Manual 2-22.3* (Sept. 2006), Sec. 4-41, 5-73, 5-74 (noting that “torture is not only illegal but also it is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the HUMINT [human intelligence] collector wants to hear. Use of torture can also have many possible negative consequences at national and international levels.”); *see also* Sec. 5-89 (recognizing that torture is expressly prohibited by the Geneva Conventions and 18 U.S.C. §2340A).

<sup>35</sup> Detainee Treatment Act of 2005, 199 Stat. 3136, Sec. 1002(a) (2006).

<sup>36</sup> *See supra* Part I.B; *see also* Torture Victim Relief Act of 1998, Pub. L. No. 105-320, §2(a)(1), 112 Stat. 3016 (1998) (providing assistance to the victims of torture) (finding that “[t]he American people abhor torture by any government or person.”); TVPA, *supra* note 18; Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, §2(a), 114 Stat. 2488, 18 U.S.C.A. § 3261(a) (placing military personnel or those accompanying them within the jurisdiction of the courts for any acts of torture and other

security threats posed by the ongoing “war on terror.” Congress amended the War Crimes Act after the terrorist attacks of September 11, 2001 through the Military Commissions Act of 2006, which makes torture and conspiracy to commit torture punishable under the explicit language of the War Crimes Act.<sup>37</sup> Neither the War Crimes Act nor the amendments of the Military Commissions Act permit torture under any circumstances. Thus, Congress has consistently prohibited torture despite the ongoing “war on terror” and has never indicated any circumstances under which acts of torture would be permissible.

While U.S. policies and practices are regarded as worldwide examples. Manfred Nowak, the current U.N. Special Rapporteur on Torture and Cruel, Inhumane, and Degrading Treatment noted that “[t]he United States has been the pioneer . . . of human rights and is a country that has a high reputation in the world.”<sup>38</sup> He noted that departure from these established laws and policies has the potential to erode compliance with the absolute obligation of nations to refrain from the use of torture: “Today,

---

felonies); Federal Anti-Torture Statute, *supra* note 16 (punishing any acts of torture or conspiracy to commit acts of torture within the U.S. or committed by a U.S. citizen with up to 20 years in prison, or death), *amended by* Pub. L. No. 109-366, 120 Stat. 2600 (2006).

<sup>37</sup> Pub. L. No. 109-366, § 6(b)(1)(B), 120 Stat 2600, 2633 (2006).

<sup>38</sup> Quoted in Nick Wadhams, *U.N. Says Human Rights Violators Cite U.S.*, Washington Post, Oct. 24 2006 at A04.



many other governments [which practice torture] are kind of saying: ‘But why are you criticizing us? We are not doing something different than what the United States is doing.’”<sup>39</sup> Therefore, U.S. policy and practice plays an important role in shaping international perceptions of significant human rights norms.

**B. *Opinio Juris* Evidences the Customary International Legal Prohibition against Torture.**

**1. Prohibition of Torture is Evident in Domestic and International Judicial Opinions and Statements.**

States have recognized that their practice regarding the absolute prohibition against torture arises from a sense of legal obligation. Domestic courts have considered the use of torture in light of emergency circumstances, and have overruled domestic policy based on the higher principles prohibiting torture. For example, in considering Israeli General Security Services practices that permitted the use of torture in interrogation of terrorist suspects, the High Court of Justice found:

“At times, the price of truth is so high that a democratic society is not prepared to pay it ... The rules pertaining to investigations are important to a democratic State. They reflect its character. An illegal investigation harms the suspect’s human dignity. It equally harms society’s image.”<sup>40</sup>

---

<sup>39</sup> *Id.*

<sup>40</sup> *Public Committee Against Torture in Israel v. Israel*, HCJ 5100/94 (September 6, 1999).

Numerous U.N. policy statements and resolutions have reiterated the absolute and universally-recognized prohibition against torture,.<sup>41</sup> In relying on the principles set forth in these declarations, state representatives indicated their respective governments were refraining from torture out of a sense of legal obligation.

## **2. The Customary International Legal Prohibition Against Torture is Evident in U.S. Court Opinions.**

In 1900, the U.S. Supreme Court recognized customary international law as “part of our law,”<sup>42</sup> and has since referred to these legal norms as “the law of the land.”<sup>43</sup> The first Congress enacted the Judiciary Act in 1789, which contained a provision known as the Alien Tort Statute, affording

---

<sup>41</sup> *See, e.g.*, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975) (citing the UN Charter and Universal Declaration on Human Rights); *see also* Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 37/194, annex, 37 U.N. GAOR Supp. (No. 51) at 211, U.N. Doc. A/37/51 (1982); Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, G.A. res. 40/144, annex, 40 U.N. GAOR Supp. (No. 53) at 252, U.N. Doc. A/40/53 (1985). While U.N. General Assembly Resolutions are not binding as a matter of international law, they serve as evidence of customary international law.

<sup>42</sup> *The Paquete Habana*, 177 U.S. 677, 700 (1900).

<sup>43</sup> *See, e.g. Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

jurisdiction for violations of the “law of nations or a treaty of the United States.”<sup>44</sup> The Supreme Court has since held that federal courts have jurisdiction based on customary international law, including the customary prohibition against torture.<sup>45</sup>

**C. Customary International Legal Prohibitions of Torture are Peremptory Norms.**

**1. Regional and International Courts Recognize that Torture Violates *Jus Cogens* Norms.**

The widespread and absolute prohibition against torture has established its status as a *jus cogens* norm, rendering the prohibition non-derogable. According to Peter Kooijmans, the first U.N. Special Rapporteur on Human Rights, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “[i]f ever a phenomenon was outlawed unreservedly and unequivocally it is torture,” as “there was no disagreement whatsoever on the fact that torture is absolutely forbidden.”<sup>46</sup> The peremptory nature of the anti-torture norm is evident in major international and regional instruments, which contain absolute prohibitions against torture as described above. This absolute prohibition is reinforced by the Vienna

---

<sup>44</sup> 28 U.S.C. § 1350.

<sup>45</sup> *Sosa* at 694 (2004), *supra* note 39.

<sup>46</sup> Com. on Human Rights, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report by the Special Rapporteur, ¶ 3, UN Doc. E/CN4/1986/15 (Feb. 19, 1986).

Convention on the Law of Treaties, which does not permit states to rely on domestic law to justify their failures to fulfill international obligations.<sup>47</sup>

Numerous courts have referenced the fact that freedom from torture cannot be violated under any circumstances. In *Ireland v. United Kingdom*, the European Court for Human Rights (ECHR) held that the European Convention prohibits torture “in absolute terms,” and therefore “there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation.”<sup>48</sup> Since the passage of CAT, the ECHR has reaffirmed that even “undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism” cannot justify sacrifice of the “protection to be afforded in respect of the physical integrity of individuals.”<sup>49</sup> The Inter-American Court on Human Rights similarly found the prohibition of torture to be “absolute and non-derogable, even under the

---

<sup>47</sup> Art. 47, *supra* note 3.

<sup>48</sup> 2 E.H.R.R. 25, ¶ 163 (1978).

<sup>49</sup> *Tomasi v. France*, 15 E.H.R.R. 1, ¶ 115 (1992); *see also Selmouni v. France*, 29 E.H.R.R. 403, ¶ 95 (1999) (“Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the [European] convention prohibits in absolute terms torture...”); *Aksoy v. Turkey*, 93 E.C.H.R. 68 ¶ 62 (1996), (“Article 3, as the Court has observed on many occasions, enshrines one of the fundamental values of democratic society... Unlike most of the substantive clauses of the [European] Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible...even in the event of a public emergency threatening the life of the nation.” [citations omitted]).

most difficult circumstances,” including in the contexts of “war, threat of war, struggle against terrorism or any other crimes, state of emergency, disruption, or internal conflict, suspension of constitutional guarantees, internal political instability, or other public calamities or emergencies.”<sup>50</sup>

The ICTY<sup>51</sup> and domestic courts<sup>52</sup> have also cited prohibition of torture as a non-derogable *jus cogens* norm.

## **2. U.S. Courts Recognize that Torture Violates *Jus Cogens* Norms.**

Nearly two centuries after the enactment of the Alien Tort Statute, this Court issued the first major opinion regarding the Statute and customary international law. In *Filartiga v. Peña-Irala*, this Court held that “official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and

---

<sup>50</sup> *Case of Lori Berenson Mejía v. Perú*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 119, at 100 (Nov. 25, 2004) (unofficial translation); *see also Case of Cantoral-Benavides v. Peru*, 2000 Inter-Am. Ct. H.R. (ser. C) No. 69, at 96 (Aug. 18, 2000) (“[T]he fact that the State is confronted with terrorism should not lead to restrictions on the protection of the physical integrity of the person.”).

<sup>51</sup> *See, e.g., Prosecutor v. Furundzija*, Case No. ICTY IT-95-17/1-T, Judgment, ¶ 98 (Oct. 2, 1995) (“International human rights law... bans torture both in armed conflict and in time of peace. The prohibition... is an absolute right which may never be derogated from. In this regard... the prohibition of torture is a norm of *jus cogens*.”).

<sup>52</sup> *See, e.g., Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 137, 198; *Public Committee Against Torture in Israel*, *supra* note 54.

citizens.”<sup>53</sup> Modern courts have the authority to prosecute serious crimes; torture is among the widely-recognized of illegal acts, as “the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.”<sup>54</sup> Thus, this Court recognized the absolute nature of the prohibition against torture.

Since *Filartiga*, other courts have recognized the prohibition on torture is “specific, universal and obligatory”<sup>55</sup> and is a *jus cogens* norm.<sup>56</sup> The U.S. Supreme Court spoke definitively on the issue in *Sosa v. Alvarez-Machain*, finding that international norms constituting the “law of nations” under the Alien Tort Statute must be specific, universal, and obligatory under all circumstances.<sup>57</sup> Subsequently, numerous courts have findings that the

---

<sup>53</sup> *Filartiga* at 884, *supra* note 2.

<sup>54</sup> *Id.* at 890.

<sup>55</sup> *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992); *Hilao v. Marcos*, 25 F.3d 1467, 1475 (9<sup>th</sup> Cir. 1994); *Kadic v. Karadzic*, 70 F.3d 232, 239, C.A.2 (N.Y.), 1995; *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11<sup>th</sup> Cir. 1996).

<sup>56</sup> *Siderman* at 717, *supra* note 51 (“[T]he right to be free from torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of *jus cogens*.”); *see also Marcos* at 1475, *supra* note 51; *Kadic* at 239, *supra* note 51.

<sup>57</sup> *Sosa* at 2761-62, *supra* note 67. Prior to *Sosa*, federal courts had applied this standard to find torture a clear violation of the law of nations, *see Siderman* at 717, *supra* note 51; *Marcos* at 1475, *supra* note 51; *Kadic* at 239, *supra* note 51; *Abebe-Jira* at 847, *supra* note 91.

prohibition against torture is a specific, universal practice that is non-derogable in all situations.<sup>58</sup>

## CONCLUSION

For the foregoing reasons, this Court should find that international law and U.S. law incorporating international legal obligations prohibit the use of torture in all circumstances.

Respectfully submitted, this 21st day  
of December, 2006.

---

Kristine A. Huskey  
(D.C. Bar #462979)  
(application for membership to the  
Second Circuit Court of Appeals  
pending)  
INTERNATIONAL HUMAN  
RIGHTS LAW CLINIC  
American University  
Washington College of Law  
4801 Massachusetts Avenue NW,  
Suite 417  
Washington, DC 20016  
(202) 274-4175

---

<sup>58</sup> See, e.g., *Tachiona v. Mugabe*, 169 F.Supp.2d 259, 279 (S.D.N.Y., 2001) (noting that torture is among the practices defined in “[t]he world's nations, through treaties, conventions and declarations... as violations of customary international law.”); see also *Doe v. Rafael Saravia*, 348 F.Supp.2d 1112, 1144 (E.D.Cal., 2004) (recognizing crimes against humanity as actionable under ATS); *Arce v. Garcia*, 434 F.3d 1254, 1262, (11<sup>th</sup> Cir. 2005).

**CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32**

I, Kristine A. Huskey, hereby certify pursuant to F.R.A.P 32(a)(7) that, according to the word-count feature of Microsoft Word 2002, the foregoing appellate brief contains 5,042 words (exclusive of the table of contents, table of authorities, and this certificate) and therefore complies with the 7,000 word limit for *amicus* briefs in the Federal Rules of Appellate Procedure for the Second Circuit.

/s/ Kristine A. Huskey

Kristine A. Huskey

Dated: December 21, 2006



## CERTIFICATE OF SERVICE

This is to certify that I have this day caused two true and correct copies of the foregoing BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL to be served by Overnight Courier Service (Federal Express) upon the following:

Barbara L. Herwig Esq.  
Robert M. Loeb Esq.  
U.S. Department of Justice  
Civil Division, Appellate Staff  
950 Pennsylvania Ave., N.W.  
Rm. 7268  
Washington, DC 20530  
(202) 514-5425  
(202) 514-4332

Scott Dunn, Esq.  
Assistant United States Attorney  
Eastern District of New York  
One Pierrepont Plaza, 14<sup>th</sup> Floor  
Brooklyn, NY 11201-2776  
(718) 254-6029

Dennis Barghaan, Esq.  
Larry Gregg, Esq.  
Assistant U.S. Attorney  
Eastern District of Virginia  
2100 Jamieson Ave.  
Alexandria, VA 22314-5794  
(703) 299-3891  
(703) 299-3737  
**Attorneys for John Ashcroft**

Jeremy Maltby, Esq.  
O'Melveny & Myers LLP  
400 South Hope Street  
Los Angeles, CA, 90071

(212) 430-6000

**Attorney for Robert Mueller**

William Alden McDaniel, Esq.  
Bassel Bakhos, Esq.  
Law Office of William Alden McDaniel, Jr.  
118 West Mulberry Street  
Baltimore, MD, 21201  
(410) 685-3810

**Attorneys for James W. Ziglar**

Debra L. Roth, Esq.  
Thomas M. Sullivan, Esq.  
Shaw, Bransford, Veileux & Roth PC  
1100 Connecticut Ave  
Washington, DC, 20036  
(202) 463-8400

**Attorneys for Edward J. McElroy**

Thomas G. Roth, Esq.  
395 Pleasant Valley Way, Suite 201  
West Orange, NJ 07052  
(973) 736-9090

**Attorney for J. Scott Blackman**

Stephen L. Braga Esq.  
Jamie S. Kilberg, Esq.  
Baker Botts LLP  
1299 Pennsylvania Ave., N.W.  
Washington, DC, 20004  
(202) 639-7704

**Attorneys for Larry D. Thompson**

Maria Couri LaHood, Esq.  
Barbara J. Olshansky, Esq.  
David Cole, Esq.  
William Goodman, Esq.  
Katherine Gallagher, Esq.  
Jules Lobel, Esq.  
Center for Constitutional Rights

666 Broadway, 7<sup>th</sup> Floor  
New York, NY 10012  
(212) 614-6430

Robert F. Fink, Esq.  
Stanley McDermott III, Esq.  
Joshua S. Sohn, Esq.  
Sarah J. Sterken, Esq.  
DLA Piper US LLP  
1251 Avenue of the Americas  
New York, NY 10020  
(212) 335-4500  
**Attorneys for Maher Arar**

/s/ Akbar Siddiqui

Akbar Siddiqui

Dated: December 21, 2006

**ANTI-VIRUS CERTIFICATION FORM**  
**Pursuant to Second Circuit Local Rule 32(a)(1)(E)**

**CASE NAME: Arar v. Ashcroft**

**DOCKET NUMBER: 06-4216-cv**

I, Kristine A. Huskey, certify that I have scanned for viruses the PDF  
version of the

\_\_\_\_\_ Appellant's Brief

\_\_\_\_\_ Appellee's Brief

\_\_\_\_\_ Reply Brief

  X   Amicus Brief

that was submitted in this case as an email attachment to

<briefs@ca2.uscourts.gov> and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you  
used:

Symantec AntiVirus version 10.0.0.846 (OEM) was used.

/s/ Kristine A. Huskey

Kristine A. Huskey

Dated: December 21, 2006