Oral Argument Not Yet Scheduled

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

06-5209, -5222

SHAFIQ RASUL; ASIF IQBAL; RHUHEL AHMED; JAMAL AL-HARITH,

Plaintiffs-Appellants,

—v.—

DONALD H. RUMSFELD, SECRETARY OF DEFENSE; RICHARD MYERS, AIR FORCE GENERAL; GEOFFREY MILLER, ARMY MAJOR GENERAL; JAMES T. HILL, ARMY GENERAL; MICHAEL E. DUNLAVEY, ARMY MAJOR GENERAL; JAY HOOD, ARMY BRIGADIER GENERAL; MICHAEL LEHNERT, MARINE BRIGADIER GENERAL; NELSON J. CANNON, ARMY COLONEL; TERRY CARRICO, ARMY COLONEL*; WILLIAM CLINE, ARMY LIEUTENANT COLONEL; DIANE BEAVER, ARMY LIEUTENANT COLONEL; DOES 1 THROUGH 100,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA, C.A. NO. 1:04CV01864 (RMU)
THE HONORABLE RICARDO M. URBINA

BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW SCHOLARS AND HUMAN RIGHTS ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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January 18, 2007

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28.1 amici certify the following:

A. PARTIES APPEARING BEFORE THE DISTRICT COURT

Except for the following, all parties, intervenors and amici appearing before the district court and this court are listed in the Brief for Appellants Shafiq Rasul, et al.

1. Amici International Law Scholars and Human Rights Organizations are identified in the Appendix to this brief.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief for Appellants Shafiq Rasul, et al.

C. RELATED CASES

References to the related cases appear in Brief for Appellants Shafiq Rasul, et al.

CERTIFICATE PURSUANT TO CIRCUIT RULE 29(d)

Pursuant to Circuit Rule 29(d), counsel for amici curiae international law scholars and human rights organizations certify that as of the date of this certification, the only other brief amicus curiae of which we are aware is the Brief of Retired Military Officers, Military Law and History Scholars in Support of Plaintiffs-Appellants. These two briefs could not be joined as a single memorandum because the perspectives and analyses provided in each brief are completely distinct. In this brief, amici discuss torture as a violation of international law and the impossibility of considering torture an "official action" within the scope of a government official's employment. In the Brief of Retired Military Officers, Military Law and History Scholars, amici discuss the prohibition of torture under military law and tradition, the laws of war, and the doctrine of command responsibility. Any overlap between the briefs is insignificant. Given the markedly different approach and experience of the amici Retired Military Officers, Military Law and History Scholars from the amici in this brief, we did not consider it practical to consolidate these two briefs.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for International Law Scholars and Human Rights Organizations makes the following disclosure:

None of the amici is a publicly held entity. None of the amici is a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity. No parent companies or publicly held companies have a 10% or greater ownership in any of the amici.

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INTEREST OF THE AMICI

This Brief of Amici Curiae International Law Scholars and Human Rights Organizations is respectfully submitted pursuant to Federal Rule of Appellate Procedure 29 and District of Columbia Circuit Rule 29 in support of the Appellants.[1]

Amici are legal experts in the fields of international law and human rights. They also represent human rights organizations. While they pursue a wide variety of legal interests, they all share a deep commitment to the rule of law and respect for human rights.[2] Amici believe this case raises important issues concerning international law and human rights law. These issues – the status of torture and whether torture authorized by government officials may be considered official acts of state that fall within the regular scope of employment and are, thereby, subject to immunity – address matters of the most profound nature for our constitutional democracy.[3] The

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[1] All parties have consented to the filing of this Brief of Amici Curiae.

[2] A complete list of Amici appears in the Appendix.

[3] As the District Court itself noted in referencing the Appellants' claims, "[m]ost disturbing . . . is their claim that executive members of the United States government are directly responsible for the depraved conduct the plaintiffs suffered over the course of their detention." Rasul v. Rumsfeld, 414 F. Supp. 2d 26, 27 (D.D.C. 2006). Recognizing the profound issues raised by this case, the District Court went on to cite from the Supreme Court's decision in United States v. Robel, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.") as well as the words of Mahatma Gandhi ("What difference does it make . . .whether the mad

mere suggestion that torture could fall within the regular scope of employment, as set forth by the District Court in Rasul v. Rumsfeld, is startling and deeply troubling. Accordingly, Amici would like to provide this Court with an additional perspective on these issues. They believe this submission will assist the Court in its deliberations.

SUMMARY OF ARGUMENT

In Rasul v. Rumsfeld, 414 F. Supp. 2d 26 (D.D.C. 2006), the District Court held that the defendants were acting within the scope of their employment when they authorized numerous human rights abuses, including torture, cruel, inhuman, and degrading treatment, and prolonged arbitrary detention. Accordingly, the District Court held that the defendants were subject to immunity pursuant to the Westfall Act. Id. at 31. While the District Court felt constrained by its interpretation of prior case law, its decision is in conflict with extensive U.S. case law as well as basic principles of international law. Quite simply, torture and other serious human rights abuses should never be construed as official acts of state that fall within the regular scope of employment. Unlike common crimes, torture is an international crime and the prohibition against torture constitutes a jus

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destruction is wrought under the name of totalitarianism or the holy name of liberty and democracy?"). Rasul v. Rumsfeld, 414 F. Supp. 2d at 27.

cogens norm, a non-derogable obligation that binds every member of the international community. Because it can never be considered an official act of state, government officials that authorize torture cannot be subject to immunity.

ARGUMENT

For well over half a century and since the Nuremberg trials, international, regional, and national laws have consistently and categorically denounced torture and prohibited its practice. The enduring importance of the prohibition against torture is further evidenced by the ban against derogation under any circumstances, even during times of war or public emergency. Because of its jus cogens status, acts of torture cannot be considered official acts of state that fall within the regular scope of employment. Because torture can never be considered an official act of state, government officials that authorize torture cannot be subject to immunity.

I. TORTURE IS PROHIBITED BY INTERNATIONAL LAW AND CAN NEVER BE CONSIDERED AN OFFICIAL ACT OF STATE

Few international norms are more firmly established than the prohibition against torture and the concomitant obligation to punish acts of torture. These obligations are recognized in every major human rights instrument, including several treaties ratified by the United States. See, e.g., Universal Declaration of Human Rights, art. 5, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); International Covenant on Civil and Political Rights, entered into force March 23, 1976, art. 7, 999 U.N.T.S. 171;[4] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force June 26, 1987, art. 2, 1465 U.N.T.S. 85.[5] The prohibition against torture is set forth in the 1949 Geneva Conventions, which the United States have ratified.[6] See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, entered into force Oct. 21, 1950, arts. 3, 13, 130, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, entered into force Oct. 31, 1950, arts. 3, 32, 147, 75 U.N.T.S. 287. It is also codified in

[4] As of January 1, 2007, there are 160 States Parties to the International Covenant on Civil and Political Rights. The United States has ratified the International Covenant.

[5] As of January 1, 2007, there are 144 States Parties to the Convention against Torture. The United States has ratified the Convention against Torture.

[6] As of January 1, 2007, there are 194 States Parties to the 1949 Geneva Conventions.

several regional human rights agreements. See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force Sept. 3, 1953, art. 3, 213 U.N.T.S. 221;[7] American Convention on Human Rights, entered into force July 18, 1978, art. 5(2), 1144 U.N.T.S. 123;[8] African Charter on Human and Peoples' Rights, entered into force Oct. 21, 1986, art. 5, OAU Doc. CAB/LEG/67/3/rev.5.[9] In countless public pronouncements, the United States has categorically denounced the use of torture and specifically rejected any derogation from the prohibition against torture. In a 2005 report to the Committee against Torture, for example, the United States indicated its firm acceptance of these obligations.

> 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 United States, repeatedly reaffirmed at the highest levels of the U.S. Government. All components of the United States Government are obligated to act in compliance with the law, including all United States constitutional, statutory, and treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment. The U.S. Government does not permit, tolerate, or condone torture, or other unlawful practices, by its personnel or employees under any circumstances. U.S.

[7] As of January 1, 2007, there are 46 States Parties to the European Convention.

[8] As of January 1, 2007, there are 25 States Parties to the American Convention. The United States has signed (but not ratified) the American Convention.

[9] As of January 1, 2007, there are 53 States Parties to the African Charter.

> laws prohibiting such practices apply both when the employees are operating in the United States and in other parts of the world.

Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America U.N. Doc. CAT/C/48/Add.3 (June 29, 2005) at 4.

Each of these international instruments make clear that the prohibition against torture is absolute. It allows for no derogation.[10] "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." Convention against Torture, supra, at art. 2(2). Attached to the prohibition against torture is a concomitant obligation to punish acts of torture and to ensure that victims obtain redress and have an enforceable right to fair and adequate compensation. Id. at arts. 4 and 14.

It is not surprising, therefore, that federal courts have consistently found the prohibition against torture constitutes a universal, definable, and

[10] This principle has been affirmed by numerous international tribunals, including the European Court of Human Rights (Selmouni v. France, 29 E.H.R.R. 403 (1999); Aksoy v. Turkey, 23 E.H.R.R. 553 (1997); Ireland v. United Kingdom, 2 E.H.R.R. 25 (1978)), the Inter-American Court of Human Rights (Case of Lori Berenson Mejia v. Peru, 2004 Inter-Am. Ct. H.R. (ser. C) No. 119 (2004)), and the International Criminal Tribunal for the former Yugoslavia (Prosecutor v. Furundzija, Case No. IT-95-17/1-T (Oct. 2, 1995)). See also Jordan J. Paust, "Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees," 43 Columbia Journal of Transnational Law 811 (2005).

obligatory norm.[11] See, e.g., Presbyterian Church of the Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003); Wiwa v. Royal Dutch Petroleum Company, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002) ; Tachiona v. Mugabe, 234 F. Supp. 2d 401 (S.D.N.Y. 2002); Barrueto v. Larios, 205 F. Supp. 2d 1325 (S.D. Fl. 2002); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); Doe v. Islamic Salvation Front, 993 F. Supp. 3 (D.D.C. 1998); Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997); Hilao v. Estate of Marcos, 103 F.3d 789 (9th Cir. 1996); Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995); Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994); Trajano v. Marcos, 978 F.2d 493 (9th Cir. 1992); Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987).

While the U.S. Supreme Court has yet to address the international prohibition against torture and its purported status as an official act of state, the Court's decision in Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) references favorably several cases that address torture, including Filartiga v.

[11] See also Nuru v. Gonzales, 404 F.3d 1207, 1222-23 (9th Cir. 2006) (citations omitted) ("Even in war, torture is not authorized. Indeed, torture is illegal under the law of virtually every country in the world and under the international law of human rights. We cannot therefore ever view torture as a lawful method of punishment.")

Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985); and In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994). Significantly, Filartiga v. Pena-Irala and In re Estate of Ferdinand Marcos, Human Rights Litigation involved government officials accused of torture and, in both cases, the federal courts declined to recognize such acts as official acts of state.[12]

In Filartiga v. Pena-Irala, the Second Circuit held that torture violates international law. "Having examined the sources from which customary international law is derived – the usage of nations, judicial opinions and the works of jurists – we conclude that official torture is now prohibited by the law of nations." Id. at 884. Indeed, "[t]he prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens." Id. "[F]or purposes of civil liability [therefore], the torturer has become – like the pirate and slave trader before him – hostis humani generis, an enemy of all mankind." Id. at 890. Because of torture's status under international law, the Second Circuit expressed "doubt whether action by a state official in violation of the Constitution and laws of the Republic of

[12] Tel-Oren v. Libyan Arab Republic did not involve claims of torture by foreign government officials. But Judges Bork and Edwards both recognized the universal prohibition of official torture under international law. Tel-Oren v. Libyan Arab Republic, 726 F.2d at 781, 819-820.

Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state." Id. at 889. Indeed, "Paraguay's renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority." Id. at 890.

In re Estate of Marcos, Human Rights Litigation involved a civil action brought against Ferdinand Marcos for acts of torture and other serious human rights abuses. The Ninth Circuit also concluded that torture was prohibited by international law, citing its previous decision in Siderman de Blake v. Republic of Argentina as well as Filartiga v. Pena-Irala with approval.

> The right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of jus cogens. The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. To subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being.

In re Estate of Marcos, Human Rights Litigation, 25 F.3d at 1475 (citing Siderman de Blake v. Republic of Argentina, 965 F.2d at 717). Because torture was proscribed by international law, the Ninth Circuit declined to recognize that acts of torture could be recognized as official acts of state.

Significantly, the universal prohibition against torture has now attained jus cogens status. As defined in Article 53 of the Vienna Convention on the Law of Treaties, entered into force May 23, 1969, 1155 U.N.T.S. 332, a jus cogens norm is a peremptory norm "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." The respected Restatement (Third) of the Foreign Relations Law of the United States adopts the Vienna Convention's definition of jus cogens norms. Restatement (Third) of the Foreign Relations Law of the United States §102, rpt. 6 (1987). U.S. courts have also accepted this definition. See Siderman de Blake v. Republic of Argentina, 965 F.2d at 714-719; Princz v. Federal Republic of Germany, 26 F.3d 1166, 1173 (D.C. Cir. 1994); Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988).

It is the jus cogens nature of the prohibition against torture that the District Court failed to consider in its decision.[13] Unlike the common crimes

[13] This Court's opinion in Princz v. Federal Republic of Germany is distinguishable. Princz addressed the applicability of jus cogens norms in the context of the Foreign Sovereign Immunities Act which is itself based on international norms. There is no comparable international nexus with the Westfall Act. In this respect, Judge Wald's dissenting opinion in Princz v. Federal Republic of Germany, 26 F.3d at 1181 (Wald, J., dissenting) (citations omitted) is most persuasive.

that form the basis for the District Court's analysis of scope of employment and immunity doctrine, torture is an international crime and the prohibition against torture constitutes a jus cogens norm. The underlying justification for refusing to recognize torture as an official act of state is that a sovereign state cannot defend violations of jus cogens norms as official functions of the state. They are ultra vires. In addition, these international crimes affect the international community in ways that common crimes do not. Thus, in Presbyterian Church of Sudan v. Talisman Energy Inc., 244 F. Supp. 2d at 306 (citing Tachiona v. Mugabe, 234 F. Supp. 2d 401, 415-16 (S.D.N.Y. 2002)), the District Court held that violations of jus cogens norms are fundamentally different from other crimes "by virtue of the 'depths of

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> The principle of nonderogable peremptory norms evolved due to the perception that conformance to certain fundamental principles by all states is absolutely essential to the survival of the international community. Were the conscience of the international community to permit derogation from these norms, ordered society as we know it would cease. Thus, to preserve the international order, states must abdicate any "right" to ignore or violate such norms. As the German Supreme Constitutional Court has explained, jus cogens norms are those that "are indispensable to the existence of the law of nations as an international legal order, and the observance of which can be required by all members of the international community." Unlike general rules of customary international law (jus dispositivum), jus cogens norms are binding upon all nations; whereas states are not constricted by customary international law norms to which they continuously object, jus cogens norms do not depend on the consent of any individual state for their validity. Therefore, jus cogens norms have significant implications for the law of sovereign immunity, which hinges on the notion that a state's consent to suit is a necessary prerequisite to another state's exercise of jurisdiction.

depravity the conduct encompasses, the often countless toll of human suffering the misdeeds inflict upon their victims, and the consequential disruption of the domestic and international order they produce.'"

In sum, torture cannot be viewed as encompassing an official act of state that falls within the regular scope of employment. Unlike common crimes, torture is an international crime and the prohibition against torture constitutes a jus cogens norm, a non-derogable obligation that binds every member of the international community.

II. BECAUSE TORTURE CAN NEVER BE CONSIDERED AN OFFICIAL ACT OF STATE, GOVERNMENT OFFICIALS WHO AUTHORIZE TORTURE ARE NOT PROTECTED BY IMMUNITY

U.S. courts have long recognized the distinction between public and private acts in considering whether to recognize immunity for acts perpetrated by foreign government officials.[14] This practice is based, in part, on the principle that government officials acting without lawful authorization are acting ultra vires. In Chuidian v. Philippine Nat'l Bank,

[14] In Rasul, the District Court discounted the relevance of cases that involved foreign government officials and claims of immunity. Rasul v. Rumsfeld, 414 F. Supp. 2d at 34. However, it failed to consider that these cases, like the allegations set forth in Rasul v. Rumsfeld involved international crimes and jus cogens norms. Thus, these cases are directly relevant. In contrast, cases addressing common crimes are inapposite to the facts of this case.

912 F.2d 1095, 1106 (9th Cir. 1990) (citing Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 689 (1949)), for example, the Ninth Circuit characterized as ultra vires, and, therefore, as "non-sovereign," actions taken by government officials that were beyond the legal authority of the state. "[W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business that the sovereign has empowered him to do." Id. at 1106. See also Phaneuf v. Republic of Indonesia, 106 F.3d 302, 308 (9th Cir. 1997) ("If the foreign state has not empowered its agent to act, the agent's unauthorized act cannot be attributed to the . . . state."). When a court determines that an individual was not engaged in official acts of state, it declines to extend immunity to that individual. See In re Doe, 860 F.2d 40, 45 (2d Cir. 1988) ("[T]here is respectable authority for denying head-of-state immunity to a former head of state for his private or criminal acts in violation of American law"); In re Grand Jury Proceedings, 817 F.2d 1108, 1111 (4th Cir. 1987); Republic of the Philippines v. Marcos, 806 F.2d 344, 360 (2d Cir. 1986); Jimenez v. Aristeguieta, 311 F.2d 547, 557-558 (5th Cir. 1962) (domestic crimes "were not acts of . . . sovereignty" or acts committed "in an official capacity."); The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch), 116, 145 (1812).

U.S. courts have also declined to recognize immunity in cases where government officials violate international law. In Santissima Trinidad, 20 U.S. (7 Wheat.) 283 (1822), the Supreme Court held that although a public vessel of a foreign sovereign was ordinarily entitled to immunity from libel proceedings in American courts, immunity could not be invoked if the vessel had violated the laws of neutrality under the "law of nations." Id. at 353.

> To be sure, a foreign sovereign cannot be compelled to appear in our Courts, or be made liable to their judgment, so long as he remains in his own dominions. . . . If, however, he comes personally within our limits, although he generally enjoy a personal immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of the nation.

Id. Accord Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 425 (2d Cir. 1987), rev'd on other grds., 488 U.S. 428 (1989) ("[S]overeigns are not immune from suit for their violations of international law."); West v. Multibanco Comermex, S.A., 807 F.2d 820, 826 (9th Cir. 1987) ("A foreign state is not immune from the exercise of our jurisdiction in a case 'in which rights in property taken in violation of international law are in issue.' 28 U.S.C. § 1605(a)(3)"). This exception is based upon the general presumption that states abide by international law and, hence, violations of international law are not 'sovereign' acts.'"); Berg v. British and African Steam Navigation Co., 243 U.S. 124 (1917) (sovereign

immunity of a public ship does not extend to such prize and property captured in violation of the forum's neutrality); Hudson v. Guestier, 8 U.S. (4 Cranch) 293, 294 (1808) (foreign public acts that violate the law of nations are not entitled to recognition as lawful public acts). See Emmerich De Vattel, The Law of Nations, ch. 4, § 54 (1758) ("The prince who violates all laws, who no longer observes any measures, and who would in his transports of fury take away the life of an innocent person, divests himself of his character, and is no longer to be considered in any other light than that of an unjust and outrageous enemy, against whom his people are allowed to defend themselves."). See also Jordan Paust, International Law as Law of the United States, 169, 177, 306-307, 422, 435-439 (3d ed. 2007); Jurgen Brohmer, State Immunity and the Violation of Human Rights (1997); Andrea Bianchi, "Denying State Immunity to Violations of Human Rights," 46 Austrian J. Pub. & Int'l L. 229 (1994).

For these reasons, it is not surprising that U.S. courts have declined to recognize immunity for government officials in cases of torture and other serious human rights abuses.[15] See, e.g., Cabiri v. Assasie-Gyimah, 921 F.

[15] These principles are not unique to American jurisprudence but are recognized by other countries. The same rationale explains the decision by the British House of Lords that ex-Chilean President Augusto Pinochet's authorization of torture did not constitute an official act of state and was not amenable to immunity. See Regina v. Bow St. Metro. Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte, [2000] 1 A.C. 147, 262 (Lord Hutton, J.) (acts of torture "cannot be regarded as functions of a head of state under

Supp. 1189, 1197-98 (S.D.N.Y. 1996) ("[T]he alleged acts of torture committed by Assasie-Gyimah fall beyond the scope of his authority. . . . [t]herefore, he is not shielded from Cabiri's claims"); Xuncax v. Gramajo, 886 F. Supp. at 176 (where the court denied immunity to Hector Gramajo, the former Guatemalan Minister of Defense, for his acts of summary execution and disappearances because "the acts which form the basis of these actions exceed anything that might be considered to have been lawfully within the scope of Gramajo's official authority," and the court also stated that "[t]here is no suggestion that either the past or present governments of Guatemala characterize the actions alleged here as 'officially' authorized"); In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d at 1470 ("Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the

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international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime."). See also Ilias Bantekas, "International Decisions: Prefecture of Voiotia v. Federal Republic of Germany," 92 Am. J. Int'l L. 765, 766 (1999) ("[W]here a state acts in breach of a rule of jus cogens, that state loses its right to invoke sovereign immunity."); Maria Gavouneli and Ilias Bantekas, "International Decisions: Prefecture of Voiotia v. Federal Republic of Germany," 95 Am. J. Int'l L. 198 (2001) (violations of jus cogens norms give rise to personal liability even if the underlying acts would otherwise have been characterized as the exercise of sovereign power). See also The Nurnberg Decision, 6 F.R.D. 69, 110 (1946) ("He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law").

sovereign has empowered him to do."); Paul v. Avril, 812 F. Supp. 207, 212 (S.D. Fla. 1992) (the court denied immunity to Prosper Avril, the former head of the Haitian military, for human rights violations because "[t]he acts as alleged in the complaint, if true would hardly qualify as official public acts"); Republic of the Philippines v. Marcos, 862 F.2d 1355, 1361 (9th Cir. 1988) ("Although sometimes criticized as a ruler and at times invested with extraordinary powers, Ferdinand Marcos does not appear to have had the authority of an absolute autocrat. He was not the state, but the head of the state, bound by the laws that applied to him. Our courts have had no difficulty in distinguishing the legal acts of a deposed ruler from his acts for personal profit that lack a basis in law. As in the case of the deposed Venezuelan ruler, Marcos Perez Jimenez, the latter acts are as adjudicable and redressable as would be a dictator's act of rape."); Forti v. Suarez-Mason, 672 F. Supp. at 1546 (holding that acts of torture, extra-judicial execution, and arbitrary detention by a former member of the Argentine military junta were not governmental, "public" or "public official" acts nor "ratified," but were "illegal" acts); Letelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980) (citations omitted) ("As it has been recognized, there is no discretion to commit, or to have one's officers or agents commit, an illegal act. Whatever policy options may exist for a

foreign country, it has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.").[16]

In a constitutional democracy, state action must conform to the rule of law. Neither military necessity nor public emergency can justify derogation from the most fundamental right protected by our democracy – the right to human dignity.[17] Recognizing acts of torture as official acts of state that fall within the regular scope of employment and granting immunity to such acts devalues our history and degrades the rule of law.

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[16] Cf. Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005); Ford ex rel. Estate of Ford v. Garcia 289 F.3d 1283 (11th Cir. 2002).

[17] Civil liberties are often challenged in times of national emergency. Korematsu v. United States, 323 U.S. 214 (1944), among many cases, is representative of this troubling phenomenon. While Korematsu remains on the pages of our legal and political history, it is now recognized as having very limited application. "As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability." Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

CONCLUSION

Torture and other serious human rights abuses are alien to our heritage and our system of law.[18] Such acts of depravity also violate the most basic norms of international law. Accordingly, such acts simply cannot be construed as official acts of state that fall within the regular scope of employment. While government officials may receive immunity in limited situations for common crimes, such exceptions do not apply to international crimes with jus cogens status.

For these reasons, Amici respectfully request this Court to reverse the judgment of the District Court.

Dated: January 17, 2007

Respectfully submitted,

WILLIAM J. ACEVES
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[18] In A and Others v. Secretary of State, [2005] UKHL 71, ¶ 51, a unanimous House of Lords explained that the common law has regarded torture with abhorrence for 500 years.

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APPENDIX

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Human Rights Organizations

The **Center for Justice and Accountability** (CJA) is an international human rights organization dedicated to ending torture and other severe human rights abuses around the world and advancing the rights of survivors to seek truth, justice and redress. CJA uses litigation to hold perpetrators individually accountable for human rights abuses, develop human rights law, and advance the rule of law in countries transitioning from periods of abuse.

Human Rights Watch (HRW) is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state

and non-state actors, HRW seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. HRW has filed amicus briefs before various bodies, including U.S. courts and international tribunals.

The **Allard K. Lowenstein International Human Rights Clinic** at Yale Law School gives students first-hand experience in human rights advocacy, undertakes litigation and research projects that aim to further the establishment and enforcement of the international law of human rights.

Physicians for Human Rights is an organization of health professionals dedicated to the protection and promotion of human rights, including fostering the rule of law holding perpetrators of human rights abuses accountable. The organization employs medical and scientific methods to investigate torture, extrajudicial executions and disappearances, the epidemiology of landmine casualties, war crimes, and the health aspects of other human rights abuses in more than 70 nations around the world, including the United States, and has provided evidence from its investigations for tribunals including the International Criminal Tribunals for former Yugoslavia and for Rwanda and the Sierra Leone Special Court. For the past five years, the organization has sought compliance by the United States with international and domestic laws prohibiting torture and

other forms of detainee abuse. In 1997, Physicians for Human Rights shared in the Nobel Peace Prize as a member of the steering committee of the International Campaign to Ban Landmines.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point, and contains 4,605 words, (which does not exceed the applicable 7,000 word limit).