No. 05-5099-AG

Oral Argument Date: Unknown | Dist. Court Case No. 3:02CV1276

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KERVING'S GUILLAUME,
Petitioner,

v.

JOHN ASHCROFT, Attorney General of the United States, et al.,
Respondents.

TRANSFERRED FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF *AMICUS CURIAE* ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC IN SUPPORT OF PETITIONER GUILLAUME'S PETITION FOR A WRIT OF *HABEAS CORPUS*

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STATEMENT OF INTEREST

The Allard K. Lowenstein International Human Rights Clinic ("the Clinic") is a Yale Law School program that gives students first-hand experience in human rights legal practice. This appeal raises important questions about the level of intent that is required under the definition of torture in Article 1 of the Convention Against Torture and how U.S. law incorporates this standard. The Clinic has a significant interest in the adoption in this case of a definition of torture that is consistent with international law. The Clinic is submitting this brief together with a motion pursuant to Federal Rule of Appellate Procedure 29(a) and (b) for an Order granting leave to file a brief as *amicus curiae* in this matter.

INTRODUCTION

Petitioner Kerving's Guillaume is a Haitian citizen who has been a lawful permanent resident of the United States since the age of fourteen. Having completed a prison sentence for committing an aggravated felony, he now faces removal.

Mr. Guillaume submitted a petition for a writ of habeas corpus to the U.S. District Court for the District of Connecticut to avoid removal to Haiti. That case has now been transferred to the Second Circuit Court of Appeals pursuant to Section 242(a)(5) of the Immigration and Naturalization Act (8 U.S.C. § 1252(a)(5)).[1] He seeks relief under Article 3 of the Convention Against Torture ("CAT"), which prohibits the United States from returning individuals to countries where they would likely be subject to torture.[2] Convention Against Torture and

[1] A brief submitted by the Clinic at the request of the U.S. District Court for the District of Connecticut in this case contains a more extensive discussion of requirements under the Convention Against Torture and how they are met in this case. Br. of *Amicus Curiae* Allard K. Lowenstein International Human Rights Clinic at Yale Law School, *Guillaume v. Ashcroft* (No. 3:02CV1276 (RNC)) (Dec. 15, 2003) (Pet'r Special App., at 4). In addition to addressing the requisite level of intent for a finding of torture, the brief concluded that international law clearly establishes that the distinction between acts and omissions is not relevant in defining torture, that a policy designed to warn particular individuals and to deter crime meets the purpose requirement of the Convention Against Torture, and that an act does not constitute a "lawful sanction" under the Convention Against Torture merely because the state has authorized the act under domestic law.

[2] This brief does not discuss the standard of review this Court should apply to the decision of the Board of Immigration Appeals in this case.

Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), *entry into force* June 26, 1987. Petitioner alleges that, if deported, the Haitian government will imprison him indefinitely in deplorable conditions and that such imprisonment would constitute torture under the CAT. An immigration judge denied Petitioner's request for withholding of deportation. Subsequently, the Board of Immigration Appeals ("BIA") dismissed Petitioner's appeal based on its decision in *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002). In *Matter of J-E-*, the BIA held that Haiti's detention policy did not amount to torture.[3]

The Haitian government has an unwritten policy of detaining criminal deportees, even those like Petitioner who have completed criminal sentences abroad, upon their return to Haiti. There is no provision in Haitian law for such detention, and the length of detention is indefinite. *See id.* at 299-300; *see also* Dep't of State, *Haiti: Country Reports on Human Rights Practices, 2004* (2005);

[3] Specifically, the BIA held that the respondent in *Matter of J-E-* did not establish that the Haitian government "deliberately inflicted acts of torture," as required by the CAT. *Matter of J-E-*, 23 I&N Dec. at 303. The BIA also held that, although "isolated acts of torture" do occur inside Haitian prisons, the respondent did not demonstrate that *he* more likely than not would be tortured, rather than severely mistreated. *Id*. at 303-04. Six of the nineteen members on the panel dissented. These members concluded that (1) the totality of conditions in Haitian prisons did constitute torture, (2) the respondent did establish that he would more likely than not be tortured upon return to Haiti, and (3) the majority misread specific intent into the CAT's definition of torture. *Id*. at 309-10, 315-16.

Dep't of State, *Haiti: Country Reports on Human Rights Practices, 2000* (2001) ("2000 State Dep't Report"). The stated purpose of this indefinite detention is to provide a "warning and deterrent" to criminal deportees to dissuade them from committing crimes in Haiti. *Matter of J-E-*, 23 I&N Dec. at 300; *see also* 2000 State Dep't Report. The U.S. government does not contest these findings; indeed, the United States has condemned Haiti's detention practices. *Matter of J-E-*, 23 I&N Dec. at 299-300.

The record contains human rights reports and news articles that document the appalling conditions in Haitian detention facilities. Detention facilities are inadequate and unsanitary, and overcrowding is severe. Prisoners lack basic hygiene and are confined to their cells for twenty-four hours a day in some facilities. Water and food shortages are frequent. Malnutrition is common, particularly among detainees who do not have family to bring food to supplement their diet. Detainees have limited access to medical care, and withholding medical treatment from injured jail inmates is a common form of police mistreatment of detainees. Abuse of detainees by police and prison officials is pervasive and can also include burning with cigarettes, choking, hooding, and beating with fists, sticks, and belts. *See* 2000 State Dep't Report; *see also* Dep't of State, *Haiti: Country Reports on Human Rights Practices, 2005* (2006). Beatings have been

described as "'pervasive in all parts of the country.'" *Matter of J-E-*, 23 I&N Dec. at 301-02 (*quoting* 2000 State Dep't Report).

The Haitian government is aware of these conditions. The BIA found that "Haitian authorities are intentionally detaining criminal deportees knowing that the detention facilities are substandard," *Matter of J-E-*, 23 I&N Dec. at 301, a finding Respondents in the instant case do not contest. The Haitian government states that it would like to improve conditions in its detention facilities but lacks the money to do so. *Id.*

Article 1(1) of the CAT defines torture as follows:

> For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 3 obligates States Parties not to expel persons to states where they would likely be subjected to torture:

> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant

> considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The United States signed the CAT on April 18, 1988, the Senate gave its advice and consent on October 27, 1990, *see* Senate Resolution of Ratification, 101st Cong., 2d Sess., 136 Cong. Rec. S17486 (daily ed., Oct. 27, 1990) ("Senate Resolution"), and the United States submitted its ratification on October 21, 1994. The CAT was codified in U.S. law in the Foreign Affairs Reform and Restructuring Act, Pub. L. 105-277, Div. G, Subdiv. B, Title XXII (Oct. 21, 1998) ("FARRA"), which states that "[e]xcept as otherwise provided, the terms used in this section have the meanings given those terms in the Convention [Against Torture], subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention." FARRA § 2242(f)(2).

The Senate Resolution and Department of Justice implementing regulations, *see* Implementation of the Convention Against Torture, 8 C.F.R. § 208.18 (2003), include two understandings that are particularly relevant for present purposes. First, "in order to constitute torture, an act must be *specifically intended* to inflict severe physical or mental pain or suffering . . . ." Senate Resolution § II(1)(a); 8 C.F.R. § 208.18(a)(5) (emphasis added). Second, "the term 'acquiescence' [in Article 1 of the CAT] requires that the public official, prior to the activity

constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity." Senate Resolution § II(1)(d); 8 C.F.R. § 208.18(a)(7).

SUMMARY OF ARGUMENT

The act of indefinitely imprisoning an individual in conditions that are known to be grossly substandard and that foreseeably result in severe mental or physical pain or suffering, for purposes of warning or deterring him from committing crime, is an act of torture prohibited by the CAT. It is immaterial whether the officials responsible for the detention affirmatively create the grossly substandard conditions or affirmatively desire to cause severe pain or suffering. The intent with which acts or omissions must be committed to constitute torture is clear under international law: The language of the CAT, decisions of several international tribunals, and commentary by the drafters of the CAT and the United Nations Special Rapporteur on Torture consistently establish that a finding of torture does not require the perpetrator to have an actual desire to cause severe pain or suffering. Rather, to satisfy the CAT's requirement that an act of torture be "intentionally inflicted," the act need only be deliberate and not accidental, and the pain or suffering need only be a foreseeable consequence of the act. U.S. law is consistent with this definition. Although the Senate Resolution contains, and the implementing regulation applies, an understanding that the CAT requires an act of

torture to be "specifically intended," this does not require the particular legal standard of "specific intent to" cause severe mental or physical pain or suffering. Contrary to the BIA's finding in *Matter of J-E-*, the phrase "specifically intended" is not unambiguous. The structural consistency of the Senate Resolution and the presumption against understandings that contravene the object and purpose of the CAT support the conclusion that U.S. law should be interpreted—consistent with international law—not to require specific intent.

ARGUMENT

The consensus under international law is clear: A finding of intent under the CAT requires only that the act be deliberate and the pain and suffering foreseeable. Neither the ambiguous use of the phrase "specifically intended" in the Senate Resolution and the implementing regulations nor the single reference to "specific intent" in the legislative history of the Senate Resolution alter this conclusion.

In *Matter of J-E-*, the BIA incorrectly held that an act of torture, as defined in Article 1 of the CAT, the Senate Resolution, and the implementing regulations, must be committed with specific intent "'to accomplish the precise criminal act that one is later charged with . . . .'" 23 I&N Dec. at 301 (quoting *Black's Law Dictionary* 814 (7th ed. 1999)); *see also id*. (stating that in the definition of torture, "it [is] clear that [there] is a 'specific intent' requirement, not a 'general intent' requirement"). The BIA expressly recognized that "Haitian authorities are

intentionally detaining criminal deportees knowing that the detention facilities are substandard," *id*. (emphasis added), and that they are doing so "'as a warning and deterrent,'" *id*. at 300 (quoting Letter from William E. Dilday, Director of the Office of Country Reports and Asylum Affairs, U.S. Dep't of State, to Immigration Judge (Apr. 12, 2001)). Yet the BIA nonetheless held that because Haiti had not "intentionally and deliberately creat[ed] and maintain[ed] such prison conditions in order to inflict torture," Haiti's acts and omissions did not constitute torture under the CAT. *Id*. at 301. This standard appears to impose a requirement of subjective motivation on every element of torture—that is, a requirement that the acting party actually desire to cause severe mental or physical pain or suffering.

The Third Circuit recently followed this same reasoning in *Auguste v. Ridge*, holding that the "appropriate standard to be applied in the domestic context is the specific intent standard." *Auguste v. Ridge*, 395 F.3d 123, 148 (3d Cir. 2005); *see also Majd v. Gonzales*, No. 05-60141, 2006 WL 554930 (5th Cir. Mar. 8, 2006); *Thelemaque v. Ashcroft*, Nos. 3:04-CV-676(MRK), 3:04-CV-1727(MRK), 2005 WL 730215 (D. Conn. Mar. 28, 2005). The standard imposed by the BIA and the Third Circuit finds no support in the text of the CAT or sources of international law applying and interpreting the CAT. The correct standard requires that the act be deliberate and the pain or suffering foreseeable in order to find intent under the CAT, a burden that the Petitioner has met here.

I. As applied and interpreted in international law, Article 1 of the CAT does not require that the perpetrator of an act of torture have the subjective motivation, or specific intent, to cause severe mental or physical pain or suffering.

Under Article 1 of the CAT, "torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted" for a requisite purpose. The text of the CAT neither expressly defines the level of intent required nor specifies which elements of torture must be intended. International law, however, has expressly rejected the definition of intent endorsed by the BIA and makes clear that the phrase "intentionally inflicted" requires: (1) that an act be deliberate, not accidental; and (2) that severe mental or physical pain or suffering be a foreseeable consequence of the act.[4]

An "intentional" act under the CAT is one "which, judged objectively, is deliberate and not accidental." *Prosecutor v. Delalic*, IT-96-21-T, at para. 468 (ICTY Trial Chamber Nov. 16, 1998); *see also* J. Herman Burgers & Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 118 (1988). Although severe pain or suffering resulting from a

[4] In order to find a violation of the CAT, the act must also be intended to achieve a purpose. There is no dispute that Haitian authorities have expressly stated that the intended purposes of this detention policy are to warn and to deter further criminal activity. *See* Br. of *Amicus Curiae* Allard K. Lowenstein International Human Rights Clinic at Yale Law School, at 23-32, *Guillaume v. Ashcroft* (No. 3:02CV1276 (RNC)) (Dec. 15, 2003) (Pet'r Special App., at 4).

deliberate act will not support a finding of torture if the pain or suffering is merely accidental, *see id.*, the lack of a subjective desire or motivation to cause pain or suffering is no defense under the CAT.

The International Criminal Tribunal for the Former Yugoslavia ("ICTY") specifically rejected such a defense in the appeal of Bosnian Serb paramilitary soldiers convicted of torturing Bosnian Muslim women by raping them. *Prosecutor v. Kunarac*, IT-96-23, at para. 153 (ICTY Appeals Chamber June 12, 2002); *see also Prosecutor v. Kunarac*, IT-96-23-T, at para. 483 (ICTY Trial Chamber Feb. 22, 2001) (adopting the CAT's intentionality requirement); *Prosecutor v. Furundžija*, IT-95-17/1-T, at para. 162 (ICTY Trial Chamber Dec. 10, 1998), *aff'd* (ICTY Appeals Chamber July 21, 2000) (same). The appellants claimed that they raped their victims for sexual gratification only and that "[their] intention . . . was of a sexual nature [and thus] inconsistent with an intent to commit the crime of torture." *Kunarac*, IT-96-23 (Appeals Chamber) at para. 153. The Tribunal held that there was an "important distinction between 'intent' and 'motivation'" and "even if the perpetrator's motivation is entirely sexual, . . . it is important to establish whether [the] perpetrator *intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.*" *Id.* (emphasis added). The Tribunal found that the soldiers' act of rape was torture: Even though the soldiers may not have been

motivated by a desire to inflict severe pain or suffering on their victims, their acts of rape were deliberate, and severe mental or physical pain or suffering should have been foreseen as arising "in the normal course of events." *Id.*

Notably, the ICTY's definition of the level of intent required by the CAT—that severe mental or physical pain or suffering need only be foreseeable rather than intended and desired—is strikingly similar to the American definition of general intent, not specific intent as required by the BIA. *See, e.g.*, *United States v. Francis*, 164 F.3d 120, 121 (2d Cir. 1999) ("In the case of general-intent crimes, the government need prove only that the defendant intended to do the act in question and intended the reasonable and probable consequences of that act . . . . The government would not need to prove that the defendant intended to violate the law or to bring about some specific result [as with a specific-intent crime].").

The United Nations Special Rapporteur on Torture has likewise found that intentional acts that foreseeably result in severe mental or physical pain or suffering may constitute torture. This is particularly true of poor prison conditions similar to those alleged by Petitioner. In his report on Russian prisons, for example, Special Rapporteur Sir Nigel S. Rodley noted that detention in poor prison conditions, if the detention is committed in furtherance of a requisite purpose, can constitute torture. He reported:

> When the door to . . . a general cell is opened, one is hit by a blast of hot, dank, stinking (sweat, urine, feces) gas that passes for air. These

> general cells may have one filthy sink and a tap, from which water does not always emerge, near a ground-level toilet . . . . There is virtually no daylight from covered or barred windows, through which only a small amount of fresh air can penetrate. Artificial light is weak and not always functioning.
>
> Due to the overcrowding in the general cells . . . there is insufficient room for everyone to lie down, sit down or even stand up at the same time. . . . The inmates tend to be half-clothed and are even stripped to their undershorts . . . . Their bodies are perspiring and nothing can dry due to the humidity. . . . [T]he general cells . . . are disease incubators. Festering sores and boils abound; most if not all inmates suffer from skin diseases that cause pervasive itching.
>
> The detainees . . . are allowed only one hour a day to leave the cell to exercise. Once a week they are able to shower. The food—not always available because of the indebtedness of the institutions—is primitive, of a fat-saturated soupy nature. It is consumed in the cell and is excreted in the cell.

Report of the Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/1995/34 (1995), *reprinted in* Nigel S. Rodley, *The Treatment of Prisoners Under International Law* 292-93 (2d ed. 1999). He concluded that if the deliberate act of detention in such conditions was accompanied by "proof of the purposive element required to justify a characterization of torture," then the prisoners could "'properly be described as being subjected to torture.'" *Id*. at 293.

The Inter-American Convention to Prevent and Punish Torture, *opened for signature* Dec. 9, 1985, OAS Treaty Ser., No. 67, *entry into force* Feb. 28, 1987 ("Inter-American Convention") provides in Article 2 that "torture shall be understood to be any act intentionally performed whereby physical or mental pain

or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose." This provision was "influenced by" the definition of torture in Article 1 of the CAT. Burgers & Danelius at 117.[5] Like the CAT, the Inter-American Convention requires that the act be intentional. Moreover, the text unambiguously indicates that the intent requirement relates to the performance of the act, not to the pain or purpose elements of the definition.

The Inter-American Commission on Human Rights ("Commission"), in interpreting the Inter-American Convention, has found that so long as severe mental or physical pain or suffering foreseeably results, the intentional act of imprisonment can amount to torture, even without a finding that the perpetrators had the subjective desire to cause severe mental or physical pain or suffering. For example, the Commission has found that subsequent to a judicial order that a prisoner be released, continued detention on grounds that the prisoner "represents 'a danger to the country'" constitutes torture and that solitary confinement of a prisoner for purposes of punishment, when the prisoner is in a weakened state of health, "seriously endanger[s] [the prisoner's] physical integrity" and constitutes torture. Case 10.832, Inter-Am. C.H.R., OEA/Ser.L/V/II.98 (1998), at paras.

[5] Differences exist between the two conventions, such as the scope of the purposes that would trigger their prohibitions, but *amicus curiae* has found nothing to suggest that the intentionality requirements are different.

85(a), 86(b), *available at* http://www.cidh.oas.org/annualrep/97eng/Dom.Rep.10832.htm. The Commission did not find that prison officials desired to cause the prisoner severe mental or physical pain or suffering to achieve a requisite purpose. Yet, the Commission found that the deliberate act of imprisoning him for a requisite purpose (under the Inter-American Convention, any purpose will suffice), where the circumstances of detention would foreseeably cause the prisoner severe mental or physical pain or suffering (i.e., detaining him for a time beyond that prescribed by law and aggravating his health problems), nonetheless constituted torture.

The conclusion that someone can be held responsible for torture even without any actual desire to cause the victim severe mental or physical pain or suffering is supported by the breadth of the CAT's definition of torture. The inclusion of "acquiescence" in Article 1 provides an example of an act that constitutes torture in the absence of a subjective desire to cause such suffering. As Burgers and Danelius note in their commentary:

> All such situations where the responsibility of the authorities is somehow engaged [in an act of torture] are supposed to be covered by the rather wide phrase appearing in article 1: "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". If torture is performed by a public agency, . . . *the government of the country has no defence under the [CAT] in saying that it was unaware of the act or even disapproved of it once it was informed.*

Burgers & Danelius at 120 (emphasis added). The ICTY has noted, "[Article 1 of the CAT is] stated in very broad terms and extends to officials who take a passive attitude or turn a blind eye to torture, most obviously by failing to prevent or punish torture under national penal or military law, when it occurs." *Delalic*, IT-96-21-T, at para. 474 (Trial Chamber). Willful blindness or passivity is, by definition, deliberate. Yet those who are deliberately blind or deliberately passive need not have any subjective desire to cause pain or suffering. If such pain or suffering is foreseeable (and not merely an accidental byproduct), "acquiescence" may constitute torture under the CAT. *See Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004) ("In terms of state action, torture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it."). The logic underlying the inclusion of acquiescence reinforces the conclusion that the intentionality requirement cannot be read so narrowly as to limit a finding of torture to those who actually desire to cause severe pain or suffering.

As the BIA found, "Haitian authorities are *intentionally* detaining criminal deportees *knowing* that the detention facilities are substandard . . . ." *Matter of J-E-*, 23 I&N Dec. at 301 (emphases added). The Third Circuit also found that the "Haitian authorities have *knowledge* that severe pain and suffering may result by placing detainees in . . . deplorable prison conditions." *Auguste*, 395 F.3d at 153

(emphasis added). Haitian officials' deliberate act of detaining prisoners indefinitely in facilities that are severely overcrowded, and in which malnourishment, starvation, disease, lack of basic sanitation and toilet facilities, and other deplorable conditions are widespread, clearly satisfies the CAT's intentionality requirement. Contrary to the BIA and Third Circuit holdings, it is not a defense under the CAT for Haitian officials to claim that they did not affirmatively create deplorable prison conditions in order to torture prisoners by deliberately inflicting severe mental or physical pain or suffering. The relevant act is the decision to detain the prisoner in such deplorable conditions. Where conditions of detention are known to be so harsh that severe pain or suffering is inevitable, the conditions are indivisible from the detention itself, and the deliberate decision to detain criminal deportees necessarily encompasses that pain and suffering.[6] Although the deliberate creation of substandard prison conditions would certainly satisfy the intent requirement, this is not required. As long as government officers deliberately confine prisoners in a facility that the officers

[6] The following example applies the BIA and Third Circuit holdings to extreme circumstances to highlight their logical flaw: *A*, a government agent, wishes to punish *B*. *A* deliberately places *B* in a cell that is infested with poisonous snakes. Although *A* did not place the snakes in the cell, he knows they exist and can foresee that they will cause *B* severe pain and suffering. Under *Matter of J-E-* and *Auguste*, *A* would have a perfect defense: He did not deliberately place the snakes in the cell for the purpose of torturing *B*. Fortunately, the CAT does not allow *A* to evade its terms so easily. *A* knows that the snakes exist and deliberately places *B* in a position in which it is foreseen that severe mental or physical pain or suffering will result. This is sufficient to bring *A*'s act within the prohibition of the CAT.

know is grossly substandard and can reasonably foresee that the deplorable conditions in that facility will result in severe mental or physical pain or suffering, the CAT's intent requirement is satisfied.

II. The phrase "specifically intended" in the Senate Resolution ratifying the CAT and in 8 C.F.R. § 208.18(a)(5) does not graft a specific intent requirement onto the CAT's definition of torture.

Specific intent to cause severe mental or physical pain or suffering in furtherance of a requisite purpose is not required to satisfy the CAT's definition of torture, and the definition of torture found in U.S. laws implementing the CAT does not add such a requirement. In the statute implementing the CAT, Congress provided that "the terms used in this section have the meanings given those terms in the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention." FARRA § 2242(f)(2). Although the resolution of ratification contains an understanding that "torture . . . must be *specifically intended* to inflict severe physical or mental pain or suffering," Senate Resolution § II(1)(a) (emphasis added), a requirement restated verbatim in 8 C.F.R. § 208.18(a)(5), this understanding does not require the specific intent to cause pain or suffering. In *Zubeda v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003), for example, the Third Circuit reasoned as follows:

> Although the regulations require that severe pain or suffering be "intentionally inflicted," we do not interpret this as a "specific intent" requirement. Rather, we conclude that the Convention [Against Torture] simply excludes severe pain or suffering that is the unintended consequence of an intentional act. The regulation does state: "in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering." However, the regulation immediately explains: "[a]n act that results in unanticipated or unintended severity of pain and suffering is not torture." *The intent requirement therefore distinguishes between suffering that is the accidental result of an intended act, and suffering that is purposefully inflicted or the foreseeable consequence of deliberate conduct. However, this is not the same as requiring a specific intent to inflict suffering.*

333 F.3d at 473 (emphasis added) (internal citations omitted).[7] Although the Third Circuit held in *Auguste* that this passage was dicta, *Auguste*, 395 F.3d at 148, the analysis of the intent standard in *Zubeda* reflects a more careful reading of the U.S. implementing regulation and is consistent with the clear standard that is unequivocally established in international law.

[7] In addition, as the Magistrate Judge in *Carry v. Holmes*, No. 02-CV-0369SR, slip op. (W.D.N.Y. July 18, 2003) (Report, Recommendation, and Order) concluded, even though "the appropriate question is not whether Haiti subjects detainees to indefinite detention with the specific intent to torture them, but whether Haitian officials intentionally, *i.e.*, deliberately or purposefully (as opposed to accidentally or negligently) inflict severe pain and suffering upon [them]," *id.* at 24, "[i]t is difficult to fathom how Haitian officials could subject criminal deportees such as petitioner to such conditions without intent to inflict severe mental or physical suffering upon them," *id*. at 27. *Amicus curiae* agree with his conclusion. Even if the law required specific intent to cause pain or suffering, that requirement is met where authorities choose to detain people knowing that the conditions of detention are so harsh that severe physical or mental pain or suffering is inevitable and indivisible from the detention itself. In such circumstances, the prison, with its brutal conditions, is, in effect, the implement of torture.

In *Matter of J-E-*, the BIA held that "specifically intended" requires that a perpetrator have an actual, subjective desire to cause severe mental or physical pain or suffering. *See Matter of J-E-*, 23 I&N Dec. at 301 (asserting that "it [is] clear that [there] is a 'specific intent' requirement"). The BIA also referred to a statement in the legislative history of the Senate Resolution that mentions specific intent. *See id.* (citing Report of the Senate Committee on Foreign Relations, S. Exec. Rep. No. 101-30, at 14 (1990)). The Committee Report states that "the requirement of intent to cause severe pain and suffering is of particular importance in the case of alleged mental pain and suffering, as well as in cases where unexpectedly severe physical suffering is caused. Because specific intent is required, an act that results in unanticipated and unintended severity of pain and suffering is not torture for purposes of th[e] [CAT]." S. Exec. Rep. 101-30, at 13-14. As this analysis indicates, the phrase "specific intent" is used in the Committee Report to emphasize the exclusion, well established in international law, of unintended pain or suffering. *See Delalic*, IT-96-21-T, at para. 486 (Trial Chamber). Although this legislative history uses the phrase "specific intent," it does not delineate a particular standard of intent except to exclude accidental injury. Moreover, an interpretation that does not require specific intent is consistent with the intent standard found in international law and is reinforced by (1) substantial evidence that the phrase "specifically intended" in the Senate

Resolution is not an unambiguous assertion of a specific intent standard, (2) the presumption against an interpretation that would defeat the object and purpose of the CAT, and (3) the need to maintain internal textual consistency within the Senate Resolution and implementing regulations.

Contrary to the BIA's assertion in *Matter of J-E-*, "specifically intended" does not unambiguously require specific intent. A review of the United States Code reveals eight uses of the phrase "specifically intend[s][ed]." In six of these sections, Congress uses the phrase in contexts that clearly do not impose a specific intent requirement and have nothing to do with the elements of a violation. For example, the section dealing with the organization of congressional committees states, "[I]f the bill or joint resolution would make [a] reduction . . . , [the Committee Report shall contain] a statement of *how the committee specifically intends the States to implement the reduction* . . . ." 2 U.S.C. § 658b(d)(3) (2000) (emphasis added).[8] In these sections, "specifically" is used as an adverb that

[8] *See also* 19 U.S.C. § 1675(d)(1) (2000) (Administrative Review of Antidumping Determinations) ("The administering authority shall not revoke . . . a countervailing duty order . . . on the basis of any export taxes, duties, or other charges . . . which are *specifically intended to offset the countervailable subsidy received*.") (emphasis added); 20 U.S.C. § 1232g(a)(1)(C)(ii) (2000) (Family Educational Privacy Rights) ("[C]onfidential letters and statements of recommendation, . . . *if such letters are not used for purposes other than those for which they were specifically intended*[, shall not be made available to students].") (emphasis added); 20 U.S.C. § 1232g(a)(1)(D) (2000) (Family Educational Privacy Rights) ("A student . . . may waive his right of access to confidential statements . . . , except that such waiver shall apply to recommendations only if . . . (ii) *such*

modifies "intend[s][ed]" in a general sense, such as the intent of Congress ("how the committee specifically intends the States to implement the reduction") or of an educational institution ("if such letters are not used for purposes other than those for which they were specifically intended") or of the U.S. government ("export taxes, duties, or other charges . . . specifically intended to offset the countervailing subsidy received").[9] These sections do not impose a requirement of specific intent as an element of a violation.

The two instances in which the use of "specifically intend[s][ed]" may refer to specific intent as an element of a violation do not overcome the phrase's ambiguity. The first is the section criminalizing the domestic use of torture, but that section simply repeats the ambiguous language in the Senate Resolution and 8 C.F.R. § 208.18 (a)(5). *See* 18 U.S.C. § 2340(1) (2000) ("'[T]orture' means an act committed by a person acting under the color of law *specifically intended* to inflict severe physical or mental pain or suffering . . . .").[10] The other is in the short title of a section dealing with punitive damages; however, the operative language of the section to which it refers uses the phrase "specific intent." 15 U.S.C. § 6604(b)(3) (2000) (Punitive Damages in Y2K Actions) ("No cap if injury specifically

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recommendations are used solely for the purpose for which they were specifically intended.") (emphasis added).

[9] See citations in footnote 8.

[10] *Amicus curiae* has found no cases interpreting 18 U.S.C. § 2340(1) to require specific intent and, indeed, has found no cases interpreting the intent requirement in 18 U.S.C. § 2340(1) at all.

intended: Paragraph (1) does not apply if the plaintiff establishes by clear and convincing evidence that the defendant acted with specific intent to injure the plaintiff."). Indeed, where Congress seeks unambiguously to require specific intent as an element of a violation, it uses the words "specific intent to"—not the more ambiguous "specifically intended"—followed by a phrase indicating the specific act the person must have intended to commit. For example, the definition of genocide found in the section implementing the Genocide Convention states, "Whoever [commits a prohibited act] *with the specific intent to* destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such . . . shall be punished as provided in subsection (b)." 18 U.S.C. § 1091(a) (2000) (emphasis added).[11]

[11] *See also, e.g.*, 10 U.S.C. § 880(a) (2000) (Uniform Code of Military Justice – Attempts) ("An act, done *with specific intent to commit* an offense under this chapter, . . . is an attempt to commit that offense.") (emphasis added); 15 U.S.C. § 6605(b)(1) (2000) (Proportionate Liability in Y2K Non-Contract Actions) ("In any Y2K action that is not a contract action, the court shall instruct the jury to answer . . . whether the defendant . . . acted *with specific intent to injure* the plaintiff.") (emphasis added); 15 U.S.C. § 6605(c)(2)(B) (2000) (Recklessness in Y2K Non-Contract Actions) ("*[R]eckless conduct by the defendant does not constitute either a specific intent to injure*, or the knowing commission of fraud, by the defendant.") (emphasis added); 31 U.S.C. § 3729(b) (2000) (False Claims) ("For purposes of this section, . . . *no proof of specific intent to defraud is required*.") (emphasis added); 5 U.S.C. 8902a(a)(1)(D) (2000) (Debarment) ("[T]he term 'should know' means that a person, with respect to information, acts in deliberate ignorance of, or in reckless disregard of, the truth or falsity of the information, and *no proof of specific intent to defraud is required* . . . .") (emphasis added).

Given the different uses of "specifically intend[s][ed]" and "specific intent to" in the United States Code, the use of the phrase "specifically intended" in the Senate Resolution cannot be deemed an unambiguous requirement of specific intent. Other interpretive aids should thus be used to determine the appropriate meaning. These aids yield substantial evidence that "specifically intended" should not be interpreted to create a specific intent requirement.

First, there is a strong presumption against interpreting "specifically intended" to require specific intent. Reservations, understandings, and declarations that defeat the object and purpose of the CAT are invalid as a matter of customary international law. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (1969), *entry into force* Jan. 27, 1980, art. 19 ("Vienna Convention"); *Restatement (Third) of the Foreign Relations Law of the United States* § 313. Thus, a presumption rests against any interpretation of the Senate Resolution and implementing regulations that would defeat the CAT's object and purpose. Interpreting the words "specifically intended" to require specific intent would defeat the CAT's object and purpose. According to the Senate Committee on Foreign Relations, the purpose of the CAT is to "eliminate torture and other cruel, inhuman or degrading treatment or punishment," and ratification "will demonstrate clearly and unequivocally U.S. opposition to torture and U.S. determination to take steps to eradicate it." S. Exec. Rep. No. 101-30, at

3. Although its analysis of specific intent was later distinguished as dicta, *Auguste*, 395 F.3d at 148, the *Zubeda* court's observation about the effect of a specific intent requirement is nonetheless persuasive: "[R]equiring an alien to establish the specific intent of his/her persecutors could impose insurmountable obstacles to affording the very protections the community of nations sought to guarantee under the Convention Against Torture." 333 F.3d at 474. Any definition of torture that would impose such a burden upon victims or potential victims of torture in order to claim the protection of the CAT, the FARRA, and the implementing regulations would be unduly restrictive and would drastically hamper these laws' effectiveness in achieving their purpose.

Second, a careful textual analysis of the Senate Resolution and implementing regulations reveals that if the phrase "specifically intended" were interpreted to create a "specific intent" requirement, it would violate the internal consistency of the Senate Resolution and the implementing regulations. The Senate Resolution states that "the term 'acquiescence' [in Article 1 of the CAT] requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity." Senate Resolution § II(1)(d); 8 C.F.R. § 208.18(a)(7) (restating this understanding). The Senate Committee on Foreign Relations explained that "[t]he purpose of this condition is to make it clear that

both actual knowledge and 'willful blindness' fall within the definition of the term 'acquiescence' in article 1." S. Exec. Rep. No. 101-30, at 9. If one simply knows of torture and does not intervene to stop it, or is deliberately blind to acts of torture, even though he has no actual, subjective desire to cause severe mental or physical pain or suffering, his actions may nonetheless be considered torture. *Cf. Khouzam*, 361 F.3d at 171 (finding that willful blindness to an act is sufficient state action to constitute torture); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354-55 (5th Cir. 2002) (holding that "'[w]illful blindness' suffices to prove 'acquiescence'" and examining whether officials in Honduras were willfully blind to torturous acts committed by private landlords in order to establish whether the CAT's definition of torture had been met).

International law and a careful analysis of the Senate Resolution and U.S. implementing regulations make clear that the BIA in this case misinterpreted "specifically intended" to graft a requirement of specific intent onto the CAT's definition of torture. When a deliberate act, like placing people in prison, results in severe mental or physical pain or suffering that was foreseeable because of deplorable conditions that are known to exist, the intentionality requirement under both the CAT and U.S. law is satisfied, regardless of whether those responsible for the act had a subjective desire to cause such pain or suffering.

CONCLUSION

For the foregoing reasons, *amicus curiae* concludes that the detention policy of the Haitian government revealed by the record in this case satisfies the intent requirement of Article 1 of the CAT. To the extent that the conclusions of law made by the BIA below state otherwise, this decision is erroneous.

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Respectfully submitted,

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