06-4216-cv

IN THE

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, EDWARD J. MCELROY, formerly District Director of Immigration and Naturalization Services for New York District, and now Customs Enforcement, ROBERT MUELLER, Director of the Federal Bureau of Investigation, 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.

On En Banc Rehearing from an Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR THE REDRESS TRUST AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* REDRESS states that it is a nongovernmental organization based in the United Kingdom, and is not owned in whole or in part by any other entity.

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INTEREST OF *AMICUS CURIAE*

The *amicus curiae*, the Redress Trust ("REDRESS"), has considerable expertise in advocating for the rights of victims of torture to gain both access to the courts and redress for their suffering on behalf of victims from different regions throughout the world. Since its establishment more than 15 years ago, REDRESS has regularly taken up cases on behalf of individual torture survivors at the national and international level and provided assistance to representatives of torture survivors.

The motivation of the *amicus curiae* to participate in this case relates to its grave concern that the absolute principle of *nonrefoulement* will be undermined if individuals, such as the Plaintiff-Appellant, are denied access to a court in which to argue their case. The right to an effective remedy, including access to justice is necessary in order to ensure that the absolute principle of *nonrefoulement* is practical and effective. The denial of access to justice would not only have a detrimental impact on the individuals concerned but would result in impunity for transfers of individuals to states where they would be at a risk of torture, thus contributing to the practice.

INTRODUCTION AND SUMMARY OF ARGUMENT

'Extraordinary rendition', while not a legal term, encompasses violations of multiple fundamental human rights in domestic and international law including, but not limited to, the absolute prohibition against transferring a person to a place where there are substantial grounds for believing that he or she would be in danger of being subjected to torture (*nonrefoulement*).

This case concerns the 'extraordinary rendition' of the Plaintiff-Appellant, a dual Canadian-Syrian citizen, from the U.S. to Syria despite the existence of substantial grounds to believe that he was at risk of torture on return. A key aspect of the case is therefore the U.S.'s responsibility for the removal of the Plaintiff-Appellant in violation of the absolute principle of *nonrefoulement*. Before the District Court and the Second Circuit, the Plaintiff-Appellant was denied access to justice to argue that he was a victim of the violation of such a fundamental and peremptory norm under international law.[1] Victims of torture, such as the Plaintiff-Appellant, have a right to full and adequate reparation under international law against each of the states responsible and are entitled to an effective remedy for their rehabilitation.

[1] 532 F.3d 157 (2d Cir. 2008), 414 F. Supp.2d 250 (E.D.N.Y. 2006).

ARGUMENT

I. THE PRINCIPLE OF *NONREFOULEMENT* IS ABSOLUTE UNDER INTERNATIONAL AND UNITED STATES LAW

The absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment is universally recognized. It is set out in all the major international and regional human rights instruments;[2] is reflected in customary international law; and enjoys *jus cogens* status as a peremptory norm under international law[3] from which no derogation is permitted.[4]

The absolute prohibition of torture imposes a negative duty on states to refrain from torturing and also a range of positive obligations including the obligation to "prevent such acts by not bringing persons under the control of other States if there are substantial grounds for believing that they would be in danger of being subjected to torture."[5]

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[2] *See, e.g.*, 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 ("ICCPR") (Article 7); *see also* American Convention on Human Rights, Nov 22, 1969, 1144 U.N.T.S. 123 (Article 5); the African Charter on Human and Peoples' Rights, Jun 27, 1981, 1520 U.N.T.S. 217 (Article 5); the European Convention on Human Rights, Nov 4, 1950, ETS No. 5 (Article 3); and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec 10 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 [hereinafter "Convention against Torture].

[3] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S 331 (Article 53) [hereinafter "Vienna Convention"].

[4] *See Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992).

[5] See Interim Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or

Any other approach would allow states to circumvent the prohibition of torture by arguing that they did not inflict the torture themselves. The principle of *nonrefoulement* is thus an inherent and indivisible part of the prohibition of torture.[6]

A. The United States Government Is Required to Observe the *Nonrefoulement* Obligation in All Transfer Contexts

The U.S. is required to observe the principle of *nonrefoulement* for at least four independent reasons.

First, the U.S. has ratified treaties which expressly prohibit the transfer, deportation, extradition, rendition, expulsion or return ("refoulement") of a person where there are substantial grounds to believe that the individual would be at a risk of torture as a result of the transfer. The U.S. signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") on April 18, 1988, and ratified CAT on October 21, 1994. The U.S. ratified the International Covenant on Civil and Political Rights ("ICCPR") on June 8, 1992, and the ICCPR entered into force for the U.S. on September 8, 1992. Article 7 of the ICCPR, which contains an absolute prohibition on

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Degrading Treatment or Punishment, UN General Assembly, 55th Session, Item 116(a) of the provisional agenda, Human Rights Questions: Implementation of Human Rights Instruments, A/55/290 (Aug. 2000) at 27.

[6] *Soering v. United Kingdom*, Application No. 14038/88 (Eur. Ct. H.R. 1989) at ¶ 88 (noting that such an approach would be "contrary to the spirit and intention of [Article 3 of the European Convention on Human Rights which prohibits torture]".

torture, has been interpreted by the U.N. Human Rights Committee to include the absolute principle of *nonrefoulement.*[7]

Second, the U.S. signed the American Convention on Human Rights Convention ("American Convention") on June 1, 1966. While the U.S. has not ratified the American Convention, it is well established under international law and well recognized in this Circuit, that the U.S. is "obliged to refrain from acts which would defeat the object and purpose of [the] treaty".[8] Article 22 of the American Convention expressly prohibits *refoulement*.

Third, the absolute principle of *nonrefoulement* constitutes a *jus cogens* norm, and as such the U.S. is bound under principles of customary international law. The United Nations' ("U.N.") Committee against Torture, as the authoritative interpretative body of the CAT, has recognised that the absolute principle of *nonrefoulement* "must be recognized as a peremptory norm under international law, and not merely as a principle enshrined in Article 3 CAT."[9]

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[7] Human Rights Committee, General Comment 20, Article 7, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 (1994) at § 9 [hereinafter "HRC General Comment 20"].

[8] Article 18(a), Vienna Convention, *supra* note 3. *See*, *Mora v. New York*, 524 F.3d 183, 196 (2d Cir. 2008).

[9] UN Committee against Torture (CAT), Summary Record of the 624th Meeting, U.N Doc. CAT/C/SR.624 (November 24, 2004), § 51-52.

Fourth, in 1998, the U.S. enacted implementing legislation for CAT to apply domestically in the form of the Foreign Affairs Reform and Restructuring Act ("FARRA") of 1998, 22 U.S.C. 6501. Section 2242 of the FARRA of 1998 specifically prohibits *refoulement*.

Each of these four grounds underscores the absolute obligation of the U.S. not to transfer individuals where there are substantial grounds to believe that they are at a risk of torture on removal. Human rights courts and bodies have consistently confirmed the absolute nature of the principle of *nonrefoulement*, which allows no limitations, derogation or exceptions.[10]

This case involves allegations of the 'extraordinary rendition' of the Plaintiff-Appellant from the U.S. to Syria. 'Extraordinary rendition' is used colloquially to refer to the transfer of 'terrorist suspects' between states outside of any legal process for the purpose of interrogation and/or detention.[11]

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[10] Article 2(2), Convention against Torture, *supra* 2; HRC General Comment 20, *supra* 7, UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, U.N. Doc. CCPR/C/21/Rev.1/Add.11. at 1 ¶ 7 (August 31, 2001) [hereinafter "HRC General Comment 29"].

[11] *See, e.g.*, U.N. Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Addendum: Mission to the United States of America*, U.N. Doc. A/HRC/6/17/Add.3 at para. 36 (Nov. 22, 2007) (*prepared by* Martin Scheinin); United Kingdom Intelligence and Security Committee, *Special Report into Rendition*, Cm 7171, (July 2007) at para. 7,

The principle of *nonrefoulement* applies to all persons without distinction. The victim's conduct, however "undesirable or dangerous" is irrelevant: the Committee against Torture has found that Article 3 of the CAT extends in equal terms to "common criminals" and persons considered to be threats to national security.[12] International human rights courts and bodies have repeatedly rejected the contention that national security interests can be 'balanced' against the absolute principle of *nonrefoulement.*[13]

Where an individual is denied the opportunity to challenge the removal by judicial or administrative review the state commits a procedural violation of the principle of *nonrefoulement* in addition to the substantive breach.[14] For example, in *Alzery v. Sweden*, the U.N. Human Rights Committee found that, "[t]he absence of any opportunity for

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http://www.cabinetoffice.gov.uk/~/media/assets/www.cabinetoffice.gov.uk/publications/intelligence/20070725_isc_final%20pdf.ashx; Foreign and Commonwealth Office, *Human Rights Annual Report 2007*, Cm 7340, (March 2008), at 15 *http://www.parliament.the-stationery-office.co.uk/pa/cm200708/cmselect/cmfaff/533/533.pdf.*

[12] *See, e.g Agiza v Sweden*, U.N. Doc. CAT/C/34/D/233/2003, Communication No. 230/2003 (Committee Against Torture 2005*). See also,* the approach of the European Court of Human Rights rejecting arguments that a higher standard of proof applies should be applied to individuals who are considered "undesirable or dangerous": *Saadi v. Italy*, App. No. 37201/06 (Eur. Ct. H.R. 2008) at ¶¶ 139-40.

[13] *Chahal v. United Kingdom*, App. No. 22414/93 (Eur. Ct. H.R. 1996), at para. 79; *Saadi v. Italy*, App. No. 37201/06 (Eur. Ct. H.R. 2008), at paras. 138 and 141.

[14] See *Agiza v Sweden, supra* 12; and *Alzery v. Sweden*, U.N. Doc. CCPR/C/88/D/1416/2005, Communication No. 1416/2005 (Human Rights Committee 2005).

effective, independent review of the decision to expel in the author's case accordingly amounted to a breach of article 7, read in conjunction with article 2 of the Covenant".[15]

As the Plaintiff-Appellant alleges that he was denied the opportunity to effectively challenge his removal to Syria, both a substantive and procedural breach of the absolute principle of *nonrefoulement* can be found.

B. Responsibility Rests with Each State in the Transfer Chain for Violations of the Absolute Principle of *Nonrefoulement* and Any Torture which Results from the Transfer

Each state involved in the transfer of an individual to a state where substantial grounds exist to believe that he or she would be at risk of torture incurs responsibility under the absolute principle of *nonrefoulement.* This responsibility results from the exposure of the individual to a risk of torture. It is irrelevant for the purposes of establishing liability under the absolute principle of *nonrefoulement* whether or not the individual is ultimately tortured as the breach is determined at the point of removal and is not determined by subsequent events.

In cases where an individual is ultimately tortured, however, any state involved in the transfer may incur additional and separate responsibility even if it had no direct involvement in the treatment after

[15] *Alzery v. Sweden*, as above, at para. 11.8.

the completion of the transfer. As the U.N. Human Rights Committee found in *Mansour Ahani v. Canada*:

> [i]n the light of the circumstances of the case, the State party, having failed to determine appropriately whether a substantial risk of torture existed such as to foreclose the author's deportation, is under an obligation (a) to make reparation to the author if it comes to light that torture was in fact suffered subsequent to deportation, and (b) to take such steps as may be appropriate to ensure that the author is not, in the future, subjected to torture as a result of the events of his presence in, and removal from, the State party.[16]

[16] *Mansour Ahani v. Canada*, U.N. Doc. CCPR/C/80/D/1051/2002, Communication No. 1051/2002 (Human Rights Committee 2004), at para 12.

II. VICTIMS OF TORTURE HAVE A RIGHT TO AN EFFECTIVE REMEDY AND FULL AND ADEQUATE REPARATION UNDER INTERNATIONAL LAW

A. A Victim of Torture Has the Right to Complain and to Have His or Her Case Examined by the Competent Judicial Authorities of States Allegedly Responsible for the Violation

The right to an effective remedy and full and adequate reparation for torture and other fundamental violations of human rights is a clear and entrenched right under U.S. constitutional law (*see* Replacement Opening Brief for Plaintiff-Appellant for Rehearing *En Banc*, pp. 22 – 29); it also results from the U.S.'s international treaty obligations and from customary international law. The right to an effective remedy and full and adequate reparation for torture and other violations of fundamental human rights has been affirmed by a range of treaties (such as Article 2(3), 9(5) and 14(6) of the ICCPR, Article 14 of the CAT and Articles 1, 5, 13 and 41 of the American Convention), the U.N. Committee against Torture[17], the U.N. Human Rights Committee[18] and regional courts[19]

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[17] UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, U.N. Doc. CAT/C/GC/2 1/Rev.4 (January 24, 2008), at para. 15.

[18] *See, e.g.*, UN Human Rights Committee (HRC), *General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), at paras. 15-17.

[19] *See, e.g.*, *Velasquez Rodriguez Case*, Inter-Am. C.H.R. (Ser. C) No. 4 (1988), at para. 174.

The U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by General Assembly resolution 60/147 of 16 December 2005 ("U.N. Basic Principles on the Right to a Remedy and Reparation") set out that states are obligated to provide victims with "fair, effective and prompt access to justice" (Principle 2(b)) and make available "adequate, effective, prompt and appropriate remedies, including reparation" (Principle 2(c)). Principle 11 defines remedies as including "equal and effective access to justice" and "adequate, effective and prompt reparation for harm suffered;" and Principles 18 – 23 define reparation restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

The right to a remedy "is one of the fundamental pillars of the rule of law in a democratic society."[20] This right necessarily encompasses the right of the individual to complain and to have his or her case examined by competent judicial authorities in the state or states allegedly responsible for the violation.

As the absolute principle of *nonrefoulement* constitutes an integral part of the absolute prohibition of torture, individuals who have an

[20] *Castillo Páez v. Peru*, Inter-Am. C.H.R. (Ser. C) No. 34 (1997); *Blake v. Guatemala (Reparations)*, Inter-Am. C.H.R. (Ser. C) No. 48 (1999), at para. 63.

arguable claim that they have been victims of *refoulement* have the right to an effective remedy and full and adequate reparation. Indeed, in relation to 'extraordinary rendition' specifically, the U.N. Human Rights Committee has found that the U.S. should "investigate allegations of rendition and provide a remedy to its victims".[21]

The right to a remedy is not only an integral part of the absolute principle of *nonrefoulement* but is also a freestanding right which is itself guaranteed and has been recognised as non-derogable.[22]

The right to a remedy must be "effective" in practice as well as in law. The U.N. Human Rights Committee, the Inter-American Court of Human Rights ("Inter-American Court") and the European Court of Human Rights ("European Court") have repeatedly emphasized that the right to a remedy must be effective and not merely illusory or theoretical,[23] and must be suitable to grant appropriate relief for the legal right that is alleged to have been infringed.[24]

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[21] Human Rights Committee (HRC), Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/USA/CO/3 (Sep. 15, 2006), at para. 16.

[22] HRC General Comment 29, supra 10 at para. 14. *See also, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 ACHR)*, Advisory Opinion OC-9/87, Inter-Am. C.H.R. (1987) at para. 24.

[23] *Judicial Guarantees in States of Emergency*, *supra* 22, at para. 24.

[24] *See, e.g., Velasquez Rodriguez Case*, Inter-Am. C.H.R. (Ser. C) No. 4 (1988) at paras. 64 and 66; *Deon McTaggart v Jamaica*, U.N. Doc. CCPR/C/62/D/749/1997, Communication No. 749/1997 (Human Rights Committee 1998); *Aksoy v. Turkey*, Application No. 21987/93 (Eur. Ct. H.R. 1996) at para. 95.

B. The "Essence" of the Right to an Effective Remedy for *Refoulement* Cannot be Undermined or Extinguished

States can introduce adjustments to the practical functioning of their procedures governing judicial remedies. However, such limitations or adjustments apply foremost to the procedural aspects of the exercise of the right to an effective remedy, and must not result in the removal of this fundamental right altogether; the substance of the right cannot be suspended or derogated from, even in times of emergency.[25]

Any "adjustment to the practical functioning of its procedures governing judicial or other remedies" must be pursuant to a legitimate aim, proportionate, strictly necessary to achieve that aim in a democratic society[26] and assessed on a case-by-case basis.[27]

If the right to a remedy, including effective access to a court, is extinguished altogether, this will constitute a disproportionate restriction.[28] In *Cordova v. Italy (No. 1)*, in which a public prosecutor had been prevented from bringing an action for defamation as a result of parliamentary immunity, the European Court held that any limitations on

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[25] Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, CCPR/C/21/Rev.1/Add.11 (August 31, 2001) at para 14.
[26] *Golder v. United Kingdom, Application No. 4451/70* (Eur. Ct. H.R. 1975); *Alba Pietraroia v. Uruguay,* Communication No. 44/1979, U.N. Doc. CCPR/C/OP/1 at 76 (Human Rights Committee 1984) at para. 16.
[27] *Waite & Kennedy v. Germany*, App. No. 26083/94 (Eur. Ct. H.R. 1999).
[28] *Cordova v. Italy (No. 1), Application No. 40877/98* (Eur. Ct. H.R. 2003) at para. 65.

access to justice under Article 6 of the European Convention on Human Rights ("ECHR") "must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired".[29]

The jurisprudence of the U.N. Human Rights Committee, Inter-American Commission and Court of Human Rights has consistently and clearly stressed that procedural rules, for example amnesty and immunity laws, cannot be used to create a blanket ban on the exercise of the right to an effective remedy in the courts of the state allegedly responsible for the violation, as this would undermine the victim's right to an effective remedy and reparation, and society's right to the truth; and would contribute to a culture of impunity.[30]

Any assessment of proposed restrictions on the right to a remedy thus requires rigorous scrutiny and the burden lies with the party seeking to achieve the restriction to demonstrate why the proposed restrictions pursue a legitimate aim, are proportionate, are strictly necessary in a

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[29] *Id.* at para. 54.

[30] *See for example,* Human Rights Committee (HRC), General Comment 20, Article 7, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 (1994).,at para. 15; *Rodríguez v. Uruguay*, U.N. Doc. CCPR/C/51/D/322/1988, Communication No. 322/1988, (Human Rights Committee 1994) at paras. 11 – 12; *Chumbipuma Aguirre v. Peru (Barrios Altos Case)*, Inter-Am. C.H.R. (2001), at para. 41.

democratic society and do not remove or undermine the "essence" of the right to an effective remedy.

1) "Alternative Remedial Schemes" that Do Not Provide for the Full Realization of the Right to an Effective Remedy Are Insufficient

Just as with the common law doctrine of *forum non conveniens* pursuant to which a court may decide which of a number of available forums is most appropriate to hear the claim, courts can take into account the existence of alternative remedies in assessing whether a restriction on access to a court is pursuant to a legitimate aim, proportionate and strictly necessary.[31] However**, s**uch alternative remedies necessarily must enable the individual to (a) set out the same allegations, (b) in relation to the same defendants and (c) if a violation is found, result in the same enforceable remedies and full and adequate reparation.

In the Plaintiff-Appellant's case, a petition to review a removal order cannot be considered an adequate "alternative remedial scheme". Had the Plaintiff-Appellant had the opportunity to bring such a petition and been successful, the only remedial action available to the court would have been to release and return the Plaintiff-Appellant to his state of residency and dual nationality or the state from which he had arrived. In

[31] *For example, see Silver and Others v. United Kingdom,* Apps. No. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 (Eur. Ct. H.R. 1983).at para. 113 and *Leander v. Sweden,* Application No. 9248/81 (Eur. Ct. H.R. 1987).at para. 77.

contrast, in the case currently before the Court, what the Plaintiff-Appellant is seeking is an effective remedy and full and adequate reparation for the violations which took place as a result of (a) his inability to challenge his removal (a procedural violation of the absolute principle of *nonrefoulement*); (b) his actual removal to Syria despite the existence of substantial grounds to believe that he was at risk of torture; and (c) his torture in Syria.

The two remedies are qualitatively different therefore because the "alternative remedial scheme" would only have been available prior to the violations taking place; whereas the remedy currently sought by the Plaintiff-Appellant could only ever be available once the violations have taken place. Thus, the first remedy is of a preventative nature and essentially relates to an immigration matter (see dissenting opinion of Judge Sack); whereas the second remedy only becomes available as a result of a continuing or past violation and is based on violations of constitutional and fundamental principles of international law. By definition, the "alternative remedial scheme" therefore could never mirror the remedy sought by the Plaintiff-Appellant in this case as at the point at which it was supposed to be available, those violations had not yet occurred.

The U.N. Human Rights Committee confirms this point in *Alzery v. Sweden*. After considering the efficacy of review mechanisms in

expulsion cases, it concluded that in addition to any breach which resulted from the absence of the same, the State Party was obligated to afford full and effective reparation, for both the lack of review mechanism as well as for the resulting *refoulement*: "[i]n accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. The State party is also under an obligation to avoid similar violations in the future".[32] It follows, in the instant case, that the Plaintiff-Appellant is entitled to a remedy and reparation for both the procedural and substantive violations of the absolute principle of *non-refoulement*.

2) "Special Factors" Relating to the Conduct of Foreign Affairs or National Security Cannot Nullify the Right to an Effective Remedy

As set out above, any proposed restriction on the right to an effective remedy must be assessed on a case-by-case basis, must pursue a legitimate aim, be proportionate and strictly necessary in a democratic society. As the burden of proof on the party seeking the restriction is particularly high and the "essence" of the right to an effective remedy cannot be removed, abstract or general assertions of the relevance of "special factors" such as foreign affairs or national security cannot restrict the right to an effective remedy in any way. Any purported restriction on

[32] *Id.*, at para. 13.

either of these grounds must be concretely advanced by the party seeking the restriction – not the court *ab initio* – and must demonstrate why a particular and identifiable aspect of foreign affairs or national security justifies the restriction sought using the three part test of (1) pursuant to a legitimate aim, (2) proportionality and (3) strictly necessary in a democratic society. Without such a rigorous approach, the Court could not be in the position to consider the proposed restriction, let alone decide upon its application.

a) States Alleged to Have Committed or Been Complicit in Acts of Torture Cannot Avoid Accountability by Invoking the Principle of Comity in Inter-State Relations

When this case was considered by previous courts, they asserted comity in international relations as one of the justifications for denying the Plaintiff-Appellant the right of access to the court. While comity may refer to the judicial comity applied to determine which court should most appropriately adjudicate the case, in the case presently before the Court, it does not carry a judicial or legal meaning but is better characterized as "rules of politeness, convenience, and goodwill. Such rules of International conduct are not rules of International Law".[33] Preventing disclosure of gross human rights violations on the basis of comity in international relations would not constitute a legitimate aim in a

[33] I. Brownlie, *Principles of Public International Law,* Sixth Edition (Oxford University Press, 2003) at 28.

democratic society and would be inconsistent with the state's positive obligations under international law. Thus, the application of non-legal justifications such as comity in international relations for limiting the right of access to a court would not meet the strict three-part test on restriction of the right to an effective remedy and in the present case, would remove the "essence" of the right entirely.

Moreover, the assessment that comity in inter-state relations would be satisfied by denying the Plaintiff-Appellant access to a court in this case directly displaces the overwhelming commitment of states and the international community to the absolute prohibition of torture and the absolute principle of *nonrefoulement* in favor of impunity for the violations alleged by the Plaintiff-Appellant.

b) States Alleged to Have Committed or Been Complicit in Acts of Torture Cannot Avoid Accountability by Invoking National Security Concerns

While courts have recognized that the protection of national security may reflect a legitimate aim,[34] it will only be considered to pursue a legitimate aim when genuinely tailored to protecting national security interests – rather than protecting states from embarrassment or preventing the exposure of illegal activity – as security agencies are

[34] *Ždanoka v. Latvia*, App. No. 58278/00, (Eur. Ct. H.R. 2004) at para. 86.

subject to the same democratic principles of governance as all other state organs.[35]

Because of the dangers to a democratic society, the threshold required for national security to constitute a legitimate limitation on judicial remedies is particularly high.[36] As set out above, national security concerns cannot be asserted in the abstract. Rather, courts must be in the position to test the propriety and legitimacy of the national security claim in the particular circumstances of that case, especially in terms of its impact on the right to a remedy.[37]

Even where national security interests are considered legitimate, they cannot extinguish the right to a remedy altogether but must impact the right in the least restrictive way. In this respect, permissible restrictions on the right to a remedy may include hearing pieces of evidence which raise national security concerns *in camera.* For example, the European Court has considered the adequacy of using security-cleared

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[35] *See*, Principle 2(b), *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information*, U.N. Doc. E/CN.4/1996/39 (1996).

[36] U.N. Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, U.N. Doc. E/CN.4/1984/4 (1984) at paras. 29-32.

[37] *See Tinnelly & Sons Ltd. and others and McElduff and Others v. United Kingdom*, App. No. 62/1997/846/1052-1053 (Eur. Ct. H.R. 1998), at para. 78.

advocates in the United Kingdom to protect the national security interests at stake while upholding Article 6(1) of the ECHR. While specific aspects of the mechanisms and procedures employed have to be tested for consistency in terms of the rights of the applicant,[38] the European Court has fundamentally pointed out that alternative ways of receiving and hearing privileged information must be explored and used where available.[39] Thus, in cases which raise national security concerns, courts are not tasked with the question as to whether or not the individual can enjoy his or her right to an effective remedy but rather with the identification of ways in which to protect potentially sensitive pieces of evidence while at the same time ensuring that the "essence" of the right to an effective remedy is not undermined or removed.

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[38] *See e.g.*, House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission and the Use of Special Advocates*, Seventh Report of Session 2004-2005 (2005) at paras. 44-66.

[39] *Tinnelly & Sons Ltd. v. UK*, *as above*, at para. 78. *See also*, *Devenney v. United Kingdom*, App. No. 24265/94 (Eur. Ct. H.R. 2002) at paras. 23-29; *Al-Nashif v. Bulgaria*, App. No. 50963/99 (Eur. Ct. H.R. 2002); and *Prosecutor v. Blaskic*, Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Oct. 29, 1997) at paras. 65 and 68.

III. VICTIMS OF TORTURE REQUIRE AN EFFECTIVE REMEDY AS PART OF THEIR FULL REHABILITATION

A. In Cases Involving a Number of States Implicated in Alleged Acts of Torture, the Duty to Provide an Effective Remedy and Full and Adequate Reparation Attaches to Each Complicit State

As set out above, an individual with an arguable claim that he or she has been subject to *refoulement* has the right to an effective remedy and full and adequate reparation, including access to a court. In cases in which a number of states are implicated in the violation of the absolute principle of *nonrefoulement*, the victim has the right to an effective remedy and full and adequate reparation from each state allegedly responsible. Article 47 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the United Nations' General Assembly in 2001, sets out that:

> 1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.
> 2. Paragraph 1:
> (a) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;
> (b) Is without prejudice to any right of recourse against the other responsible States.[40]

[40] James Crawford, "The International Law Commission Articles on State Responsibility: Introduction, Text and Commentaries" (Cambridge University Press 2005) (2002), at 272.

The commentary to the Articles sets out that where more than one state is responsible for an internationally wrongful act, each responsible state can be held to account "for the wrongful conduct as a whole".[41] The commentary emphasizes that the plurality of responsibility does not give rise to joint and several liability, but to separate responsibility in the case of each responsible state; the responsibility of each state may be invoked by the injured party meaning that the victim has the right to an effective remedy in relation to each state responsible.

Therefore, where the victim has been provided with an effective remedy and full and adequate reparation from one of the states responsible, he or she is still entitled to an effective remedy in relation to all other states implicated in the violation of the victim's fundamental rights.

B. The Rationale Underlying the Right to an Effective Remedy and Full and Adequate Reparation Demonstrates Why Each Responsible State Has an Obligation to Provide an Effective Remedy and Full and Adequate Reparation

The underlying rationales to the right to an effective remedy and full and adequate reparation underscore the basis upon which each state responsible must separately meet its obligation to provide an effective remedy and full and adequate reparation. Professor Theo van Boven, a former U.N. Special Rapporteur on Torture, has set out the multiple

[41] *id.*

rationales for the right to an effective remedy and full and adequate reparation for violations of human rights as including the absolute principle of *nonrefoulement* as to relieve "the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations".[42]

If one of the implicated states does not meet its obligation to provide an effective remedy and full and adequate reparation, impunity will ensue, even if other states implicated in the human rights violation meet their obligations.[43]

As set out above, regional and international courts and tribunals as well as experts in the field have repeatedly held that "national security" considerations cannot provide an exception nor permit derogation from the absolute prohibition of torture, of which the absolute principle of *nonrefoulement* is an integral part.[44] Nevertheless, the practice of 'extraordinary rendition' has created a class of individuals, qualified as "terror suspects", who do not have access to a remedy while detained,

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[42] Final report submitted by Mr. Theo van Boven, Special Rapporteur, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, E/CN.4/SUB.2/1993/8 (1993) at para. 137(3).

[43] Id.

[44] See General Comment 2, *supra 17* , at paras 5, 6; *Saadi v. Italy*, App. No. 37201/06, Eur. Ct. H.R. (2008), at paras. 138, 141; IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., (2002), at para. 216.

and who are further denied access to a court if and when they are released. This, in fact, enables the use of torture, and other cruel, inhuman or degrading treatment or punishment, and enforced disappearance to continue with impunity.

As such, the upholding of the right to a remedy not only protects the immediate rights of the individual applicant but also contributes towards preventing and combating the practice of 'extraordinary rendition' altogether.[45]

Furthermore, the U.N. Basic Principles on the Right to a Remedy and Reparation specifically underscore their "victim-orientated" nature, stating in the Preamble that "the international community affirms its human solidarity with victims of violations of international law." This underscores that the right to a remedy, including access to a court, is not only a means by which to seek reparation but that the process itself can be an important component of reparation.

Again, however, the right to an effective remedy can only play this role if it is exercised in relation to each actor responsible. For example, one of the victims in the *Velásquez Rodriguez Case*, whose brother was abducted and disappeared by Honduran security forces, successfully pursued her case against Honduras before the Inter-American

[45] *See* Beth Henderson, "From *Justice to Torture: The Dramatic Evolution of U.S.-Sponsored Renditions*" 20 Temp. Int'l & Comp L.J. 189 (2006) at 216.

Commission on Human Rights. She was then asked why she had brought a civil case for compensation against one of the individuals allegedly responsible for her brother's enforced disappearance before the U.S. courts and explained that:

> [t]he case that I brought to the Inter-American Commission and Court of Human Rights was a landmark case because it held the Government of Honduras responsible for the disappearance of my brother . . . But the Government never admitted culpability, no one was ever punished, and the culture of impunity in Honduras was not changed. . . . This case that CJA is bringing . . . at least it will enable us to hold a high-ranking official responsible and thereby begin to pierce the culture of impunity.[46]

C. The Experiences of Torture Survivors Who Have Had Access to Justice Demonstrate That the Judicial Process and the Acknowledgment by an Impartial Body of their Torture Are Crucial to Their Full Rehabilitation

A number of academic and clinical studies support the conclusion that the exercise of the right to a remedy can have beneficial effects for certain survivors of torture;[47] whereas, a denial of access to justice can

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[46] Statement of Ms. Zenaida Velásquez, Center for Justice & Accountability, http://www.cja.org/forSurvivors/zenaida%20for%20survivors.shtml

[47] *See e.g.*, Statement of the Medical Foundation at pages 23-27, Refugee Council Parliamentary Briefing at pages 36-38, and Refugee Therapy Centre Response by Aida Alayarian at pages 39-48 of *Torture (Damages) Bill 2007-08: A Private Member's Bill to Provide a Remedy for Torture Survivors in the United Kingdom: Compilation of Evidence Received following the Call for Evidence launched by Lord Archer of Sandwell QC*, Compiled by The Redress Trust (REDRESS) (July 2008).

compound the existing trauma and thus result in a continuation of the effects of the underlying human rights violations, such as *refoulement*.[48]

The Medical Foundation for the Care of Victims of Torture, a U.K.-based organization dedicated solely to the treatment of torture survivors, has stated,

> [t]he availability of accessible mechanisms itself can be experienced as acknowledgment and commitment by the State to uphold the right to reparation.
> …Compensation can provide victims of torture public acknowledgment of their survival, facilitating the re-establishment of their dignity, self-esteem, trust in others and belief in the world as just.
> …A public and official recognition of harm done and the condemnation of perpetrators contribute to a sense that events are unmasked, the truth is told and a legacy of the past is acknowledged and remembered.[49]

Mary Robertson, a Chartered Clinical Psychologist at the London-based Traumatic Stress Clinic, has stated that "the process of truth recovery and successful vindication has many elements similar to a therapeutic process" and "[h]aving the truth recognised and properly acknowledged through some form of redress, can play an integral role in the survivor's journey to recovery".[50]

Testimonies of victims who have had access to a court in which to argue their case support the conclusion that access to a court can have a

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[48] *See e.g.,* Mary Robertson Expert Report (Traumatic Stress Clinic) at pages 49-53 REDRESS Torture (Damages) Bill Compilation.
[49] *Supra* 47, at 25.
[50] *id.* at 52.

rehabilitative effect. For example, a torture survivor from El Salvador stated that, "[b]eing a part of the case and having the opportunity to confront these generals with these terrible facts provided me with the best possible therapy a torture survivor could have".[51] Another victim who was tortured together with his wife in Honduras commented on the effect of bringing a civil suit in the U.S. as "[a]t least there's recognition of a jury that they were responsible for the torture of those people".[52] One of the reasons given by another torture survivor tortured in El Salvador for bringing a lawsuit in the U.S. courts was that he was "looking for a psychological healing of the wounds that torture left on me. I need an explanation and that is why I need a day in court".[53]

D. The Experiences of Torture Survivors Who Have Attempted to Bring Civil Claims but Have Been Prevented from Doing so Because of the Application of Procedural Rules Demonstrate the Negative Impact a Lack of Access to Justice Can Have on Their Rehabilitation

While the healing and recovery process for survivors of torture is complex, lengthy and ongoing, and particular to the individual victim, the inability to bring a claim for compensation or to obtain an

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[51] Testimony of Dr. Juan Romagoza Arce (Executive Director, La Clinica Del Pueblo and Plaintiff, Romagoza Arce v. Garcia), before the Subcommittee on Human Rights and the Law, Committee on the Judiciary, U.S. Senate, *No Safe Haven: Accountability for Human Rights Violators in the United States*, (14 Nov. 2007) at page 4.

[52] William Branigin, *Confronting the Past: 6 Honduran Plaintiffs Suing Over 1980's Human Rights Abuses*, Washington Post (25 July 02).

[53] Statement of Mr. Carlos Mauricio, Center for Justice & Accountability website: http://www.cja.org/forSurvivors/CarlosforSurvivors.shtml

acknowledgement by an independent and neutral court of law of the crimes that took place can often complicate and even impede, an individual's recovery process.

Edelman et. al. have found that a situation of impunity, where no sanctions are taken against the perpetrators, can have serious negative consequences for the individual survivor. They argue that impunity functions as a secondary injury which can cause additional trauma.[54] For example, one torture survivor who was unable to bring his case against the state of Kuwait in the English due to state immunity, stated that:

> When the judgment in Strasbourg was made [holding by majority that there was no violation of my right to a court hearing in the determination of my claim against Kuwait, in violation of Article 6] I felt completely lost. It was the end of the road for me and it was a terrible feeling.[55]

The Inter-American Court has also recognized the impact of denial of justice on victims of violations of the American Convention. For example, in *Las Palmeras v. Colombia*, the Court found that, "[t]he damage caused by this situation [of impunity and denial of justice] consists of the impossibility of punishing those truly responsible, which

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[54] L. Edelman, D Kordon, D Lagos, *La Impunidad: Reactivacion del Trauma Psyquico*, 24 Reflexión (1996) 24-26. *See also*, R. Gurr and J. Quiroga, *Approaches to Torture Rehabilitation: A Desk Study Covering Effects, Cost-Effectiveness, Participation and Sustainability*, in 11 Torture (2001) 3-35 at 27; *see also*, The Parker Institut, Frederiksberg Hospital, Denmark, The need for reparation for torture survivors from a health perspective, at page 30 of REDRESS Torture (Damages) Bill Compilation.

[55] Statement of Sulaiman Al-Adsani, *as above*, at page 7.

creates a feeling of defenselessness and anguish among the next of kin of the victims".[56]

CONCLUSION

For the foregoing reasons, the district court decision should be reversed.

Respectfully submitted,

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[56] *Las Palmeras v. Colombia*, (Ser. C) No. 96, Inter-Am. Ct. H.R. (2002), at para. 53(a).

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I, Alexander A. Yanos, hereby certify pursuant to Fed. R. App. P. 32(a)(7)(B) that, according to the word-count feature of MS Word 2003, this brief contains 6, 918 words (exclusive of the table of contents, table of authorities, and this certificate). As such, this brief complies with the 7,000 word limit for amicus briefs in the Federal Rules of Appellate Procedure.

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Alexander A. Yanos

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