COURT OF APPEAL FOR ONTARIO

Court File No. C55441

B E T W E E N :

THE MINISTER OF JUSTICE OF CANADA

Respondent

- and -

HASSAN NAIM DIAB

Applicant

MEMORANDUM OF FACT AND LAW OF THE INTERVENER: AMNESTY INTERNATIONAL

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I. OVERVIEW

1. Amnesty International (Canadian Section, English Branch) ("Amnesty Canada") is a non-profit, independent and impartial advocacy group. Amnesty Canada works to advance and promote international human rights at the national and international level, and is recognized as a credible, trustworthy and objective organization with unique expertise in international human rights law. Amnesty Canada was granted leave to intervene in the within application by Order of Justice Rouleau dated 10 May 2013.

2. Amnesty Canada submits that Canada's obligations under international human rights law compel Canada to refuse extradition for anyone for whom there is a real risk of admission of evidence derived from torture at the trial following extradition. The real risk standard requires more than mere theory or speculation, but does not require that it be more likely than not that torture evidence will be admitted. To require the higher standard of a balance of probabilities would place Canada in violation of its international obligations.

II. THE FACTS

3. This application for judicial review seeks review of the order of the Minister of Justice, the Honourable Rob Nicholson, dated April 4, 2012 wherein the Minister ordered the surrender of the Applicant, Dr. Diab, to the Republic of France.[1]

4. Dr. Diab opposed his extradition to France. He argued that the investigation record prepared by French authorities contained "unsourced" and "uncircumstances" intelligence, which would be considered during criminal proceedings in France. Dr. Diab argued that surrender in the face of France's reliance on unsourced and uncircumstanced intelligence would be "unjust and oppressive".[2] Dr. Diab submitted that there was "at least a plausible connection between the intelligence evidence contained in the Record of the Case and the French dossier, and the use of torture-based interrogations by Syrian state security", relying on public sources to substantiate his claim.[3]

5. On April 4, 2012, the Minister of Justice ordered Dr. Diab's surrender to the Republic of France. The Minister held that, "[t]he extradition jurisprudence confirms that a claimant bears the onus of establishing a torture claim on a 'balance of probabilities'".[4]

6. Amnesty Canada takes no position on the facts of this case.

III. ISSUES AND THE LAW

7. Amnesty Canada takes no position on the disposition of the application. Amnesty Canada's submissions address the following issue:

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[1] Appellant's Appeal Book, Application for Judicial Review, Vol. 1, Tab 1, pp. 1-5.
[2] *Ibid.*, Vol. I, Tab 5, pp. 75, 79-81; Vol. 5, Tab 14, p. 1630; Vol. 6, Tab 18, p. 1730.
[3] *Ibid*., Tab 18, p. 1747.
[4] *Ibid*., Tab 2, pp. 7-10; Tab 3, p. 33.

> What legal standard, in terms of degree of risk, should the Minister apply when assessing whether extradition is prohibited due to a risk that torture-derived evidence may be admitted against the subject of the extradition request?

8. Amnesty Canada submits that the Minister of Justice should refuse extradition where there is a real risk that torture-derived evidence would be used at trial. The Minister should not require proof on a balance of probabilities that any specific piece of evidence was obtained by torture, or that any specific piece of evidence will be used. Under international law, a *real risk* of the use of evidence derived from torture requires the Minister to refuse extradition.

9. Before addressing the proper test to be applied in extradition cases where the admission of evidence derived from torture is at issue, these submissions will address the relevance of international law in Canadian proceedings, the rule of the non-admissibility of torture-derived evidence, and the obligation to protect and ensure the right to a fair trial. The proper test to be applied in cases where the admission of evidence derived from torture is at issue must be consistent with these rules of international law.

International Law is Relevant and Important

10. Extradition engages liberty rights. As such, under section 7 of the *Canadian Charter of Rights and Freedoms* extradition proceedings must be in accordance with the principles of fundamental justice.[5] The Supreme Court of Canada has expressly recognized the importance and relevance of international law in defining the scope of fundamental justice:

> [Principles of fundamental justice] represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration

[5] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11. *s. 7*; *United States of America v. Burns*, 2001 SCC 7 at para. 59 [*Burns*].

> of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.[6]

11. The Court has also affirmed that, "Canada's international human rights obligations should inform […] the interpretation of the content of the rights guaranteed by the *Charter*"[7] and identified "the various sources of international human rights law -- declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms" as "relevant and persuasive sources for interpretation of the *Charter*'s provisions".[8]

12. The Supreme Court has held that the following interpretive presumptions are at play when dealing with the impact of international law on the interpretation of a domestic statute:

> […] First, the legislature is presumed to comply with the obligations owed by Canada as a signatory of international instruments and more generally as a member of the international community. […] Second, the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional.[9]

The Prohibition Against the Admission of Evidence Extracted by Torture

13. The international law prohibition against torture and other cruel, inhuman or degrading treatment or punishment ("other ill-treatment") is absolute and non-derogable. It is recognized in multilateral treaties and is a fundamental norm of customary international law that applies to all states without exception, in all circumstances (i.e. a *jus cogens* norm).[10]

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[6] *Burns*, *supra* at para. 79, citing *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at p. 503, at 512 .

[7] *Ibid.* at para. 80, citing *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at pp. 1056-57 [emphasis omitted].

[8] *Ibid.*, citing *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at p. 348.

[9] *R. v. Hape*, [2007] 2 S.C.R. 292 at paras. 53-54; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70; *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 175.

[10] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, arts. 7 and 4, p. 171 [*ICCPR*]; Human Rights Committee, *General Comment No. 29: Derogations During States of Emergency*, (72nd Sess., 2001), UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001), art. 4, para 11; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1987] 1465 U.N.T.S. 113, p. 85, Articles 2 and 16 ["the Convention against Torture"]; United Nations Committee Against Torture, *General*

14. Flowing from the prohibition against torture and other ill-treatment is the prohibition against the use of evidence obtained through torture or other ill-treatment in any proceeding ("the exclusionary rule"). With respect to information obtained by torture, the exclusionary rule is recognized, *inter alia*, in article 15 of the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("CAT").[11]

15. The United Nations Human Rights Committee, established and mandated by the *International Covenant on Civil and Political Rights* ("ICCPR") to interpret and apply its provisions,[12] has held that the prohibition of torture and other ill-treatment in article 7 and the right to fair trial under article 14 of the ICCPR entail a similar exclusionary rule with respect to all torture and other ill-treatment.[13] The European and Inter-American Courts of Human Rights have similarly found an exclusionary rule to arise from the prohibition of torture and other ill-treatment and the right to fair trial under their respective treaties.[14]

16. The exclusionary rule, like the underlying prohibition from which it derives, is absolute and non-derogable. The United Nations Committee Against Torture established by the CAT, the

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Comment No. 2, CAT/C/GC/2, 24 January 2008 at para. 6 [CAT *General Comment No. 2*]; *Prosecutor v. Anto Furundzija*, Trial Judgment (10 December 1998) at paras. 134-157 (International Criminal Tribunal for the former Yugoslavia) [*Anto Furundzija*]; *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, [2010] I.C.J. Rep. 639 at para. 87 ["*Diallo*"].

[11] The Convention Against Torture, *supra*.

[12] The International Court of Justice has found that "great weight" should be given the opinions of the Human Rights Committee and similar treaty bodies in interpreting their treaties, see *Diallo, supra* at paras 66-67.

[13] Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment*, (44th Sess, 1992), UN Doc HRI/GEN/1/Rev.9 (Vol. I) (1994), p 200, para 12 [HRC *General Comment No. 20*]; Human Rights Committee, *General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial*, (90th Sess., 2007), UN Doc CCPR/C/GC/32 (23 August 2007), p. 248 at paras 6 and 41 [HRC *General Comment No. 32*]. See also *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975), Article 12.

[14] European Court of Human Rights: *Jalloh v Germany* [GC], no. 54810/00, [2006], ECHR 2006-IX, paras 99, 105-109; *Gäfgen v. Germany* [GC], no. 22978/05, ECHR 2010, paras 165-167,173 [*Gäfgen*]; *Othman (Abu Qatada) v. The United Kingdom*, no. 8139/09, ECHR 2012, paras 263-267[*Othman*]. Inter-American Court of Human Rights: *Cabrera Garcia and Montiel Flores v. Mexico* (2010), Inter-Am. Ct. HR., Ser. C no 220, para 165 [*Cabrera*].

Human Rights Committee, and the Inter-American Court of Human Rights have all held that the exclusionary rule is not subject to derogation and therefore must be observed in all circumstances.[15] The European Court of Human Rights has also held the exclusionary rule is absolute, at least as it applies to evidence obtained by torture and to statements obtained by any form of ill-treatment.[16]

17. The absolute character of the exclusionary rule is essential to ensuring compliance with the absolute ban on the use of torture itself.[17] Excluding statements obtained through torture from judicial proceedings removes one of the most significant motivations for inflicting torture.[18] The exclusionary rule also reflects the abhorrent character of torture, protects the fundamental rights of the party against whom torture-derived evidence may be used, and preserves the integrity of the judicial process.[19]

18. The Committee against Torture has affirmed that the exclusionary rule is broad in scope and applies to any proceeding, including extradition proceedings.[20] In *Ktiti v. Morocco,* Ktiti alleged that his extradition was sought on the basis of statements obtained under torture. The Committee Against Torture stated:

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[15] CAT *General Comment No. 2*, *supra* at para. 6; HRC *General Comment No 32*, *supra* at para. 6; *Cabrera*, *supra*.

[16] See e.g. *Gäfgen*, *supra* at paras 167,173 [exclusionary rule absolute as regards statements or real evidence obtained by torture, and with respect to statements obtained by other ill-treatment, but not necessarily with respect to real evidence obtained by other ill-treatment]; *Othman*, *supra* at paras 264-267.

[17] CAT *General Comment No. 2* at para. 25: "Articles 3 to 15 of the Convention constitute specific preventative measures that the States parties deemed essential to prevent torture and ill-treatment, particularly in custody or detention". See also the HRC, *General Comment No. 20*, at para. 12: "It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."

[18] J. Herman Burgers and Hans Danelius, *A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (Norwell, MA: Kluwer Academic Publishers, 1988) at p. 148.

[19] *A & Others. v. Secretary of State of the Home Department*, [2005] UKHL 71 at paras. 39, 112 [*A & Others*]; *Othman*, *supra* at paras 264-266.

[20] *G.K. v. Switzerland*, CAT/C/30/D/219/2002 (CAT 2003) at para 6.10 [*G.K. v. Switzerland*]; *P.E. v. France*, Comm. 193/2001, U.N. Doc. A/58/44 (CAT 2002) [*P.E. v. France*].

> Regarding article 15, the Committee considers that it is central to the case and closely linked to the questions raised under article 3 of the Convention. The Committee recalls that the general nature of its provisions derives from the absolute nature of the prohibition of torture and therefore implies an obligation for each State party to ascertain whether or not statements included in an extradition procedure under its jurisdiction were made under torture.[21]

19. Further, the exclusionary rule should be read in conjunction with what the UN Special Rapporteur on human rights and counter-terrorism has characterized as the "obligation *erga omnes* of States to cooperate in the eradication of torture".[22] The *erga omnes* character of this obligation means that it is "owed toward all the other members of the international community, each of which then has a correlative right".[23]

20. As the European Court of Human Rights stated in the case of *Othman (Abu Qatada) v. United Kingdom*, the admission of statements obtained by torture as evidence would be, "a flagrant denial of justice".[24] The Court in *Othman* also noted:

> More fundamentally, no legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself.[25]

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[21] *Ktiti v. Morocco*, Comm. 419/2010, U.N. Doc. CAT/C/46/D/419/2010 (CAT 2011) at para 8.8 [*Ktiti*]. The Committee Against Torture concluded that Morocco would be in violation of Article 3 of the Convention if Ktiti was extradited to Algeria, because Morocco, in extraditing him, would rely on statements which were alleged to have been obtained through torture, without verifying the allegations of torture.

[22] *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Human Rights Council, 13th Sess., U.N. Doc. A/HRC/10/3, (2009), at para 55.

[23] *Anto Furundzija, supra*, at para. 151. See also Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, (80th Sess., 2004), U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004), at para 2 [HRC *General Comment No. 31*].

[24] *Othman, supra* at para. 267.

[25] *Ibid*., at para. 264.

Extradition Requests Must be Refused Where There is a Real Risk of the Admission of Evidence Obtained Through Torture

21. To ensure Canada respects its obligations under the ICCPR, the CAT, and customary international law, the Minister must refuse extradition when the subject would face a real risk that evidence obtained by torture would be admitted at trial.

22. The European Court in *Othman* found that Mr. Othman's deportation to Jordan would be in violation of the right to a fair trial found in Article 6 of the Council of Europe's *Convention for the Protection of Human Rights and Fundamental Freedoms* (similar in terms to article 14 of the ICCPR) due to the existence of a "real risk" of the admission at Mr. Othman's retrial in Jordan of evidence obtained by torture of third persons.[26]

23. The European Court expressly rejected a "balance of probabilities" test, found in cases such as the majority judgment of the House of Lords in *A. & Others (no. 2)* and in *Mahjoub v. Canada*.[27] The Court noted that these cases related to proceedings that are "very different from criminal proceedings where, as in the present case, a defendant might face a very long sentence of imprisonment if convicted".[28] The Court stated in this regard:

> Torture is uniquely evil both for its barbarity and its corrupting effect on the criminal process [...] All too frequently, those who are charged with ensuring that torture does not occur – courts, prosecutors and medical personnel – are complicit in its concealment [...] in a criminal justice system which is complicit in the very practices which it exists to prevent, such a standard of proof is wholly inappropriate.[29]

24. The European Court's application of the real risk test in *Othman* finds support in other contexts in international law where a real risk test is applied, including the threshold for

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[26] Note that the Court in *Othman, supra*, did not specifically decide whether the real risk test applies to ill-treatment, but left this as an open possibility.

[27] *A. & Others, supra*, and *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503.

[28] *Othman, supra*, at para. 274.

[29] *Ibid*., at para. 276.

excluding evidence potentially obtained by torture, and the obligation not to deport or extradite a person to a risk of torture or other ill-treatment in another state.

a) The real risk threshold in the context of the exclusionary rule

25. In *El Haski v. Belgium*, the European Court applied the reasoning in *Othman* in the context of exclusion of evidence in a criminal trial in Belgium. The applicant challenged his conviction on the basis that declarations made by persons subject to torture or ill-treatment had been admitted in his criminal trial. The Court confirmed that demonstrating a "real risk" - and not some higher likelihood - that the evidence in question had been obtained by torture was sufficient to require exclusion of the evidence.[30]

26. The Committee Against Torture has similarly held in its individual complaints procedure that an applicant is only required to demonstrate that his or her allegations that evidence was extracted under torture are well-founded.[31] After the applicant has established the well-founded nature of his or her allegations, the burden of proof shifts to the State to rebut the evidence adduced by the applicant that the statements invoked as evidence in any proceedings, including extradition proceedings, were made as a result of torture.[32]

27. In a 2006 report to the UN General Assembly, then-Special Rapporteur on torture Manfred Nowak described the approach to be taken in applying the exclusionary rule as follows:

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[30] *El Haski v. Belgium*, 649/08 ECHR 2012 at paras. 88 and 99 [*El Haski*].

[31] *G.K. v. Switzerland, supra* at para. 6.11. See also *P.E. v. France, supra* at para. 6.6.

[32] *Ibid.*, at para. 6.10, with reference to *P.E. v. France*, *supra*., at para. 6.3. In both *G.K.* and *P.E.* the Committee Against Torture did not find a violation of article 15 on the facts of the case. Amnesty Canada considers that the Committee Against Torture correctly enunciated the principles governing the use of torture derived evidence in extradition proceedings, but does not necessarily agree with the result reached by the Committee in its application of those principles to the facts of the case in *G.K.* or *P.E.* For critique of that aspect of the decisions, see the leading scholarly work on the Convention against Torture: Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, (New York: Oxford University Press, 2008) at pp. 515-519 [Nowak and McArthur, *Commentary*].

> [T]he appellant must first advance a plausible reason why evidence may have been procured by torture. It would then be for the court to inquire as to whether there is a real risk that the evidence has been obtained by torture and if there is, the evidence should not be admitted. In other words, the evidence should only be admitted if the court establishes that there is no such real risk [emphasis added].[33]

28. The Special Rapporteur noted that:

> […] with an increasing trend towards the use of "secret evidence" in judicial proceedings, possibly obtained by torture inflicted by foreign officials, together with a too-heavy burden being placed on the individual, there exists the potential of undermining the preventive element of article 15.[34]

29. In a 2011 report, current UN Special Rapporteur on torture Juan Mendez emphasized the importance of the real risk standard:

> It is of deep concern that States regularly receive and rely on information – either as intelligence or evidence for proceedings – whose sources present a real risk of having been acquired as a result of torture and ill-treatment from third party States. Receiving or relying on information from third parties which may be compromised by the use of torture does not only implicitly validate the use of torture and ill-treatment as an acceptable tool to gain information, but creates a market for information acquired through torture, which in the long term undermines the goal of preventing and eradicating torture [emphasis added].[35]

30. The UN Special Rapporteur on counter-terrorism and human rights further emphasized:

> There may be no circumstances in which the use of evidence obtained by torture or cruel, inhuman or degrading treatment may be used for the purpose of trying and punishing a person. If there are doubts about the voluntariness of statements by the accused or witnesses, for example, when no information about the circumstances is provided or if the person is arbitrarily or secretly detained, a statement should be excluded irrespective of direct evidence or knowledge of physical abuse [emphasis added].[36]

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[33] *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 14 August 2006, UN Doc A/61/259 at para. 65; Nowak and McArthur endorsed the same real risk test in their *Commentary, ibid*, at p. 534.

[34] *Report of the Special Rapporteur, ibid.*, at para. 47.

[35] *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Human Rights Council, 16th Sess. U.N. Doc. A/HRC/16/52, (2011), para 53 [emphasis added].

[36] *Report of Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, United Nations General Assembly*, 63rd Sess., U.N. Doc. A/63/223 (2008), at para 45(d).

b) ‘Real risk’ threshold in the context of *non-refoulment* to torture or other ill-treatment

31. The “real risk” standard is also applied by international human rights courts and expert bodies to determine whether deportations or extraditions are prohibited because the person faces a risk of torture or other ill-treatment in the receiving country (i.e. the obligation of *non-refoulement* to torture or other ill-treatment). In the *non-refoulement* context, international courts and expert bodies have established that demonstrating a “real risk” does not require proof that it is “more likely than not” that the person will be tortured.

32. For several decades, the European Court of Human Rights has applied the test of whether there are “substantial grounds for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country”.[37] It has always been understood by the Court and the States Party to the Convention that this “real risk” standard is a lower threshold than “more likely than not”. In a 2008 case, *Saadi v. Italy*, a Grand Chamber of the Court explicitly rejected an argument that the Court should exceptionally adopt a stricter standard of “more likely than not” in the special context of national security deportations and counter-terrorism, and re-affirmed that the lower “real risk” standard was appropriate.[38]

33. Similarly, the Human Rights Committee, in assessing the obligation of *non-refoulement* under article 7 of the ICCPR applies the test whether “there are substantial grounds for believing that there is a real risk” of torture or other ill-treatment.[39]

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[37] See e.g. *Soering v. The United Kingdom*, no. 14038/88, ECHR (Ser. A) no. 161 (1990) at para. 91, and many subsequent cases.

[38] *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008, at para. 140.

[39] HRC *General Comment No. 31*, *supra* at para 12.

34. A leading study on *non-refoulement*, commissioned by the United Nations High Commissioner on Refugees, also concluded that the applicable standard under customary international law was the "real risk" standard, which is "less than proof to a level of probability".[40]

35. Article 3 of the CAT includes a *non-refoulement* provision which states "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." The Committee Against Torture has described this as involving a risk that goes "beyond mere theory or suspicion" but that "does not have to meet the test of being highly probable". The Committee Against Torture has also referred to "real risk" in this context.[41]

36. At the time of ratification of the CAT, the United States of America expressly conditioned its consent to the treaty by way of a 'reservation' to article 3, which declared that the United States would apply a "more likely than not" standard in implementing article 3. This reservation has been widely criticised as constituting a stricter standard than provided for in article 3 and therefore represents a failure by the United States to accept the full breadth of the obligations provided for in the CAT. For example, during the 2000 review of the first report of the United States under the CAT, the chairman of the Committee against Torture stated in respect of article 3:

> […] according to the United States interpretation of that article, the person claiming that he should not be expelled must demonstrate that it was "more likely than not that he would be tortured" (para. 158 of the report). That was not the Committee's

[40] Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement : opinion', in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (New York, NY: Cambridge University Press, 2003), at 125-126, 161-162.

[41] See Nowak and McArthur, *Commentary, supra* at 166-170, 181-193.

> interpretation of the phrase "substantial grounds for believing that he would be in danger of being subjected to torture" in article 3. It held that something less than probability could, in certain circumstances, constitute a real risk. [The chairman] wished to know why the State party had opted for such a strict standard, which did not reflect the Committee's jurisprudence.[42]

37. Similarly, it its 2006 review of the report of the United States under the ICCPR, the Human Rights Committee, which as noted above applies a "real risk" test, stated in relation to article 7 that the Committee "notes with concern the 'more likely than not' standard [the United States] uses in *non-refoulement* procedures".[43]

38. Amnesty Canada notes that in the 2003 *Li v. Canada* case, the Federal Court (affirmed by the Federal Court of Appeal in 2005) interpreted Canadian legislation implementing obligations of *non-refoulement* to torture and other ill-treatment as imposing a "balance of the probabilities" test.[44] The Federal Court relied in part on several documents from the Committee Against Torture, a judgment of a US court, and several older judgments of the European Court. Amnesty International submits that this Court ought not to rely upon the reasoning or the result in *Li* in determining the present case. It is not clear whether the Federal Court or Federal Court of Appeal had before it the 2000 statement from the CAT

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[42] Committee Against Torture, *Summary Record of the First Part (Public) of the 424th Meeting, 10 May 2000*, 24th Sess., U.N. Doc. CAT/C/SR.424 (9 February 2001), para 17. A comment in a later review of the USA (UN doc CAT/C/USA/CO/2 (25 July 2006) para 7), while more positive, did not indicate that the Committee accepts the USA standard as a correct interpretation of the language of article 3 CAT more generally: Committee Against Torture, *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention*, 36th Sess., CAT/C/USA/CO/2 (25 July 2006). It must be understood in light of the explicit US reservation and the Committee's practice in periodic review of state reports to welcome all progress on implementation. Nowak and McArthur in their 2008 *Commentary* maintain that the US "more likely than not" interpretation "involves a much stricter standard than that reflected in the Committee's jurisprudence". See also Cordula Droege, "Transfer of Detainees: Legal Framework, Non-Refoulement, and Contemporary Challenges" (2008) 90 International Review of the Red Cross 669 at 679-680; Parliamentary Information and Research Service, "Extraordinary Rendition: International Law and the Prohibition of Torture", by Laura Barnett (Ottawa, ON: Parliament of Canada, 2008), pp 12 and 16; Andrea Montavon-McKillip, "CAT Among Pigeons: The Convention Against Torture, a Precarious Intersection Between International Human Rights Law and U.S. Immigration Law" (2002) 44 Arizona Law Review 247 at 260, 271-272.

[43] Human Rights Committee, *Concluding Observations on the Report of the United States of America*, 87th Sess., U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (18 December 2006), para 16.

[44] *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 [*Li* FCA], affirming *Li v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1514.

noted above, which directly contradicts the Federal Court's inferences about the Committee's interpretation of the test under CAT article 3. Neither court acknowledged that the US jurisprudence is not a free-standing interpretation of the treaty text but rather implements the express US reservation.

39. Moreover, *Li* was decided in 2005 and subsequent commentary from the leading experts and jurisprudence from the European Court of Human Rights and the Human Rights Committee, cited above, have reaffirmed that the appropriate standard under international law is the "real risk" test, and that this is a lower threshold than "more likely than not". As the provision of the *Immigration and Refugee Protection Act* in question incorporates an international treaty into domestic law, the *Li* decision must be re-assessed in light of these subsequent developments internationally.[45]

40. Amnesty Canada submits that in the context of an extradition request in Canada, if there is a plausible reason to believe that evidence obtained through torture may ultimately be admitted at the trial, whether that reason is advanced by the affected person or arises from some other source, then the onus shifts to the Minister to consider whether there is a real risk of the use of evidence derived from torture. The real risk standard must be understood to be less onerous than the "more likely than not" balance of probabilities. This approach is in keeping with the *Othman* judgment and the other jurisprudence and expert opinions cited above.

41. The real risk standard should apply to both the possibility of the existence of torture-derived evidence and the possibility that such evidence will be admitted at trial. The Minister should

[45] See *Li* FCA, *supra*, at paras. 17-18.

first ask if there is a real risk that evidence was obtained by torture; and second, is there a real risk that the evidence in question will be admitted at the trial. If the answer to both questions is "yes", then the extradition is prohibited by international law and the Minister should refuse the request.

IV. ORDER REQUESTED

42. Amnesty Canada takes no position on the disposition of the application, but respectfully requests that it be determined in light of the submissions set out above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24th DAY OF MAY 2013.

per Lorne Waldman,
Counsel for the Intervener, Amnesty International
LSUC # 18639E

SCHEDULE "A" – LIST OF AUTHORITIES

Canadian Jurisprudence

1 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

2 *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1

3 *Li v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1514

4 *R. v. Hape*, [2007] 2 S.C.R. 292

5 *R. v. Sharpe*, [2001] 1 S.C.R. 45

6 *United States of America v. Burns*, 2001 SCC 7

International Jurisprudence

7 *A & Others. (No. 2) v. Secretary of State of the Home Department*, [2005] UKHL 71

8 *Cabrera Garcia and Montiel Flores v. Mexico* (2010), Inter-Am. Ct. HR., Ser. C no 220

9 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, [2010] I.C.J. Rep. 639

10 *El Haski v. Belgium*, 649/08 ECHR 2012.

11 *G.K. v. Switzerland*, CAT/C/30/D/219/2002 (CAT 2003)

12 *Gäfgen v. Germany* [GC], no. 22978/05, 91 ECHR 2010

13 *Jalloh v Germany* [GC], no. 54810/00, [2006], 67 ECHR 2006-IX

14 *Ktiti v. Morocco*, Comm. 419/2010, U.N. Doc. CAT/C/46/D/419/2010 (CAT 2011)

15 *Othman (Abu Qatada) v. United Kingdom*, no. 8139/09, ECHR 2012

16 *P.E. v. France*, Comm. 193/2001, U.N. Doc. A/58/44 (CAT 2002)

17 *Prosecutor v. Anto Furundzija*, Trial Judgment (10 December 1998), (International Criminal Tribunal for the former Yugoslavia)

18 *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008

19 *Soering v. The United Kingdom*, no. 14038/88, ECHR (Ser. A) no. 161 (1990)

Other International Materials

20 Committee Against Torture, *Summary Record of the First Part (Public) of the 424th Meeting, 10 May 2000*, 24th Sess., U.N. Doc. CAT/C/SR.424 (9 February 2001)

21 Committee Against Torture, *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention*, 36th Sess., CAT/C/USA/CO/2 (25 July 2006)

22 Committee Against Torture, *General Comment No. 2*, CAT/C/GC/2, 24 January 2008

23 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1987] 1465 U.N.T.S. 113, p. 85

24 *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975)

25 Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment,* (44th Sess, 1992), UN Doc HRI/GEN/1/Rev.9 (Vol. I) (1994)

26 Human Rights Committee, *General Comment No. 29: Derogations During a State of Emergency*, (72nd Sess., 2001), UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001)

27 Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, (80th Sess., 2004), U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004)

28 Human Rights Committee, *Concluding Observations on the Report of the United States of America*, 87th Sess., U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (18 December 2006)

29 Human Rights Committee, *General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial*, (90th Sess., 2007), UN Doc CCPR/C/GC/32 (23 August 2007)

30 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171

31 *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 14 August 2006, UN Doc A/61/259

32 *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Human Rights Council, 16th Sess. U.N. Doc. A/HRC/16/52, (2011)

33 *Report of Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, United Nations General Assembly*, 63rd Sess., U.N. Doc. A/63/223 (2008)

34 *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Human Rights Council, 13th Sess., U.N. Doc. A/HRC/10/3, (2009)

Secondary sources

35 Burgers, J. Herman and Hans Danelius, *A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (Norwell, MA: Kluwer Academic Publishers, 1988)

36 Droege, Cordula, "Transfer of Detainees: Legal Framework, Non-Refoulement, and Contemporary Challenges" (2008) 90 International Review of the Red Cross 669

37 Lauterpacht, Sir Elihu and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: opinion ', in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (New York, NY: Cambridge University Press, 2003)

38 Montavon-McKillip, Andrea, "CAT Among Pigeons: The Convention Against Torture, a Precarious Intersection Between International Human Rights Law and U.S. Immigration Law" (2002) 44 Arizona Law Review 247

39 Nowak, Manfred and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, (New York: Oxford University Press, 2008)

40 Parliamentary Information and Research Service, "Extraordinary Rendition: International Law and the Prohibition of Torture", by Laura Barnett (Ottawa, ON: Parliament of Canada, 2008)

SCHEDULE "B" – RELEVANT STATUTES

***Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11. s. 7**

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

HASSAN NAIM DIAB Applicant	and	**THE MINISTER OF JUSTICE OF CANADA** Respondent	and	**AMNESTY INTERNATIONAL** Intervener	**Court File No. C55441**

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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