No. 09-923

IN THE

United States Supreme Court

MAHER ARAR,

Petitioner,

against

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE REDRESS TRUST AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of the Redress Trust ("REDRESS"), an international human rights organization that helps torture survivors obtain justice and reparation (the "*amicus curiae*").[1]

Since its establishment in 1992, REDRESS has developed a considerable expertise in advocating on behalf of victims of torture through legal research, policy and litigation. It regularly represents victims of torture directly and acts as *amicus curiae* before national, regional and international courts and human rights bodies throughout the world. REDRESS has particular expertise on the right to an effective remedy and full and adequate reparation under international law and the relationship of these rights with procedural rules, such as immunities, amnesties, statutes of limitation and the 'state secrets' privilege.

This case concerns the alleged responsibility of U.S. officials for their part in exposing the Petitioner, Mr. Maher Arar, to the risk of torture in violation of the absolute principle of *non-refoulement*. The motivation of the *amicus curiae* to participate in this case therefore relates to its grave concern that the absolute prohibition of torture, of which the absolute principle of *non-refoulement* is an integral part, will be undermined if individuals, such as the Petitioner, are denied access to a court in which to argue their case. The right

[1] The parties have consented to the filing of this brief and such consents have been lodged with the Court. No counsel for a party authored this brief in whole or in part. No person or entity other than the *amicus curiae* and their counsel made a monetary contribution to the preparation and submission of this brief.

to an effective remedy, including access to justice, is an inherent component of the absolute prohibition of torture. The denial of access to justice would not only have a detrimental impact on the Petitioner in this case, but would also leave violations of the prohibition of torture and the principle of *non-refoulement* unchecked, thus enabling the outsourcing of torture from U.S. territory with impunity.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the alleged 'extraordinary rendition' of the Petitioner, a dual Canadian-Syrian national, who alleges that he was arbitrarily detained in the U.S. before being sent to Syria, without the ability to challenge his removal. In Syria, he alleges that he was subjected to torture and other cruel, inhuman or degrading treatment or punishment for nearly a year before being returned to Canada without charge. The Petitioner alleges that a number of individuals and states bear responsibility for his 'extraordinary rendition.'

The case currently before this Court concerns the alleged responsibility of U.S. officials for their part in the Petitioner's alleged 'extraordinary rendition' through exposing him to the risk of torture in violation of the absolute principle of *non-refoulement*. This principle prohibits the transfer of 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. The lower courts[2] denied the Petitioner access to

[2] 585 F.3d 559 (2d Cir. 2009), 532 F.3d 157 (2d Cir. 2008), 414 F. Supp.2d 250 (E.D.N.Y. 2006).

a court to argue that he had been a victim of such a serious human rights violation.

This *amicus curiae* filed a substantive brief in the court below supporting the Petitioner's right to an effective remedy and to full and adequate reparation under U.S. and international law. It is this same view that moves the *amicus curiae* to present this brief in support of Mr. Arar's Petition for Writ of Certiorari.

This brief raises four issues. First, individuals who have an arguable claim that they have been a victim of 'extraordinary rendition' have the right to an effective remedy and full and adequate reparation, including access to a court. Second, the right to an effective remedy and full and adequate reparation arises in relation to each individual and/or state responsible for the violation; where one responsible entity has provided relief, this does not extinguish the individual's claim against other responsible entities. Third, any restriction of access to a court must not undermine or extinguish the right of access to a court entirely. Finally, access to a court is critical to the remedial process in and of itself.

ARGUMENT

1. A Victim of *Refoulement* Has the Right to Access a Court to Argue His or Her Claim and Receive Reparation

This case concerns the responsibility of U.S. officials for their part in the Petitioner's alleged 'extraordinary rendition,' in violation of the absolute principle of *non-refoulement*. As explained below, the U.S. is

bound to respect the principle of *non-refoulement* and to provide victims with an effective remedy and full and adequate reparation.

A. The U.S. is Required to Observe the Principle of *Non-Refoulement*

The universally recognized absolute prohibition of torture[3] includes the negative duty on states to refrain from torturing and also positive obligations including preventing torture "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."[4] This obligation encapsulates the absolute principle of *non-refoulement*, which is

[3] The absolute prohibition of torture is a *jus cogens* norm and is set out in every major international and regional human rights instrument. *See, e.g.*, International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, A/6316, 999 U.N.T.S 171 [hereinafter ICCPR]; *see also* American Convention on Human Rights art. 5, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter *American Convention*]; and the United Nations [hereinafter *U.N.*] 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 *UNCAT*]. *See also de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992); *Soering v. United Kingdom,* Application No. 14038/88 (Eur. Ct. H.R. 1989) at ¶ 88.

[4] *See* U.N. General Assembly, *Interim Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 55th Session,* Item 116(a) of the provisional agenda, A/55/290 Human Rights Questions: Implementation of Human Rights Instruments, (2000) at 27.

an inherent and indivisible part of the prohibition of torture.[5]

Human rights courts and bodies have consistently confirmed the absolute nature of the principle of *non-refoulement*, which allows no limitations, derogation or exceptions,[6] including on national security grounds.[7] It applies to all persons without distinction and the victim's conduct, however "undesirable or dangerous," is irrelevant.[8]

The U.S. is bound to respect the principle of *non-refoulement* for at least four reasons: (i) the U.S. ratified treaties which expressly prohibit the *refoulement* of a person where there are substantial grounds to believe that the individual would be at risk of tor-

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[5] *See, e.g., Chahal v. United Kingdom*, Application No. 22414/93 (Grand Chamber Eur. Ct. H. R. 1996) at ¶ 74.

[6] *See, e.g.*, UNCAT Article 2(2), *supra* note 3; *Chahal, supra* note 5; *Dadar v. Canada*, U.N. Committee against Torture [hereinafter *CAT*], CAT/C/35/D/258/2004 (2005) at ¶ 8.8; HRC General Comment 20, Article 7, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.1 (1994) at § 9 [hereinafter *HRC General Comment 20*]; HRC General Comment 29, Article 4, Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11. at 1 ¶ 7 (2001) [hereinafter *HRC General Comment 29*].

[7] *Chahal, supra* note 5, at ¶ 79; *Saadi v. Italy*, Application No. 37201/06 (Eur. Ct. H. R. 2008) at ¶¶ 138 and 141.

[8] *See, e.g., Agiza v. Sweden*, CAT, CAT/C/34/D/233/2003 (2005); *Saadi, supra* note 7, at ¶¶ 139-40.

ture;[9] (ii) the U.S. signed the American Convention on Human Rights ("American Convention") on June 1, 1966 which expressly prohibits *refoulement*;[10] (iii) the absolute principle of *non-refoulement* constitutes a *jus cogens* norm, which binds the U.S. as customary international law;[11] and (iv) the U.S. enacted implementing legislation for the UNCAT in the form of the Foreign Affairs Reform and Restructuring Act of 1998, which specifically prohibits *refoulement*.[12]

The absolute principle of *non-refoulement* contains a procedural and a substantive dimension. Where, as the Petitioner alleges, an individual is denied the opportunity to challenge removal through judicial or administrative review, the state commits a procedural violation of the principle of *non-refoulement*, in addition to a substantive breach.[13]

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[9] *See, e.g.,* UNCAT (ratified on Oct. 21, 1994); ICCPR (ratified on June 8, 1992). See also ICCPR art. 7. *See also Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (it is a "settled proposition that federal common law incorporates international law (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900))); *In re Estate of Ferdinand E. Marcos Human Rights Litigation (Marcos I)*, 978 F.2d 493, 502 (9th Cir. 1992).

[10] *See* American Convention, *supra* note 3, art. 22.

[11] *See, e.g.*, CAT, *Summary Record of the 624th Meeting,* CAT/C/SR.624 (2004), § 51-52; Restatement (Third) of Foreign Relations Law § 702(c) (1987) ("The customary law of human rights is part of the law of the United States to be applied as such by State as well as federal courts.").

[12] *See* Foreign Affairs Reform and Restructuring Act of 1998, 8 U.S.C. 1231(b)(3).

[13] *See Agiza v Sweden, supra* note 8; *Alzery v. Sweden*, HRC, CCPR/C/88/D/1416/2005 (2005).

The principle of *non-refoulement* is breached at the point of transfer. Whether the individual ultimately faces torture is irrelevant for the purposes of establishing liability.[14] In cases where an individual is ultimately tortured, any state involved in the transfer, may incur additional and separate responsibility even if it had no direct involvement in the treatment after the transfer.[15]

The numerous authoritative sources cited above bind the U.S. to respect the principle of *non-refoulement*. These same authorities obligate the U.S. to provide the Petitioner access to a court and an effective remedy.

B. The U.S. is Obligated to Provide an Effective Remedy for Violations of the Absolute Principle of *Non-Refoulement*

Individuals who allege that they have been victims of *refoulement* have the right to an effective remedy and to full and adequate reparation, including access to a court.[16] The right to an effective remedy and full and adequate reparation for torture and other fundamental violations of human rights is a clear, entrenched right under U.S. Constitutional Law (*see* Petition for Certiorari, pp. 11-15), that is also supported by U.S.

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[14] *See, e.g., Agiza, id.*, at ¶ 13.7.

[15] *Ahani v. Canada*, HRC, CCPR/C/80/D/1051/2002 (2004), at ¶ 12.

[16] 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, G.A. Res. 60/147, ¶ 11, A/RES/60/147 (2006).

treaty obligations and customary international law. The right to a remedy has been affirmed by a range of treaties to which the U.S. is a party (*e.g.,* Articles 2(3), 9(5) and 14(6) of the ICCPR; Article 14 of the UNCAT; and Articles 1, 5, 13 and 41 of the American Convention) as well as Articles 8 and 10 of the Universal Declaration of Human Rights and the U.N. Committee against Torture,[17] the U.N. Human Rights Committee[18] and regional human rights courts.[19]

The right to an effective remedy is not only an integral part of the absolute principle of *non-refoulement* but it is also a freestanding right, which is guaranteed, non-derogable,[20] and recognised as "one of the fundamental pillars of the rule of law in a democratic society."[21]

The right to a remedy must be "effective" in practice as well as in law[22] and must be suitable to grant appropriate relief for the legal right that is alleged to

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[17] UNCAT General Comment 2: Implementation of Article 2 by States Parties, CAT/C/GC/2 (2008) at ¶ 15.

[18] *See, e.g.*, HRC General Comment 31, The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (2004) at ¶¶ 15-17.

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

[20] HRC General Comment 29, *supra* note 6 at ¶ 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 ¶ 24.

[21] *Castillo Páez v. Peru,* Inter-Am. C.H.R., (Ser. C) No. 34 (1997) ¶ 82; *Blake v. Guatemala* (Reparations), Inter-Am. C.H.R. (Ser. C) No.48 (1999), at ¶ 63.

[22] Judicial Guarantees in States of Emergency, *supra* note 20, at ¶ 24.

have been infringed.[23] General Assembly Resolution 60/147 clarifies that States must provide "adequate, effective, prompt and appropriate remedies, including reparation,"[24] and "equal and effective access to justice."[25]

Dissenting from the Second Circuit, Judge Calabresi noted the importance of providing a remedy.[26] Judge Parker echoed this sentiment: "[w]hile I broadly concur with my colleagues who dissent, I write separately to underscore the miscarriage of justice that leaves Arar without a remedy in our courts."[27]

As set out above, individuals who have an arguable claim that they have been victims of *refoulement* have the right to an effective remedy and full and adequate reparation, including access to a court to contest procedural and substantive breaches of the principle of *non-refoulement*.[28]

II. Responsibility Rests with Each State in the Transfer Chain for Violations of the Absolute

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[23] *See, e.g., Velasquez Rodriguez Case, supra* note 19, at ¶¶ 64 and 66; *McTaggart v. Jamaica*, HRC, CCPR/C/62/D/749/1997 (1998); *Aksoy v. Turkey*, Application No. 21987/93 (Eur. Ct. H.R. 1996) at ¶ 95; and *Aydin v. Turkey*, Application No. 23178/94 (Eur. Ct. H. R. Grand Chamber 1997) at ¶ 103.

[24] Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 16, Principle 11.

[25] *Id.*, at 2(c).

[26] *Arar v. Ashcroft,* 585 F.3d at 630 (Calabresi, J. dissenting).

[27] *Arar v. Ashcroft,* 585 F.3d at 610 (Parker, J. dissenting).

[28] *Alzery v. Sweden*, *supra* note 13, at ¶ 13.

Principle of *Non-Refoulement* and Any Torture which Results from the Transfer

A victim of an 'extraordinary rendition' must be afforded an effective remedy and full and adequate reparation by each responsible entity, regardless of the actions or inactions of other responsible individuals and states. 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, confirms as much. In particular, it 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.[29]

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 respect of each state.

[29] Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, art. 47, A/RES/56/83 (2002); *see also* James Crawford, "The International Law Commission Articles on State Responsibility: Introduction, Text and Commentaries" 272-275 (Cambridge University Press 2008) (citing Article 47).

The underlying rationale for the right to an effective remedy and full and adequate reparation underscores the basis upon which each state is separately responsible for meeting its obligations pursuant to these rights, regardless of the actions or inactions of other states. For example, one of the purposes of reparation for human rights violations has been described 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."[30]

In addition, 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.[31] While Canada has provided compensation to the Petitioner for its role surrounding his 'extraordinary rendition,' this does not extinguish the obligation of other entities to provide an effective remedy and full and adequate reparation. In the case presently before this Court, the responsibility at issue is that of U.S. officials for allegedly exposing the Petitioner to a risk of torture in violation of the absolute principle of *non-refoulement*; this was not addressed within the Canadian context.

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[30] 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 ¶ 137(3).

[31] *Id.*

III. The Right to an Effective Remedy for *Refoulement* Cannot be Undermined or Extinguished

Any proposed restriction on the right to an effective remedy must be assessed on a case-by-case basis, pursue a legitimate aim, and be proportionate and strictly necessary in a democratic society.[32]

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. Thus, abstract or general assertions of the relevance of "special factors" such as "diplomacy, foreign policy, and the security of the nation"[33] cannot restrict the right to an effective remedy. Rather any purported restriction on 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. While states may introduce adjustments to the practical functioning of the procedures governing judicial remedies; such adjustments must not result in the removal of the fundamental right to an effective rem-

[32] *See generally Tachiona v. Mugabe*, 234 F.Supp.2d 401 (S.D.N.Y. 2002); *Golder v. United Kingdom*, Application No. 4451/70 (Eur. Ct. H.R. 1975); Restatement (Third) of Foreign Relations Law § 701 (1987).

[33] *Arar v. Ashcroft,* 585 F.3d at 574.

edy altogether since the substance of the right cannot be suspended or derogated from, even in times of emergency.[34]

A. States Alleged to Have Violated the Principle of *Non-Refoulement* Cannot Avoid Accountability by Invoking National Security Concerns

While courts have recognized that the protection of national security may reflect a legitimate aim,[35] it will only be considered as such when its invocation is genuinely tailored to protecting national security interests.[36] National security cannot be used to protect states from embarrassment or to prevent the exposure of illegal activity as security agencies are subject to the same democratic principles of governance as all other state organs.[37]

Courts must test the propriety and legitimacy of the national security claim in the particular circumstances of a case, especially in terms of its impact on the right to an effective remedy.[38] Any assessment of pro-

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[34] HRC General Comment 29, *supra* note 6, at ¶ 14; HRC, *Concluding Observations of the Human Rights Committee: United States of America,* CCPR/C/USA/CO/3 (2006) at ¶ 16.

[35] *See generally, Ždanoka v. Latvia*, Application No. 58278/00, (Eur. Ct. H.R. 2004) at ¶ 62.

[36] *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983).

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

[38] *See Tinnelly & Sons Ltd. v. United Kingdom,* Application No. 62/1997/846/1052-1053 (Eur. Ct. H.R. 1998) at ¶¶ 78-79.

posed restrictions on the right to an effective remedy requires rigorous scrutiny and the burden lies with the party seeking the restrictions to demonstrate why such restrictions pursue a legitimate aim, are proportionate, strictly necessary in a democratic society and do not remove or undermine the essence of the right to an effective remedy. While the conduct of U.S. foreign affairs is "committed by the Constitution to the executive and legislative--'the political'--departments of the government,"[39] this Court has stated that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[40] Indeed, this Court has long recognized that the Constitution confers upon the judiciary the right, if not an obligation, to review executive action which may be unconstitutional even in matters involving national security.[41] Moreover, international human rights courts and bodies have repeatedly rejected the contention that national security interests can be balanced against the absolute principle of *non-refoulement*.[42]

Even where national security interests are considered legitimate, they cannot extinguish the right to an effective remedy altogether but must impact the right in the

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[39] *Igartua-de la Rosa v. United States*, 417 F.3d 145, 151 (1st Cir. 2005).

[40] *Baker v. Carr*, 369 U.S. 186, 211 (U.S. 1962). *See also Filartiga v. Pena-Irala,* 630 F.2d 876, 887 (2d Cir. 1980).

[41] *See generally Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[42] *Chahal*, *supra* note 5, at ¶ 79; *Saadi, supra* note 7, at ¶¶ 138 and 141.

least restrictive way.[43] The threshold required for national security to limit judicial remedies is particularly high given the dangers to a democratic society.[44] Thus, in cases which raise national security concerns, courts are tasked with the identification of ways in which to protect potentially sensitive pieces of evidence while ensuring that the essence of the right to an effective remedy is not undermined or removed. The presumption should always be to ensure complete openness of court proceedings and equality of arms as between the parties. However, in appropriate cases, permissible restrictions on the right to an effective remedy may include, for example, hearing pieces of evidence which raise national security concerns in camera.[45] Alternative ways of receiving and hearing privileged information must be explored and used where available;[46] however, proposed restric-

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[43] *See generally* HRC, General Comment 29, *supra* note 6, at ¶ 14.

[44] 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 ICCPR, Annex, U.N. Doc. E/CN.4/1984/4 (1984), at ¶¶ 29-32.

[45] *See also In re NSA Telcoms. Records Litig.*, 564 F. Supp. 2d 1109, 1114 (N.D. Cal. 2008); *A and Others v. United Kingdom,* Application No. 3455/05 (Eur. Ct. H.R 2009) at ¶ 92.

[46] *See, e.g., Devenney v. United Kingdom,* Application No. 24265/94 (Eur. Ct. H.R. 2002) at ¶¶ 23-29; *Tinnelly*, *supra* note 38, at ¶ 78.

tions must respect the rights of the individual.[47] In the present case, the Second Circuit recognized that "[a]llowing Arar's claims to proceed would very likely mean that some documents or information sought by Arar would be redacted, reviewed *in camera*, and otherwise concealed from the public."[48]

Although certain items of evidence may require redaction or similar measures, each piece of evidence must be assessed carefully with the understanding that this should not lead to the whole matter being removed from the courts, and that in general, any such measures run counter to the right to public disclosure and acknowledgement of the violations.

Indeed, Canadian and English proceedings are instructive in their attempts to deal with sensitive material. For example, the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar produced both a public and a confidential version of their report. Prior to publication, the Canadian government redacted certain paragraphs of the public report on national security grounds resulting in litigation. The Canadian Federal Court provided both an open judgment in which it advanced the standards it applied to reach its decision and a closed judgment in

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[47] *See, e.g.*, *Al-Nashif v. Bulgaria*, Application No. 50963/99 (Eur. Ct. H.R. 2002), at ¶ 97; *see also* 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 ¶¶ 44-66.

[48] *Arar v. Ashcroft,* 585 F.3d at 576-77.

which it applied these standards to the facts.[49] Without commenting on the merits of the Canadian decision and whether it fully provided the Petitioner with his right to an effective remedy and to full and adequate reparation - particularly in relation to the right to the truth and public disclosure and acknowledgement of the violations - the Canadian Court's decision demonstrates an attempt to reconcile the value in the public disclosure, with national security concerns by redacting pieces of evidence.

Similarly, in a unanimous decision in *R (on the application of Binyam Mohamed) v. The Secretary of State for Foreign and Commonwealth Affairs,*[50] the English Court of Appeal recently found that seven redacted paragraphs should be published despite the U.K. Foreign Secretary's submission that their publication would be damaging to "intelligence sharing arrangements" between the U.K. and the U.S. and their respective allies.[51] The Lord Chief Justice of England and Wales reasoned that, "each of our judgments proceeded on the principle of open justice and its contribution to the preservation of the rule of law in our society."[52] In advance of being handed down,

[49] Federal Court (Ottawa, Ontario), *"Attorney General of Canada v. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar and Maher Arar"*, 2007 FC 766, 24 July 2007, at ¶ 58 (citing *Carey v. Ontario,* [1986] 2 S.C.R. 637, ¶ 84). *See also* Brief of *Amici Curiae* Canadian and International Human Rights Organizations and Scholars in Support of the Issuance of a Writ of Certiorari.

[50] *R (on the application of Binyam Mohamed) v. The Secretary of State for Foreign and Commonwealth Affairs,* [2010] EWCA Civ 65, (Feb. 10, 2010).

[51] *Id.* at ¶ 12.

[52] *See id.* at ¶ 17.

draft judgments of the three members of the Court were circulated to counsel, solicitors and the parties on a confidential basis.[53] Following submissions by government lawyers, one paragraph of Lord Neuberger's draft judgment was amended. In a further ruling, the English Court of Appeal required publication of the original draft of the contested paragraph (which contained criticism of the U.K. Security Services) on the basis that "the interests of open justice must prevail."[54]

Extinguishing the right to an effective remedy altogether, including effective access to a court, would constitute a disproportionate restriction.[55] International jurisprudence has consistently and clearly stressed that procedural rules, including 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 to full and adequate reparation, and society's right to the truth; and would contribute to a culture of impunity.[56] Dissenting from the Second Circuit *en banc* decision, Judge Parker concluded that

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[53] *Id*. at ¶ 4.

[54] *Id.* at ¶ 17.

[55] *See, e.g., Cordova v. Italy* (No. 1), Application No. 40877/98 (Eur. Ct. H.R. 2003) at ¶¶ 54, 60 and 65.

[56] *See, e.g.,* HRC General Comment 20, *supra* note 6, at ¶ 15; *Rodríguez v. Uruguay,* CCPR/C/51/D/322/1988 (1994), at ¶¶ 12.1-12.4, 14; *Chumbipuma Aguirre v. Peru* (Barrios Altos Case), Inter-Am Ct. H.R. (Ser. C) No. 87 (2001), at ¶ 41.

[57] *Arar v. Ashcroft,* 585 F.3d at 612.

this case "should be permitted to proceed"[57] since the role of the judiciary is "to defend the Constitution… by affording redress when government officials violate the law, even when national security is invoked as the justification."[58] Underscoring "the miscarriage of justice that leaves Arar without a remedy in our courts," Judge Parker noted that "[t]he majority would immunize official misconduct by invoking the separation of powers and the executive's responsibility for foreign affairs and national security."[59] For the reasons stated above, Mr. Arar is entitled to an effective remedy in the U.S. courts.

B. Officials or States Alleged to Have Outsourced Torture in Violation of the Principle of *Non-Refoulement* Cannot Avoid Accountability by Invoking the Principle of Comity in Inter-State Relations

Preventing disclosure of alleged gross human rights violations on the basis of comity in international relations would not meet the strict three-part test for restrictions of the right to an effective remedy and in the present case, would remove the essence of the right entirely. Although the lower courts asserted comity in international relations when denying the Petitioner the right of access to the court, comity does not carry a judicial or legal meaning. Rather, it is better characterized as "rules of politeness, convenience, and goodwill"[60] which are "rules of international con-

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[58] *Id*. at 611.

[59] *Id.*

[60] Ian Brownlie, *Principles of Public International Law*, Seventh Edition 29 (Oxford University Press, 2008).

duct, not rules of international Law."[61] Comity does not present a legitimate encroachment upon the right to an effective remedy for an alleged violation of the absolute prohibition of torture and the absolute principle of *non-refoulement*.

Moreover, the assessment that comity in inter-state relations would be satisfied by denying the Petitioner 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 *non-refoulement* in favor of impunity for the violations alleged by the Petitioner.[62]

IV. Access to a Remedy is Critical to the Remedial Process in and of Itself

The right to an effective remedy, including access to a court, is not only a means by which to seek reparation; the process itself can be an important component of reparation. A number of academic and clinical studies support the conclusion that the exercise of the right of access to a court can have beneficial effects for survi-

[61] Lassa Oppenheim, *International Law: A Treatise 25* (Longmans, Green and Co., 1905).

[62] *See, e.g., Certain Criminal Proceedings in France (Republic of the Congo v. France)* Provisional Measure, Order of 17 June 2003, I. C. J. Reports 2003, at 102.

vors of torture;[63] whereas, a denial of access to justice can compound the existing trauma and thus result in a continuation of the effects of the underlying human rights violations.[64]

Testimonies of victims who have had access to a court in which to argue their case support this conclusion. 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."[65] Another Salvadoran torture survivor bringing a lawsuit in the U.S. courts explained 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

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[63] *See, e.g., Statement of the Medical Foundation*, 23-27, *Refugee Council Parliamentary Briefing*, 36-38, *Refugee Therapy Centre Response by Aida Alayarian*, 39-48 from *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 (Jul. 2008) [hereinafter *REDRESS Torture (Damages) Bill Compilation*].

[64] *See, e.g., id., Mary Robertson Expert Report (Traumatic Stress Clinic)*, at 49-53.

[65] *No Safe Haven: Accountability for Human Rights Violators in the United States: Hearing before the Subcomm. on Human Rights and the Law of the H. Comm. on the Judiciary* (2007) (testimony of Dr. Juan Romagoza Arce, Executive Director, La Clinica Del Pueblo and Plaintiff, Romagoza Arce v. Garcia). *See also* William Branigin, *Confronting the Past: 6 Honduran Plaintiffs Suing Over 1980's Human Rights Abuses*, Washington Post, Jul. 25, 2002.

court."[66] According to the Medical Foundation for the Care of Victims of Torture, for victims "[t]he availability of accessible mechanisms itself can be experienced as acknowledgment and commitment by the State to uphold the right to reparation."[67]

While the healing and recovery process for survivors of torture is complex, lengthy and ongoing, and particular to the individual victim, the inability to access a court can often complicate and even impede the 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.[68] For example, one torture survivor who was unable to bring his case against the state of Kuwait in the English courts due to the Court's interpretation that state immunity applied and who could not bring his claim elsewhere, stated, "I felt completely lost. It was the end of the road for me and it was a terrible feeling."[69]

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[66] Statement of Carlos Mauricio, Center for Justice & Accountability, http://cja.org/article.php?id=484.

[67] REDRESS Torture (Damages) Bill Compilation, Statement of the Medical Foundation, *supra* note 63, at 25.

[68] Lucila Edelman et al., *La impunidad: Reactivación del trauma psíquico,* Reflexión 1996, at 24-26. *See also* Roger Gurr & José Quiroga, *Approaches to Torture Rehabilitation,* 11 Torture 3, 27 (2001); REDRESS Torture (Damages) Bill Compilation, *supra* note 63, *The need for reparation for torture survivors from a health perspective,* The Parker Institut, Frederiksberg Hospital, Denmark, at 30.

[69] REDRESS Torture (Damages) Bill Compilation, *supra* note 63, Statement of Sulaiman Al-Adsani, at 7.

The Inter-American Court of Human Rights has also recognized the impact of denial of justice on victims of violations of the American Convention, finding that "[t]he damage caused by this situation [of impunity and denial of justice] consists of the impossibility of punishing those truly responsible, which creates a feeling of defenselessness and anguish among the next of kin of the victims."[70]

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 successfully pursued her case against Honduras before the Inter-American Commission on Human Rights. When asked why she had also brought a civil case for compensation against one of the individuals allegedly responsible for her brother's enforced disappearance before the U.S. courts, she explained:

> [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

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

> a high-ranking official responsible and thereby begin to pierce the culture of impunity.[71]

Indeed, as discussed above, even where the victim has been provided with a remedy and some form of reparation from one of the states or individuals responsible, he or she is still entitled to an effective remedy and full and adequate reparation from all other entities implicated in the violation of the victim's fundamental rights.

CONCLUSION

For the foregoing reasons, the *amicus curiae* urge this Court to grant the Petition for Writ of Certiorari.

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[71] Statement of Zenaida Velásquez, Center for Justice & Accountability, http://cja.org/article.php?id=469.