No. 17-2171

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

USAMA JAMIL HAMAMA, ET AL.,
Petitioners-Appellees,

v.

THOMAS HOMAN, DEPUTY DIRECTOR AND SENIOR OFFICIAL PERFORMING THE DUTIES OF THE DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL.,
Respondents-Appellants.

On Appeal from the
U.S. District Court for the Eastern District of Michigan
D.C. No. 2:17-cv-11910

BRIEF OF CURRENT AND FORMER U.N. SPECIAL RAPPORTEURS ON TORTURE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS-APPELLEES

Elisa J. Lintemuth (P74498)
Dykema Gossett PLLC
300 Ottawa Ave NW Ste 700
Grand Rapids, MI 49503-2306
(616) 776-7532
elintemuth@dykema.com

William J. Aceves (CA Bar 151031)
California Western School of Law
225 Cedar Street
San Diego, CA 92101
(619) 515-1589
wja@cwsl.edu

Counsel for Amici Curiae

DISCLOSURE OF CORPORATE AFFILIATIONS

Pursuant to Fed. R. App. P. 26.1, the *Amici* make the following disclosure:

1. Is the party a publicly held corporation or other publicly held entity?

NO.

2. Is the party a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity?

NO.

3. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation?

NO.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Rules & Statutes

International Cases

International Treaties

International Authorities

Scholarly Treatises and Articles

INTEREST OF *AMICI*

Amici are three former U.N. Special Rapporteurs on Torture as well as the current U.N. Special Rapporteur. They were each appointed by the United Nations to serve in this distinguished capacity. The U.N. Special Rapporteur on Torture is appointed to examine questions relating to torture and other cruel, inhuman, or degrading treatment or punishment.[1] Accordingly, *Amici* are recognized experts in the fields of international law and human rights. They teach and have written extensively on these subjects. Indeed, their work is regularly cited with approval by legal scholars and human rights institutions. While they pursue a wide variety of legal interests, *Amici* share a deep commitment to the rule of law and respect for human rights. Both parties have consented to the filing of this brief.[2]

[1] *See* U.N. Comm'n on Human Rights, Resolution Regarding Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/Res/1985/33 (Jan. 4, 1985). The U.N. Special Rapporteur's mandate includes transmitting appeals to states with respect to individuals who are at risk of torture as well as submitting communications to states with respect to individuals who were previously tortured. The U.N. Special Rapporteur's mandate was most recently renewed by the Human Rights Council of the United Nations in April 2017. *See* U.N. Human Rights Council, Resolution Regarding Mandate of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/HRC/RES/34/19 (Apr. 7, 2017).

[2] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission.

Nils Melzer was appointed the U.N. Special Rapporteur on Torture in 2016.[3] He currently holds the Swiss Human Rights Chair at the Geneva Academy for International Humanitarian Law and Human Rights. He is also Professor of International Law at the University of Glasgow. He previously served for 12 years with the International Committee of the Red Cross ("ICRC") as a Legal Adviser and Deputy Head of Delegation in various conflict zones as well as at the ICRC's headquarters in Geneva. In 2011, he was appointed Research Director of the Competence Centre for Human Rights at the University of Zürich and, in 2012, he was appointed Senior Programme Advisor and Senior Fellow at the Geneva Centre for Security Policy (GCSP). Professor Melzer has authored several books, including *Targeted Killing in International Law*, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *International Humanitarian Law: A Comprehensive Introduction*, and numerous other publications in the field of international law.

Juan E. Méndez served as the U.N. Special Rapporteur on Torture from 2010 to 2016. He is currently Professor of Human Rights Law in Residence at the American University – Washington College of Law, where he is the Faculty

[3] This brief is provided by Professor Melzer and the former U.N. Special Rapporteurs on a voluntary basis for the court's consideration without prejudice to, and should not be considered as a waiver, express or implied of, the privileges and immunities of the United Nations, its officials, and experts on missions, including Professor Melzer, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

Director of the Anti-Torture Initiative. In 2017, Professor Méndez was appointed a Commissioner of the International Commission of Jurists. Previously, Professor Méndez served as Co-Chair of the Human Rights Institute of the International Bar Association (London) in 2010 and 2011 and Special Advisor on Crime Prevention to the Prosecutor of the International Criminal Court from 2009 to 2010. Until May 2009, Professor Méndez was the President of the International Center for Transitional Justice. Between 2000 and 2003, he was a member of the Inter-American Commission on Human Rights for the Organization of American States, and he served as its President in 2002. Professor Méndez directed the Inter-American Institute on Human Rights in San Jose, Costa Rica (1996-1999), and worked for Human Rights Watch (1982-1996).

Manfred Nowak served as the U.N. Special Rapporteur on Torture from 2004 to 2010. He is currently Professor of International Law and Human Rights at Vienna University, Co-Director of the Ludwig Boltzmann Institute of Human Rights, and Vice-Chair of the European Union Agency for Fundamental Rights (Vienna). He served as the U.N. Expert on Enforced Disappearances from 1993 to 2006 and Judge at the Human Rights Chamber of Bosnia and Herzegovina in Sarajevo from 1996 to 2003. Professor Nowak has written extensively on the subject of torture, including *The United Nations Convention Against Torture—A Commentary* (with Elizabeth McArthur); *Challenges to the Absolute Nature of the*

Prohibition of Torture and Ill-Treatment, 23 Neth. Q. Hum. Rts. 674 (2005); and *What Practices Constitute Torture? U.S. and U.N. Standards*, 28 Hum. Rts. Q. 809 (2006).

Theo van Boven served as the U.N. Special Rapporteur on Torture from 2001 to 2004. He is an Emeritus Professor of Law at the University of Maastricht, where he was Dean of the Faculty of Law from 1986 to 1988. He has served as Director of the Division of Human Rights of the United Nations (1977-1982). As a Special Rapporteur of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, he drafted the first version of the 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. From 1992 to 1999, Professor van Boven served on the Committee on the Elimination of Racial Discrimination, the treaty body charged with monitoring the Convention on the Elimination of All Forms of Racial Discrimination. He was also the first Registrar of the International Criminal Tribunal for the former Yugoslavia (1994). He served as the Head of the Netherlands delegation to the U.N. Diplomatic Conference for the Establishment of an International Criminal Court (1998).

Amici recognize the importance of protecting individuals fleeing torture and the significance of the principle of non-refoulement in such cases. These issues

form the core of the Special Rapporteur's mandate. Over many years, they have submitted countless reports to the United Nations highlighting the obligation of all states to comply with the prohibition against torture and the corresponding principle of non-refoulement. Accordingly, *Amici* would like to provide the Court with an additional perspective on these issues. They believe their submission will assist the Court in its deliberations.

SUMMARY OF ARGUMENT

This case involves hundreds of Iraqi nationals who have lived in the United States for many years and who now face removal to Iraq, a country where they would be in danger of being subjected to torture and persecution.[4] Accordingly, this case implicates the principle of non-refoulement contained in the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Convention against Torture"), a treaty the United States has signed and ratified.[5]

[4] While Appellees were ordered removed years ago (some overstayed their visas; others had criminal convictions) and were subject to final orders of removal, the United States was unable to remove them because Iraq refused to issue travel documents and accept them. When the Trump administration was considering whether to remove Iraq from the list of designated countries under the original travel ban, the Iraqi government changed its policy and agreed to accept the return of these Iraqi nationals.

[5] This case implicates other international agreements, including the International Covenant on Civil and Political Rights as well as the Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees.

On June 11, 2017, Immigration and Customs Enforcement ("ICE") began arresting Iraqi nationals throughout the country who were subject to final orders of removal and prepared to remove them summarily to Iraq. If returned to Iraq, they would be in danger of being subjected to torture.[6] Significantly, the United States refused to provide them with the opportunity to challenge their removal and to resolve their claims before they were sent back to Iraq.

In *Hamama v. Adducci*, 261 F. Supp. 3d 820 (E.D. Mich. 2017), the district court granted a preliminary injunction which halted the deportation of the Appellees until they were provided a meaningful opportunity to challenge their removal. The court acknowledged Appellees had provided "ample evidence of the risk of persecution, torture, and death" if they were removed to Iraq. *Id*. at 839. Accordingly, the court held Appellees had a procedural due process right to challenge their removal. *Id*. at 837-38. Appellants are now challenging this ruling, asserting that no such right exists and that Appellees can be deported regardless of the refoulement principle.

Given the significance of the non-refoulement principle in this case, *Amici* would like to address three issues before this Court. First, the principle of non-refoulement precludes states from removing individuals to a country where they

[6] The U.N. High Commissioner for Refugees has documented the serious threat posed to individuals who are returned to Iraq. *See generally* U.N. High Commissioner for Refugees, UNHCR Position on Returns to Iraq (Nov. 14, 2016).

would be in danger of being subjected to torture. This principle is absolute and allows no derogation. It has been accepted by the United States through its ratification of the Convention against Torture and through the adoption of implementing legislation. Second, the Convention against Torture requires states to provide meaningful review to determine whether the principle of non-refoulement applies to prevent removal. Such review must be fair, effective, individualized, and provided before removal is effectuated. Third, the principle of non-refoulement applies even in cases where non-state actors pose the threat of torture.

The district court's decision allows Appellees to challenge their deportation, which is essential for effectuating the principle of non-refoulement. This decision should, therefore, be affirmed.

ARGUMENT

I. The Principle of Non-Refoulement Precludes States From Removing Individuals to a Country Where They Would Be in Danger of Being Subjected to Torture.

The principle of non-refoulement is one of the most recognized norms in international law. It was adopted to protect individuals fleeing persecution by restricting the ability of states to send these individuals to countries where they would be further threatened. The principle of non-refoulement appears in several

forms and is codified in several international agreements.[7] *See generally* Deborah E. Anker, *Law of Asylum in the United States* (2011); Kees Wouters, *International Legal Standards for the Protection from Refoulement* (2009).

The Convention Relating to the Status of Refugees ("Refugee Convention"), which was adopted after the Second World War, sets forth the general principle of non-refoulement as it applies to refugees.[8]

> No Contracting Party shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 137. The Refugee Convention thus protects individuals fleeing persecution by

---

[7] The non-refoulement principle first appeared in the Convention Relating to the International Status of Refugees, which the League of Nations adopted in 1933. Convention Relating to the International Status of Refugees, art. 3, Oct. 28, 1933, CLIX L.N.T.S. 3663 ("Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order. It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin. It reserves the right to apply such internal measures as it may deem necessary to refugees who, having been expelled for reasons of national security or public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorisations and visas permitting them to proceed to another country.").

[8] The United States ratified the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, which incorporates the provisions of the Refugee Convention, in 1958.

offering them refugee status and preventing their return to a country where their life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion.

The principle of non-refoulement was expanded in the Convention against Torture.[9] While the Refugee Convention only applies to refugees, the Convention against Torture applies to any individual who is in danger of being subjected to torture:

> 1. No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85. The Committee against Torture, which was established by the Convention against Torture to guide the development of the treaty and monitor implementation, has applied the principle of non-refoulement on many occasions. *See, e.g.*, *X v. Kazakhstan*, Comm. No. 554/2013, at ¶ 12.7, U.N. Doc. CAT/C/55/D/554/2013 (Oct. 9, 2015) (state violated the non-refoulement obligation by failing to provide a thorough and

[9] The United States ratified the Convention against Torture in 1994.

individualized risk assessment before removing an individual to a country where he would be in danger of being subjected to torture).

In contrast to the Refugee Convention, the principle of non-refoulement set forth in the Convention against Torture offers a broader level of protection to individuals. While some individuals are excluded from the protections of the Refugee Convention, the Convention against Torture permits no such limitation.[10] It is an absolute obligation as evidenced by the plain language of the treaty. Thus, any person who is in danger of being subjected to torture is entitled to the non-refoulement protection of the Convention against Torture. And, there is no exception or right of derogation. "In other words, even if the host State where a dangerous terrorist is seeking protection against persecution refuses to grant him or her asylum, the authorities are prevented from returning him or her to the country of origin or any other country where there exists a serious risk of torture." Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* 129 (2008).

[10] *See* Human Rights Council, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 38, U.N. Doc. A/HRC/34/54 (Feb. 14, 2017) ("The Special Rapporteur fully endorses the long-standing jurisprudence and doctrine stating that the absolute prohibition against refoulement contained in the Convention against Torture is stronger than that found in refugee law under article 33 of the 1951 Convention Relating to the Status of Refugees. This absolute prohibition means that persons may not be returned even when they may not otherwise qualify for refugee status under the 1951 Convention or domestic law.").

The principle of non-refoulement is also recognized in the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 ("ICCPR"). The Human Rights Committee, which was established by the ICCPR to guide the development of the treaty and monitor implementation, has identified the principle of non-refoulement as one that emerges from several ICCPR provisions. These include the prohibitions against torture (Article 7) and the arbitrary deprivation of life (Article 6). *See, e.g.*, U.N. Human Rights Committee, General Comment No. 31, at ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) ("[T]he article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed."); *see generally* Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights* 262-76 (3d ed. 2013). The principle of non-refoulement, which is directly derived from the prohibition against torture in Article 7, is also an absolute and non-derogable obligation.

The principle of non-refoulement is also recognized in several regional agreements. The American Convention on Human Rights, art. 22(8), Jan. 7, 1970, OEA/Ser.K/XVI/1.1, contains an explicit reference to this obligation. ("In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."). The European Court of Human Rights has taken a similar position, finding that the prohibition against torture contained in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 ("European Convention"), incorporates the principle of non-refoulement. Accordingly, the European Convention precludes a state from sending someone to a country where they may be subjected to torture. *See, e.g.*, *Saadi v. Italy*, App. No. 37201/06, at ¶ 125 (Eur. Ct. H.R. 2008) ("[E]xpulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country."); *see generally* William A. Schabas, *The European Convention on Human Rights: A Commentary* 194-96 (2016).

In 2014, the International Law Commission released its Draft Articles on the Expulsion of Aliens which also address the principle of non-refoulement. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session, U.N. Doc. A/69/10, at 11-17 (2014). Article 24 provides that "[a] State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id*. at 16. Significantly, the Draft Articles do not limit the non-refoulement obligation to situations involving torture. Rather, they build upon the jurisprudence emanating from the Human Rights Committee as well as regional human rights bodies that extend the principle of non-refoulement to cases involving cruel, inhuman, or degrading treatment. *Id*. at 60-61.

Apart from its codification in various treaties, the principle of non-refoulement is also recognized under customary international law. Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*: *Opinion, in Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* 87, 162-63 (Erika Feller et al. eds., 2003). The universality of the principle of non-refoulement reinforces its status under international law as a binding and non-derogable obligation. *See* Anker, *supra*, at 8 ("[T]he non-refoulement principle under the Torture Convention is absolute and allows for no exceptions."); Wouters, *supra*, at 563 ("The

prohibitions on refoulement contained in Article 3 ECHR, Article 3 CAT and Article 7 ICCPR provide absolute protection. This means, (1) there are no exceptions allowed for such reasons as the past criminal conduct of the person concerned, or the public order, health, morals or national security of the State concerned, and (2) there is no derogation possible in times of war or other public emergencies threatening the life of the nation. Consequently, not only may an individual never, for whatever reason, be subjected to proscribed ill-treatment, he may also not be removed to a country where he faces such a risk, even if he poses a threat to the security or community of the country which provides him with protection.").

Finally, it bears emphasis that the United States has ratified several of these multilateral agreements that recognize the principle of non-refoulement, including the Protocol Relating to the Status of Refugees, the ICCPR, and the Convention against Torture. Moreover, the United States has implemented its obligations under international law through the Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, 112 Stat. 2681-822 ("FARRA"). The statutory provisions clearly state that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture."

In sum, the principle of non-refoulement precludes states from removing individuals to a country where they would be in danger of being subjected to torture. This principle is absolute and allows for no derogation.

II. The Convention Against Torture Requires States to Provide Meaningful Review to Determine Whether the Principle of Non-Refoulement Applies to Prevent Removal.

Under the Convention against Torture, states may not return an individual to a country where they would be in danger of being subjected to torture. This obligation requires states to undertake a meaningful review whenever such claims are raised. Such procedures must be fair and effective. They must also be individualized and must be provided before any removal is carried out. *See generally* Sir Nigel Rodley & Matt Pollard, *The Treatment of Prisoners Under International Law* 174 (3d ed. 2009).

The Committee against Torture has made clear that the principle of non-refoulement set forth in Article 3 of the Convention against Torture includes both a substantive obligation as well as a procedural obligation. The substantive obligation prevents states from removing individuals to a country where they would be in danger of being subjected to torture. The procedural obligation requires states to provide meaningful review when claims of torture are raised.[11]

[11] *See generally* Emanuela-Chiara Gillard, *There's No Place Like Home: States' Obligations in Relation to Transfers of Persons*, 90 Int'l Rev. Red Cross 703, 731

This requires an effective, independent, and impartial review of the decision to expel or remove an individual. It must occur before removal is effectuated. The Committee against Torture has taken this position in several individual communications brought against member states. *See, e.g.*, *Agiza v. Sweden*, Comm. No. 233/2003, at ¶ 13.7, U.N. Doc. CAT/C/34/D/233/2003 (May 24, 2005) ("[A]ccordingly, the right to an effective remedy contained in article 3 requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise."); *X v. Kazakhstan*, *supra*, at ¶ 12.7 (state violated the non-refoulement obligation by failing to provide a thorough and individualized risk assessment before removing an individual to a country where he would be in danger of being subjected to torture).

The Committee against Torture has also taken this position in its Concluding Observations regarding state compliance with the Convention against Torture. In these reports, the Committee has emphasized the importance of suspending removal proceedings while a non-refoulement claim is pending. *See, e.g.*, Comm. against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Finland, ¶ 4(b), U.N. Doc. CAT/C/CR/34/FIN (June 21, 2005) (expressing concern that "[t]he 'accelerated procedure' under the Aliens Act

---

(2008) ("This procedural dimension is essential to the actual practical implementation of the protection afforded by the principle of non-refoulement.").

allows an extremely limited time for applicants for asylum to have their cases considered thoroughly and to exhaust all lines of appeal if their application is rejected"); Comm. against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Belgium, ¶ 5(e), U.N. Doc. CAT/C/CR/30/6 (June 23, 2003) (expressing concern with "[t]he non-suspensive nature of appeals filed with the Council of State by persons in respect of whom an expulsion order has been issued.").

The Human Rights Committee has made similar determinations regarding the obligation of states under the ICCPR to provide a meaningful review to determine whether the principle of non-refoulement applies to prevent removal. These decisions also emphasize the importance of suspending removal proceedings while a non-refoulement claim is pending. This position has been taken by the Committee in several individual communications brought against member states. *See, e.g.*, *Alzery v. Sweden*, Comm. No. 1416/2005, at ¶ 11.8, U.N. Doc. CCPR/C/88/D/1416/2005 (Nov. 10, 2006) ("By the nature of refoulement, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning. The absence of any opportunity for 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."); *Maksudov v. Kyrgyzstan*, Comm. No. 1461/2006, at ¶ 12.7, U.N. Doc. CCPR/C/93/D/1461 (July 31, 2008) (same).

The Human Rights Committee has also taken this position regarding meaningful review in its Concluding Observations on state compliance with the ICCPR. *See, e.g.*, Hum. Rts. Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Finland, ¶ 12, U.N. Doc. CCPR/CO/82/FIN (Dec. 2, 2004) ("The Committee notes the lack of clarity as to the implications and consequences of the amendment to the Aliens Act of July 2000 providing for accelerated procedures in the case of asylum-seekers with manifestly ill-founded claims and applications by aliens from a 'safe' country, as regards both the suspensive effect of an appeal and the legal protection available to asylum-seekers.").

In sum, international law requires states to provide meaningful review to determine whether the principle of non-refoulement applies to prevent removal.[12] This review must be fair, effective, individualized, and provided before removal is carried out.[13] To hold otherwise would vitiate the international obligation to

[12] *See also* Inter.-Am. Comm'n H.R., *Report on Terrorism and Human Rights* ¶ 394, OEA/Ser.L/V/II.116 (2002) (states must provide adequate, individualized hearings before removing an individual).

[13] *See* Gillard, *supra*, at 736 ("On the basis of the existing jurisprudence and other guidance from the human rights supervisory bodies, it can be concluded that at present the procedural safeguards to be ensured to persons facing transfers include the following minimum elements: once a decision to transfer a person has been

prevent refoulement in cases where individuals face the risk of torture and persecution.[14]

III. The Principle of Non-Refoulement Applies Even in Cases Where Individuals Face the Threat of Torture from Non-State Actors.

As a general matter, the Convention against Torture requires some form of involvement or acquiescence by state officials in order to find "torture" within the meaning of Articles 1 (definition) and 3 (non-refoulement) of that treaty.[15] But, significantly, the actual perpetrators of "torture" need not be state officials. This is evidenced by the plain language of Article 1 of the Convention against Torture, which defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed,

---

taken she or he must be informed of this in a timely manner; if she or he expresses concern that she or he may risk ill-treatment, the well-foundedness of such fears must be reviewed on a case-by-case basis by a body that is independent of the authority that took the decision; such review must have a suspensive effect on the transfer; the person concerned must have the opportunity to make representations to the body reviewing the decision; she or he should be assisted by counsel; and she or he should be able to appeal the reviewing body's decision.") (citations omitted).

[14] The dangerous consequences of deporting individuals before a proper assessment of their underlying claims is well-documented. *See* Fatma Marouf et al., *Justice on the Fly: The Danger of Errant Deportations*, 75 Ohio State L.J. 337 (2014).

[15] *See also* Nowak & McArthur, *supra*, at 77-79.

or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." It is also evidenced by the plain language of Article 3, which provides that "[n]o 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." Neither of these provisions require the actual perpetrators of "torture" to be state officials. Accordingly, the actions of non-state actors may amount to torture within the meaning of the Convention and, therefore, implicate the principle of non-refoulement whenever such actions are approved or tolerated by state officials in some form, including consent or acquiescence.[16]

The principle of non-refoulement is also implicated when state officials are unable to prevent torture by non-state actors. Anker, *supra*, at 584; Nowak & McArthur, *supra*, at 200-01. Similarly, the actions of non-state actors may

[16] In its General Comment No. 2, the Committee against Torture indicated that states bear responsibility when they fail to prevent, investigate, prosecute, or punish non-state actors when they violate the Convention. Comm. against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, ¶ 18, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) ("[W]here State authorities . . . fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts.").

implicate the principle of non-refoulement when these non-state actors manifest quasi-government authority. Anker, *supra*, at 582-83; Nowak & McArthur, *supra*, at 201.

A state's inability to prevent acts of torture by non-state actors was addressed by the Committee against Torture in *Njamba and Balikosa v. Sweden*, Comm. No. 322/2007, U.N. Doc. CAT/C/44/D/322/2007 (June 3, 2010). In this case, the applicants alleged they would be subjected to torture if returned to the Democratic Republic of the Congo. They argued, *inter alia*, that they would be subjected to sexual violence. In its analysis of the complaint, the Committee against Torture emphasized that sexual violence existed in the country and that such acts were often committed by civilians. *Id*. at ¶ 9.5. While the applicants had raised claims of potential persecution by government actors in their complaint, the Committee focused its analysis on the threat posed by non-state actors. In addition, the Committee noted that a government's inability to stop such acts or its failure to provide remedies to victims "'facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity.'" *Id*. (citation omitted). Accordingly, the Committee concluded that the removal of the applicants would violate the principle of non-refoulement.

A similar conclusion was reached by the European Court of Human Rights in *N. v. Finland,* App. No. 38885/02 (Eur. Ct. H.R. 2005). In this case, the

European Court considered whether the principle of non-refoulement was implicated when an individual faced a risk from non-state actors if he were returned to the Democratic Republic of the Congo. The European Court determined that public authorities "would not necessarily be able or willing to protect him" against the threats by non-state actors. *Id*. at ¶ 164. Accordingly, the principle of non-refoulement was implicated and would be violated if the applicant was returned. *See also J.K. and Others v. Sweden*, App. No. 59166/12, at ¶ 80 (Eur. Ct. H.R. 2016) ("Owing to the absolute character of the right guaranteed, Article 3 of the Convention applies not only to the danger emanating from State authorities but also where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection").

A well-recognized example of the quasi-government actions of non-state actors giving rise to a valid non-refoulement claim occurred in *Elmi v. Australia*, Comm. No. 120/1998, U.N. Doc. CAT/C/22/D/120/1998 (May 25, 1999), which was considered by the Committee against Torture. The applicant asserted he would be subjected to torture by an opposing faction if he were removed to Somalia. The Committee noted that state authority in Somalia was wholly lacking. In addition, the Committee determined that several factions had established quasi-

government institutions in the country. *Id*. at ¶ 6.5. Moreover, the international community regularly negotiated with these factions. "It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments." *Id*. Accordingly, these factions could fall within the meaning of state actors for purposes of the non-refoulement analysis.[17] And, therefore, Australia was obligated to refrain from returning the applicant to Somalia.

The Committee against Torture is now drafting a new General Comment to update its position on the principle of non-refoulement as codified in Article 3 of the Convention against Torture. The current draft, which was prepared in February 2017, contains the following language.

> 31. Equally, States parties should refrain from deporting individuals to another State where they would be in danger of facing torture and cruel, inhuman or degrading treatment or punishment at the hands of non-State actors over which the State of deportation has no or only partial de facto control or is unable to counter their impunity.
> 32. Similarly the responsibility of not deporting a person at risk of being subjected to torture and cruel, inhuman or degrading treatment or punishment in the State of transfer or return is incumbent on international organizations, military operation programs and other entities that could be qualified as non-State actors.

Comm. against Torture, General Comment No. 1 (2017) on the Implementation of

[17] When the country situation improved in Somalia, the Committee determined that the actions of private actors would not implicate the principle of non-refoulement. *H.M.H.I. v. Australia*, Comm. No. 177/201, at ¶ 6.4, U.N. Doc. CAT/C/28/D/177/2001 (2002).

Article 3 of the Convention in the Context of Article 22, at ¶¶ 31-32, U.N. Doc. CAT/C/60/R.2 (2017). While it has not been finalized, the proposed General Comment reflects the Committee against Torture's recognition that the actions of non-state actors can implicate the principle of non-refoulement. *See generally* Fanny de Weck, *Non-Refoulement Under the European Convention on Human Rights and the U.N. Convention against Torture* 214 (2017).

CONCLUSION

Under international law, the principle of non-refoulement prevents individuals from being returned to a country where they would be in danger of being subjected to torture. The district court's decision provides Appellees with the opportunity to prepare and present their claims seeking non-refoulement in a manner consistent with international law. This decision should, therefore, be affirmed.

Dated: February 12, 2018

Respectfully submitted,

/s/ Elisa J. Lintemuth

Elisa J. Lintemuth (P74498)
Dykema Gossett PLLC
300 Ottawa Ave NW Ste 700
Grand Rapids, MI 49503-2306
(616) 776-7532
elintemuth@dykema.com

William J. Aceves (CA Bar 151031)
California Western School of Law

225 Cedar Street
San Diego, CA 92101
(619) 515-1589
wja@cwsl.edu

Counsel for *Amici Curiae*