IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA, ATHEER FAWOZI ALI, ALI AL-DILAMI, HABIL NISSAN, JIHAN ASKER, MOAYAD JALAL BARASH, SAMI ISMAEL AL-ISSAWI, on behalf of themselves and all those similarly situated, Petitioners, v. **REBECCA ADDUCCI**, Director of the Detroit District of Immigration and Customs Enforcement, Respondent.	Case No. 2:17-cv-11910-MAG-DRG Hon. Mark A. Goldsmith Mag. David R. Grand Class Action

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

ISSUES PRESENTED

1. Does the principle of non-refoulement preclude the United States from removing Petitioners to a country where they would be in danger of being subjected to torture?

Amici answer: Yes.

2. Should the Petitioners be granted a stay of removal that would provide them with an opportunity for a meaningful hearing to establish that they would be in danger of being subjected to torture if removed?

Amici answer: Yes.

3. Should this Court apply the principle of non-refoulement even where non-state actors pose the threat of torture?

Amici answer: Yes.

MOST CONTROLLING OR APPROPRIATE AUTHORITY

In support of their Brief, *Amici* rely on the following most controlling or appropriate authority, in addition to the other authority cited within.

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.
- International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171

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STATEMENT OF INTEREST OF *AMICI*

Amici are three former U.N. Special Rapporteurs on Torture as well as the current U.N. Special Rapporteur.[1] They are legal experts in the fields of international law and human rights. They teach and have written extensively on these subjects. While they pursue a wide variety of legal interests, they share a deep commitment to the rule of law and respect for human rights.

Nils Melzer was appointed the U.N. Special Rapporteur on Torture in 2016.[2] He currently holds the Swiss Chair for International Humanitarian Law 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

[1] The U.N. Special Rapporteur on Torture was established by the United Nations to examine questions relating to torture and other cruel, inhuman, or degrading treatment or punishment. *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] This brief is provided by Professor Melzer 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 Mr. Melzer, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

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, 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 Director of the Anti-Torture Initiative. 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. Concurrently, he was the U.N. Secretary-General's Special Advisor on the Prevention of Genocide from 2004 to 2007. Between 2000 and 2003, he was a

member of the Inter-American Commission on Human Rights of the Organization of American States, and served as its President in 2002. He directed the Inter-American Institute on Human Rights in San Jose, Costa Rica (1996-1999), and worked for Human Rights Watch (1982-1996). In the past, he has also taught at Notre Dame, Georgetown, and Johns Hopkins.

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. Qtrly 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. Accordingly, *Amici* would like to provide the district court with an additional perspective on these issues. They believe this submission will assist this Court in its deliberations.

This Brief of *Amici Curiae* is respectfully submitted in support of Petitioners' efforts to seek a stay of removal that would provide them with an opportunity for a meaningful hearing to establish that they would be in danger of being subjected to torture if removed.[3] Both parties have consented to the filing of this Brief.

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. (*See* Op. & Order Regarding Jurisdiction, Dkt. 64). While the Petitioners 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. (*Id*., pg 2 of 24). 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. (*Id*.)

On approximately 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. (*Id*.) If

[3] 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.

returned to Iraq, the Petitioners would be in danger of being subjected to torture. Significantly, the United States has refused to provide the Petitioners with the opportunity to challenge their removal and to resolve their claims before they are sent back to Iraq. Such action violates the principle of non-refoulement contained in the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Convention against Torture").

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 would be in danger of being subjected to torture. This principle is absolute. 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 individualized, fair, and provided before removal is carried out. Third, the principle of non-refoulement applies even in cases where non-state actors pose the threat of torture. For these reasons, the Petitioners' request for a stay should be granted so they can prepare and present their claims seeking non-refoulement in a manner consistent with this fundamental principle of international law.

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.[4] *See generally* Deborah E. Anker, *Law of Asylum in the United States* (2011); Kees Wouters, *International Legal Standards for the Protection from Refoulement* (2009).

[4] The non-refoulement principle first appeared in the Convention Relating to the International Status of Refugees, which was adopted by the League of Nations 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.").

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.[5]

> 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 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.[6] 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.

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[5] 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.

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

> 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 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 contains no such limitation. *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."). 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).

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 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.").

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.[7]

[7] *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

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(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, the Convention against Torture requires states to provide meaningful review to determine whether the principle of non-refoulement applies to prevent removal.[8] Such review must be individualized, fair, and provided before removal is carried out.[9]

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[8] *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).

[9] *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

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 that threats of torture must arise from state action in order to implicate the principle of non-refoulement.[10] There are, however, significant exceptions to this rule.

First, the actions of non-state actors may implicate the principle of non-refoulement when the non-state actors manifest quasi-government authority. Anker, *supra*, at 582-83; Nowak & McArthur, *supra*, at 201. Second, the actions of non-state actors may implicate the principle of non-refoulement when their actions are approved by the state. This includes situations where the state acquiesces or is unwilling to prevent the torture.[11] Third, the actions of non-state

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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).

[10] This is consistent with Article 1 of the Convention against Torture, which requires the consent or acquiescence of a public official or other person acting in an official capacity in order to commit an act of torture. Nowak & McArthur, *supra*, at 77-79.

[11] 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

actors may implicate the principle of non-refoulement when the state is unable to prevent torture by non-state actors. Anker, *supra*, at 584; Nowak & McArthur, *supra*, at 200-01.

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.[12]

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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.").

[12] 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).

And, therefore, Australia was obligated to refrain from returning the applicant to Somalia.

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").

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 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 Petitioners' request for a stay should be granted so they can prepare and present their claims seeking non-refoulement in a manner consistent with this fundamental principle of international law.

Dated: July 19, 2017

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2017, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the attorneys on that system.

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