No. 09-923

In The Supreme Court of the United States

MAHER ARAR,

Petitioner,

v.

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 OF *AMICI CURIAE* CANADIAN AND INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND SCHOLARS IN SUPPORT OF THE ISSUANCE OF A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*

Amici curiae are Canadian and international human rights organizations and scholars with an interest in the application of the established principle of international law which provides to victims of human rights violations – and, in particular, torture – the right to an effective remedy. *Amici* seek to have the United States comply with its obligations under international law to provide a person whose human rights have been violated with an effective remedy.[1]

It is not the role of these *amici* to advise the Court on the application of U.S. law. Rather, *amici* seek to bring to the Court's attention: (i) the bedrock rule of international law that victims of human rights violations have the right to pursue and receive an effective remedy; and (ii) the findings of the Canadian Commission of Inquiry into Maher Arar. Some *amici* were directly involved in the Commission of Inquiry, and all have closely considered its detailed and

[1] No counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici curiae* has made a monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. *Amici curiae* provided Notice to the parties of their intention to file this brief at least 10 days prior to the due date, as required by Sup. Ct. R. 37.2(a). All parties have granted consent to the filing of a brief by *amici* either by filing a letter with the Clerk or by communicating such consent directly to counsel.

carefully cataloged findings concerning Mr. Arar's ordeal and the violation of his rights.[2]

SUMMARY OF ARGUMENT

Under international law all states are obliged to provide the victims of human rights violations, including torture, with an effective remedy. This includes the right of anyone who *claims* to have been a victim to have meaningful access to a *procedure* that is capable of repairing the effects of the violation, and the right actually to *receive* such reparation if the violation is established. This rule is without exception. Where several states are responsible for violations of the human rights of an individual, each has an obligation to provide an effective remedy in relation to its own responsibility. Provision of a partial remedy by one state for its own role does not release other states from their responsibility.

To investigate the facts concerning Mr. Arar, determine the responsibility of its officials and make recommendations for avoiding similar situations in the future, the government of Canada ordered a Commission of Inquiry. Following the release of the Commission's report, Canada provided a public apology and paid compensation to Mr. Arar for its role in his ordeal. The United States declined to cooperate

[2] A full list of *amici* is set forth in the Appendix to this brief.

with or participate in the Commission of Inquiry, and has not provided Mr. Arar with any remedy in relation to its own responsibility for the violation of his human rights. The ruling of the court below, if left to stand, would effectively deprive persons in Mr. Arar's situation of their right to access a procedure capable of providing an effective remedy. This would be inconsistent with the international legal obligations of the United States.

ARGUMENT

I. THE RIGHT TO AN EFFECTIVE REMEDY UNDER INTERNATIONAL LAW

International law binding upon the United States provides that a person who is the victim of a human rights violation, including torture, has the right to an effective remedy. Failure by the United States to provide access to an effective remedy for an individual who credibly claims to be the victim of torture or other human rights violations in relation to which the United States is responsible constitutes a violation of the individual's rights and U.S. obligations under international law.

A. States Must Provide Effective Remedies To Individuals for Violations of Human Rights

The right to an effective remedy for violations of internationally protected human rights is a

fundamental rule of international human rights law. This right stems from a general principle of international law that every breach gives rise to an obligation to provide a remedy.[3] It is also expressly prescribed in the general human rights treaties,[4] in thematic treaties including the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention against Torture"),[5] and in numerous non-treaty international

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[3] *See, e.g.*, *Castillo-Páez v. Perú*, 1997 Inter-Am. Ct. H.R. (ser. C) No. 34 (Nov. 3, 1997); *Blake v. Guat.*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 48, at ¶ 63 (Jan. 22, 1999) (noting that the right to a remedy "is one of the fundamental pillars . . . of the very rule of law in a democratic society"); *Chorzów Factory (F.R.G. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at ¶ 21 (Sept. 13) ("[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.").

[4] International Covenant on Civil and Political Rights ("ICCPR") art. 2(3), Dec. 16, 1966, 999 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") art. 13, Nov. 4, 1950, 213 U.N.T.S. 222; American Convention on Human Rights ("ACHR") art. 25, Nov. 22, 1969, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights ("African Charter") art. 7(1)(a), *adopted* June 27, 1981, 1520 U.N.T.S. 217; League of Arab States, Arab Charter on Human Rights ("Arab Charter") art. 23, May 22, 2004, *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (2005).

[5] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention against Torture") art. 14, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

instruments.[6] It has also been recognized as a rule of customary international law.[7]

Article 2(3) of the International Covenant on Civil and Political Rights ("ICCPR"), which the United States ratified in 1992, gives particular effect to the general right of individuals to an effective remedy for violations of human rights under international law:

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[6] *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, art. 8, U.N. Doc. A/810 (Dec. 10, 1948); American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003); 43 AJIL Supp. 133, art. XVIII (1949); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, ¶ 4, U.N. Doc. A/RES/40/34 (Nov., 29 1985); 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 ("U.N. Basic Principles on the Right to a Remedy"), G.A. Res. 60/147, Principles 18-23, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

[7] U.N. Basic Principles on the Right to a Remedy, Principles I.1(b) and 2; *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C, Decision on Appropriate Remedy, ¶ 40 (Jan. 31, 2007); *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-A, Decision on Appeal Against Decision on Appropriate Remedy, ¶¶ 23-25 (Sept. 13, 2007); *Cantoral-Benavides v. Perú,* 2001 Inter-Am. Ct. H.R. (ser. C) No. 88, at ¶ 40 (Dec. 3, 2001); *Customary International Humanitarian Law, Vol. 1: Rules* 537-550 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds. 2005). The consistency of the principle of effectiveness of remedies across universal and regional legal systems and as grounded in the general public international law on state responsibility, as further explained below, is compelling evidence of its character as a norm of customary international law.

> 2(3) Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

The obligation to provide an effective remedy is "fundamental" and must be fulfilled in all situations, including in situations of public emergency which threaten the life of the nation.[8] Accordingly, the deprivation of the right to a remedy can never be justified on any grounds. Accusation (or, for that matter, conviction) of an individual as having threatened the

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[8] U.N. High Comm'r for Human Rights, Human Rights Committee ("UNHRC"), General Comment No. 29, ¶ 14, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001). The UNHRC is the expert body mandated by the ICCPR to review compliance. *See also Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, 1987 Inter-Am. Ct. H.R. (ser. A) No. 9, at ¶¶ 24-25 (Oct. 6, 1987).

safety or lives of the public does not deprive the individual of the right of meaningful access to a procedure capable of providing an effective remedy for torture or other similar human rights violations which he or she claims to have suffered.

The remedy in question must also be *effective* and not merely theoretical or illusory. The individual must have practical and meaningful *access to a procedure* that is capable of ending and repairing the effects of the violation.[9] For some violations, including gross violations of international human rights law such as torture, the procedure must be judicial in character.[10] Where a violation is established, the individual must *actually receive* the relief needed to repair the harm.[11] Procedures for remedying human rights violations must "function effectively in practice,"[12] that is, they must be "accessible, effective and enforceable,"[13] and the remedy actually obtained

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[9] ICCPR art. 2(3)(b); U.N. Basic Principles on the Right to a Remedy, Principles 2(b), 3(c), 11(a), 12.

[10] U.N. Basic Principles on the Right to a Remedy, Principle 12.

[11] ICCPR arts. 2(3)(a) and (c); UNHRC, General Comment No. 31 ("UNHRC General Comment No. 31"), ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); U.N. Basic Principles on the Right to a Remedy, Principles 2(c), 3(d), 11(b), 15-23.

[12] UNHRC General Comment No. 31, at ¶¶ 15, 20.

[13] *George Kazantzis v. Cyprus,* Communication No. 972/2001, U.N. Doc. CCPR/C/78/D/972/2001, at ¶ 6.6 (2003). *See also Yasoda Sharma v. Nepal*, Communication No. 1469/2006, U.N. Doc. CCPR/C/94/D/1469/2006, at ¶ 9 (2008).

through the procedure must be capable of providing real relief.[14]

Fulfilling the right to an effective remedy in any particular case entails the taking of all steps necessary to repair the violation, through a combination of relevant elements among: public apologies or memorials, restitution, compensation, rehabilitation, measures of satisfaction, such as guarantees of non-repetition and changes in relevant laws and practices, and bringing those responsible to justice.[15]

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[14] *Judicial Guarantees in States of Emergency*, *supra*, at ¶ 24; *Velásquez-Rodríguez v. Hond.*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, at ¶¶ 63, 64, 66 (July 29, 1988); *Raquel Martí de Mejía v. Perú*, Case 10.970, Inter-Am. C.H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc. 7, 157 at 190-191 (1996); *Silver v. U.K.*, Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, 3 Eur. Comm'n H.R. Dec. & Rep. 475 at ¶ 113 (1983); *Airey v. Ir.*, 32 Eur. Ct. H.R. (ser. A) at ¶ 24 (1979); African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, Principle C(a) (2001).

[15] *See* UNHRC General Comment No. 31, at ¶ 16; U.N. Basic Principles on the Right to a Remedy, Principles 18-23. *See also Velásquez-Rodríguez v. Hond.,* 1989 Inter-Am. Ct. H.R. (ser. C) No. 7, at ¶¶ 25-26 (July 21, 1989); *Papamichalopoulos and Others v. Greece*, App. No. 14556/89, 21 Eur. H.R. Rep. 439 at ¶ 34 (1995).

B. International Law Makes Particular Provision for the Right To an Effective Remedy for Violations of the Prohibition of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment

The absolute and non-derogable prohibition of torture and other cruel, inhuman and degrading treatment or punishment ("other ill-treatment") forms part of customary international law[16] and has been codified in numerous international treaties.[17] The Convention against Torture reinforces the universal prohibition through a range of specific obligations that aim "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world."[18] One key aspect of the prohibition of torture and other ill-treatment is the obligation of *non-refoulement*; states may not transfer individuals to countries where they would face a substantial *risk* of torture or other

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[16] *See* Nigel S. Rodley with Matt Pollard, *The Treatment of Prisoners Under International Law* 64-81 (3d ed. 2009); *see also Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, ¶¶ 143-157 (Dec. 10, 1998) (finding also that the prohibition of torture is a peremptory norm of international law).

[17] *See, e.g.*, Geneva Convention (III) Relative to the Treatment of Prisoners of War arts. 3, 17, 87, 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; ICCPR art. 7; ECHR art. 3; ACHR art. 5(2); African Charter art. 5.

[18] Convention against Torture, Preamble.

ill-treatment.[19] The obligation of *non-refoulement* is violated regardless of whether abuse actually results from the transfer. Where, however, torture or other ill-treatment *actually occurs* in the receiving state, the sending state additionally becomes jointly responsible *for the abuse itself* notwithstanding that the torture or other ill-treatment was at the hands of another state.[20]

Article 14 of the Convention against Torture expressly recognizes the universal right of victims of torture to obtain a remedy and the corresponding obligation of State Parties to provide it:

> Each State Party shall ensure in its legal system that the victim of an act of torture

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[19] This prohibition is founded in customary international law, Article 7 of the ICCPR and its analogues under regional treaties, and is partially codified by Article 3 of the Convention against Torture. *See* 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* 155-164 (Erika Feller, Volker Turk & Frances Nicholson eds., 2003); *see also* Rodley & Pollard, *supra*, at 166-179; UNHRC, General Comment No. 20 ("UNHRC General Comment No. 20"), ¶ 9, U.N. Doc. HRI/GEN/1/Rev.9 (Oct. 3, 1992); UNHRC General Comment No. 31, at ¶ 12.

[20] *Mansour Ahani v. Can.*, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002, at ¶ 12 (June 15, 2004). *See also* Responsibility of States for Internationally Wrongful Acts ("State Responsibility"), G.A. Res. 56/83, arts. 16, 41(2), U.N. Doc. A/RES/56/83 (Jan. 28, 2002); *Report of the International Law Commission* ("ILC Report"), U.N. G.A.O.R., 56th Sess., Supp. No. 10 at 43, U.N. Doc. A/56/10 (2001).

> obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible.[21]

The U.N. Committee against Torture, the expert body charged by the Convention against Torture with monitoring compliance, has found a similar obligation to apply as regards other ill-treatment under Article 16 of the Convention.[22] The obligation to provide redress to a victim of torture or other ill-treatment is without exception, including in states of emergency.[23]

The U.N. Human Rights Committee and U.N. Committee against Torture have specifically applied

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[21] A similar obligation applies under the ICCPR by combined effect of Article 7 and Article 2(3). *See also* UNHRC General Comment No. 20, at ¶ 14; Arab Charter art. 8(2).

[22] U.N. High Comm'r for Human Rights, Committee against Torture ("UNCAT"), General Comment No. 2, ¶ 3, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

[23] *Id.* at ¶ 6. When it examined the report of Canada in May 2005, the UNCAT noted as a subject of concern "the absence of effective measures [in Canada] to provide civil compensation to victims of torture *in all cases*" and recommended that Canada "review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to *all victims of torture*." UNCAT, *Conclusions and Recommendations (Canada)*, ¶¶ 4(g), 5(f), U.N. Doc. CAT/C/CR/34/CAN (July 7, 2005) [emphasis added]. *See also* UNCAT, *Conclusions and Recommendations (Republic of Korea)*, ¶ 8(a), U.N. Doc. CAT/C/KOR/CO/2 (July 25, 2006); UNCAT, *Conclusions and Recommendations (Japan)*, ¶ 23, U.N. Doc. CAT/C/JPN/CO/1 (Aug. 3, 2007); UNCAT, *Conclusions and Recommendations (New Zealand)*, ¶ 14, U.N. Doc. CAT/C/NZL/CO/5 (May 14, 2009).

the obligation to provide a remedy vis-à-vis renditions to risk of torture in violation of the obligation of *non-refoulement*.[24] Indeed, in 2006, the U.N. Human Rights Committee found that the United States was obliged to "investigate allegations of rendition and provide a remedy to its victims."[25]

C. Responsibility of Several States

Where an individual has suffered human rights violations at the hands of several states, he or she is entitled to a full remedy for all of the violations. So long as the right to an effective remedy remains unfulfilled in relation to an act for which a particular state is responsible, that state remains under the obligation to provide meaningful access to a procedure capable of providing an effective remedy.[26]

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[24] *Agiza v. Swed.*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003, at ¶¶ 13.6-13.8 (2005); *Alzery v. Swed.*, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005, at ¶¶ 12-13 (2006).

[25] UNHRC, *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 16, U.N. Doc. CCPR/C/USA/CO/3 (Sept. 15, 2006).

[26] *See, e.g.*, State Responsibility, *supra*, art. 47; *see also* ILC Report, *supra*, at 313-18.

II. THE REMEDY ACCORDED TO MAHER ARAR IN CANADA DID NOT ADDRESS VIOLATIONS OF HIS RIGHTS BY U.S. OFFICIALS

In its ruling below, the *en banc* majority of the United States Court of Appeals for the Second Circuit effectively denied Maher Arar the opportunity to seek a remedy for the conduct of U.S. officials in his case. Although, based on the findings of a Commission of Inquiry, the government of Canada has paid Mr. Arar compensation, he has not received redress from the U.S. in relation to the conduct of its officials. A person in the position of Mr. Arar, then, remains entitled under international law to a remedy for the violations of his or her rights.

A. The Mandate of the Commission of Inquiry Was Limited To the Actions of Canadian Officials

On February 5, 2004, Canada's Governor in Council appointed Justice Dennis R. O'Connor to conduct a Commission of Inquiry into Mr. Arar's case. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar, Analysis and Recommendations* (2006) at 280.[27] Under Canadian law, the

[27] The Commission's final report comprises three volumes. *See* Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar* (Analysis and Recommendations, Factual Background

(Continued on following page)

Governor in Council may create a federal commission of inquiry to address "any matter connected with the good government of Canada or the conduct of any part of the public business thereof." Inquiries Act, R.S.C., ch. I-11 (1985).

The Commission's mandate had two parts: a "factual inquiry" and a "policy review." A&R at 280. The factual inquiry focused on "the actions of Canadian officials in relation to Maher Arar," and, specifically, the role they played in Mr. Arar's detention in the United States, deportation, imprisonment and treatment in Syria, and return to Canada. *Id.* at 280-81.

The Inquiry, thus, was directed only to the actions of Canadian officials. The role of the United States government was not the focus of the Commission. Indeed, the U.S. government refused to provide evidence or participate in the Inquiry. *Id.* at 11.

The Commission heard from more than 70 witnesses during public hearings and *in camera* sessions. *Id.* at 10. Those testifying included government

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Vols. I & II) (2006), *available at* http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/arar-ef/commisionners_report/index.html (last visited Feb. 24, 2010) (hereinafter referred to as "A&R," "Vol. I" and "Vol. II"). A subsequently-released Addendum contained additional information, previously withheld on the grounds that it was confidential. *See* Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Addendum* (2006), *available at* http://www.statewatch.org/news/2007/aug/canada-maher-arar-commreport.pdf (last visited Feb. 24, 2010) ("Addendum").

officials and experts in human rights, including some of the *amici* here. Vol. II at 651-52. Mr. Arar was granted standing as a party to the inquiry. *Id.* at 650. Several civil society and human rights organizations, including some of these *amici*, were accepted as interveners. *Id.*

The Commission stated that transparency and public accessibility were "essential" in its proceedings. A&R at 282. However, the Order creating the Commission laid out specific procedures to be followed in reviewing any evidence, the release of which would be "injurious to international relations, national defence or national security." *Id.* at 283. These included a requirement to review such evidence *in camera*. *Id.* Despite delays and challenges created by the Canadian government's overbroad invocation of secrecy, *id.* at 301-2, the Commission was ultimately able to reach and publish findings on the key issues, as described below.

B. The Findings of the Commission of Inquiry

In September 2006, the Commission released a public version of its three-volume, 1200-page report. The report provides a comprehensive and detailed analysis of the events involving Mr. Arar and, in particular, the role of Canadian officials.

1. Mr. Arar's Detention and Torture

a. Commission's Findings Regarding Detention in New York

The Commission found the following:

Mr. Arar, a citizen of Canada and Syria, was first detained by American officials on September 26, 2002, while he was changing planes at New York's JFK Airport, en route to Canada following a vacation in Tunisia. A&R at 53-54. He was placed under arrest and strip-searched. *Id.* For the next 12 days, Mr. Arar was held and subjected to extensive interrogations by American officials. *Id.* For the first four days, he was denied access to his family, a lawyer and Canadian consular officials. "Essentially, no one knew where he was." *Id.* at 172.

On October 1, after being contacted by Mr. Arar's concerned family, Canadian consular officials began inquiring of U.S. officials into the reason for Mr. Arar's detention. Notwithstanding repeated inquiries, consular officials could not ascertain the charges against him or the reasons behind his detention. *Id.* at 165-66. Finally, on October 3, a Canadian consul was able to visit Mr. Arar. *Id.* at 166. During that visit, Mr. Arar expressed concern that U.S. officials would send him to Syria. *Id.* at 166-67. Mr. Arar also met with a lawyer, arranged for by his family, on October 5. *Id.* at 168.

The U.S. Immigration and Naturalization Service ("INS") scheduled a removal hearing for Mr. Arar on Sunday, October 6. An INS official left a voicemail

message for Mr. Arar's lawyer on October 6, advising her of the hearing scheduled for the evening. But the message was not picked up until the next day. *Id.* at 168.

On October 7, Mr. Arar was ordered removed from the United States. The removal order accused Mr. Arar of being a member of a foreign terrorist organization: al-Qaeda. *Id.* at 155-56. The order also stated that the "Commissioner of the INS had determined that Mr. Arar's removal to Syria would be consistent" with the Convention against Torture. *Id.* at 156.

On October 8, Mr. Arar was shackled, put onto a plane and flown to Amman, Jordan. While in Jordan, Mr. Arar "suffered blows at the hands of his Jordanian guards." *Id.* at 54. The next day, he was put into a vehicle and taken to the Far Falestin prison in Syria, where he would spend the next ten months. *Id.* at 54-55, 57.

b. Commission's Findings Regarding Detention and Torture in Syria

The Commission found the following:

Upon arriving at Far Falestin, Mr. Arar was repeatedly interrogated and tortured by the Syrian intelligence service. A&R at 55. Syrian officials also threatened him with additional torture techniques including electrical shock and "the chair," *id.*, an

instrument that "bends backwards to asphyxiate the victim or fracture the victim's spine." Vol. II at 567. They hit Mr. Arar repeatedly and struck him with a two-foot shredded electrical cable. A&R at 55. He was also at times intentionally placed where he could hear the screams of other inmates. *Id.*

The worst of the physical abuse lasted for about a week, from October 9 until October 16, a period during which Mr. Arar was held incommunicado and the Canadian government did not know his whereabouts. *Id.* at 14, 55-56, 182. Mr. Arar remained at Far Falestin until August 20, 2003, when he was transferred to another prison. *Id.* at 57.

Throughout his time at Far Falestin, Mr. Arar was confined to a tiny basement cell. *Id.* at 56. Mr. Arar slept on the concrete floor. The cell was cold and damp in the winter, and extremely hot in the summer. *Id.* During this period of over 10 months, Mr. Arar rarely saw sunlight. Vol. II at 809.

The Syrians released Mr. Arar into Canadian custody on October 5, 2003, 374 days after he was detained by American officials in New York. A&R at 57.

2. The Commission Concluded Canadian Officials Did Not Participate in the Decision To Detain Mr. Arar and Send Him to Syria

The Commission concluded Canadian officials did not participate in the decision to detain Mr. Arar and send him to Syria. A&R at 14. Specifically, the Commission found:

On September 26, 2002, Royal Canadian Mounted Police ("RCMP") officials were notified by telephone of Mr. Arar's pending arrival in New York, and American authorities' intention to question him. *Id.* at 140. At that time, U.S. authorities indicated their intention to send Mr. Arar "back to Zurich, where his flight had originated." *Id.* The telephone call to the RCMP was the "first indication that Canadian officials had that the American authorities would take any action with respect to Mr. Arar," and there was "no evidence" that Canadian officials "ever discussed a scenario with American officials that involved Mr. Arar's being detained or sent to Syria." *Id.*

On October 3, the Central Intelligence Agency ("CIA") sent a fax to RCMP headquarters asking specific questions about Mr. Arar. *Id.* at 148; Addendum at 148. At this time, U.S. authorities provided no

indication to the RCMP that they were considering removing Mr. Arar to Syria.[28] A&R at 148.

On October 4 and 5, an RCMP officer spoke by telephone with American authorities about Mr. Arar. *Id.* at 151. In the first call, a Federal Bureau of Investigation ("FBI") official indicated that Mr. Arar would be sent to Switzerland. In response, the Canadian officer "suggested that Mr. Arar be sent to Canada," and indicated the "RCMP would look into setting up surveillance." *Id.* at 152. On October 5, the FBI official asked whether the RCMP could charge Mr. Arar and whether he could be refused entry to Canada. The RCMP officer indicated there was insufficient evidence to charge Mr. Arar in Canada and that he could probably not be refused entry to Canada as he was a Canadian citizen. *Id.*

On October 7, an FBI official asked whether Canadian authorities "could link Mr. Arar to al-Qaeda or any other terrorist group." *Id.* at 153. That same day, however, the INS Regional Director made an order finding Mr. Arar to be a member of al-Qaeda and refusing him entry to the United States. *Id.* at 155-56. Also on that day, in a conversation with Canadian authorities, the FBI official indicated that Mr. Arar would likely be deported to Canada following a

[28] The Commission stated that information provided by the RCMP in response to the fax indicated that Canadian authorities "had yet to complete either a detailed investigation of Mr. Arar or a link analysis on him." A&R at 148.

final hearing on October 9. Vol. I at 171. On the assumption that Mr. Arar would be deported to Canada, an RCMP officer "was instructed to start preparing a surveillance package and interview questions for Mr. Arar." *Id.* at 173.

Based on the evidence, the Commission concluded, "American authorities were less than forthcoming with the RCMP and with Canadian consular officials about their plans for Mr. Arar." A&R at 153. The Commission found "no evidence that American officials ever indicated to a Canadian official that Syria was being considered. The American authorities appear to have intentionally kept Canadian officials in the dark about their plans to remove Mr. Arar to Syria."[29] *Id*.

3. The Commission's Findings Regarding the Conduct of Canadian Officials

The Commission made a number of findings regarding actions taken by certain Canadian officials at various stages of Mr. Arar's ordeal:

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[29] The Commission determined that, although Mr. Arar advised a Canadian consular official of his fear of being sent to Syria, "[b]ased on their experience and the information they had received, [foreign affairs officials] did not believe that there was an imminent risk that Mr. Arar would be sent to Syria. . . . They were caught completely off guard when they learned of Mr. Arar's fate." A&R at 165.

First, the Commission faulted the RCMP for providing inaccurate information to U.S. authorities that "portrayed [Mr. Arar] in an unfairly negative fashion and overstated his importance in the RCMP investigation." A&R at 13. This information was likely relied upon by the U.S. in detaining Mr. Arar. *Id.* at 140. Specifically, although the RCMP only considered Mr. Arar a "person of interest," and on the periphery of an investigation centered on another individual, *id.* at 113, the RCMP submitted a request to U.S. Customs to include Mr. Arar and his wife in a database as part of a group of "Islamic Extremist individuals" with ties to al-Qaeda. Vol. II at 559. Also, when notified of Mr. Arar's imminent arrival in New York, the RCMP submitted a list of questions to the FBI that contained inaccurate information. A&R at 140-44. In the end, however, after hearing all of the evidence gathered by Canadian investigators about Mr. Arar, the Commission found no evidence that he had committed an offense or was a threat to the security of Canada.[30] *Id.* at 59.

Second, although it could not conclude whether Canadian officials could have secured an earlier release of Mr. Arar, the Commission expressed "serious

[30] As set out earlier, whether a person is accused of or has in fact committed any criminal offense, or otherwise poses a threat to the safety or lives of the public, is entirely irrelevant to the individual's right to meaningful access to a procedure capable of providing an effective remedy for torture or other similar human rights violations the individual claims to have suffered.

concern" with regard to a number of actions taken by Canadian officials during his imprisonment in Syria. *Id.* at 14-15. In particular, there were mixed signals coming from Canadian officials. While the Department of Foreign Affairs and International Trade was demanding his release, intelligence officials may have created the impression that Mr. Arar was of continuing importance to its terrorism investigation. *Id.* at 213.

Third, upon Mr. Arar's return to Canada, there were leaks of confidential information for the purpose of damaging Mr. Arar's reputation. *Id.* at 16.

C. The Commission's Recommendations Pertained Only To Canadian Officials

The Commission issued 23 recommendations arising from the factual inquiry; only the final two addressed Mr. Arar's right to redress. A&R at 311-63. Twenty-one of the recommendations were directed to the Canadian police, intelligence and foreign affairs services, proposing changes to their internal procedures. *Id.* at 312-60. Recommendation 22 suggested the Canadian government should "register a formal objection with the governments of the United States and Syria concerning their treatment of Mr. Arar and Canadian officials involved with his case." *Id.* at 361. Recommendation 23 concerned compensation by Canada for Mr. Arar. *Id.* at 362. The Commission was not permitted to make assessments about whether the government of Canada was civilly liable to Mr.

Arar but stated that Canada "should assess Mr. Arar's claim for compensation in the light of the findings in this report and respond accordingly." *Id.*

None of the 23 recommendations addressed the role or responsibility of the United States, as this was not within the Commission's mandate.

D. The Canadian Government Provided Compensation and Issued an Apology for the Role Played By Canadian Officials

Following the release of the Commission's report, the government of Canada provided redress to Mr. Arar for the wrongdoing of Canadian officials. In settlement of his lawsuit against Canadian agencies and individuals, the government paid Mr. Arar CAD $10.5 million plus legal fees.[31] In January 2007, Prime Minister Stephen Harper publicly apologized to Mr. Arar for Canada's involvement. *Id.* The Prime Minister also provided a letter of apology for "any role Canadian officials may have played." *Id.* Canada's Foreign Ministry sent the United States an official letter of protest, and the Minister of Public Safety

[31] Press Release, Office of the Prime Minister, *Prime Minister Releases Letter of Apology to Maher Arar and His Family and Announces Completion of Mediation Process*, Jan. 26, 2007, *available at* http://www.pm.gc.ca/eng/media.asp?id=1509 (last visited Feb. 24, 2010).

asked the United States to remove Mr. Arar from their terrorist look-out lists.[32]

These steps were apparently taken only with regard to the involvement of the Canadian government in Mr. Arar's ordeal. Mr. Arar has not obtained redress from other countries involved, including the U.S., whether in the form of a public apology, compensation or full acknowledgement of the facts and of responsibility of the state for violations of his human rights.

CONCLUSION

International law requires the United States to ensure that every individual who claims to have suffered human rights violations, including torture, in relation to which the United States is responsible, has meaningful access to a procedure capable of providing an effective remedy and, if the claim is established, that the individual actually receives effective reparation. Mr. Arar has received some redress from Canada arising from the responsibility of its own officials but he has not received redress from the United States. A person in his situation remains entitled to meaningful access to a procedure in the

[32] *Day: U.S. Asked to Clear Arar as Security Threat*, CTV News, Oct. 1, 2006, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061001/arar_day_061001/20061001?hub=TopStories (last visited Feb. 24, 2010).

United States capable of providing an effective remedy for the human rights violations for which he claims the United States is responsible. For these reasons, *amici* respectfully urge this Honorable Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

Amici Curiae

Organizations

Amnesty International ("AI") is a worldwide movement of people working for respect and protection of internationally-recognized human rights principles. The organization has over 2.8 million members and supporters in more than 150 countries and territories and is independent of any government, political ideology, economic interest or religion. It bases its work on international human rights instruments adopted by the United Nations and regional bodies. Amnesty International played a central role in campaigning to protect Maher Arar's rights while he was imprisoned in the United States and Syria and in pressing for establishment of a public inquiry into his case. Its Canadian section, AI Canada, was granted intervener status before the Commission of Inquiry and made numerous oral and written submissions in the course of the proceedings.

The BC Civil Liberties Association ("BCCLA") is Canada's oldest civil liberties organization, and is dedicated to the promotion of civil liberties and human rights throughout British Columbia and Canada. The BCCLA actively works on issues such as privacy protections, discrimination, due process, freedom of speech, patients' rights, prisoners' rights and other emerging issues. The BCCLA has a long history and involvement with national security and intelligence issues, anti-terrorism legislation and police

accountability in Canada. The BCCLA was an intervener before the Commission of Inquiry.

The Canadian Arab Federation ("CAF"), established in 1967, is a national, non-partisan, non-profit and membership-based organization which represents Canadian Arabs on issues relating to public policy. Through education, public awareness, media relations and non-partisan government relations, CAF raises awareness of domestic and international issues that affect its community.

The Canadian Centre for International Justice ("CCIJ") is a charitable organization that works with survivors of genocide, torture and other atrocities to seek redress and bring perpetrators to justice. The CCIJ has intervened in several cases seeking remedies for Canadians tortured abroad. The CCIJ has named Maher Arar to its "Honorary Council," an honorary designation in recognition of his exemplary contribution to human rights and international justice. Members of the Honorary Council (including Mr. Arar) are not involved in the operation of the CCIJ, nor were they involved in the preparation of this brief.

The Canadian Centre for Victims of Torture ("CCVT") is a non-profit, charitable organization founded by several Toronto doctors, lawyers and social service professionals. The CCVT aids survivors in overcoming the lasting effects of torture and war. In partnership with the community, the Centre supports survivors in the process of successful integration into

Canadian society, works for their protection and integrity, and raises awareness of the continuing effects of torture and war on survivors and their families.

The Canadian Civil Liberties Association ("CCLA") is one of Canada's largest human rights advocacy organizations. The CCLA was constituted to promote respect for and observance of fundamental human rights and civil liberties and to defend and foster the recognition of those rights and liberties. The CCLA's major objectives include the legal protection of individual rights, freedoms and dignity and to ensure the protection of vulnerable groups in society. The CCLA has been granted intervener status before the Supreme Court of Canada over the past four decades on over a hundred leading human rights cases, engaging an understanding of international law and constitutional issues.

The Canadian Council for Refugees ("CCR") is a national umbrella organization comprising approximately 180 member agencies that work with, and on behalf of, refugees and immigrants in Canada. For over 30 years it has been serving the networking, information-exchange and advocacy needs of its membership. The CCR has come to be recognized as a key advocate for refugee rights in Canada.

The Canadian Council on American-Islamic Relations ("CAIR-CAN") strives to be a leading voice that enriches Canadian society through Muslim civic engagement and the promotion of human rights. CAIR-CAN is a national grassroots NGO that works

to represent the concerns of Canadian Muslims through dedicated and professional activism. This is achieved through community education and outreach, media engagement, anti-discrimination initiatives, public advocacy and partnering with other social justice organizations.

The International Civil Liberties Monitoring Group ("ICLMG") is a pan-Canadian coalition of 38 civil society organizations, including unions, professional associations, faith groups, environmental organizations, human rights and civil liberties advocates, as well as groups representing immigrant and refugee communities in Canada. The mandate of the ICLMG is to defend the civil liberties and human rights set out in the Canadian Charter of Rights and Freedoms, federal and provincial laws and international human rights instruments.

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