Case Nos. 13-1676(L), 14-2212

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LEONIDAS BIMENYIMANA; FRANCOIS KARAKE;
GREGOIRE NYAMINANI

Petitioners,

v.

ERIC H. HOLDER, JR., United States Attorney General, and
DEPARTMENT OF HOMELAND SECURITY

Respondents.

BRIEF OF AMICUS CURIAE AMNESTY INTERNATIONAL, CENTER FOR CONSITUTIONAL RIGHTS, HUMAN RIGHTS WATCH, INTERNATIONAL COMMISSION OF JURISTS, AND WORLD ORGANISATION AGAINST TORTURE IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, *amici curiae* certify that none are publicly held corporations, and none have any parent corporations. To *amici curiae*'s knowledge, no publicly held corporation has any direct financial interest in the outcome of this litigation.

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STATEMENT OF AUTHORITY TO FILE

The petitioners have consented to the filing of this brief. The Government took no position. *Amici curiae* have filed a motion for permission to file pursuant to Federal Rule of Appellate Procedure 29(b) concurrently with this brief.

STATEMENT REGARDING PARTICIPATION BY PARTIES, THEIR ATTORNEYS, OR OTHER PERSONS

Counsel for *amici curiae* states pursuant to Federal Rule of Appellate Procedure 29(c)(5) that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

IDENTITY AND INTEREST OF AMICI CURIAE

Amicus curiae Amnesty International ("AI"), established in 1961 and headquartered in London, monitors law and practices around the world in light of international human rights and humanitarian law and standards. It is a worldwide human rights movement that enjoys special consultative/participatory status at the United Nations and the Council of Europe.

Amicus curiae Center for Constitutional Rights ("CCR"), established in 1966 and headquartered in New York, is a non-profit legal and educational organization dedicated to protecting the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. CCR has a long history of advocating on behalf of civil and human rights, including representing individuals who are in danger of being transferred despite known risks of torture or mistreatment.

Amicus curiae Human Rights Watch ("HRW") is a non-partisan, non-profit human rights organization established in 1978 and headquartered in New York. HRW investigates, documents, and reports on violations of human rights, including torture, genocide, and crimes against humanity, in over seventy countries. It has conducted extensive research on the use of diplomatic assurances against torture worldwide, including by the United States Government.

Amicus curiae International Commission of Jurists ("ICJ") is a non-governmental organization ("NGO") working to advance understanding and respect for the rule of law and the protection of human rights worldwide. Established in 1952 and headquartered in Geneva, it is composed of some sixty eminent jurists representing different justice systems throughout the world.

Amicus curiae World Organisation Against Torture ("OMCT"), based in Geneva and established in 1986, supports a global coalition of hundreds of NGOs seeking to end torture and other forms of ill-treatment. OMCT frequently represents torture victims seeking redress before national and international courts.

All *amici* have filed numerous amicus briefs in United States, foreign, and international courts, including in cases concerning the universal prohibition on torture and other cruel, inhuman, or degrading treatment or punishment.

PRELIMINARY STATEMENT

The petitioners were repeatedly tortured by the Rwandan government for two years. This is not in dispute. Two neutral fact finders—a federal district court judge and an immigration judge—found that Rwandan soldiers "use[d] torture to extract . . . information" until the petitioners told them "whatever [they] wanted."[1] During a full and fair hearing before a federal district court judge, each of the three petitioners described two excruciating years of "solitary confinement, positional torture, and repeated physical abuse."[2] This case is not about a speculative fear of torture: petitioners' fear is real, "just like the scarring on their bodies."[3]

After a full hearing and fair process, an immigration judge held that petitioners could not be returned to Rwanda because it was "more likely than not" that they would be tortured there (once again). Now the Government seeks to short-circuit that judgment and return petitioners to Rwanda nonetheless, based solely on the word of the same government that tortured them without any meaningful review of the promises by an impartial factfinder. Such a lack of process is contrary to both international law and the practices of many other states.

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[1] *United States v. Karake*, 443 F. Supp. 2d 8, 55-56 (D.D.C. 2006).

[2] *Id.* at 94.

[3] *Id.* at 85.

Petitioners must be afforded the ability to challenge such inherently unreliable assurances before a "neutral and detached judge in the first instance."[4]

Amici, internationally recognized human rights organizations that have researched and monitored human rights violations, including the absolute prohibition against sending a person to a state where she or he would be at risk of torture or other ill-treatment despite diplomatic assurances, write to make two fundamental points:

First, diplomatic assurances are inherently unreliable when they come from a state that has a record of torture and/or previously has tortured the very people it promises to protect. They create serious monitoring and enforcement problems that have been highlighted by a number of high profile cases in which diplomatic assurances were breached and returned detainees were tortured.

Second, any diplomatic assurances must be tested by meaningful legal process. Other states, including close allies such as the United Kingdom and Canada, provide substantially more process than the United States does when seeking to return a detainee based on diplomatic assurances. Employing diplomatic assurances to effectuate removal to a state with a history of torture, or that has previously tortured those being removed, and not affording petitioners

[4] *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 617 (1993) (quotation omitted).

meaningful process before a neutral factfinder, runs contrary to the Government's human rights obligations, including non-*refoulement*.

I.
LEGAL ARGUMENT

The right to be free from torture and other ill-treatment is guaranteed under international human rights law and customary international law, and has attained the rank of *jus cogens*, a peremptory norm of international law from which no derogation is permitted.[5] The corresponding prohibition of *refoulement* to a risk of torture, *i.e.*, the expulsion or transfer of an individual to a state where there is a real risk of torture or other ill-treatment, is also prohibited under customary international law[6] as well as international treaties such as the CAT,[7] which the U.S. ratified on October 21, 1994.

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[5] The right to be free from torture is well-established, and guaranteed under Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 ("CAT"); *see also, e.g.*, InterAmerican Convention to Prevent and Punish Torture, art. 2, Dec. 9, 1985, OAS Treaty Series, No. 67 ("IACPPT"); International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 ("ICCPR"); *Prosecutor v. Furundzija*, No. IT-95-17/1-T, Judgment, ¶¶ 134-64, Int'l Crim. Trib. for the Former Yugoslavia (Dec. 10, 1998).

[6] Sir Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement* (Opinion) ¶¶ 196-216 (July 20, 2001) http://www.refworld.org/pdfid/3b3702b15.pdf.

[7] *See* CAT, art. 3(1); *see also* IACPPT art. 13. Jurisprudence from the European Court of Human Rights interpreting Article 3(1) of the European Convention on Human Rights has also recognized the prohibition against *refoulement*. *See, e.g.*,

(footnote continued)

Under the legislation the U.S. adopted to implement the CAT, the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"),[8] the U.S. is prohibited categorically from returning any person within its territory or jurisdiction, including petitioners, to another state if it is "more likely than not" that he or she would be subject to torture there.[9] Here, a disinterested immigration judge conducted a full and fair hearing and found that petitioners should not be removed based on their "credible fear of torture," Rwanda's record of torture, and serious concerns that petitioners would be subject to retaliation for testifying about their mistreatment in open court.[10] The Government now seeks to return petitioners to Rwanda not because it contends any of this has changed, but based solely on promises by the same government that tortured petitioners that they will not be subjected to the same abuse again. Employment of assurances in these

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Chahal v. The United Kingdom, No. 22414/93, Judgment ¶ 10, Eur. Ct. H.R. (Nov. 15, 1996).

[8] Pub. L. No. 105-277, 112 Stat. 2681-822 (codified at 8 U.S.C. § 1231).

[9] CAT Article 3 prohibits removal when there are "substantial grounds for believing that [the detainee] would be in danger of being subjected to torture." When the United States Senate ratified the CAT, it did so with the reservation that this was interpreted to "to mean 'if it is more likely than not that he would be tortured.'" 136 Cong. Rec. 36193 (1990). *Amici* dispute this interpretation of the CAT and observe that most other countries do not employ such a narrow interpretation.

[10] Amended Certified Administrative Record ("DHS-AR") (ECF 61-2), DHS-AR-549-50 (Bimenyimana); DHS-AR 577-78 (Karake); DHS-AR 612-13 (Nyaminani).

circumstances is inconsistent with the U.S.'s obligations under the CAT, the ICCPR, the requirements of the FARRA, and binding *jus cogens* norms of general and customary international law.

A. Diplomatic Assurances from States that Employ Torture Are Inherently Unreliable

The U.S. would violate its obligations under the non-*refoulement* provision of Article 3 of the CAT and customary international law if it were to accept the diplomatic assurances proffered by Rwanda. Diplomatic assurances from states that employ torture are inherently unreliable and do not provide an effective safeguard against future abuse, particularly where a state has previously tortured the very petitioners whose return is sought.

1. Diplomatic Assurances Are Typically Sought from States that Already Ignore International and Domestic Prohibitions Against Torture and Therefore Are Highly Unlikely to Honor Them

States that do not practice torture generally do not need to provide diplomatic assurances against torture. Typically there is little reason to believe such states will depart from their normal detainee protocols and so the returning state need not ask for any special assurances. Instead, diplomatic assurances most often are sought from states where the specter of torture is real because the practice of torture in the state is a recalcitrant and endemic problem, or the state routinely

targets persons of a particular profile for torture and other ill-treatment.[11] Assurances were obtained here precisely because an immigration judge found that petitioners more likely than not would be tortured again if returned to Rwanda.

All states must observe the *jus cogens* prohibition against torture and those that have ratified international human rights treaties (such as the CAT) must also comply with those legally-binding treaty obligations, as well as domestic law prohibiting torture and ill-treatment. States that engage in torture and ill-treatment, however, habitually flout these preexisting and binding legal obligations. Diplomatic assurances from such states, despite existing obligations not to engage in torture, cannot ensure that detainees are not "more likely than not" to be tortured upon return. Reliance on such assurances is inconsistent with and creates an end-run around the Government's obligations under the CAT.[12]

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[11] *See* Louise Arbour, *In Our Name and On Our Behalf*, 55 Int'l & Compl. L.Q. 511, 521-22 (2006). The Committee Against Torture is particularly careful when determining the likelihood of post-extradition torture where diplomatic assurances were requested, as "such a request demonstrates that the extraditing State harbours concerns about the [individual's] treatment . . . in the destination country." *Boily v. Canada*, U.N. Comm. Against Torture, Commc'n No. 327/2007, ¶ 14.4, U.N. Doc. CAT/C/47/D/327/2007 (Jan. 13 2012).

[12] *See, e.g.*, Council of Europe, European Committee on the Prevention of Torture, *15th General Report* ¶ 39 (Sept. 22, 2005) http://www.cpt.coe.int/en/annual/rep-15.htm#_Toc114645552 ("If these countries fail to respect their obligations under international human rights treaties ratified by them . . . why should one be confident that they will respect assurances given on a bilateral basis in a particular case?").

Accepting diplomatic assurances from states that employ torture also undercuts the broader human rights regime. It signals that adherence to binding, multilateral treaties is secondary to smaller, piecemeal agreements that cover discrete persons.[13] This inevitably will frustrate the CAT's and the ICCPR's purposes by eroding respect for universal human rights guarantees that many states, including the U.S., have worked hard to entrench in the global consciousness.[14] Only strong enforcement of global human rights regimes such as the CAT will ensure that all people are free from torture and other cruel, inhuman, or degrading treatment or punishment.

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[13] Council of Europe, Group of Specialists on Human Rights and the Fight Against Terrorism, *Results of Survey of State Practices on Diplomatic Assurances* ¶ 17(iii) (Apr. 3, 2006) http://www.coe.int/t/dghl/standardsetting/cddh/DH_S_TER/2006_005_en.pdf (declining to promulgate guidelines on diplomatic assurances in part because "such an instrument could be seen as weakening the absolute nature of the prohibition of torture").

[14] *See* U.N. Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 243, U.N. Doc. A/HRC/13/39/Add.5 (Feb. 5, 2010) http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add.5_en.pdf ("The practice of diplomatic assurances . . . encourages States to seek an exception to their obligation instead of using all their diplomatic and legal powers as States parties to hold other States parties accountable for their violations.").

2. Reliance on Diplomatic Assurances from States that Practice Torture Creates Inherent Monitoring and Enforcement Problems

In its diplomatic assurances, Rwanda pledged that it would "grant access upon request, whether or not previously announced, to the U.S. Embassy and/or an agreed upon third party" to visit petitioners upon their return to Rwandan custody.[15] Such individual monitoring, however, poses serious problems. First, untrained diplomatic staff would be unlikely to uncover any maltreatment short of the most obvious signs of physical torture.[16] Torture happens in secret and "all [states] that engage in torture deny it."[17] Sophisticated techniques practiced by states with long histories of torture, such as electrical shocks, submersion in water, sexual violence, and various forms of psychological torture, often leave little to no lasting physical evidence.[18]

Second, individual monitoring places detainees who have been abused in the untenable position of either reporting the abuse and risking retaliation, or declining to report it and simply hoping it stops. The State Department has

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[15] DHR-AR 509.

[16] *See* Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard against Torture* 25 (Apr. 2005), http://www.hrw.org/sites/default/files/reports/eca0405.pdf ("*Still at Risk*").

[17] *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992).

[18] Julia Hall, *Mind the Gap: Diplomatic Assurances and the Erosion of the Global Ban on Torture*, *in* Human Rights Watch World Report 64 (2008) http://www.hrw.org/sites/default/files/reports/wr2k8_web.pdf.

recognized many instances where "detainees often refrained from reporting torture and abuse because they feared retaliation or believed complaining to authorities would be futile."[19] Because individual monitoring is generally ineffective, controlling weight should not be placed on superficial promises to do it.

Moreover, there is no effective way to enforce assurances. Nothing in the assurances offered here promises that domestic courts or other independent review mechanisms will be open to petitioners upon their return, or that they can obtain an enforceable court order that will effectively compel Rwanda to ensure they are not tortured. The U.S. Government, or whatever hypothetical "third party" ultimately may be permitted to monitor compliance, also cannot seek redress in any court if assurances are breached.

Top Government officials have publicly acknowledged the inability to enforce such diplomatic assurances. For example, former Director of Central Intelligence Porter J. Goss testified to Congress that while the Government tries to

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[19] U.S. Dep't of State, *Turkey 2013 Human Rights Report* 5 (2014) http://www.state.gov/documents/organization/220551.pdf (last visited Mar. 20, 2015); *see also*, U.S. Dep't of State, *Armenia 2013 Human Rights Report* 4 (2014) http://www.state.gov/documents/organization/220461.pdf (last visited Mar. 20, 2015) ("[M]ost cases of police mistreatment were unreported due to fear of retaliation."); U.S. Dep't of State, *Sri Lanka 2013 Human Rights Report* 10 (2014) http://www.state.gov/documents/organization/220616.pdf (last visited Mar. 20, 2015) ("A number of women did not lodge official complaints due to fear of retaliation.").

obtain pledges that detainees will not be tortured, "once they're out of our control, there's only so much we can do."[20] This was echoed by other intelligence officials,[21] as well as by former Attorney General Alberto Gonzalez, who conceded that despite diplomatic assurances, "[w]e can't fully control what that [receiving] country might do."[22]

3. Instances where Diplomatic Assurances Were Breached Highlight the Inherent Problems of Relying on Assurances from States that Employ Torture

States that employ torture often do not honor assurances they give not to torture specific individuals. This has been demonstrated time and again. Although there are examples from all over the globe,[23] a few from the U.S.'s own experience highlight this unfortunate and common result.

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[20] *Still at Risk* 37.

[21] Michael Scheuer, a former CIA official involved with the agency's rendition program, stated that CIA officers "knew that taking detainees to Egypt or elsewhere might yield treatment not consonant with United States legal practice" despite receiving diplomatic assurances to the contrary. *See* Human Rights Watch, *Double Jeopardy: CIA Renditions to Jordan* 8-9 (2008) http://www.hrw.org/sites/default/files/reports/jordan0408_1.pdf (last visited Mar. 20, 2015).

[22] *Still at Risk* 37.

[23] *See, e.g., Agiza v. Sweden*, U.N. Comm. Against Torture, Commc'n No. 223/2003, U.N. Doc. CAT/C/34/D/233/2003 (May 20, 2005) (Egypt breaking assurances it made to Sweden); Amnesty Int'l, *Dangerous Deals: Europe's Reliance on "Diplomatic Assurances" Against Torture* 5 (Apr. 12, 2010) https://www.amnesty.org/en/documents/EUR01/012/2010/en/ (Tunisia breaking assurances it made to Italy); Columbia Law School Human Rights Institute, (footnote continued)

The U.S. Government returned two ethnic minority Sikhs, Kamaljit Kaur Sandhu and Sukhminder Sandhu, to India in 1997 based in part on diplomatic assurances. The Government completely failed to monitor their treatment post-transfer, admitting in a diplomatic cable that it was "unable authoritatively to confirm whether the Sand[h]us were tortured by Indian police officials" despite it being "keenly aware of the culture of torture and extrajudicial punishment in Indian jails."[24] The Sandhus later filed a sworn affidavit claiming that they in fact were tortured by the Indian police.[25]

In 2002, the Government removed Maher Arar, a dual Canadian-Syrian citizen who was transiting in New York on his way home to Canada, to Syria based on unexamined assurances that he would be protected. A 2008 DHS Office of Inspector General report found that Arar was sent to Syria even though Immigration and Naturalization Service officials had concluded that he more likely than not would have been tortured.[26] They were right: while detained in Syria,

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Promises to Keep 17 (Dec. 2010), http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/PromisestoKeep.pdf ("*Promises to Keep*") (Afghanistan breaking assurances it made to Canada).

[24] *Promises to Keep* 36.

[25] *Id.* at 35.

[26] U.S. Dep't of Homeland Security, Office of Inspector General, *The Removal of a Canadian Citizen to Syria* 22 (Mar. 2008) http://www.oig.dhs.gov/assets/Mgmt/OIGr_08-18_Jun08.pdf.

Arar was repeatedly beaten and whipped with an electrical cable and held in an underground grave-like cell for nearly a year, despite several visits from Canadian consular officials.[27] Arar ultimately obtained an apology and $10 million from the Canadian Government, which had provided the U.S. with faulty information.[28]

Moreover, despite abundant evidence that breaches occur, there rarely is any incentive for a state to admit that a breach took place. Doing so jeopardizes diplomatic relations with the receiving state and compromises the sending state's ability to employ diplomatic assurances in the future because it amounts to an admission that assurances do not work. Recognizing a breach also exposes the sending state's poor decision to credit diplomatic assurances in the first place. As a result, there likely are far more examples of breached assurances than anyone will ever know.

B. Other States Provide More Procedural Protections and More Scrutiny of Diplomatic Assurances than the United States

The United States is not the only state to employ diplomatic assurances. At present, however, it offers less opportunity for evidentiary challenge, independent review, and the opportunity to be heard than many other

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[27] Center for Constitutional Rights, *The Story of Maher Arar, Rendition to Torture*, 4 (2007) https://ccrjustice.org/files/rendition%20to%20torture%20report.pdf (last visited Mar. 24, 2015).

[28] *Id.* at 9; *see also Promises to Keep* 39-40 (citing additional examples where Russia, Tunisia, and Tajikistan broke their assurances to the United States).

states. There is also very little public information regarding the process that the executive branch must provide to those it seeks to remove on the basis of diplomatic assurances.[29] In fundamental areas of procedural safeguards, the U.S. lags far behind many of its counterparts.

This is especially troubling given that, in the normal course of immigration procedure, the U.S. has an established mechanism for testing and evaluating the risk an individual likely faces upon removal; in fact, petitioners' cases went through this process, at the close of which an immigration judge determined that removal would violate the Government's absolute obligation not to return a person to the risk of torture. By procuring diplomatic assurances after the fact and relying on agency evaluation of those assurances, DHS is short-circuiting the procedural protections the immigration system normally provides.

Terminating deferral of removal under the CAT normally entails the following: (1) DHS moves for a hearing to terminate and submits evidence supporting termination; (2) the deferral recipient receives notice of the hearing and has an opportunity to submit evidence to supplement his or her initial application; (3) the immigration judge conducts a hearing and makes "a de novo determination, based on the record of proceeding and initial application in addition to any new

[29] *See Promises to Keep* 33-35 (noting that "[t]here is little to no public information about the State Department's protocol for negotiating assurances").

evidence submitted by the Service or the Alien, as to whether the alien is more likely than not to be tortured" if returned; and (4) either party may appeal to the Board of Immigration Appeals.[30]

The agency's regulation on diplomatic assurances, however, is disturbingly devoid of process. It reads, in total: "Termination pursuant to § 1208.18(c). At any time while deferral of removal is in effect, the Attorney General may determine whether deferral should be terminated based on diplomatic assurances forwarded by the Secretary of State pursuant to the procedures in § 1208.18(c)."[31] Section 1208.18(c) provides that, when evaluating deferral under CAT, the Attorney General decides in his or her sole discretion whether assurances are appropriate, and once assurances are provided, "the alien's claim for protection under the [CAT] shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer."[32] In other words, the regulations enshrine a complete dearth of procedural protections.

Had the diplomatic assurances at issue been levied against petitioners in other states—or in the normal course of our domestic immigration proceedings—petitioners would have enjoyed most or all of the following

[30] 8 C.F.R. § 1208.17(d).

[31] 8 C.F.R. § 1208.17(f).

[32] 8 C.F.R. § 1208.18(c)(3).

procedural safeguards: the opportunity to present and cross-examine witnesses, a decision from a neutral factfinder in the first instance, and multiple levels of searching judicial review.

1. A Full Hearing with Live Testimony

In extradition and deportation proceedings in other states, persons subject to removal based on diplomatic assurances, or at least their representatives, are afforded the opportunity for a full hearing with live testimony. Courts in the United Kingdom hear testimony on the reliability of assurances in both standard immigration cases[33] and specialized national security cases.[34] Canadian judges hold hearings and examine live witnesses in removal cases involving diplomatic assurances.[35] Russian courts reviewing extradition determinations based on

[33] *See Zakaev v. Russia*, Bow Street Magistrates Court (Nov. 13, 2003, Eng.), Ex. D to Sentencing Memo. Of Babar Ahmad, *United States v. Ahmad*, No. 04-cr-301 (June 16, 2014 D. Conn) ECF No. 179-4, pp. 4-5, ¶ 12 (Magistrates' Court rejects extradition after lay and expert testimony, including testimony from the Deputy Minister in charge of Russian prisons on assurances regarding where Zakaev would be held).

[34] Despite its many problems, the U.K. Special Immigration Appeals Commission ("SIAC") does hear extensive testimony, including expert witnesses, from both sides. *See AS & DD (Libya) v. Sec'y of State*, No. T1/2007/0504, [2008] EWCA (Civ) 289, ¶¶ 11-12, 24, 31-33, 264, 323 (Apr. 9, 2008 Eng.) (rejecting deportation after considering testimony including that of the former Ambassador to Libya who held the post at the time the Memorandum of Understanding was drafted).

[35] *See Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 S.C.R. 350, ¶¶ 38, 63 (Can.) ("Judges working under the process have eschewed an overly deferential approach, insisting instead on a searching examination of the (footnote continued)

assurances permit defense witness testimony.[36] Despite severe shortcomings in the U.K.'s, Canada's, and Russia's domestic procedures—and the fact that domestic assurances from states with a record of torture are inherently unreliable—these courts *at least* evaluate live testimony when deciding the merit, utility, and impact of diplomatic assurances.

A live hearing is a vital tool in testing evidence and establishing truth. The U.S. legal system depends on the right to present, and cross-examine, witnesses and challenge written submissions.[37] Petitioners, however, had no such opportunity. There was no hearing for them to challenge the reliability of the

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reasonableness of the certificate on the material placed before them."); *see also* Government of Canada, Department of Justice, "Special Advocates Program," http://www.justice.gc.ca/eng/fund-fina/jsp-sjp/sa-es.html (last visited Mar. 13, 2015). The Canadian procedure—which offers more process than that available to petitioners here—suffers from similar procedural infirmities as the SIAC. *See infra* note 39; *see also* Letter from Human Rights Watch to Members of Canada's Parliament, *Canada: Parliament Should Amend Bill on Special Advocates* (Nov. 19, 2007) http://www.hrw.org/news/2007/11/18/canada-parliament-should-amend-bill-special-advocates (last visited Mar. 24, 2015).

[36] *See Abdulkhakov v. Russia*, No. 14743/11, Judgment ¶¶ 47-48, Eur. Ct. H.R. (Feb. 11, 2013) (hearing expert witnesses for the defense); *Dzhurayev v. Russia*, No. 31890/11, Judgment ¶ 42, Eur. Ct. H.R. (Jan. 20, 2014) (hearing lay witnesses for the defense).

[37] *See United States v. Salerno*, 505 U.S. 317, 328 (1992) (Stevens, J., dissenting) (footnote omitted) ("Even if one does not completely agree with Wigmore's assertion that cross-examination is 'beyond any doubt the greatest legal engine ever invented for the discovery of truth,' one must admit that in the Anglo-American legal system cross-examination is the principal means of undermining the credibility of a witness whose testimony is false or inaccurate").

assurances. Petitioners could not testify on their own behalf, call witnesses to testify as to the reliability or sufficiency of the Rwandan government's diplomatic assurances, call witnesses who might effectively challenge the Government's preordained conclusion, or present other testimony otherwise indicating that they more likely than not will be tortured *in spite of* the assurances.

2. A Neutral Factfinder

One of the most obvious and crucial procedural protections not provided to petitioners is a neutral factfinder. In other states, a neutral factfinder either makes the initial determination or performs an additional round of fact-finding in reviewing an executive decision. In the U.K., fact-finding judges fully evaluate a case, including any diplomatic assurances offered, to determine if the state may remove a person who claims to be at risk for torture.[38] Even when the U.K. uses its most restrictive and secretive procedures for cases involving sensitive national security information,[39] any assurances are evaluated with the full factual

[38] *See Zakaev*, ¶¶ 17-18 (denying removal despite assurances of fair treatment from the Russian government).

[39] Although the U.K.'s security-specific procedures would be an improvement over those petitioners here received, they still are subject to widespread criticism and concern, and *amici* oppose many aspects of them. U.K. law permits certain security-related cases to be evaluated by the Special Immigration Appeals Commission ("SIAC"). SIAC may hold closed hearings and evaluate sealed evidence not available to the named individual or his or her attorney. The named individual's only representative in the closed portions of these cases is a security-vetted Special Advocate, who may participate in closed hearings and review closed (footnote continued)

record by an independent panel of three evaluators, one of whom must be a senior judge.[40]

German domestic law permits extradition, including when relying on diplomatic assurances, only "if the competent Court of Appeal has declared extradition to be admissible,"[41] and a German Administrative Court fully reviews executive rejections of asylum, including evaluating assurances and ordering that an individual be considered a refugee if it finds sufficient risk of ill-treatment.[42]

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evidence, but may not discuss either with the named individual. These procedures are highly controversial and cannot be considered the gold standard for transparent, effective procedural safeguards. *See, e.g., Terror Arrests: Controversy of the Secretive Special Immigration Appeals Commission*, The Telegraph, May 18, 2010, http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/7737173/Terror-arrests-controversy-of-the-secretive-Special-Immigration-Appeals-Commission.html. Despite SIAC's many drawbacks, the SIAC procedures provide minimal protections not afforded by the United States.

[40] SIAC reviews a case in detail and makes the (appealable) decision on whether extradition is appropriate. *See AS & DD (Libya) v. Sec'y of State*, ¶¶ 11-12, 15 (evaluating and rejecting assurances from the Libyan government); *see Dangerous Deals* 28-29 (citing *Othman (Abu Qatada) v. United Kingdom*, No. 8139/09, Judgment, Eur. Ct. H.R. (May 9, 2012)).

[41] *Atmaca v. Germany*, No. 45293/06, Decision at 9, Eur. Ct. H.R. (Mar. 6, 2012) (citing "sections 12 and 13 of the Act on International Legal Assistance in Criminal Matters").

[42] *See Id.* at 6 (describing the Darmstadt Administrative Court's order, after a hearing, that Atmaca be considered a refugee and not deported despite Turkey's assurances of humane treatment); *see* Letter from Human Rights Watch to the German Government Regarding Diplomatic Assurances (July 21, 2009) http://www.hrw.org/news/2009/07/21/letter-german-government-regarding-diplomatic-assurances#_ednref8, (citing Verwaltungsgericht Duesseldorf, 11 K 4716/07.A, Mar. 4, 2009); *Dangerous Deals* 23.

Similarly, in Bosnia and Herzegovina, pursuant to its domestic Human Rights Agreement, its special Human Rights Chamber engages in judicial fact finding and decision making when analyzing whether a particular extradition or removal, including those based on diplomatic assurances, will satisfy international standards.[43] It also appears that Russian courts reviewing extradition orders granted by the Prosecutor General's Office, including ones based on diplomatic assurances, evaluate and weigh the evidence presented.[44] Russian law provides that an extradition decision may be challenged in "in open court by a panel of three judges in the presence of a prosecutor, the person whose extradition is sought and the latter's legal counsel."[45]

The U.S., by contrast, does not permit an institution or judge independent of either party to determine whether the immigration judge's finding

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[43] *See Boudellaa v. Bosnia & Herzegovina*, Nos. CH/02/8679, CH/02/8689, CH/02/8690 and CH/02/8691, The Human Rights Chamber for Bosnia and Herzegovina ¶¶ 164-69 (Oct. 11, 2002).

[44] *See Dzhurayev v. Russia*, ¶¶ 40-46; *Abdulkhakov v. Russia*, ¶¶ 45-53, 71-77 (citing Russia's Code of Criminal Procedure Article 463 § 4).

[45] *Abdulkhakov v. Russia*, ¶ 73; *see also id.* ¶ 77 (requiring courts to "assess both the general situation in the requesting country and the personal circumstances of the person whose extradition was sought . . . the testimony of the person concerned and that of any witnesses, any assurances given by the requesting country, and information about the country provided by the Ministry of Foreign Affairs, by competent United Nations institutions and by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment." (citation omitted)).

that petitioners face a risk of torture remains true in light of the Rwandan government's assurances. Instead, the Government relies solely on the executive branch—which actively opposed CAT protection for petitioners in the first instance—to review, evaluate, and pass judgment on whether the diplomatic assurances they have negotiated and secured justify revoking deferral of removal.

3. Holistic Assessment of the Risk of Torture

When evaluating diplomatic assurances, either as a basis for removal or as one factor of many to weigh in considering removal, foreign courts generally engage in a multifactor analysis that includes far more context than DHS considered in petitioners' cases. Courts in other states evaluate a variety of considerations, including the likely behavior of the government in question,[46] the overall condition of the receiving nation's human rights record,[47] the function and

[46] *See AS & DD (Libya) v. Sec'y of State*, ¶ 41 (noting that the factual question of "whether there were substantial grounds for believing that the respondents would face the risk of torture" was one for SIAC to determine, and "[i]f that involves a consideration of the hearts and minds of Colonel Qadhafi and members of his regime, so be it"); *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, [2007] 4 F.C.R. 247, ¶ 86 (Can.). The Federal Court's earlier decision remanding on national security risk is *Mahjoub v. Canada (Minister of Citizenship and Immigration*, [2005] 3 F.C.R. 334 (Can. Fed. Ct.). All subsequent *Mahjoub* citations reference the 2007 decision.

[47] *See Mahjoub v. Canada*, ¶¶ 86, 88-94; *Boudellaa v. Bosnia and Herzegovina*, ¶¶ 311-20 (evaluating the record of the United States); *Youssef v. The Home Office*, [2004] EWHC (QB) 1884 ¶¶ 8, 23, 41, 48 (Eng.) (evaluating Egyptian authorities' torture record and credibility of diplomatic assurances).

behavior of law enforcement and security services in the receiving nation,[48] and the ability and willingness of the assuring government to enforce the assurances.[49]

No such holistic review was performed here. DHS merely accepted the assurances as "reliable" without any meaningful analysis of the historic treatment of petitioners or current country conditions.[50] DHS's employment of the sparse regulations governing the use of diplomatic assurances reduced the factors that DHS was legally required to consider, resulting in a far less thorough and holistic analysis than the review provided when other states evaluate diplomatic assurances.

4. Transparent, Fully Explained Reasoning

A common requirement in other states' courts is that a factfinder or reviewing court must provide a written decision setting out its particular reasons for the decision. Indeed, under normal circumstances, U.S. immigration law consistently requires immigration judges to provide clear determinations and

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[48] *Labsi v. Slovakia*, No. 33809/08, Judgment ¶¶ 32-34, Eur. Ct. H.R. (Sept. 24, 2012).

[49] *See Zakaev v. Russia*, ¶ 12 (refusing to rely on assurances by Russian Deputy Minister that Zakaev would be housed in a particular prison facility, even though found to be offered in good faith, given inability to enforce assurance in Russian system); *AS & DD (Libya) v. Sec'y of State*, ¶79 (SIAC determined that monitoring by a foundation run by the head of state's son was not sufficiently independent to effectively ensure implementation of assurances).

[50] DHS-AR 88-106 (Bimenyimana); DHS-AR 107-27 (Karake); DHS-AR 128-46 (Nyaminani).

reasoning when evaluating applications for asylum, withholding of removal, or CAT relief.[51] The Canadian Supreme Court, when evaluating whether an individual may be removed pursuant to its national security laws, requires that an executive officer consider any submissions from the individual, provide written reasons for all decisions, and that those written reasons "articulate and rationally sustain a finding that there are no substantial grounds to believe" the individual will be subjected to torture.[52] This includes evaluating any assurances provided by the receiving government.[53] In the U.K., the Special Immigration Appeals

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[51] *See, e.g.*, *Sobaleva v. Holder*, 760 F.3d 592, 598 (7th Cir. 2014) ("An asylum applicant is entitled to a reasoned analysis of her case supported by relevant, probative evidence."); *Soeung v. Holder*, 677 F.3d 484, 488 (1st Cir. 2012) (noting that when evaluating an application for asylum, withholding of removal, or CAT protection based on an applicant's testimony, "before the failure to produce corroborating evidence can be held against an applicant, there must be explicit findings that (1) it was reasonable to expect the applicant to produce corroboration and (2) the applicant's failure to do so was not adequately explained"); *Tan v. U.S. Atty. Gen.*, 446 F.3d 1369, 1374 (11th Cir. 2006) (quoting *Vergara–Molina v. INS*, 956 F.2d 682, 685 (7th Cir. 1992)) ("The Immigration Judge must 'consider the issues raised and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted.'").

[52] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, ¶¶ 122-23, 126 (Can.); *Mahjoub v. Canada*, ¶¶ 80-82, 88-94 (reviewing court rejected neutral delegate's conclusion as "patently unreasonable" in part because the delegate's statements and conclusions did not logically follow from the evidence); *Lai v. Canada (Minister of Citizenship and Immigration)* (2007), [2008] 2 F.C.R. 3, ¶¶ 142-43 (Can. Fed. Ct.) (reviewing court rejected neutral delegate's conclusion as "patently unreasonable").

[53] "'In evaluating assurances by a foreign government, the Minister may also wish to take into account the human rights record of the government giving the (footnote continued)

Commission issues full written decisions to evaluate risk of torture upon return and the value of assurances, such as the 433-paragraph opinion in *AS & DD*.[54] In Austria, extradition decisions from the Court of Appeal must issue a formal decision that "must be reasoned."[55] In Bosnia and Herzegovina, the Human Rights Chamber issued a 333-paragraph majority opinion accompanied by four dissenting opinions in *Boudellaa*.

The process that the Government employed did not require that its evaluation of the assurances be thorough or made public.

5. Searching Review by an Appellate Court

Many foreign courts provide multiple levels of review of forcible removal decisions (including national security expulsions, extradition requests, and immigration decisions), which include a review of any diplomatic assurances proffered by the receiving state. In Germany, the *Atmaca* case went through asylum proceedings requiring fact-finding by the Darmstadt Administrative Court and appellate review by the Hessian Administrative Court (which rejected the

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assurances, the government's record in complying with its assurances, and the capacity of the government to fulfill the assurances, particularly where there is doubt about the government's ability to control its security forces.'" *Mahjoub v. Canada*, ¶ 86 (quoting *Suresh v. Canada*, ¶ 125).

[54] *See AS & DD (Libya) v. Sec'y of State*, ¶¶ 11-12, 24, 31-33.

[55] *Bilasi-Ashri v. Austria*, No. 3314/02, Decision at 11, Eur. Ct. H.R. (Nov. 26, 2002).

Government's request for appeal), and extradition review by the Frankfurt am Main Court of Appeals.[56] In *Labsi*, the Slovak Supreme Court engaged in a full analysis of inter-governmental bodies' and human rights groups' reports on the use of torture and inhuman treatment, particularly regarding the actions of the Algerian security organization and the use of testimony procured by torture.[57] The Supreme Court rejected extradition,[58] despite two letters from the Algerian Ministry of Justice providing assurances of a fair trial, safety from capital punishment, the existence of criminal punishments for those who perpetrate torture or ill-treatment, and the possibility of private visits to detainees from the International Committee of the Red Cross.[59] Even when a reviewing court exercises a relatively deferential standard, there is close scrutiny of the logic and reasoning of the underlying decision's conclusion, and the decision's treatment of assurances.[60]

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[56] *Atmaca v. Germany*, 2-8. The Darmstadt Administrative Court, in evaluating Atmaca's asylum request, determined that Atmaca qualified for refugee status despite assurances from the Turkish government. *See Atmaca v. Germany*, 6.

[57] *Labsi v. Slovakia*, ¶¶ 29, 31-34.

[58] The Supreme Court actually issued two opinions. Labsi's extradition and asylum proceedings included analysis from the Bratislava Regional Court, the Slovak Supreme Court, and the Slovak Constitutional Court. *See id.* ¶¶ 29-31. Following the remand, the Supreme Court reversed its earlier position. *Id.* ¶ 35.

[59] *Labsi v. Slovakia*, ¶¶ 35, 121-22; *see also Dangerous Deals* 25.

[60] *See Mahjoub v. Canada*, ¶ 97 (ultimately concluding that the delegate's "flawed approach" on evaluating substantial risk of torture, including evaluating the assurances from Egypt, was "patently unreasonable" because the delegate had (footnote continued)

Searching review (with public, reasoned decisions) has many advantages. It ensures accuracy through redundancy, limits risk of human error, and requires that agency reasoning is subject to the careful scrutiny of experienced judges. In the normal course of our immigration system, an immigration judge's decision may be reviewed both by the Board of Immigration Appeals and the federal circuit courts. The role of reviewing courts in the U.S. under the procedures DHS is currently advocating is unclear, and there is little precedent regarding this unique procedural regime. Here, this Court cannot engage in such review because no meaningful record was ever created by any neutral factfinder.

C. Courts Are Competent to Review Diplomatic Assurances

As demonstrated in the preceding section, in many other jurisdictions it is *courts* that have an "obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment."[61] They may do so in different ways and with

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"consistently ignored critical evidence, failed to take important factors into consideration and arbitrarily relied on selected evidence."); *Lai v. Canada*, ¶¶ 142-43 (concluding that delegate's evaluation of diplomatic assurances was "patently unreasonable" because the delegate "fail[ed] to determine whether the assurances met the essential requirements to make them meaningful and reliable"); *AS & DD (Libya) v. Sec'y of State*, ¶¶ 31-85 (engaging in an in-depth review of the evidence presented before SIAC and SIAC's reasoning).

[61] *Othman (Abu Qatada) v. United Kingdom*, No. 8139/09, Judgment ¶ 187, Eur. Ct. H.R. (May 9, 2012).

varying degrees of process,[62] but they all do *something* to ensure that a person subject to forcible removal has the ability to challenge the reliability of diplomatic assurances. By contrast, U.S. courts played no role at all in assessing the reliability or sufficiency of diplomatic assurances here—a stark departure from basic international practice.

Any claim that providing independent review of assurances could hamper the U.S.'s ability to engage in foreign relations is simply not borne out by practice in other countries, such as the U.K.[63] States that proffer assurances to those governments are aware that persons subject to removal will have access to procedures to challenge the assurances. They would likewise understand that to be the case going forward should the U.S. now provide meaningful process to challenge assurances.

II.
CONCLUSION

In courts and independent tribunals around the world, persons subjected to removal to a place where they are at risk of torture in reliance on

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[62] *See id*. at ¶ 189 (laying out an eleven factor test that the European Court of Human Rights uses to evaluate whether diplomatic assurances are sufficiently reliable); *see also BB v. Sec'y of State*, No. SC/39/2005, ¶ 5, Special Immigration App. Ct. (Dec. 5, 2006 Eng.) (enumerating four factor test that the U.K. SIAC uses to assess the reliability of diplomatic assurances).

[63] *See Promises to Keep* at 75-82.

diplomatic assurances are given an opportunity to challenge the reliability and sufficiency of such assurances. The United States stands apart in not providing such an opportunity. *Amici curiae* urge the Court to reject the Government's exclusive reliance on diplomatic assurances that have not been subject to any meaningful testing or process.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because it contains 6920 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface (Times New Roman) using Microsoft Word 2010 in 14-point font.

Dated: March 26, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2015, I electronically filed the foregoing document with the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 26, 2015

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