

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

MANICKAVASAGAM SURESH

Appellant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
THE ATTORNEY GENERAL OF CANADA

Respondents

FACTUM OF THE INTERVENER AMNESTY INTERNATIONAL

PART I: STATEMENT OF FACTS

1. The Intervener Amnesty International ("AI") accepts the Statement of Facts as presented in the factum of the Appellant.

PART II: POSITION OF THE INTERVENER AMNESTY INTERNATIONAL

2. Amnesty International submits that the absolute prohibition on returning a person to a risk of torture constitutes a norm of customary and conventional international law which is binding on Canada.
3. Amnesty International submits that there are substantial grounds for believing that the Appellant would be in danger of being subjected to torture upon his return to Sri Lanka.

PART III: LAW AND ARGUMENT

A. Absolute prohibition on torture is a norm of international customary and conventional law

4. Over the last century there is no practice which has attracted more unqualified universal condemnation than torture. The absolute international legal prohibition on torture has been consistently reaffirmed for more than half a century by the international community. All of the traditional sources of international law provide evidence of this principle, including resolutions of the United Nations General Assembly, international treaties and instruments, decisions of national and international courts, writings of international law scholars and statements by inter-governmental organizations.

Statute of the International Court of Justice, Article 38(1).

5. Moreover, while a number of international instruments contain provisions stating that the exercise of rights may be restricted by states on specific grounds, the international community has recognized that even in emergencies certain rights are so fundamental that they must not be violated. Freedom from torture is one of those rights.
6. Torture is unconditionally prohibited by the four Geneva Conventions of August 12, 1949 protecting the victims of armed conflicts. These conventions are among the most widely ratified treaties in the world. Virtually every state in the world is committed not to engage in acts of torture, either in international armed conflict or, according to Article 3 common to the four Conventions, in armed conflict not of an international character, at any time or at any place.

The Geneva Convention Relative to the Treatment of Prisoners of War, 3 U.S.T. 3316, T.I.A.S. No. 3364, 75 UNTS 135 (1949)

The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 UNTS 31 (1949)

The Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick, Shipwrecked Members of the Armed Forces at Sea, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 UNTS 85 (1949)

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T.S. 3516, T.I.A.S. No. 3365 , 75 UNTS 287 (1949)

7. The absolute prohibition against torture can also be found in Article 5 of the Universal Declaration of Human Rights and in the United Nations Declaration against Torture. While these declarations may not be legally binding as treaty law, their formal condemnation of torture constitutes a powerful statement of customary international law. The Declaration against Torture confirms the absolute nature of the prohibition in its statement that "exceptional circumstances such as a state of war, a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture...". It is significant that the Declaration against Torture was adopted by consensus. These pronouncements are strong evidence of the view that customary international law prohibits torture absolutely.

Universal Declaration of Human Rights, G.A. Res. 3/217 3 UN GAOR Supp. (Resolutions) at 71, UN Doc. A/810 (1948)

Declaration against Torture, G.A. Res. 30/3452, 30 UN GAOR Supp. (No. 34) at 91, UN Doc. A/10034 (1975).

8. Parties to the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the American Convention on Human Rights are bound not to use torture, even in time of grave national emergency.

International Covenant on Civil and Political Rights [ICCPR], December 16, 1966, G.A. Res. 2200A (XXI) 21 UN GAOR, Supp. (No. 16) at 52, UN Doc. A/6316 (1966), entered into force Mar. 23, 1976 [I.C.C.P.R.], Article 4.

[European] Convention for the Protection of Human Rights and Fundamental

Freedoms, 213 UNTS 221 (1950), entered into force Sep. 3, 1953 [European Convention], Article 15.

American Convention on Human Rights, signed Nov. 22, 1969, OAS Doc. OEA/Ser. L/V/ II 65, doc. 6, at 29 (1985) entered into force July 18, 1978 [American Convention], Article 27.

9. The prohibition on torture is also recognized in the African Charter on Human and People's Rights and in the Universal Islamic Declaration of Human Rights.

African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/ 67/ 3 rev 5, 21 I.L.M. 58 (1982) entered into force Oct. 21, 1981, Art. 5

Universal Islamic Declaration of Human Rights, Sept. 19, 1981 (1981) the Muslim World League Journal 27.

10. International courts and tribunals have recognized that the absolute prohibition of torture is one of the rare obligations *erga omnes* which all states have a legal interest in ensuring is implemented.

Case Concerning the Barcelona Traction, Light and Power, Ltd. (Belgium versus Spain) 1970 I.C.J. 3, para. 33-34.

Case concerning the United States Diplomatic and Consular Staff in Tehran (U.S.A. versus Iran) 1979 I.C.J. 7

Prosecutor v. Furundziji (December 10, 1998) Case No. IT-95-17/1-T 10, pp. 28, 29, 31, at para. 153: "Because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules".

11. The global community's exceptional efforts toward ending torture has led to its recognition as a crime against humanity under international customary law, imposing a duty on states to try or extradite persons found responsible. This prohibition also represents one of the rare norms which pierce the concept of sovereign immunity.

Article VI (c) of the International Law Commission's Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (1950)

Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press 5th ed.

1998) p. 515.

R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet
[1999] 2 A11 E. R. 97 (H.L.)

12. Decades of setting standards against torture culminated in the adoption of the Convention against Torture or Other Cruel, Inhumane or Degrading Treatment or Punishment [CAT] by the United Nations General Assembly on December 10, 1984. In the resolution by which the General Assembly adopted the Convention it referred to "*the existing prohibition* under international and national law of the practice of torture..." [Emphasis added]. The Convention codified existing prohibitions on torture, but also broke new ground by establishing the Committee against Torture, an expert body created to monitor its implementation. The establishment of a mechanism designed to react adequately to violations of the CAT is powerful evidence that its provisions represent peremptory norms of international law.

Convention against Torture or Other Cruel, Inhumane or Degrading Treatment or Punishment, entered into force 26 June, 1987, GA/res. 39/46, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984) [CAT].

13. The UN Secretary General made it clear that the prohibition on torture is a norm of customary international law in his report to the Security Council on the establishment of the International Criminal Tribunal for the former Yugoslavia, which has jurisdiction over torture. He stated, "*the international tribunal should apply [those] rules of international humanitarian law which are beyond any doubt part of customary law*". [Emphasis added]. Torture was among the acts prohibited by customary international law within the tribunal's jurisdiction.

Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, May 3, 1993, para. 34, 40, 49.

14. It is also the generally accepted view among international law

scholars that the prohibition of torture has developed into a rule of customary international law applying even to states which are not parties to any conventions prohibiting its use.

Sir Robert Jennings and Sir Arthur Watts, ed's., *Oppenheim's International Law*, 9th ed., Essex: Longman House, 1992. pp. 999-1000.

Malcolm Shaw, *International Law*, 4th edition, Cambridge University Press, page 204

Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture: A Handbook on The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (1988); Martinus Nijhoff Publishers, p.12.

Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*. Helsinki: Finnish Lawyers' Publishing Co., 1998. pp. 504-509.

15. The fact that torture exists does not detract from the strength of its prohibition under international law. No state has ever legalized torture or admitted to its deliberate practice. Governments accused of practicing torture regularly reject their guilt, denying the existence of torture or placing responsibility on individual state agents or groups outside the government's control. These attitudes are further evidence of a universal general acceptance of the absolute prohibition on torture.

The reason for the prohibition under customary international law.

16. Torture does not simply offend the rule of law; it represents the antithesis of it. Torture offends the notion of just punishment which is based on a fixed term of imprisonment for a specific offence, replacing this legal maxim with a perverse philosophy that permits the arbitrary punishment and suffering of many innocent individuals. The duration of torture is completely open ended and often has nothing to do with a specific offence.

**First Amnesty Report (1973), p.25
Second Amnesty Report, 7-8**

B. Prohibition on return to a risk of torture is part of the international law prohibition on torture

17. The extent of the international commitment to end torture can be seen in the interpretation of treaties which prohibit its use. The prohibitions of torture in the ICCPR and the European Convention on Human Rights have been found to include a prohibition on the return to a risk of torture or cruel, inhuman or degrading treatment or punishment, even though the treaties do not explicitly mention expulsion, extradition or *refoulement*.

United Nations Human Rights Committee, General Comment No. 20, 10/04/92.

***Cox v. Canada*, Comm No. 539/1993, UN Doc. CCPR/C/52/D/539/1993 at para. 16.1: "If a State party to the Covenant takes a decision relating to a person within its jurisdiction and the necessary and foreseeable consequence is that the person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant".**

***P. v. Belgium*, Application No. 984/61 (1963).**

***X. v. Federal Republic of Germany*, Application No. 1802/62 (1963).**

***Altun v. Germany* (1983) 5 EHRR 611**

***Soering v. U.K.*, Application No. 1/1989/161/217, 7 July 1989, p. 35, para. 90-91.**

***Cruz Varas v. Sweden*, Application No. 46/1990/237/307, 20 March 1991, p. 28, para. 69-70.**

***D. v. U.K.*, Application No. 146/1996/767/964, 21 April 1997, para. 47.**

18. Furthermore, the right to be protected from return to a risk of torture has been interpreted under the European Convention as being absolute irrespective of a person's conduct. In *Chahal v. United Kingdom* the European Court of Human Rights specifically determined that concerns about state safety and security cannot override the duty to protect a person from return to torture:

Article 3 [of the European Convention] enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct... The prohibition provided in article 3 against ill treatment is equally absolute in expulsion cases... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot

be a material consideration. The protection afforded by Article 3 is thus wider than that provided by articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.

Chahal v. United Kingdom, Application No. 70/1995/576/662, November 15, 1996.
Ahmed v. Austria, Application No.71/1995/577/663, 17 December 1996, para. 39.

19. Article 3 of the Convention against Torture was a codification of the case law on this issue. The prohibitions contained in the articles of the Convention against Torture are descriptive as well as constitutive; they both reflect and establish international norms to prevent torture. The Convention's drafters recognized that its principal aim was not to outlaw torture; the practices prohibited in the Convention were already outlawed under international law. The principal aim of the Convention was to strengthen the existing prohibition of such practices by a number of supportive measures.

Burgers and Danelius, *supra*, page 1, 35.

20. To date the CAT has been ratified by 122 countries. An additional 11 countries have signed the CAT, indicating their intention to be bound by its terms. As a quasi-universal multilateral treaty indicative of state practice the CAT is part of the *jus cogens* regarding torture. Because rules of *jus cogens* can only be modified by new peremptory norms, there can be no derogation by national law or treaty. A rule of *jus cogens* is an overriding rule depriving any act or situation which is in conflict with it of legality.

Office of the United Nations High Commissioner for Human Rights, *Status of Ratification of the Principal International Human Rights Treaties.*

International Law Commission Report 1966, UN Doc. A/6309/Rev. 1, p. 89.
Vienna Convention on the Law of Treaties, Articles 18(a), 53

21. In proceedings pursuant to Article 3 of the CAT, State parties have opposed complaints based on a range of factors concerning the complainants' personal circumstances – from their involvement in violent secessionist movements to their general lack of

credibility. The Committee against Torture has ruled in a number of authoritative decisions that as long as an objectively identifiable risk is present, the prohibition under Article 3 prohibits return to that risk.

***Tala v. Sweden*, Comm. No. 43/1996 (UN Doc. CAT/C/17/D/43/1996)**
***Kisoki v. Sweden*, Comm. No. 41/1996 (UN Doc. CAT/C/16/D/41/1996)**
***Allen v. Switzerland*, Comm. No. 21/1995 (UN Doc. CAT/C/167/D/21/1995)**
***Khan v. Canada*, Comm. No. 15/1994 (UN Doc. CAT/C/13/D/15/1994)**
***Mutombo v. Switzerland*, Comm. No. 13/1993 (UN Doc. CAT/C/12/D/13/1993)**

22. The Committee against Torture required Sweden to protect against the return of a Shining Path member to a risk of torture in Peru, stating:

"The test of Article 3 of the Convention [against Torture] is absolute... the nature of the activities in which the person engaged cannot be a material consideration when making a determination under Article 3 of the Convention".

***Tapia Paez v. Sweden*, Comm.No. 39/1996 (UN Doc. CAT/C/17/D/39/1996) at para. 14.5.**

23. In prohibiting Switzerland from removing a member of the People's Mojahedin, the Committee against Torture stated:

The Committee is not convinced by the State party's explanations insofar as they refer to Mr. Aemei's activities in Switzerland. It would recall that the protection afforded by Article 3 is absolute. Whenever there are substantial grounds for believing that a particular person would be in danger of being subjected to torture if he was expelled to another State, the State party is required not to return that person to that State. The nature of activities in which the person engaged is not a relevant consideration in the taking of a decision in accordance with Article 3 of the Convention.

***Aemei v. Switzerland*, Comm. No. 34/1995 (UN Doc. CAT/C/18/D/34/1995)**

24. In submissions before the Committee against Torture, Canada has accepted the Committee's jurisprudence regarding the absolute nature of Article 3, irrespective of the complaints post conduct.

***T.P.S. v. Canada*, Comm. No. 99/1997, (UN Doc. CAT/C/24/D/99/1997) 4 September, 2000.**

25. Despite its recognition of the jurisprudence on this issue, the Canadian government continues to take the position that returning a person to torture is permissible. In its recent general comments on Canada's third periodic report, the Committee Against Torture expressed concern about the Canadian government's view that a person may be returned to a risk of torture if the person is considered to be a security risk. Similar concerns had been expressed previously by the Human Rights Committee regarding Canada's obligations under the ICCPR.

Conclusions and Recommendations of the Committee Against Torture: Canada. UN Doc. CAT/C/XXV/Concl. 4, 22 November 2000.

Concluding Observations of the Human Rights Committee: Canada. 07/04/99. CCPR/C/79/Add.105

26. Canada's position on the CAT's Article 3 can be contrasted with that of the United States, which in October 1998 incorporated the CAT's Article 3 into legislation. Regulations made pursuant to the law prohibit removal to torture regardless of an individual's criminality or threat to security.

Code of Federal Regulations, Title 8, Volume 1, Chapter 1, 8 CFR 208.16

27. Regarding the interpretation of the CAT, AI supports the submissions of the intervener Canadian Bar Association.

Factum of the Intervener Canadian Bar Association.

28. In the present case the Federal Court of Appeal stated that there is no "express principle of non-derogation" in the CAT regarding the return to a risk of torture. AI submits that no such express principle is necessary. There is

no general rule allowing a state to derogate from its obligations under human rights treaties. On the contrary, states are expressly forbidden from derogating from human rights treaties, unless the treaty itself expressly provides for it.

Vienna Convention on the Law of Treaties, Article 60(5).

Reasons of the Federal Court of Appeal, Appellant's Record, Vol. III, pp. 449-50.

29. The Federal Court of Appeal determined that CAT's Article 16(2) allowed for derogation from Article 3 through other international treaties or national laws. AI submits that the entirety of Article 16 is concerned with expanding the protections against cruel, inhuman or degrading treatment or punishment, not narrowing the protection against torture. In the words of the Convention's drafters:

In paragraph [16]2, it is made clear that a wider protection in international instruments or national law shall not be affected by the limited protection which the *Convention* gives against other cruel, inhuman or degrading treatment or punishment. A similar clarification is included with regard to international instruments or national law relating to extradition or expulsion. Consequently, insofar as it might be possible to derive from other international or national legal instruments a prohibition against extradition or expulsion to a country where the extradited or expelled person might be exposed to cruel, inhuman or degrading treatment or punishment falling short of torture, the fact that Article 3 of the present *Convention* only deals with torture should not be interpreted as limiting the prohibition against extradition or expulsion which follows from such other instruments.

Burgers and Danelius, supra, p. 150.

30. This interpretation of Article 16 (2) is consistent with the fact that the ICCPR and the European Convention, which were drafted before the CAT, prohibited in absolute terms the return to cruel, inhuman or degrading treatment or punishment. Article 16(2) was designed to preserve this wider protection.

Paras 17, 18, *infra*.

31. The CAT should not be read to permit States to send people to treatment which States are absolutely prohibited from committing within their jurisdiction. The international community has rejected any division between the unacceptability of torture domestically versus its tolerance abroad. This is clearly demonstrated by the widely accepted concept of universal jurisdiction which mandates prosecution for torture wherever it takes place.

R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet, supra.

32. Creating an exception to the CAT's Article 3 would give citizens greater protection from torture than non-citizens. This double standard is not supportable under international law. As stated by the Human Rights Committee in *General Comment 15: The Position of Aliens under the Covenant*: "The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens".

Human Rights Committee, "General Comment 15: The Position of Aliens under the Covenant", UN Doc. HRI/GEN/1/Rev. 1(1994).

33. Importing any exception to the right to be free from torture contradicts the evolution of the international prohibition on torture, the universal understanding of the absolute nature of the prohibition, the intention of the CAT's drafters, and the plain meaning of the CAT's provisions. All of these factors indicate that the CAT should be given an interpretation that provides the greatest, rather than the least, protection from torture.
34. Regarding the Convention Relating to the Status of Refugees [Refugee Convention] and the CAT, AI submits that the two instruments are fully consistent and compatible because they deal with different subjects. The Refugee Convention protects people who risk a wide range of sanctions ("persecution") for very specific reasons (race, religion, nationality, political

opinion, membership in a particular social group). By contrast the CAT protects anyone from one specific form of treatment: torture. In the *travaux* on the development of the CAT, there was discussion on the use of the word return ("refouler") which was also found in the Refugee Convention. The view was expressed that the Refugee Convention "concerned a different subject". Moreover, Article 33(1) of the Refugee Convention, which is subject to substantial limitations, served as a model for the CAT's Article 3 which has no limitations. This suggests that the CAT's drafters made a deliberate decision not to adopt the Refugee Convention's exceptions to *refoulement*. Therefore the Refugee Convention does not affect the international prohibition on returning a person to torture.

Burgers and Danelius, supra, p. 50, 125.

David Weissbrodt and Isabel Hortreiter, "The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of other Human Rights Treaties", 5 Buffalo Human Rights Law Review 1 (1998), pp. 16, 50

UN Doc. E/CN.4/WG.1/WP.1.

35. In assessing the CAT and the Refugee Convention, AI submits that it is critical to consider the evolutionary nature of international law, which has been described as a "dynamic process" of evolving ideas and principles. In this regard, AI considers it significant that the CAT was adopted in 1984, long after the 1951 Refugee Convention. To the extent that an individual falls within Article 33 of the Refugee Convention and Article 3 of the CAT, AI submits that the right to be free from torture is controlling and the person concerned should not be returned to a recognized risk of torture.

***Puspanathan v. Canada (M.C.I.)* [1998] 1 S.C.R. 982 at 1059 per Cory J.**

***Trendtex Trading Corp. Ltd. v. Central Bank of Nigeria* [1977] 1 All E.R. 881.**

C. The Absolute International Prohibition on Returning a Person to Torture is binding on

Canada

36. AI supports the Appellant's submissions regarding the use of international law in interpreting the *Charter*. However, as stated above, the absolute prohibition on returning a person to torture is binding under the customary international law doctrines of *erga omnes* and *jus cogens*. AI submits that such principles of international law are binding notwithstanding the *Charter* or the lack of domestic implementing legislation.

37. The principle that customary international law is incorporated into common law is supported by a long line of authority in Commonwealth nations, including Canada. Customary law is "the law of the land", subject to the right of the legislature to override it.

Ian Brownlie, *Principles of Public International Law*, supra., pp. 42-47.

***Trendtex Trading Corp. Ltd. v. Central Bank of Nigeria*, supra. at p. 890.**

R. St. J. Macdonald, "The Relationship Between International Law and Domestic Law in Canada", in R. St. J. Macdonald, G. L. Morris, D. J. Johnston, eds., *Canadian*

***Perspectives on International Law and Organization*, Toronto: University of Toronto Press, 1974 p. 88 at 111.**

William Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada", *Canadian Bar Review*, v. 79, no. 2 July 2000, p. 174 at 182.

38. As a codification of the recognized prohibition on torture in customary international law, the CAT's provisions are binding on Canada. The fact that its provisions have not been duplicated in Canadian legislation is not an answer to its breach.

Ian Brownlie, *Principles of International Law*, supra., pp. 34-36.

39. This can be seen clearly from its provisions. The language used

in the CAT's provisions clearly suggests that it is not among those treaties that simply articulate aspirations rather than impose specific and binding obligations. In particular, the language of Article 3 of the Convention clearly imposes a specific obligation on signatories, stating emphatically that a party shall not return an individual to a risk of torture. Such strict language suggests that this prohibition was designed to have the force of law upon a country's accession to the treaty.

40. Moreover, unlike other provisions in the CAT, Article 3 does not call for domestic implementing legislation (*cf.* Article 4, requiring States to "ensure that all acts of torture are offences under criminal law"). The straightforward prohibition in Article 3 reflects the fact that the provision was designed to be enforceable without the need for duplication in a nation's laws.

41. Finally, the nature of the obligation under Article 3 of the CAT is such that it is not dependent upon implementing legislation for execution. Article 3 constitutes a prohibition from acting; unlike a positive obligation to act, this prohibition requires no domestic procedures. Article 3 establishes a right, describes a legal standard to be met in order to trigger that right ("substantial grounds"), and directs an outcome - *non-refoulement* - to enforce the right. It leaves no gaps to be filled by domestic laws. Prior to ratifying the CAT, amendments were made to the Criminal Code in order to ensure Canada's adherence to its provisions concerning the punishment of persons responsible for torture. No similar amendments were made incorporating Article 3, it is submitted, in recognition of its binding nature. As stated in the House of Commons at that time:

By adding the name of our nation to that list, we will make it possible to *bind the signatory nations together* in a solemn covenant to work together to obliterate torture throughout the world." [Emphasis added].

Thus by ratifying the CAT without reservations and by further submitting to the jurisdiction of the Committee against torture pursuant to Article 22, Canada consented to being bound by

its terms.

House of Commons Debates, Volume IV, p. 4603, March 26, 1987

42. Section 53(1) of the Immigration Act does not affect the prohibition on return to torture under international law. As recognized by the Respondents and the Federal Court of Appeal, s. 53(1) is a replication of Article 33 of the Refugee Convention. Because there is no conflict between Article 33 of the Refugee Convention and Article 3 of the CAT, there is therefore no conflict between s. 53(1) and Article 3 of the CAT. The overriding prohibition on returning a person to torture under international law is controlling.

Respondent's factum, p. 16, para. 31.

Reasons of the Federal Court of Appeal, Appellant's Record, p. 452.

43. In this regard, this Court has recognized the importance of interpreting legislation in a manner which respects international law "as far as possible". International law recognizes the distinction between the *refoulement* of a Convention refugee deemed to be a security threat and the absolute prohibition on the return of a person to a recognized risk of torture. Section 53(1) should be interpreted with this recognized distinction in mind.

***Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817.**

44. In *Baker*, this Court determined that a Minister's statutory discretion must be exercised in a manner consistent with Canada's international human rights obligations. In *Burns and Rafay*, the Court did not find sufficient evidence of an international law norm against the death penalty, and resort was made to the *Charter* to prohibit the removal of persons to a risk of the death penalty. In the present case, however, it is submitted that there is no clearer international norm than that prohibiting torture, including the absolute prohibition on *refoulement* to torture. AI submits that this prohibition is binding regardless of the *Charter's* application.

Burns and Rafay.

D. The "Substantial Grounds" test and the nature of the risk to Suresh

45. AI submits that the following factors should be considered in establishing the standard pursuant to Article 3:

- a) the plain words of Article 3 do not require substantial grounds to believe a person *would be tortured* if returned but rather substantial grounds to believe she *would be in danger* of being tortured. Therefore the test is met when a *danger* of torture is recognized;
- b) the *travaux* reveal the intention that Article 3's evidentiary requirement "not be too rigorous" and that the burden not fall solely on the person concerned;
- c) the test is prospective and therefore there is no requirement to establish past experience of torture;
- d) in its jurisprudence, the Committee against Torture has been generous in disregarding inconsistencies and contradictions of complainants, acknowledging not only the unique experience of torture victims but also the objective aspect of the test;
- e) Article 3 was designed to offer proactive protection against one of the most severe forms of persecution.

AI submits that these factors militate toward a lower threshold than the "balance of probabilities" threshold suggested by the Federal Court of Appeal.

Weissbrodt and Hortreiter, *supra*, pp. 13-16

Burgers and Danelius, *supra*, pp. 50-51

UN Doc. E/CN.4/WG.1/WP.2

Reasons of the Federal Court of Appeal, Appellant's Record, Vol. III, pp. 506.

46. The torture of people suspected of being members or sympathizers of the Liberation Tigers of Tamil Eelam (L.T.T.E.) has been widespread in Sri Lanka for many years. Factors contributing to its occurrence include impunity for perpetrators, the lack of effective legal safeguards, and the lack of accountability of armed groups affiliated with the security forces. Given the repeatedly published allegations of the Appellant's association with the L.T.T.E.,

AI believes that there are substantial grounds to believe he would be in danger of torture upon return to Sri Lanka.

Record, Vol. II, pp. 241-2, 279, 290

47. AI supports the Federal Court of Appeal's finding that assurances against the use of torture must be approached with caution. Assurances against torture are assurances against a practice that is rarely, if ever, admitted by states. In this context, such assurances must be assessed for reliability, such as the willingness and capacity of the source providing the assurances, and the effectiveness of previous attempts to prevent torture.

Reasons of the Federal Court of Appeal, Appellant's Record, Vol. III, pp. 507-8.

48. As noted by the Federal Court of Appeal the Appellant is not being returned to Sri Lanka pursuant to a bilateral treaty, therefore there is no mechanism for monitoring compliance or avenue of redress in the event of non-compliance with assurances that torture will not occur. Even if such a mechanism existed, torture commonly occurs in clandestine circumstances, substantially reducing the effectiveness of any ability to monitor its occurrence.

Reasons of Federal Court of Appeal, supra.

Conclusion

49. Under international law the protection from being returned to torture is absolute and binding. AI respects the interests of states to take measures in the interest of security. However sending someone to a recognized risk of torture in order to preserve Canada's security is a case of the means corrupting the end. Deliberately exposing a person to torture weakens the historical and universal condemnation of torture and perpetuates escalating cycles of human rights abuses. AI submits that security can only be achieved through the strengthening rather than the

erosion of human rights. In the words of former Foreign Minister Lloyd Axworthy,

[S]tates that respect human rights and the rule of law are less likely to go to war with one another, unleash waves of refugees, create environmental catastrophes, engage in terrorism, or break their commercial commitments. Global stability and peace are intimately linked with respect for international human rights.

"Notes for an address by the Honourable Lloyd Axworthy Minister of Foreign Affairs to the United Nations Commission on Human Rights", Geneva, Switzerland, March 30, 1998.

PART VI: ORDER SOUGHT

50. The Intervener requests that this appeal be allowed, preventing the removal of the Appellant to Sri Lanka.

51. In the alternative, should the appeal be dismissed, the Intervener requests an order staying the Appellant's removal pending a determination of any petition made by the Appellant to the United Nations Committee against Torture established under the Convention against Torture.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

Dated:

Michael F. Battista

Michael Bossin

Solicitors for the
intervener Amnesty International

PART V: TABLE OF AUTHORITIES

Statutes

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