

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
SHERIF EL-MASHAD, <i>et al.</i>,)	
)	
Petitioners,)	
)	CASE NO. 05-CV-270
v.)	
)	
GEORGE W. BUSH, <i>et al.</i>,)	
)	
Respondents.)	
_____)	

PETITIONER’S SUPPLEMENTAL MEMORANDUM
OPPOSING HIS RENDITION

Petitioner Ala Abdel Maqsud Muhammad Salim (hereinafter “Ala”), by counsel, submits this supplemental memorandum opposing his rendition back to Egypt, a country he fled on account of being tortured government officials.

The relief Ala seeks is different from the relief sought by petitioners in *Qassim v. Bush*, Civ. No. 05-0497 (D.D.C. 2005) in their Motion to Vacate Stay Order and Issue Writ Directing Immediate Release of Petitioners. Ala is not seeking a live hearing in this Court, nor is he seeking an immediate release into the general population at Guantanamo Bay.

Petitioner Ala simply asks that the Court extend the Temporary Restraining Order in place or alternatively, grant his Motion for Preliminary Injunction enjoining Respondents from rendering him out of Guantanamo Bay into Egypt until counsel for Petitioner and

Respondents have been able to arrange for Ala's release into a country where he will not be tortured. This Court should also order Respondents to represent to this Court their efforts to locate a safe, third country for Ala's release.

PROCEDURAL BACKGROUND

On March 27, 2005, Petitioner Ala filed a Motion for Preliminary Injunction, along with his Writ of Habeas Corpus, in which he asked the Court to enjoin Respondents from rendering him to the Egyptian government, or any other government, while his habeas petition was pending. This case, styled *Alladeen v. Bush*, Civ. No. 05-833, was originally assigned to Judge Robertson, later reassigned to Judge Huvelle, and subsequently reassigned back to Judge Robertson.

On or about September 14, 2005, Respondents telephoned counsel for Petitioner and informed her that Petitioner Ala's "enemy combatant" status had been reclassified to "no longer an enemy combatant" ("NLEC").

On October 13, 2005, Petitioner Ala filed a Motion for a Temporary Restraining Order to enjoin Respondents from rendering or otherwise transferring him out of Guantanamo Bay until the Court ruled on his pending Motion for Preliminary Injunction.

On October 27, 2005, the Court granted Petitioner's Motion for a Temporary Restraining Order, enjoining and restraining Respondents from removing Petitioner until the Court had heard and decided

Petitioner's Motion for Preliminary Injunction. Order, *Alladeen v. Bush*, Civ. No. 05-833 (D.D.C. 2005) entered on October 27, 2005.

On December 7, 2005, the Court entered an Order consolidating *Alladeen v. Bush*, Civ. No. 05-833 with *el-Mashad v. Bush*, Civ. No. 05-270. This Order administratively closed the former case and ordered that all documents be filed only in the latter case.

FACTUAL BACKGROUND

In November 2005, Petitioner Ala first met with his counsel, Carol Elder Bruce and David Dickman, at Guantanamo Bay. The following facts ascertained by counsel during this visit are included to assist the Court's understanding of Ala's situation.

Now the age of 38, Ala has celebrated four birthdays at Guantanamo Bay.

Ala was born on January 13, 1967 in Bayul Monofia, Egypt. He has five brothers and three sisters. Ever since he was fourteen years old, Ala has required eyeglasses and has had problems with his hearing.

In Egypt, Ala lived as a strict Muslim. He gave lectures on Islam in Egypt. However, Ala never joined any Muslim or religious organization.

In 1986, during Egyptian House of Parliament elections, the Egyptian government arbitrarily arrested Ala under the 1981 emergency laws in effect at that time. The Egyptian government was arbitrarily arresting any person who they happened to find in the same area as members of the Muslim Brotherhood. These arbitrary arrests were part

of a government attempt to restrict the voting rights of the Muslim Brotherhood and other religious organizations during the election period. The Egyptian government did not charge Ala with any crime. After two weeks of arbitrary imprisonment, and without providing a court with any evidence that Ala committed a crime, the Egyptian government released Ala.

In 1987, Ala was again a victim of mass arbitrary arrests by the Egyptian government. There had been an assault on a member of the Egyptian government in 1987 and the Egyptian police arrested thousands of people in connection with the assault. Ala was one of thousands arrested and charged with attempting to revive an extremist Islamist organization. During his imprisonment, the Egyptian government tortured Ala. After seven months of imprisonment, a court order found him innocent and he was, once again, released from an Egyptian jail as an innocent man who was wrongfully imprisoned.

In 1998, Ala was jailed again by the Egyptian government. The Egyptian government provided him with no reason for the arrest, brought no charges against him, but nonetheless threw him into jail. After several days of arbitrary imprisonment, the Egyptian government once again released Ala as an innocent man who was wrongfully imprisoned.

Each time the Egyptian government arrested Ala, government officials would pay a visit to his home. During each visit, the officials would trash his home and terrorize his family. Ala was devastated to see

his family also victimized by the Egyptian government. Seeing no other option to safeguard his and his family's physical safety, Ala left his home country at the age of twenty two.

Ala arrived in Saudi Arabia in 1989. He lived in Saudi Arabia for three months. Since he did not have a visa, Saudi officials informed him that he needed to leave the country or risk repatriation back to Egypt. Fearful of the risk that Egyptian officials would subject him to further political persecution and torture, Ala decided to go to Pakistan.

From 1989 to 1991, Ala worked for the Islamic Relief Organization in Peshawar, Pakistan. He worked in a warehouse distributing dates, blankets, margarine, and flour to the Afghani people. By 1991, several Afghani political parties began creating dissent in Peshawar. Disinterested in political activities, Ala left Peshawar the same year.

For the next six years, Ala studied Koranic text at Imdad Al Alum, and Islamic university in Pakistan. After his time at Imdad Al Alum, Ala enrolled in Ahl Alhadith University in Sadiqabad, Pakistan to continue his Islamic studies.

In early 2002, Ala learned that Pakistani authorities were arbitrarily arresting and detaining Arabs living in Pakistan. He was advised by a friend to go to Lahore, Pakistan and stay at the house of a Pakistani man named Wasim. Fearful for his safety, Ala went to Lahore to stay with Wasim. In March 2002, Pakistani police broke into Wasim's house and arrested Ala and five other men. Pakistani police handcuffed

Ala, put goggles over his eyes, and took him to a police station. The police forced Ala to wear these goggles for the entire day. Ala recalls vomiting during this ordeal.

At the police station, the Pakistani authorities interrogated Ala about his activities in Pakistan. Ala had a passport when he came to Pakistan, but he had since lost it. After they interrogated him, the Pakistani police placed Ala into solitary confinement and kept him imprisoned for two months. Ala spent the next eight weeks in a cell that was six feet by four feet. Pakistani authorities fed him split peas and bread twice a day, once in the morning and once in the evening. During his solitary imprisonment, Pakistani police would beat Ala. While in jail, Ala recalls seeing American officials in civilian clothing conferring with Pakistani authorities.

After two months of solitary confinement in Lahore, Pakistan, Pakistani authorities transferred Ala to another jail, located in Islamabad, Pakistan. He was kept imprisoned in Islamabad for one day.

The next day, Pakistani authorities took Ala to Bagram, Afghanistan and handed him over into the custody of United States officials. While imprisoned at Bagram, United States officials confiscated Ala's eyeglasses. Ala asked for his eyeglasses repeatedly, because he could not see without them, but United States officials refused to give Ala his eyeglasses back. The United States kept Ala imprisoned in Bagram, Afghanistan for four months.

In August 2002, the United States transferred Ala to Guantanamo Bay, Cuba.

While incarcerated in Guantanamo, Ala repeatedly begged Respondents for his eyeglasses. About two years ago, Ala began a personal hunger strike in an effort to get his eyeglasses back. After ten days of this strike, an Egyptian delegation came to interview Ala. At this time, Ala was too weak to walk. Respondents had to bring him into the interrogation room for the interview on a stretcher. As soon as Ala was brought into the interrogation room, Respondents put goggles over Ala's eyes to prevent him from seeing anything. Because he was so weak, Ala asked if he could lay on the floor. Instead, Respondents shackled him to a chair.

Ala heard a man's voice speaking in Arabic and thought Respondents had brought in an interpreter to try and convince him to end his hunger strike. But the man speaking in Arabic said that he had come from Egypt to speak with Ala, at which point Ala responded that he would not speak with anyone until he got his eyeglasses.

His response made the Egyptian delegation angry. The Egyptians began cursing and yelling at him and said, "Listen, darling, you think you are a big shot, a royal priest, **but you will eventually come back to Egypt and then we will get you.**"

The Egyptians also blew smoke in Ala's face. Ala was so weak, he fell off the chair and onto the floor. The Egyptians forcibly picked him up

and put him back in the chair. Ala fell to the floor again and the man who had initially spoke said, "If you die now, you are an infidel, a two-faced infidel."

The Egyptians left Ala on the floor with the air conditioning set at the maximum setting for about three hours. Then the Egyptian delegation came back and the members said "Who do you think you are? **We will take you somewhere and they will never see you again. Wait until you make it back to Egypt, we will take care of you.**"

Respondents then took Ala back into the general population of other Guantanamo Bay detainees, but shortly after getting there, he fainted. He was then taken to the hospital and was given oxygen and intravenous fluids. When he left the hospital later that day, Respondents once again took him back to the interrogation room. Respondents covered Ala's eyes with goggles and placed him onto a small metal chair with no arm supports. Respondents then wrapped shackles around Ala's body and the chair, and then chained the shackles to the ground.

The Egyptian delegation came back into the interrogation room and told Ala that they had to talk. Ala was still dizzy, so he said he would talk, but only if they let him lay on the floor. He tried to sink to the floor, but could not because of the shackles. Respondents came into the interrogation room and undid the shackles. Ala lay on the floor with chains on his feet and hands.

The Egyptians asked Ala his story. Ala told them about leaving Egypt and going to Pakistan, and his activities in Pakistan. Then one of the Egyptians told him that **“If you come back to Egypt, we’ll get you.”** They said they had a case against him from 1987 and that he had been sentenced in absentia. Ala told them that he had been declared innocent and released. Ala said that after he had been released, he used his passport to leave Egypt and had gone through a regular port. One Egyptian told Ala that he had been sentenced. He asked Ala if he wanted him to appeal the sentence on his behalf. Ala said no, that if he had to go back, he would appeal the sentence himself. This ended the interrogation.

Respondents then sent Ala back into the general population of other Guantanamo Bay detainees. Ala remained on the hunger strike to get his eyeglasses for approximately five more days. During that time, he was interrogated two more times. He was beaten, and when he would faint from the abuse, they would place iodine under his nose to wake him, but would not remove the iodine when he did waken. Respondents took Ala to a clinic and placed plastic restraints around his neck and on either side of his head. Ala could not breathe because the restraints were too tight. Finally, he could not take it anymore and he ended the strike.

In July or August, 2005, Ala was finally given a new pair of eyeglasses, but they made his vision worse. He still has not received

correct eyeglasses, and therefore, he can not read the Koran or other materials. Additionally, because of his bad hearing, he can not use the telephone by himself; another person must listen on the receiver and then relay the information to him.

Although Respondents have kept Ala incarcerated at Guantanamo Bay since August 2002, they only conducted a Combat Status Review Tribunal (“CSRT”) proceeding to determine his status in January 2005. After this CSRT proceeding, Respondents concluded that Ala was not an enemy combatant, and euphemistically labeled him “no longer an enemy combatant” (“NLEC”).

Respondents made no attempt to release Ala after they determined that he was not an enemy combatant.

Ala has not been to Egypt in over 18 years. He has no family connections left in Egypt. In 1992, Ala’s father told Ala to cease contact with his family because his father was so afraid of the Egyptian government. Ala has not spoken with his family since his father’s instructions. He has sent his family several letters while at Guantanamo, but he has not received a reply. He knows his father just wants to raise his siblings in peace, and is scared of what will happen to the family if Ala ever returns to Egypt or even contacts them.

ARGUMENT

Petitioner Ala asks this court to extend the Temporary Restraining Order in place or alternatively, grant his Motion for Preliminary

Injunction enjoining Respondents from rendering him out of Guantanamo Bay and into the hands of authorities who have pledged to arrange for his disappearance. The Court should continue an injunction until counsel for Petitioners and Respondents have been able to arrange for Ala's release into a country different from one that he fled *specifically* on account of being tortured. This Court should also order Respondents to represent to this Court their efforts to locate a safe, third country for Petitioner's release.

Petitioner's Motion for a Preliminary Injunction and the Memorandum in Opposition to Respondent's Motion for a Partial Modification of the Stay Order filed on behalf of Petitioner Adel Fattouh Aly Ahmed Algazzar in *el-Mashad v. Bush*, Civil No. 05-270 (D.D.C. 2005) on November 3, 2005 sets forth Egypt's abysmal human rights record and documents the routine practice of torture committed by Egyptian officials in prisons and detention centers. Petitioner incorporates all such facts pertaining to the human rights record of Egypt herein.

I. THE COURT HAS JURISDICTION TO PREVENT PETITIONER'S RENDITION TO EGYPT.

A. Ala has Alleged Cognizable Claims under 28 U.S.C. §2241, and the Court Accordingly has Jurisdiction to Review and Prevent the Attempted Rendition.

This Court has already exercised its jurisdiction over Ala's substantive challenges to his unlawful detention in his petition for writ of habeas corpus under 28 U.S.C §2241. Under the clear language of 28

U.S.C. §2241, Ala is also entitled to mount a habeas challenge where “[h]e is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. §2241(c)(3).

Ala has recounted that he was previously persecuted for his political beliefs, tortured by Egyptian authorities, and that Egyptian authorities visiting him at Guantanamo Bay assured him that when he returned to Egypt, he would never be seen again. These allegations clearly comprise a claim that the rendition would be “in violation of . . . laws or treaties of the United States.” 28 U.S.C. §2241(c)(3). The rendition would also violate Ala’s rights to due process because he will have been deprived of a liberty interest without appropriate due process. See *Singh v. Waters*, 87 F.3d 346, 347 (9th Cir. 1977) (alien’s removal violated his right to counsel and unlawful removal was, itself, grounds for habeas petition that the court granted). Ala has, therefore, cognizable claims within the jurisdictional review of the Court under 28 U.S.C. §2241(c)(3).

B. Prevention of Rendition Does Not Implicate Separation of Powers Concerns.

At every opportunity in the instant litigation, Respondents have sought to argue that separation-of powers doctrine precludes judicial review of any Government action that falls within the realm of “foreign policy.” These arguments sweep too broadly and eviscerate the Supreme Court’s decisions in *Rasul v. Bush*, 542 U.S. 466, 481 (2004) and in *Hamdi v. Rumsfeld*, 542 U.S. 507, 528 (2004), which established

Petitioner's right to challenge the lawfulness of his detention by way of a habeas petition.

In rejecting the separation of powers argument raised by Respondents, the Supreme Court in *Hamdi* noted the pivotal role of the habeas writ in challenging the lawfulness of Executive detention specifically, which cannot be diminished or eliminated by Respondents' innovation of "war powers." "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." 542 U.S. at 536; *INS v. Enrico St. Cyr*, 533 U.S. 289, 301, 304 (right of habeas review to challenge detention by the Executive branch applies no less forcefully to non-citizens).

If Ala has the right to judicial review of his detention by the Executive, and such review does not violate separation of powers, then this court must be able to protect its ability to conduct such review without running afoul of separation of powers. "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536.

Indeed, among the three branches, it is the judiciary that is charged with upholding the United States' obligation to not return a person to a country where they will be tortured. In both the extradition

and immigration context, a court determines whether the removal of a person would subject him to torture in violation of the United States' obligation under the Convention Against Torture. If the court concludes that the person would be tortured if removed, the court prohibits the U.S. government from effectuating the removal. *See, e.g., In re G-A*, 23 I. & N. Dec. 366, 368 (BIA 2002) (prohibiting the transfer of person on the basis that it was more likely than not that he would be tortured if removed from the United States). Respondents' argument that the separation of powers doctrine would bar judicial oversight of rendition is without merit and is contradicted by the judiciary's role in adjudicating issues arising from the Convention Against Torture in extradition and immigration proceedings.

C. Diplomatic Assurances Cannot Substitute for Judicial Review

Respondents also seek to evade U.S. treaty and customary law obligations by arguing that "diplomatic assurances," immune from judicial scrutiny, are sufficient to ensure Ala's physical safety. But diplomatic assurances do not satisfy Respondents' obligations, discussed more fully below, under either the Convention Against Torture or the principle of *non-refoulement*. *See Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, Human Rights Watch Report, 18-28 (Apr. 2005) (noting that relying on assurances bypasses a state's obligations under the principle of *non-refoulement*) (attached as Exh. A to Petitioner Algazzar's Supplemental Memorandum). As diplomatic assurances are

no substitute for judicial review of the United States' obligations, this Court has the power to order Respondents to represent to this Court their efforts to locate a safe, third country for Ala's release.

II. THE CONVENTION AGAINST TORTURE PROHIBITS PETITIONER'S RENDITION BACK TO EGYPT.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention"), 1465 U.N.T.S. 85 (Dec. 10, 1984) prohibits Respondents from rendering Ala to Egypt. The Convention is specifically implemented by the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), which provides that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-822 (1998).

As a number of courts have noted, "FARRA gives the [Convention] domestic effect," and "FARRA and the regulations are now the positive law of the United States, and, as such, are cognizable under habeas." *Saint Fort v. Ashcroft*, 329 F.3d 191, 202 (1st Cir. 2003); *see also Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 220 (3d Cir. 2003) ("individuals whose detention violates FARRA may challenge their detention under 28

U.S.C. § 2241”).¹ Under both the Convention and FARRA, the United States is obliged to not render Ala to a country where he faces a substantial risk of torture.² The information before the Court shows that Ala faces a real risk of torture if he were delivered to Egyptian authorities. Allowing Respondents to render Ala back to Egypt under these facts would be a clear violation of U.S. obligations under the Convention.

¹ Respondents have elsewhere contended that detainees such as Petitioner have no enforceable rights under CAT because his case does not involve a final order of removal under section 242 of the Immigration and Nationality Act. This argument is incorrect. The provision of FARRA on which Respondents rely in making this argument, § 2242(d), simply contains a “zipper clause” purporting to confine review of CAT claims to the specific context of a final order of deportation. *Saint Fort*, 329 F.3d at 195 & n.4. This provision, however, does not preclude review of CAT or FARRA claims in a habeas corpus proceeding. *Id.* at 201-02; *Ogbudimkpa*, 342 F.3d at 220-21; *Wang v. Ashcroft*, 320 F.3d 130, 141 (2d Cir. 2003). Indeed, foreclosing habeas review of those claims would raise a substantial constitutional question under the Suspension Clause, *Saint Fort*, 329 F.3d at 201; *Ogbudimkpa*, 342 F.3d at 216-17; *see also INS v. St. Cyr*, 533 U.S. 289, 300-01 (2001), and would undermine the historic role of the courts, which “have exercised habeas review over claims of aliens based on treaty obligations since the earliest days of the republic.” *Saint Fort*, 329 F.3d at 201; *see Mali v. Keeper of the Common Jail (Wildenhuis’s Case)*, 120 U.S. 1 (1887) (reviewing and adjudicating habeas petition brought pursuant to consular agreement between United States and Belgium); *see also Ogbudimkpa*, 342 F.3d at 218 n.22 (suggesting that habeas review would be available for claims under non-self-executing treaties absent implementing legislation because the general habeas statute, 28 U.S.C. § 2241, is available for treaty violations and provides a cause of action that 28 U.S.C. § 1331 does not).

² In addition to FARRA, the Torture Victim Protection Act of 1991 (“TVPA”) enables the courts to assess liability against individuals who, under actual or apparent authority, or color of law of a foreign nation, subject an individual to torture or to extrajudicial killing. *See Pub. L. 102-256, 106 Stat. 73 (1992)* (printed in the Notes to 28 U.S.C.A. § 1350). Given that the legislative history for this act demonstrates Congress’ clear opposition to any act that condones torture, the TVPA, in concert with 28 U.S.C. § 1350, provides an additional basis under which the Court may act to prevent Ala from being rendered to Egypt for purposes of torture, and under which the Court may require more detail relating to any proposed transfer than Respondents have provided.

III. CUSTOMARY INTERNATIONAL LAW PROHIBITS PETITIONER'S RENDITION BACK TO EGYPT.

The principle of *non-refoulement* also bars Respondents from rendering Ala to Egypt. *Non-refoulement*, which is the prohibition against returning individuals to countries where they will face torture, has attained the status of binding customary international law. See Guy S. Goodwin-Gill, *The Refugee in International Law* 143 (2d ed. 1996); *Restatement (Third) of the Foreign Relations Law of the United States* §702 (1987); United Nations High Commissioner for Refugees, *The State of the World's Refugees: The Challenge of Protection* 10 (1993) (“Non-refoulement has always been, and remains, indispensable to international protection. It is expressed as an obligation of states in the 1951 Convention, and has gained universal recognition through regional refugee instruments and as a part of customary international law.”)

The United States has is bound by the principle of *non-refoulement* both by the Convention on the Status of Refugees and the U.S. Immigration and Nationality Act (“INA”). The prohibition against non-refoulement is explicitly set out in Article 33 of the Convention on the Status of Refugees, which became binding on the United States through its accession to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. As a result, the United States has bound itself not to “expel or return (‘refouler’)” individuals who have a “well-founded fear” that their lives or freedom

would be threatened upon return to their home country. The United States has also reiterated its commitment to the principle of non-refoulement in the INA. See 8 U.S.C.A. § 1231(b)(3)(A)(2002) (“The Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country...”).

It is undisputed that customary international law is legally binding and judicially applicable by U.S. courts where ascertainable. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (recognizing piracy as a crime against the law of nations using customary international law analysis); *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (finding that customary international law prohibits torture). As a binding principle of customary international law, *non-refoulement* prohibits Respondents from sending Ala back to a country where is likely to face torture.

CONCLUSION

This Court should continue enjoining Respondents from sending Ala back to a country where he has already been tortured and will likely be tortured again if returned, until counsel for Petitioner and Respondents have been able to find a safe, third country for Ala’s release. This Court should further require Respondents to represent their efforts to find a country for Ala’s release that does not violate the United States’

obligations under the Convention Against Torture and customary international law.

Dated: January 17, 2006 Respectfully submitted,

VENABLE LLP

_____/s/_____
Carol Elder Bruce, D.C. Bar No. 202200
David G. Dickman, D.C. Bar No. 465010
Amy J. McMaster, D.C. Bar No. 490336
575 7th Street, NW
Washington, DC 20004
Tel: (202) 344-4000
Fax:(202) 344-8300

_____/s/_____
Mitchell Y. Mirviss, D.C. Bar No. 476648
Randolph S. Sergent, D.C. Bar No. 486063
Two Hopkins Plaza, Suite 1800
Baltimore, MD 21201
Tel: (410) 244-7400
Fax: (410)244-7742

_____/s/_____
Michael W. Robinson, D.C. Bar No. 437979
8010 Towers Crescent Drive
Suite 300
Vienna, VA 22182
Tel: (703) 760-1600
Fax: (703) 821-8949

Counsel for Petitioners