Case No. 05-56759

Oral Argument: Week of March 6, 2006 Dist. Court Case No. 04-CV1939LAB

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AHILAN NADARAJAH, A 79 784 826, an individual,

Petitioner-Appellant,

v.

ALBERTO GONZALES, in his official capacity as Attorney General of the United States; MICHALE CHERTOFF, in his official capacity as Secretary of the U.S. Department of Homeland Security; MICHAEL J. GARCIA, in his official capacity as Assistant Secretary of U.S. Immigration and Customs Enforcement; RON SMITH, in his official capacity as San Diego District Director of U.S. Immigration and Customs Enforcement; HECTOR NAJERA, in his official capacity as Officer-in-Charge of Detention and Removal Operations of U.S. Immigration and Customs Enforcement; BARBARA WAGNER, in her official capacity as Warden of the Otay Detention Facility,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER-APPELLANT AND REVERSAL OF JUDGMENT BELOW

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INTEREST OF *AMICUS CURIAE*

The Allard K. Lowenstein International Human Rights Clinic ("the Clinic") is a Yale Law School program that gives students first-hand experience in human rights advocacy. The Clinic undertakes litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses. The Clinic's work is based on the human rights standards contained in international customary and conventional law, at the core of which is the prohibition against arbitrary detention. Since the Clinic began more than fifteen years ago, its students have worked on a number of lawsuits and other projects designed to combat violations of international human rights law. The Clinic has conducted research and provided briefs for many U.S., foreign, and international tribunals. In recent years, the Clinic has focused increasing attention on efforts to ensure respect for international human rights standards in the United States.

This appeal raises important questions about the international prohibition on prolonged and arbitrary detention. The Clinic has a significant interest in furthering the enforcement of human rights norms, such as the norm against arbitrary and prolonged detention, in the United States and around the world. The Clinic is submitting this brief together with a motion pursuant to Federal Rule of Appellate Procedure 29(a) and (b) for an Order granting leave to file a brief as *amicus curiae* in this matter.

INTRODUCTION

Mr. Nadarajah, an asylum-seeker who fled persecution and torture in his home country of Sri Lanka, has been detained by the U.S. government for more than four years, even though an immigration judge has twice granted him asylum. He is currently detained in San Diego, California, pending the government's appeal of the second order granting him asylum. The reliance of the government's appeals on impermissible hearsay evidence from an anonymous source and repeated delays in resolving Mr. Nadarajah's case make his detention arbitrary under treaties and customary international law binding on the United States.

Mr. Nadarajah has been detained since he attempted to enter the United States on October 27, 2001. *Nadarajah v. Ashcroft*, No. 04CV1939-LAB, at 2 (S.D. Cal. Oct. 28, 2005). Upon Mr. Nadarajah's arrival, a federal immigration officer found him to have a credible fear of persecution and referred him for a removal proceeding before an immigration judge. *Id.* at 2-3. The government delayed the removal proceedings twice in order to investigate its claim that Mr. Nadarajah was associated with the Liberation Tigers of Tamil Eelam ("LTTE"), a State Department-designated terrorist organization. *Id*. at 3; Verified Pet. for a Writ of Habeas Corpus ("Pet.") ¶ 30.

On April 21, 2003, the immigration judge held a removal hearing at which the government presented an Immigration and Customs Enforcement ("ICE")

agent's report detailing allegations made by a confidential informant that Mr. Nadarajah was a member of the LTTE. Pet. ¶ 31. After reviewing this information, the immigration judge nevertheless granted Mr. Nadarajah asylum. *In the Matter of Ahilan Nadarajah*, at 15-16 (U.S. Immigration Ct., Apr. 21, 2003).

The government moved to reopen the case, and hearings were held on June 8 and August 18, 2004, at which the government presented uncorroborated and untested hearsay in the form of testimony by a Special Agent of the Department of Homeland Security that a "reliable confidential informant" working with the Canadian government had asserted that Mr. Nadarajah was a member of the LTTE. *In the Matter of Ahilan Nadarajah*, at 2 (U.S. Immigration Ct., Sept. 1, 2004) ("9-1-04 Decision").

The government agent also testified that the informant had alleged that Mr. Nadarajah had placed a call, along with a female LTTE member detained in the same facility, to plan the informant's death, even though Mr. Nadarajah's lawyers later demonstrated that Mr. Nadarajah and the woman could not have made a call together in a sex-segregated facility. *Id*. at 3-4; Pet. ¶ 37-38. The government agent did not provide Mr. Nadarajah, his lawyers, or the judge with any record of his written communication with this unknown informant. 9-1-04 Decision, at 3-4. Mr. Nadarajah and his lawyers were not able to cross-examine the alleged informant. The judge denied their motion to compel the informant to testify,

because the government agent claimed that testifying would endanger the informant's life. *Id.* at 4.

The immigration judge again granted Mr. Nadarajah asylum, noting that the government's new evidence offered "nothing of significance which would seriously alter the Court's original findings." *Id.* at 12. He concluded that the record "seriously undermined" the government's claim that Mr. Nadarajah was a member of the LTTE. *Id.* As the judge noted, the government agent acknowledged that the confidential informant might have had a motive to falsely implicate Mr. Nadarajah as an LTTE member. *Id*. at 11. The judge also indicated that the reliability of the informant's information was disputed. *See id*. at 12. Finally, the judge rejected the government agent's presumption that no one could have been smuggled out of an LTTE-controlled area of Sri Lanka unless he was a member of or paid smuggling fees to the LTTE, citing expert testimony that the area in which Mr. Nadarajah lived was controlled by the Sri Lankan Army, not the LTTE. *Id*.

The government again appealed the grant of asylum to the Board of Immigration Appeals, where the case has been pending for more than a year. On September 20, 2004, the ICE San Diego District Director denied Mr. Nadarajah parole, Pet. ¶ 60, citing the government's belief that Mr. Nadarajah poses a threat to national security because he "has close ties to a terrorist organization" and

stating that "testimony was presented" alleging that Mr. Nadarajah plotted to kill an informant. *Id*. ¶ 61. The District Director's reasons for denying Mr. Nadarajah's parole are based entirely on the U.S. government agent's testimony about the allegations of an anonymous informant. The immigration judge considered this hearsay evidence and twice rejected the government's claims, but Mr. Nadarajah remains in detention.

SUMMARY OF ARGUMENT

International law, including the International Covenant on Civil and Political Rights and customary international law, which are binding on the United States, unequivocally prohibits arbitrary detention. International bodies have determined that detention is arbitrary if it results from proceedings that violate fundamental due process rights. Proceedings using evidence that the detainee cannot examine or challenge do not meet international standards of due process and fundamental fairness. The use of evidence from secret sources in asylum and other administrative proceedings is only permissible when accompanied by particularly strong procedural safeguards that allow the detainee and his representatives to meaningfully challenge the source and substance of adverse evidence.

In this case, the government relies on impermissible hearsay evidence from a secret source both to appeal Mr. Nadarajah's asylum claim and to continue his prolonged detention. Although Mr. Nadarajah has been granted asylum twice, he has been detained for more than four years on the basis of secret-source evidence that he cannot examine or confront. Mr. Nadarajah's continued detention on this basis is arbitrary and in violation of the international obligations of the United States.

ARGUMENT

I. THE ICCPR AND CUSTOMARY INTERNATIONAL LAW, WHICH ARE BINDING ON THE UNITED STATES, PROHIBIT ARBITRARY DETENTION, INCLUDING DETENTION RESULTING FROM PROCEEDINGS THAT VIOLATE FUNDAMENTAL DUE PROCESS RIGHTS.

International law unequivocally prohibits arbitrary detention. The International Covenant on Civil and Political Rights ("ICCPR"), which the United States has ratified, codifies this prohibition. The ICCPR is binding on the United States and applies to all individuals within U.S. territory, including asylum-seekers such as Mr. Nadarajah who have not been formally admitted into the United States. United States courts have recognized that the right to be free from arbitrary detention is also customary international law, binding on the United States.

International bodies charged with enforcing these obligations have stated that prolonged detention – including administrative detention of immigrants and asylum-seekers and those suspected of terrorism – that results from proceedings with insufficient procedural safeguards violates the prohibition against arbitrary detention.

A. International Law Prohibits Arbitrary Detention.

International law, including treaties to which the United States is a party, unequivocally prohibits arbitrary detention. The Universal Declaration of Human Rights set out the principle that "no one shall be subjected to arbitrary arrest, detention, or exile." G.A. Res. 217A (III), at 71, U.N. GAOR, 3d sess., 1st plen. mtg., U.N. Doc. A/810 (1948). The Declaration's condemnation of arbitrary detention was codified in the ICCPR, which the United States ratified in 1992. International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). Article 9(1) of the ICCPR guarantees: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such ground and in accordance with such procedure as are established by law." ICCPR, art. 9(1). Article 9(4) of the ICCPR requires, "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay

on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR, art. 9(4). The ICCPR applies to all individuals "within [the] territory and subject to [the] jurisdiction" of a state party, regardless of their nationality.[1] ICCPR, art. 2(1). Regional human rights treaties also unanimously prohibit arbitrary detention.[2]

The prohibition against arbitrary detention is well established as customary international law. According to the Restatement of Foreign Relations Law, "A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention . . . ." Restatement (Third) of Foreign Relations Law § 702 (1987). A comment to the Restatement explains that the term "arbitrary detention" extends to all detentions that are "incompatible with principles of justice or with the dignity of the human person."

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[1] According to the U.N. Human Rights Committee, which the ICCPR mandated to monitor compliance with and interpret its provisions, the rights in the ICCPR extend to all people "within the power or effective control of [a] State party" and are "not limited to citizens of states parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers [and] refugees." U.N. Hum. Rts. Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10 (Mar. 29, 2004), U.N. Doc. HRI/GEN/1/Rev.7.

[2] The American Convention on Human Rights, which the United States has signed but not ratified, provides, "No one shall be subject to arbitrary arrest or imprisonment." O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, Ch. II, art. 7(3); *see also* European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), E.T.S. No. 5, art. 5 ("Everyone has the right to liberty and security of person."); African Charter on Human Rights and People's Rights, OAU Doc. CAB/LEG/67/3/Rev. 5, pt. I, ch. 1, art. 6 ("No one may be arbitrarily arrested or detained.").

Id. cmt. h (quoting Statement of U.S. Delegation, 13 GAOR, U.N. Doc. A/C.3/SR.863, at 137 (1958)).

This Court has recognized that "a clear international prohibition" exists against prolonged and arbitrary detention. *Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998). Other U.S. appellate courts also have recognized the prohibition on arbitrary detention under customary international law. *See, e.g.*, *de Sanchez v. Blanco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) (listing "the right not to be arbitrarily detained" among the small group of "basic rights" that have been "generally accepted"); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) ("No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."). Furthermore, in his dissenting opinion in *Zadvydas v. Davis*, Justice Kennedy cited international standards on refugees and asylum-seekers to support the proposition that "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." *Zadvydas v. Davis*, 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting) (citing a report of the United Nations Working Group on Arbitrary Detention and the Guidelines of the United Nations High Commissioner for Refugees); *cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 737-38 (2004) (stating that "[a]ny credible invocation of a principle against

arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority" and holding that a prohibition on the kind of short-term detention at issue did not "support the creation of a federal remedy").

B. Detention Resulting from Proceedings that Violate the Fundamental Due Process Rights Guaranteed in the ICCPR Is Arbitrary Under International Law.

Authoritative international bodies have interpreted the term "arbitrary detention" to include detention resulting from proceedings that violate fundamental due process rights; this definition applies to proceedings governing the administrative detention of immigrants and asylum-seekers and those suspected of terrorism. The U.N. Human Rights Committee has noted that the ICCPR's drafting history "confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law." U.N. Hum. Rts. Comm., *Womah Mukong v. Cameroon*, Communication No. 458/1991, ¶ 9.8, U.N. Doc. CCPR/C/51/D/458/1991 (July 21, 1994), *available at* http://www1.umn.edu/humanrts/undocs/html/vws458.htm.

The U.N. Commission on Human Rights created the Working Group on Arbitrary Detention to investigate and issue opinions on alleged arbitrary detention in criminal and administrative contexts, including custody of immigrants and

asylum-seekers. U.N. Econ. & Soc. Council, Comm'n on Hum. Rts., *Report of the Working Group on Arbitrary Detention*, ¶ 28, U.N. Doc. E/CN.4/1998/44 (Dec. 19, 1997).[3] The Working Group has determined that among the circumstances in which detention is arbitrary is "[w]hen the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character." U.N. Office of the High Commissioner for Human Rights, *Fact Sheet No. 26, The Working Group on Arbitrary Detention*, *available at* http://www.unhchr.ch/html/menu6/2/fs26.htm. To determine when detention results from unfair procedures, the Working Group relies on Article 14 of the ICCPR, which provides that "[i]n the determination of . . . his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." ICCPR, art. 14(1).

Article 14 of the ICCPR applies to all people present within a state subject to proceedings in any adjudicative forum, whether criminal or administrative. It

[3] The Working Group relies on "the standards set forth in the Universal Declaration of Human Rights and . . . the relevant international instruments accepted by the States concerned." U.N. Econ. & Soc. Council, Comm'n on Hum. Rts., *Report of the Working Group on Arbitrary Detention*, ¶ 1, U.N. Doc. E/CN.4/2005/6 (Dec. 1, 2004).

expressly states that its guarantees apply to "[a]ll persons" present before a state's "courts and tribunals." *Id*. Furthermore, the U.N. Human Rights Committee has explained that Article 14 applies to "all courts and tribunals . . . whether ordinary or specialized." U.N. Hum. Rts. Comm., *General Comment No. 13: Article 14 (Administration of justice)*, ¶ 4, U.N. Doc HRI/GEN/1/Rev.7, at 136 (1984).

Consistent with the Human Rights Committee's application of Article 14 to all tribunals, the Working Group urges that states afford the same procedural guarantees of the criminal process to administrative proceedings resulting in detention, particularly when the detainee is suspected of being involved in illegal activity. Its most recent report states:

> The use of "administrative detention" under public security legislation [or] migration laws . . . resulting in a deprivation of liberty for unlimited time or for very long periods without effective judicial oversight, as a means to detain persons suspected of involvement in terrorism or other crimes, is not compatible with international human rights law.

U.N. Econ. & Soc. Council, Comm'n on Hum. Rts., *Report of the Working Group on Arbitrary Detention*, ¶ 77, UN Doc. E/CN.4/2005/6 (Dec. 1, 2004). The Working Group therefore recommends that states review their legislation and practice to ensure that persons "suspected of criminal activity or any other activities giving rise under domestic law to deprivation of liberty are in fact afforded the guarantees applicable to criminal proceedings." *Id*.

The ICCPR and the Working Group's findings make it clear that the

international law prohibition on arbitrary detention includes any detention resulting from proceedings that violate fundamental due process rights. This prohibition is universal and encompasses administrative proceedings for immigrants and asylum-seekers and those suspected of terrorism.

II. THE USE OF SECRET-SOURCE EVIDENCE WITHOUT MINIMAL PROCEDURAL SAFEGUARDS VIOLATES INTERNATIONAL STANDARDS OF DUE PROCESS AND FUNDAMENTAL FAIRNESS.

International law requires that in any proceeding in which a person's liberty is at stake, the adjudicator as well as the detainee and the detainee's representative must have access to the source and substance of evidence presented by the government. Even in those limited situations in which narrow exceptions to these requirements are permitted, international law requires the government to ensure certain minimal procedures for challenging the source and substance of adverse evidence. Such procedures are necessary to guarantee the right to due process and to prevent arbitrary deprivations of liberty. Detention based solely on impermissible secret-source evidence, without even minimal procedural safeguards, violates international standards of fairness and due process.

Because asylum applicants face potentially irreparable harm – torture and even death – if returned to their countries of origin, international law, including

treaties ratified by the United States,[4] requires the government to provide them with a fair proceeding to determine whether they are eligible for refugee status. *See, e.g.*, Office of the U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ("*UNHCR Handbook*"), ¶ 190 (2d ed., Jan. 1992).[5] As the U.N. High Commissioner for Refugees ("UNHCR") has noted, "the seriousness of the consequences that may follow an erroneous [asylum or withholding] decision demand the highest degree of procedural fairness and care." Addendum, Letter from Bemma Donkoh, Deputy Regional Representative, U.N. High Commissioner for Refugees, to Henry J. Hyde, Chairman, Senate Judiciary Committee, at 4 (Mar. 23, 2000) ("UNHCR Letter").

The exclusion of asylum applicants based on secret-source evidence in the absence of significant procedural safeguards has been prohibited by authoritative

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[4] The United States is party to the ICCPR and to the Protocol Relating to the Status of Refugees ("Refugee Protocol"), which incorporates Articles 2 through 34 of the Refugee Convention. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

[5] In *Cardoza-Fonseca*, the Supreme Court stated that, although the *UNHCR Handbook* does not have the binding force of law, it "provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 (1987). The Ninth Circuit has regularly relied on this language in looking to the *UNHCR Handbook* for guidance on interpreting the 1967 Protocol. *See, e.g., Chanco v. INS*, 82 F.3d 298, 301 (9th Cir. 1996); *Ndom v. Ashcroft*, 384 F.3d 743, 753 (9th Cir. 2004); *Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004).

international bodies. According to an official communication of the UNHCR, when secret evidence is employed to deny an asylum claim, a State Party fails to fulfill its obligation under the Refugee Convention and Protocol not to return someone to a country where he would face persecution or torture. *Id*. For this reason, the UNHCR has concluded that applicants for asylum or refugee status should not be excluded on the basis of "sensitive evidence that cannot be challenged by the individual concerned." Office of the U.N. High Comm'r for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* ("*Guidelines on Exclusion*"), ¶ 36, U.N. Doc. HCR/GIP/03/05 (Sept. 4, 2003);[6] *see also Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* ("*Background Note on Exclusion*"), Protection Policy and Legal Advice Section, Office of the UNHCR, ¶ 112 (Sept. 4, 2003), *available at* http://www.unhcr.bg/coi/files/05_en.pdf ("Exclusion should not be based on evidence that the individual concerned does not have the opportunity to challenge, as this offends principles of fairness and natural justice."). The Inter-American Commission on Human Rights similarly

[6] Between 2002 and 2004, the UNHCR issued the *Guidelines on International Protection.* This Court has appropriately relied on these guidelines for assistance in interpreting U.S. obligations under the 1967 Protocol. *See, e.g., Zhang*, 388 F.3d at 720 (citing the *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, HCR/GIP/04/06 (Apr. 28, 2004)).

rejects the use of secret evidence in asylum and refugee determination proceedings, because "[a] person . . . who is the subject of secret evidence will not enjoy a full opportunity to be heard with minimum guarantees, the essence of the right to due process." Inter-Am. Comm'n on Hum. Rts., *Report on the Situation of Human Rights of Asylum-Seekers Within the Canadian Refugee Determination System* ¶ 157, OEA/Ser.L/V/II.106 (Feb. 28, 2000).

Minimum standards of fairness and due process in asylum proceedings require that applicants be allowed an opportunity to challenge the source's credibility and rebut the content of the evidence used against them and that, at a minimum, the adjudicator be informed of the source and substance of the information. As the Inter-American Commission explained in its report on the use of secrecy procedures in the Canadian refugee-determination system, disclosure to the adjudicator of the sensitive information used to exclude an asylum applicant is a necessary but not sufficient condition of due process; the fatal flaw of Canada's security clearance process was that it did not "require an evaluation of the credibility or veracity of the original source, and the person concerned is unable to challenge the source or to rebut the content of that information." *Id*.

"[T]he consequences of a negative asylum determination, based on undisclosed evidence that cripples the applicant's ability to present his or her case fully, can be grave if the applicant is returned to a situation where he faces

persecution or torture." UNHCR Letter at 4. In such proceedings, "the potential for loss of life or liberty if the applicant is returned to a situation of risk warrants employing many of the procedural safeguards of a criminal trial in order to ensure due process, fairness and lack of bias in the asylum determination." *Id*. at 3. In fact, it is widely acknowledged that international standards of fundamental fairness drawn from criminal cases are applicable in the asylum context, because both criminal and asylum cases involve potentially serious deprivations of life and liberty. *See* Inter-Am. Comm'n on Hum. Rts., *Report on Terrorism and Human Rights* ("*Terrorism Report*"), ¶ 409, OEA/Ser.L/V/II.116 (Oct. 22, 2002) (stating that "proceedings involving the detention, status or removal of aliens from a state's territory by exclusion, expulsion or extradition have been found in this and other human rights systems to require individualized and careful assessment and to be subject to the same basic and non-derogable procedural protections applicable in proceedings of a criminal nature"); U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Report of the Working Group on Arbitrary Detention*, ¶ 77, UN Doc. E/CN.4/2005/6 (Dec. 1, 2004) (recommending that states afford the same guarantees applicable to criminal proceedings to all persons suspected of any activity for which they can be detained); UNHCR Letter at 3 (recommending looking to the rules of evidence adopted by the international criminal tribunals for

guidance in determining minimal due process standards in asylum and refugee proceedings).

International tribunals have consistently ruled that in deciding a case involving a significant liberty interest, the adjudicator must know the identity of witnesses. Withholding the identities of witnesses from the parties has been allowed only where the adjudicator had full access to that information. *See, e.g*., *Kostovski v. Netherlands*, 166 Eur. Ct. H.R. (ser. A) § 44 (1989) (acknowledging possible legal use of anonymous witnesses in limited circumstances but assuming the adjudicator's full access to witnesses); *Doorson v. Netherlands*, 22 Eur. H.R. Rep. 330 § 69 (1996) (defense counsel not aware of the identities of the witnesses, but judge knew their identities and questioning took place in front of defense counsel); *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 71 (Aug. 10, 1995) (minimum fairness standards require that at least the judge be aware of the identity of all witnesses). Furthermore, in order to test the reliability of a witness's testimony, the adjudicator must be able to observe the witness's demeanor during questioning. *See, e.g.*, *id.* ¶ 71 (minimum fairness standards require that at least the judge be able to observe the demeanor of all witnesses); *Kostovski v. Netherlands*, 166 Eur. Ct. H.R. (Ser. A) § 43 (absence of anonymous informants in court precluded the judge from observing their demeanor under questioning and

forming an impression as to their reliability); *Windisch v. Austria*, 186 Eur. Ct. H.R. (ser. A) § 29 (1990) (government officials' testimony about the statements of anonymous informants "cannot be regarded as a proper substitute for direct observation").

International bodies have held that an individual's right to challenge the evidence against him includes a right to question witnesses and observe their demeanor during questioning. *See, e.g.*, *Kostovski v. Netherlands*, 166 Eur. Ct. H.R. §§ 41-42 (1989) (stating that "an accused should be given an adequate and proper opportunity to challenge and question a witness against him" and that "[i]f the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable"); *Windisch v. Austria*, 186 Eur. Ct. H.R. (ser. A) (1990) (finding violation of the ECHR where conviction was based largely on statements by two anonymous witnesses heard only by the police, in the absence of the defense, and not appearing at trial); *Saïdi v. France*, 261 Eur. Ct. H.R. (ser. A) (1993) (finding violation of the ECHR where conviction was based on the identification evidence of three persons and applicant's request to examine these witnesses was repeatedly denied); *Castillo-Petruzzi v. Peru*, Inter-Am. Ct. H.R., Ser. C/No. 52 (1999) (finding violation of minimum due process requirements where state failed to allow the accused to examine witnesses or otherwise

challenge the evidence proffered against him); U.N. Working Group on Arbitrary Detention, *Opinion No. 23/2001 (Israel)*, ¶¶ 7, 11 U.N. Doc. E/CN.4/2003/8/Add.1 (2001) (declaring detention "arbitrary" because detainee was not allowed to confront or cross examine primary witnesses).

International tribunals have allowed states to impose limitations, such as withholding the identity of witnesses, on the right to confront evidence, but only in exceptional circumstances and only where the defense had other options for questioning and challenging the witness. *See Doorson v. Netherlands*, 22 Eur. H.R. Rep. 330, 470 § 83 (finding no violation of Article 6 of the ECHR where the defendant's attorney was present while the court interrogated two anonymous witnesses *in camera* and had an opportunity to question the witnesses himself); *Prosecutor v. Tadic*, ¶¶ 60-61 (stating that "only in exceptional circumstances" rising to the level of a national emergency can a Trial Chamber of the ICTY restrict the right of the accused to examine or have examined witnesses against him). For example, if absolutely necessary to protect the witness's safety, states may conceal the identity of a witness from the detainee but must not abridge the defense's right to confront and can never conceal a witness's identity from the judge. Although the Inter-American Commission accepts the possibility that witness identity may be kept secret in a legitimate state of emergency, it calls for procedures "whereby witnesses' anonymity may be protected without

compromising a defendant's fair trial rights." *Terrorism Report*, ¶ 251. The permissibility of such procedures will depend, in part, on whether the defense can challenge the witnesses' evidence and whether the judge will know the witnesses' identity and evaluate the reliability of the evidence accordingly. *Id*.; *see also Guidelines on Exclusion*, ¶ 36 ("Exceptionally, anonymous evidence (where the source is concealed) may be relied upon but only where . . . the asylum-seeker's ability to challenge the substance of the evidence is not substantially prejudiced.")

International bodies emphasize that national security concerns do not outweigh a refugee's right to challenge the reliability of evidence that the state offers to exclude him or rebut his claim for asylum. The Inter-American Commission on Human Rights has affirmed that refugees' procedural rights must be respected even after explicitly taking into consideration post-September 11 security concerns. In its 2002 *Report on Terrorism and Human Rights*, the Inter-American Commission clearly stated that human rights are compatible with and a precondition for the effective struggle against terrorism in the framework of the rule of law. Specifically, the Inter-American Commission emphasized that states' commitments under multinational anti-terrorism instruments, which may include conditions for denying refugee status, should not be interpreted or applied in a manner inconsistent with states' human rights obligations. *See Terrorism Report*, ¶ 375.

Although the UNHCR recognizes that a state's national security interests may conflict with an asylum-seeker's right to a fair trial, it maintains, like the Inter-American Commission, that "these [interests] may be protected by introducing procedural safeguards which also respect the asylum-seeker's due process rights." *Guidelines on Exclusion*, ¶ 36. For example, the UNHCR recommends providing the refugee with a summary of the content of the sensitive material and providing the complete substance of the evidence to the refugee's representative (assuming that the representative has been cleared by the court to examine such evidence). *See Background Note on Exclusion*, ¶ 113.

International courts have reached procedural compromises between deference to national security concerns and upholding due process standards, including *in camera* review of evidence, protective orders, and security-cleared attorneys. However, none have allowed the use of the types of secret evidence at issue in this case without affording the detainee some opportunity to confront the evidence.

III. BECAUSE IMPERMISSIBLE SECRET-SOURCE EVIDENCE UNDERLIES BOTH THE GOVERNMENT'S APPEAL AND ITS PROLONGED DETENTION OF MR. NADARAJAH, THIS DETENTION IS ARBITRARY AND THUS VIOLATES INTERNATIONAL LAW.

In this case, the government relies on hearsay evidence from an unnamed confidential informant. Mr. Nadarajah and his representatives were not given an

opportunity to confront or cross-examine the informant and had only limited, indirect access to the substance of the informant's testimony via hearsay evidence presented by a U.S. government agent. *See supra* pp. 1-3. Neither Mr. Nadarajah nor the judge was allowed to assess the demeanor of the unknown informant. Even assuming there were reasons to protect the identity of this witness, the judge, at a minimum, should have been informed of his identity. Mr. Nadarajah was not afforded any of the procedural safeguards necessary to protect one's due process rights even in those narrow circumstances in which limited restrictions on access to testimony might be appropriate. Furthermore, the government has appealed Mr. Nadarajah's grant of asylum based solely on this same evidence. *See supra* p. 4. Mr. Nadarajah's continued detention on the basis of impermissible secret-source evidence clearly violates fairness and due process and is arbitrary under international law.

The Working Group on Arbitrary Detention has consistently found that instances of detention resulting from proceedings using secret evidence and lacking fundamental procedural guarantees are arbitrary and thus violate international law. In particular, the Working Group has determined that detention is "arbitrary" when it results from proceedings based on secret evidence that neither the detainee nor his or her attorney was allowed to confront and examine. A major factor underlying a determination of arbitrary detention in Israel in 2004

was that the basis for the detention was "secret evidence which the military authorities claim cannot be revealed so as not to compromise the source" and that the "detainees or their lawyers could not challenge the reasons for their detention, since these reasons had not been communicated to them." U.N. Working Group on Arbitrary Detention, *Opinion No. 3/2004 (Israel)*, ¶ 9, U.N. Doc. E/CN.4/2005/6/Add.1 (2004). In another case of arbitrary detention in Israel, the government relied on secret evidence and failed to ask supposed informers against the detainee to appear during judicial proceedings; the detainee's appeals to the High Court of Justice were rejected by "judges relying on secret evidence." *See* U.N. Working Group on Arbitrary Detention, *Opinion No. 23/2001 (Israel)*, ¶¶ 6, 7, 11, U.N. Doc. E/CN.4/2003/8/Add.1 (2001). The Working Group noted that the detainee

> [h]ad no access to the information used against him. This made it impossible for him to challenge the accusation. According to the source, although [the detainee] may again appeal against his detention, he is unable to present a meaningful defence. Since almost all information presented to the Court is classified, he is unable to contest its veracity. He cannot confront or cross-examine the primary witnesses.

Id. ¶ 7; s*ee also* U.N. Working Group on Arbitrary Detention, *Opinion No. 25/2001 (Pakistan)*, ¶ 15, U.N. Doc. E/CN.4/2003/8/Add.1 (2001) (detainee not provided with documentation of the charges or evidence against him); U.N. Working Group on Arbitrary Detention, *Opinion No. 30/2001 (Islamic Republic of*

Iran), ¶ 10, U.N. Doc. E/CN.4/2003/8/Add.1 (2001) (trials allegedly held in secret, and defense lawyers denied access to the case file and ejected from the courtroom); U.N. Working Group on Arbitrary Detention, *Opinion No. 10/2002 (Mauritania)*, ¶ 7, U.N. Doc. E/CN.4/2003/8/Add.1 (2002) (the detainee's "fundamental rights to a just and fair trial have not been respected, owing to the many procedural irregularities, and in particular to the fact that the only evidence against [the detainee] is [a] report . . . the greater part of which has been removed").

As in the Working Group's cases, Mr. Nadarajah's attorneys could not confront or cross-examine the unknown informant, and not even the immigration judge had access to the evidence. The unfair procedures underlying Mr. Nadarajah's continued administrative detention make it arbitrary under international law. This detention is clearly prolonged – although he has been granted asylum twice, Mr. Nadarajah has been detained for more than four years.[7] Because it is arbitrary and prolonged, Mr. Nadarajah's detention clearly violates the ICCPR and customary law binding on the United States.[8]

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[7] With respect to immigration detention, a "maximum period [of detention] should be set by law and the custody may in no case be unlimited or of excessive length." U.N. Econ. & Soc. Council, Comm'n on Hum. Rts., *Report of the Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2000/4, principle 7 (Dec. 28, 1999); *accord* U.N. Comm'n on Human Rts., *Report on the Visit of the Working Group to the United Kingdom on the issue of Immigrants and Asylum-seekers*, ¶ 35, U.N. Doc. E/CN.4/1999/63/Add.3 (Dec. 18, 1998).

[8] This Court should apply and interpret the statutes on which the government relies to detain Mr. Nadarajah in a manner that does not violate international law. "[A]n

CONCLUSION

For the foregoing reasons, Mr. Nadarajah's continued detention is arbitrary and in violation of binding international obligations.

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Respectfully submitted,

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act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-15 (1993) (quoting *The Schooner Charming Betsy* and labeling the principle a "canon of statutory construction."). The Ninth Circuit has reaffirmed this rule on several occasions. *Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001); *In re Simon*, 153 F.3d 991, 998 (9th Cir. 1998); *United States v. Thomas*, 893 F.2d 1066, 1069 (9th Cir. 1990) (adhering to this principle "out of respect for other nations"). In *Ma v. Ashcroft*, this Court stated that "although Congress may override international law in enacting a statute, we do not presume that Congress had such an intent when the statute can be reasonably reconciled with the law of nations." 257 F.3d at 1114 n.30 (interpreting a detention statute to include a reasonable time limitation).