No. 19-7121

In The

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

DARIOUSH RADMANESH,

Appellant,

v.

ISLAMIC REPUBLIC OF IRAN,

Appellee.

On Appeal from Case No. 1:17-cv-01708-CKK
in United States District Court for the District of Columbia,
Honorable G. Michael Harvey, Magistrate Judge, presiding

APPELLANT'S REPLY BRIEF

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ORAL ARGUMENT REQUESTED

Radmanesh requests oral argument, particularly with the appointment of Amicus counsel. Even taking Radmanesh's allegations as true, all briefs acknowledge there is no clear line-drawing as to what constitutes torture (and probably hostage-taking too). As a result, justices on a panel assigned to this appeal could differ in concluding whether some of the acts alleged constitute torture or hostage-taking. Radmanesh therefore requests oral argument to further argue these issues and answer questions.

Further, Amicus counsel includes law school student counsel. Undersigned counsel was blessed with opportunities to participate in oral argument before higher courts as a younger lawyer. These opportunities provided invaluable experience. Undersigned counsel would appreciate—and is certain Amicus counsel would appreciate as well—the opportunity for student counsel to participate in the preparation and/or arguing of oral argument before this esteemed Court.

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GLOSSARY

App'x	Appendix—referenced and cited in lieu of the record on appeal.
FSIA	Federal Sovereign Immunities Act. 28 U.S.C. Ch. 97.
Iran	Islamic Republic of Iran—Appellee, defendant in the district court. Iran is designated by the United States as a state-sponsor of terrorism.
IRGC	Iranian Revolutionary Guard Corps—a governmental division of Iran.
PTSD	Post-traumatic stress disorder.
Radmanesh	Darioush Radmanesh—Appellant, plaintiff in the district court. Sometimes also collectively referring to his family.
TVPA	Torture Victim Protection Act.

REPLY ARGUMENTS

This Reply focuses on a void in Amicus's brief when arguing whether Radmanesh suffered torture. This void is an act Radmanesh undisputedly suffered under the custody of Iran. In fairness, Amicus mentions it in the Statement of the Case, merely mentioning it in a laundry list of "mistreatments." But Amicus never mentions it again, particularly in the argument.

The failure to address it in arguments speaks volumes, for it alone constitutes torture. It is the kill or be killed order given to Radmanesh by the Iranian military commander while at gunpoint. (App'x 0021; App'x 0103.) More specifically, the Iranian commander forced Radmanesh, at gunpoint, to shoot a sleeping Iraqi soldier in the head at point blank range. (*Id.*)

Murder or be murdered at gunpoint is not merely a "mistreatment"; it is torture. This is true whether it is done one time or 500 times.

Beyond downplaying if not ignoring the kill or be killed order, Amicus's arguments are unpersuasive for three reasons. First, Amicus admits there is no clear line-drawing with the severity inquiry for torture, then asks the Court to do just that. Second, Amicus elevates the intent

requirement to a virtually impossible standard to satisfy. Third, Amicus attempts to write a frequency element into the FSIA which is not there.

I. Amicus Admits There is no Clear Line-drawing With the Severity Inquiry of Torture, Then Asks the Court to Do Just That

Amicus admits: "The severity inquiry is a delicate one that is not susceptible to clear line-drawing." *See* Amicus Brief at 27. Amicus is right. But the arguments articulated by Amicus belie this admission.

For example, Amicus emphasizes that Radmanesh received medical treatment as an indicator he was not tortured. *See* Amicus Brief at 32 ("Another indicator that Iran's treatment of Mr. Radmanesh was not so severe as to constitute torture in that he was never denied the medical care he required during his time in the military"). This effectively argues clear line-drawing requiring withholding medical treatment as a prerequisite to proving torture. No case holds or reasons this. In this regard, Radmanesh is unaware of a single case holding or reasoning that some acts inconsistent with torture undercut other acts that are torture.

Amicus also cites cases finding no torture from interrogations gone wild. *See* Amicus Brief at 29 (citing *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003) (*Simpson I*); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002)). Certainly,

interrogations of those in official custody are a most difficult area to evaluate in terms of torture, as international standards on interrogation vary widely. Even the standards in the United States—and even within different departments in the federal government—vary widely. It is therefore difficult to view certain types of interrogation techniques as acts of "universal condemnation." *See Price*, 294 F.3d at 93-94.

But one act is not open to interpretation as to whether it is universally rejected: a kill or be killed order at gunpoint. It is so universally rejected that even cases recognizing torture have not been faced with this extreme act. The act most akin to this atrocity is forcing a victim to play Russian roulette, which is an act included as those establishing torture. *See Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322, 1332-40, 1345-46 (N.D. Ga. 2002); *Cicippio v. Islamic Republic of Iran*, 18 F.Supp.2d 62, 64-66 (D.D.C. 1998).

Forcing a victim to play Russian roulette constitutes torture because it undoubtedly inflicts severe mental pain or suffering—in large part by threatening the very real risk of death. If forcing a victim to play Russian roulette constitutes torture, a kill or be killed order at gunpoint does too.

Russian roulette is torturous because of the severe mental suffering of whether victims will die. The kill or be killed order carries that same severe

mental suffering, as the failure to kill on command risks death by the firing of the gun presently pointed at the victim. But the severe mental suffering goes much further, for the death of the victim is not the only death at issue. The kill or be killed order forces the victim to a murder decision—a choice between lives. Murder or be murdered. Kill or be killed. The severe mental suffering of putting a victim to such a decision must be unimaginable. It must be torture.

II. Amicus Elevates the Intent Requirement to a Virtually Impossible Standard.

In discussing Radmanesh's unwilling time spent in the Iranian military, Amicus argues "the suffering was not targeted at Mr. Radmanesh in particular so [it] was not 'both intentional and malicious.'" *See* Amicus Brief at 34. Amicus then cherry-picks examples shared amongst all members of the Iranian military, such as discussions of martyr and receiving keys to heaven.

But again, Amicus ignores the act of an Iranian military commander singling out Radmanesh and forcing him at gunpoint to murder an innocent Iraqi in his sleep. (App'x 0021; App'x 0103.) Short of the commander simply pulling the trigger and killing Radmanesh, what is more intentional and malicious than forcing Radmanesh to choose his own life over an innocent,

sleeping man? What is more intentional and malicious than forcing Radmanesh to murder, and live with it the rest of his life?

Amicus instead argues "[n]o evidence suggests that Iranian agents, at any point, acted with the purpose of torturing Mr. Radmanesh." *See* Amicus Brief at 34. This is confusing the standard for defining torture with the intent requirement. Intent is defined in the FSIA to include "intimidating or coercing that individual. . . ." 28 U.S.C. § 1605A (incorporating by reference the TVPA § 3(b)). This is precisely what the kill or be killed order at gunpoint was: the Iranian military commander intimidating and coercing Radmanesh to commit murder by holding a gun to him.

Amicus admits that Radmanesh's allegations include times when he was a targeted individual in Iran's custody. Radmanesh also suffered severe pain or suffering. Finally, it was intentionally inflicted. Taking his allegations as true, Radmanesh established torture under the FSIA.

III. Amicus Writes a Frequency Element Into the FSIA Which is not There.

This Court said in *Price*: "The more intense, lasting, or heinous the agony, the more likely it is to be torture." *Price*, 294 F.3d at 93. Amicus runs with this statement to effectively imply single acts don't rise to the level of

torture. This reverse logic and extension of the Court's statement in *Price* is problematic for three reasons.

First, it is illogical. A single act can maim. A single act can exact severe pain. A single act can kill. Frequency is not an element of torture.

Second, as argued in Radmanesh's opening brief, the deficiency in *Price* was one of pleading rather than severity (much less frequency). *See* Appellant's Brief at 33-34 (citing *Price*, 294 F.3d at 93-94). The Court in *Price* did not evaluate the torture claim in terms of the frequency of acts; it evaluated the claim in terms of a pleading deficiency not present here.

Third, the FSIA statute does not state or imply a frequency element. The statute defines torture in terms of custody, severity, and intent of "an act." As this Court noted in *Price*, "in order to constitute torture, an act must be deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering." *Price*, 294 F.3d at 93 (emphasis added; quoting S. Exec. Rep. No. 101-30, at 15 (1990)).

A single act can constitute torture. Here, it did in the kill or be killed order at gunpoint. (App'x 0021; App'x 0103.)

Of course, the more prolonged or frequent the acts of torture, the more obvious the torture. As set forth in Radmanesh's opening brief, many acts of torture are present here. But torture is torture, whether one time or multiple times.

The latter may result in different or even more recoverable damages than a single act or torture. Yet both are torture.

Custody, severity, and intent are the only elements of torture. Radmanesh's allegations, taken as true, establish each element—particularly in the kill or be killed order Radmanesh was forced to carry out at gunpoint.

As set forth in Radmanesh's opening brief, Radmanesh also establishes hostage-taking by Iran. The Court should therefore reverse the district court's order and render default judgment in Radmanesh's favor.

PRAYER

Radmaesh prays the Court:

1.) reverses the district court's memorandum opinions and orders denying Radmanesh's motion for default judgment and *sua sponte* dismissing his claims;

2.) renders default judgment in favor of Radmanesh on liability for his claims against Iran;

3.) remands to the district court for a determination of damages; and

4.) awards any other relief which is proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for Appellant certifies that this Reply Brief complies with the Federal Rules of Appellate Procedure and D.C. Circuit Rules in submitting Appellant's Brief. *See* Fed. Rs. App. P. 28, 32; Cir. Rs. 28, 32. Specifically, this brief contains 1,543 words, as determined by the sections included per Rule 32(f).

/s/ Michael A. Yanof
Michael A. Yanof

CERTIFICATE OF SERVICE

With the appointment of Amicus counsel, this Brief was e-filed and served on all counsel in accordance with the Federal Rules of Appellate Procedure and Circuit Rules on December 21, 2020.

/s/Michael A. Yanof
Michael A. Yanof