No. 08-1234

In The
Supreme Court of the United States

JAMAL KIYEMBA, NEXT FRIEND, et al.,

Petitioners,

v.

BARACK OBAMA,
PRESIDENT OF THE UNITED STATES, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF INTERNATIONAL LAW EXPERTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. INTERNATIONAL TREATIES RATIFIED BY THE UNITED STATES REQUIRE THAT THE COURT REVIEWING DETENTION HAVE THE AUTHORITY TO ORDER RELEASE OF DETAINEES WHOSE DETENTION IS NOT LAWFUL 3

A. Domestic habeas corpus law should be interpreted consistently with the United States' international legal obligations under the International Covenant on Civil and Political Rights 5

B. The law of war obligates the United States to permit the District Court to release Petitioners 12

II. THE DISTRICT COURT'S ORDER TO GRANT PETITIONERS' RELEASE IS CONSISTENT WITH ACCEPTED PRINCIPLES OF INTERNATIONAL LAW GOVERNING PROLONGED ARBITRARY DETENTION 20

A. International human rights law condemns prolonged arbitrary detention and supports the prompt and effective release of individuals whose detention is unjustified 21

TABLE OF CONTENTS – Continued

Page

B. International humanitarian law consistently demands the prompt release of detainees when the circumstances justifying their detention cease to exist....... 28

III. THE UNITED STATES SHOULD LIVE UP TO THE STANDARDS OF INTERNATIONAL LAW TO WHICH IT HAS HELD OTHER COUNTRIES BY PROVIDING EFFECTIVE JUDICIAL REVIEW OF UNLAWFUL DETENTION........ 35

CONCLUSION 38

LIST OF *AMICI CURIAE* ....Appendix 1

TABLE OF AUTHORITIES

Page

CASES

Atkins v. *Virginia*, 536 U.S. 304 (2002)......................21

Boumediene v. *Bush*, 553 U.S. ___, 128 S. Ct. 2229 (2008)...10, 11

Ex Parte Watkins, 28 U.S. (3 Pet.) 193 (1830)............7

Hamdan v. *Rumsfeld*, 548 U.S. 557 (2006)...4, 11, 13, 14, 15

Hartford Fire Ins. Co. v. *California*, 509 U.S. 764 (1993)..11

Kim Ho Ma v. *Ashcroft*, 257 F.3d 1095 (9th Cir. 2001) 12

Kolovrat v. *Oregon*, 366 U.S. 187 (1961)....................16

Landgraf v. *USI Film Products*, 511 U.S. 244 (1994)..19

Lawrence v. *Texas*, 539 U.S. 558 (2003) 20

Mali v. *Keeper of the Common Jail*, 120 U.S. 1 (1887)..17

Martinez v. *City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998) 22

Murray v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).............................4, 10, 11, 12, 17

Olympic Airways v. *Husain*, 540 U.S. 644 (2004)..26

Rasul v. *Bush*, 542 U.S. 466 (2004)..............................9

Rodriguez-Fernandez v. *Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) 22, 26

TABLE OF AUTHORITIES – Continued

Page

Roper v. *Simmons*, 543 U.S. 551 (2005)...............11, 20

Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004)..........10

Thompson v. *Oklahoma*, 487 U.S. 815 (1988)...........21

Weinberger v. *Rossi*, 456 U.S. 25 (1982).....................11

Zadvydas v. *Davis*, 533 U.S. 678 (2001) 12

STATUTES, EXECUTIVE ORDERS AND REGULATIONS

28 U.S.C. § 2241 ....11, 17, 18

22 U.S.C. § 2151n 35

Exec. Order No. 13107, 3 C.F.R. § 234 (1999) 6

Military Commissions Act of 2006, § 5(a), Pub. L. 109-366, 120 Stat. 2600, 2631......................18, 19

Proclamation No. 2999, 3 C.F.R. 46 (1953)...............22

LEGISLATIVE HISTORY

International Covenant on Civil and Political Rights: Hearing Before the S. Comm. on Foreign Relations, 102d Cong. 5 (1991).....20, 21, 24, 27

Joint Statement by Senators McCain, Warner, and Graham on Individual Rights Under the Geneva Conventions, 152 Cong. Rec. S10401 (2006)...18

S. Exec. Rep. No. 102-23 (1992) 9, 10

TABLE OF AUTHORITIES – Continued

Page

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3 Int'l Comm. of the Red Cross, *Commentary: Geneva Convention Relative to the Treatment of Prisoners of War* (Jean S. Pictet ed., 1960) 29, 30, 31

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A v. *Australia*, U.N. Hum. Rts. Comm., Communication No. 560/1993, ¶ 9.5, U.N. Doc. CCPR/C/59/D/560/1993 (1997)...............................27

American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 131 ....23, 24, 25, 26

American Declaration of the Rights and Duties of Man, OAS Res. XXX, Int'l Conf. of Am. States, 9th Conf., OAS Doc. OEA/Ser. L./V/II.23, doc. 21 rev. 6 (1948) 24

Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Advisory Opinion, 2005 I.C.J. (Dec. 19, 2005).....................................13

Case of Assanidze v. Georgia, 2004-IV Eur. Ct. H.R. 659...27

Case of Chaparro Álvarez and Lapo Íñiguez v. *Ecuador*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 170 (Nov. 21, 2007)..23

TABLE OF AUTHORITIES – Continued

Page

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 108 Stat. 382, 463-64, 1465 U.N.T.S. 85 25

Convention on the Rights of the Child art. 37(d), *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990)...........................25

Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 26

Council of Europe, European Convention on Human Rights art. 13, Nov. 4, 1950, 213 U.N.Y.S. 232 (1955)...23, 25

D. Monguya Mbenge et al. v. *Zaire*, Communication No. 16/1977, U.N. Doc. A/38/40, 140 (March 25, 1983) 8

Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 132, Aug. 12, 1949, 6 U.S.T. 3526, 75 U.N.T.S. 287 ....32, 33, 34

Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ....*passim*

Human Rights Comm., Communication No. 1324/2004: Australia, U.N. Doc. CCPR/C/88/ D/1324/2004 (Nov. 13, 2006).....................................8

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TABLE OF AUTHORITIES – Continued

Page

Ilascu v. Moldova, 2004-VII Eur. Ct. H.R. 1134........27

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (Jul. 8, 1996)........13

Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN. 4/2004/3, 15 December 2003........8

Restatement (Third) of Foreign Relations Law of the United States (1987)........22

Shafiq v. Australia, U.N. Hum. Rts. Comm., Communication No. 1324/2004, U.N. Doc. CCPR/C/88/D/1324/2004 (2006)........27

U.N. Econ. & Soc. Council, Comm'n on Human Rights, 5th Sess., 96th mtg., U.N. Doc. E/CN.4/SR.96 (June 1, 1949)........7

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TABLE OF AUTHORITIES – Continued

Page

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OTHER AUTHORITIES

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10 Dep't of State, Country Report on Human Rights Practices for 1985 (1986).......................36, 37

13 Dep't of State, Country Reports on Human Rights Practices for 1988 (1989).............................36

13-A Dep't of State, Country Reports on Human Rights Practices for 1988 (1989) 37

27 Dep't of State, Country Reports on Human Rights Practices for 2002 (2003).............................37

27-B Dep't of State, Country Reports on Human Rights Practices for 2002 (2003) 37

28 Dep't of State, Country Reports on Human Rights Practices for 2003 (2004).............................38

4 Dep't of State, Country Reports on Human Rights Practices for 1980 (1981).............................36

8 Dep't of State, Country Reports on Human Rights Practices for 1984 (1984).............................36

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TABLE OF AUTHORITIES – Continued

Page

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Letter from John B. Bellinger, III, Legal Adviser, Dep't of State, to William J. Haynes, II, Gen. Counsel, Dep't of Def. (Jan. 16, 2008) 16

Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001) 22

Page

Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int'l L. & Pol'y 419 (1987)....................................17

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are experts in international law.[1] The subject matter of this brief – the international law governing prolonged and arbitrary detention of noncombatants – presents questions of which *amici* have firsthand knowledge as practitioners and scholars and about which they are deeply concerned. *Amici* wish to clarify the relevant international legal obligations of the United States and to emphasize the importance of taking these obligations into account when interpreting the domestic statutes and common law that govern *habeas corpus*.

SUMMARY OF ARGUMENT

This *amicus* brief is filed in support of Petitioners' argument that a U.S. federal court sitting in habeas jurisdiction must be able to order a detainee's release upon finding that his detention is unlawful.

The United States has accepted two international legal obligations that require that the court reviewing Petitioners' habeas petitions have the authority to

[1] A list of *amici* appears in the Appendix. Pursuant to Rule 37.6, *amici* affirm that no counsel for the parties authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

order release. First, the International Covenant on Civil and Political Rights, which the United States ratified in 1992, provides that every detainee has a right to judicial review of his detention by a competent court that may "*order his release* if the detention is not lawful." International Covenant on Civil and Political Rights art. 9(4), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter Covenant] (emphasis added). Second, the Geneva Conventions' Common Article 3 provides that in a time of war, a civilian detainee must be "treated humanely." *E.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Common Article 3]. This requirement, in turn, should be interpreted in light of customary international law that requires the release of detainees when the reason for their detention has ceased.

In addition to these two binding international legal obligations, human rights law and humanitarian law reflect the universal norm that prompt release is the proper remedy where there is no lawful justification for detention. This widely accepted principle of international law does not control the outcome of this case, but it can provide confirmation for this Court's own conclusions. In this case, the District Court found that Petitioners present no threat to the United States and that there is no justification for their detention. World opinion supports a conclusion that the District Court's order of

release is the appropriate remedy for this unlawful detention.

The United States has repeatedly criticized other countries for failing to release detainees whose detention is unlawful. It has made clear that international law requires that habeas review be not only available but *effective* – meaning that it results in release when the detention is found to be unlawful. If the United States fails to live up to the standards to which it has held the rest of the world, this will breed resentment and will undermine the ability of the United States to encourage other countries to follow basic principles of international law in the future.

ARGUMENT

I. INTERNATIONAL TREATIES RATIFIED BY THE UNITED STATES REQUIRE THAT THE COURT REVIEWING DETENTION HAVE THE AUTHORITY TO ORDER RELEASE OF DETAINEES WHOSE DETENTION IS NOT LAWFUL

The United States has accepted two international legal obligations that independently require that the U.S. District Court have the authority to order Petitioners' release. First, the International Covenant on Civil and Political Rights (Covenant), which the United States has called "the most important human

rights instrument adopted since the U.N. Charter and the Universal Declaration of Human Rights,"[2] requires that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention *and order his release* if the detention is not lawful." Covenant, *supra*, art. 9(4) (emphasis added). Although this treaty is not self-executing, it creates legal obligations that may be enforced through application of the longstanding principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

Second, Common Article 3 of the Geneva Conventions, which the Supreme Court found binding and enforceable in *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 629-32 (2006), requires that Petitioners be "treated humanely." That obligation, read in light of Article 75 of the first Additional Protocol to the Geneva Conventions, *see* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, adopted June 8, 1977, art. 75, 1125 U.N.T.S. 3

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[2] Press Release, U.S. Mission to the United Nations in Geneva, Opening Statement by Matthew Waxman, Head of U.S. Delegation and Principal Deputy Dir. of Policy Planning, Dep't of State, to U.N. Human Rights Comm. (July 17, 2006), *available at* http://geneva.usmission.gov/Press2006/0717Waxman.html).

[hereinafter Article 75], provides that the District Court must have the authority under the habeas statute to order the release of Petitioners, who it found are not lawfully held and pose no threat to the United States.

A. Domestic habeas corpus law should be interpreted consistently with the United States' international legal obligations under the International Covenant on Civil and Political Rights.

1. The Covenant obligates the United States to allow courts to order release from unlawful and prolonged arbitrary detention.

The International Covenant on Civil and Political Rights, which the United States ratified in 1992, obligates the United States to allow detainees to challenge their detention before a court that has the authority to order release if the detention is unlawful. Article 9(4) of the Covenant provides that "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." Covenant, *supra*, art. 9(4) (emphasis added). Article 9(4) thus requires State parties not simply to provide an opportunity to challenge unlawful detention in court. State parties must provide *effective* judicial review of that detention by

permitting the reviewing court to order release if the detention is found unlawful.[3]

Article 9(4)'s requirement that State parties provide effective judicial review of detention was incorporated into the Covenant at the behest of the United States precisely to encourage robust and effective habeas corpus protections. The United States first proposed a provision that referred expressly to habeas proceedings: "Any one who is deprived of his liberty by arrest or detention shall be entitled to an effective remedy in the nature of 'habeas corpus' by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Draft International Covenant on Human Rights: United States of America: Amended Proposals*, at 1, U.N. Doc. E/CN.4/170/Add.4 (May 19, 1949). The phrasing was changed to accommodate State parties from different legal and language traditions. *See* ECOSOC, Comm'n on Human Rights, Drafting Comm., 2d Sess., 23d mtg. at 8, U.N. Doc. E/CN.4/AC.1/SR.23 (May 10, 1948) [hereinafter Second Drafting Session] (summarizing Chinese

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[3] The United States has repeatedly confirmed that it is bound by the Covenant and that it is fully committed to comply with its obligations. *See* Exec. Order No. 13107, 3 C.F.R. § 234 (1999), *reprinted in* 5 U.S.C. § 601 app. at 749-50, 750 (2006) ("It shall be the policy and practice of the United States . . . fully to respect and implement its obligations under the international human rights agreements to which it is a party, including the ICCPR. . . .").

objection to term "habeas corpus" because "the expression habeas corpus was not altogether clear to people who did not know Latin or English"); ECOSOC, Comm'n on Human Rights, 5th Sess., 96th mtg. at 3, U.N. Doc. E/CN.4/SR.96 (June 1, 1949) (summarizing Soviet view that habeas corpus "was scarcely known except to the Anglo Saxon public"). The original purpose of the provision proposed by the United States – to make the robust protections of habeas available to detainees in member states – remained the same.

The requirement of effective relief for unlawful detention in the Covenant is reinforced by Article 2(3), which provides that "any person whose rights or freedoms . . . are violated shall have an *effective remedy*. . . ." Covenant, *supra*, art. 2(3) (emphasis added). In the habeas context, the "effective remedy" for unlawful detention is release. *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) ("The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause."). The United States ratified the Covenant without adopting any reservation to Article 2(3) or Article 9(4).[4]

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[4] At the time of ratification, the Senate and the Executive Branch both affirmed their shared understanding that the United States was committed to comply with all treaty obligations for which the U.S. did not adopt a reservation. *See* David Sloss, *The Domestication of International Human Rights*, 24 Yale

(Continued on following page)

The remedy of release may not be delayed indefinitely. The Covenant recognizes that detention without trial is a severe infringement on liberty and thus is proscribed except where strictly necessary and proportionate.[5] Although Article 9 does not provide a specific period of time a person may be detained, the seven years which Petitioners have been held at Guantanomo clearly exceeds any reasonable period for detaining a person who has not been convicted of a crime under the standards set forth in Article 9. *See D. Monguya Mbenge et al.* v. *Zaire*, Communication No. 16/1977, U.N. Doc. A/38/40, 140, ¶ 20-21 (March 25, 1983) (finding violation of Article 9 where individual was held for approximately sixteen months without charge).

J. Int'l L. 129, 171-88 (1999) (providing detailed review of Senate record of ratification).

[5] *See, e.g.*, Human Rights Comm., Communication No. 1324/2004: Australia, ¶ 7.2, U.N. Doc. CCPR/C/88/D/1324/2004 (Nov. 13, 2006) (detention could be arbitrary if "not necessary in all the circumstances of the case and proportionate to the ends sought"); Human Rights Comm., Communication No. 66/1980: Uruguay, ¶ 18.1, U.N. Doc. CCPR/C/17/D/66/1980 (Oct. 12, 1982) ("[A]dministrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society *which cannot be contained in any other manner.*" (emphasis added)). This requirement applies equally in declared emergencies. *See, e.g.*, Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN. 4/2004/3, 15 December 2003, ¶ 60 ("[I]n no event may an arrest based on emergency legislation last indefinitely.").

At the time it ratified the Covenant, the United States made clear that it aimed not only to promote core rights through the Covenant but also to strongly encourage other states to provide an effective remedy for violations of those rights. *See* S. Exec. Rep. No. 102-23, at 3 (1992). Testifying on behalf of the administration and in support of ratification of the Covenant, the Assistant Secretary of State for Human Rights and Humanitarian Affairs, Richard Schifter, derided other State parties for ratifying the Covenant while paying only "lip-service" to enforcement of its provisions, a practice the United States was committed to discouraging. *International Covenant on Civil and Political Rights: Hearing Before the S. Comm. on Foreign Relations*, 102d Cong. 5 (1991) (statement of Richard Schifter, Assistant Secretary of State for Human Rights and Humanitarian Affairs). The United States thus ratified the Covenant with the explicit goal of codifying core U.S. rule of law values in a multilateral treaty to give international legitimacy and binding effect to these values at a time of global political transition.

The terms of the Covenant confirm that its obligations extend to Guantanamo. The Covenant states that each party is bound to "ensure to all individuals within its *territory* and subject to its *jurisdiction* the rights recognized in the present Covenant. . . ." Covenant, *supra*, art. 2(1) (emphasis added). The Supreme Court has made clear that Guantanamo is "in every practical respect a *United States territory*," *Rasul* v. *Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J.,

concurring) (emphasis added), and that it is "within the constant *jurisdiction of the United States.*" *Boumediene* v. *Bush*, 553 U.S. ___, 128 S. Ct. 2229, 2261 (2008) (emphasis added). As such, the United States is obligated to fulfill its obligations under the Covenant at Guantanamo.

2. The Court should interpret domestic law in light of the United States' obligations under the Covenant.

The Covenant, which comprises binding obligations on the United States as a matter of international law, is relevant to this Court's construction of domestic law. The United States entered a declaration to the Covenant stating that Articles 1 through 27 are not "self-executing," S. Exec. Rep. No. 102-23, at 21-24 (1992); therefore, the Covenant does not create a private right of action.[6] U.S. courts have instead enforced the Covenant through application of the longstanding principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ." *Murray* v. *Schooner Charming Betsy*, 6

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[6] As this Court has acknowledged, even though it is not self-executing, "the Covenant does bind the United States as a matter of international law." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 735 (2004). The declaration was thus meant "to clarify that the Covenant will not create a private cause of action in U.S. Courts." S. Exec. Rep. No. 102-23, at 14 (1992).

U.S. (2 Cranch) 64, 118 (1804).[7] The Supreme Court has repeatedly affirmed that this rule of statutory construction applies not only to customary international law, but also to treaty obligations. *See, e.g.*, *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982).

Here, *Charming Betsy* calls for interpreting 28 U.S.C. § 2241[8] in light of the United States' obligation under the Covenant to allow a court to order the release of a person who cannot be lawfully held. This approach is consistent with the longstanding practice of federal courts. In *Hamdan* v. *Rumsfeld*, the plurality cited the Covenant as an example of a legally binding international instrument, requiring the United States to provide enemy combatants with certain judicial protections. 548 U.S. at 633 n.66 (plurality opinion); *cf. Roper* v. *Simmons*, 543 U.S. 551, 576 (2005) (citing Covenant as evidence of international consensus against juvenile executions in concluding that the Eighth Amendment prohibits execution of individuals under eighteen at time of their offense).

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[7] *See Hartford Fire Ins. Co*. v. *California*, 509 U.S. 764, 814-19 (1993) (Scalia, J., dissenting) (expressly relying on *Charming Betsy* rule).

[8] Petitioners properly invoke the protections of statutory habeas because *Boumediene* v. *Bush* invalidated section 7(a) of the MCA and restored application of the statutory writ of habeas corpus under 28 U.S.C. § 2241. 553 U.S. ___, 128 S. Ct. 2240 (2008); *see also id*. at 2266 (declaring that § 2241 would "govern in MCA § 7's absence").

Indeed, a federal court has previously applied the *Charming Betsy* canon to construe domestic law to comply with the United States' obligation to prohibit prolonged arbitrary detention under Article 9(4). In *Kim Ho Ma* v. *Ashcroft*, an alien petitioned for a writ of habeas corpus, arguing that the Immigration and Naturalization Service violated his due process rights by subjecting him to indefinite detention. 257 F.3d 1095 (9th Cir. 2001).[9] The Ninth Circuit construed the underlying statute narrowly in holding that the alien had to be released, since there was no reasonable likelihood that he would be removed in the foreseeable future. The court reasoned that the alien's indefinite detention was a clear violation of Article 9, which prohibits arbitrary arrest and detention. *Id.* at 1114. Federal case law thus confirms that this Court can and should interpret the habeas statute in light of the United States' obligations under the Covenant.

B. The law of war obligates the United States to permit the District Court to release Petitioners.

The law of war creates an independent legal obligation that the District Court be permitted to order Petitioners' release. The law of war does not displace the obligations under the Covenant outlined above, but creates an additional international legal

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[9] This decision was issued on remand from *Zadvydas* v. *Davis*, 533 U.S. 678 (2001).

obligation on the United States to permit the District Court to order Petitioners' release.[10] Common Article 3 of the Geneva Conventions, which the United States has ratified, requires that detainees be treated humanely. This principle is appropriately interpreted in light of recognized customary international law that requires the release of detainees when the reason for their detention has ceased. In the case at hand, the District Court must have the authority to order the release of Petitioners, whose detention is unlawful and who pose no threat to the United States.

Article 3 of the Geneva Conventions – often called Common Article 3 because it appears in all four of the Geneva Conventions – requires that all persons taking no active part in the hostilities, including detainees, be "treated humanely." Common Article 3, *supra*. In *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 630 (2006), the Supreme Court held that Common Article 3 is legally binding on the United States and

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[10] As a general matter, the law of war does not displace international human rights law during armed conflict. *See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, 240 (Jul. 8, 1996) ("[T]he protection of the International Covenant on Civil and Political Rights does not cease in times of war. . . ."); *see also Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Advisory Opinion, 2005 I.C.J. ¶ 106 (Dec. 19, 2005) (noting that in times of armed conflict, "both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration").

enforceable in U.S. courts.[11] Common Article 3 provides that in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum," certain provisions. Common Article 3, *supra*. Among these provisions is the requirement that "[p]ersons taking no active part in the hostilities, including . . . those placed *hors de combat* by . . . detention . . . shall in all circumstances be *treated humanely*." *Id.* (second emphasis added).

The obligation that detained civilians be "treated humanely" must be read in light of Article 75 of Protocol I to the Geneva Conventions, *see* Article 75, *supra*. Article 75, which is "indisputably part of the customary international law," 548 U.S. at 634 (plurality opinion),[12] provides that all detainees held in connection with armed conflict "*shall be released* with the minimum delay possible and in any event *as soon as* the circumstances justifying the arrest, detention

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[11] *See* 548 U.S. at 631-32 ("Common Article 3, then, is applicable here and, as indicated above, requires that Hamdan be tried by a 'regularly constituted court. . . .' "); *see also id.* at 642 ("[Common Article 3] is part of a treaty the United States has ratified and thus accepted as binding law.") (Kennedy, J., concurring).

[12] Justice Kennedy declined to "reach unnecessarily the question whether . . . Article 75 of Protocol I to the Geneva Conventions is binding law. . . ." *Id.* at 654 (Kennedy, J., concurring).

or internment have ceased to exist." Article 75, *supra*, § 3 (emphasis added).[13]

Although the United States has not ratified Protocol I, the Protocol's status as customary international law renders it an appropriate interpretive tool for the Court. *See Hamdan*, 548 U.S. at 633 (plurality opinion) (noting that Common Article 3 "must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law," many of which are "described in Article 75 of Protocol I"). Under Article 75, civilians initially detained because they were thought to pose a security risk must be released as soon as it is clear that they pose no such risk. This reading of Common Article 3 in light of Article 75 is consistent with the conclusions of a 2005 study on Customary International Humanitarian Law by the International Committee of the Red Cross, which concludes that as a matter of treaty law, "arbitrary deprivation of liberty is not compatible" with humane treatment under Common Article 3. *See* Int'l Comm. Red Cross, I *Customary International Humanitarian*

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[13] *See also* Jelena Pejić, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 Int'l Rev. Red Cross 375, 382 (2005) ("One of the most important principles governing internment/administrative detention is that this form of deprivation of liberty must cease as soon as the individual ceases to pose a real threat to State security, meaning that deprivation of liberty on such grounds cannot be indefinite.").

Law 344 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2007).

State Department Legal Advisers have repeatedly stated that the fundamental guarantees expressed in Article 75 are part of the law of war.[14] While serving as Legal Adviser to President George W. Bush, William H. Taft, IV wrote that the "customary law notion of fundamental guarantees found more expansive expression in Article 75 of Additional Protocol I to the Geneva Conventions" and that the United States "does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled." William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 321-22 (2003). His successor, John Bellinger, argued for a public statement recognizing Article 75 as customary international law binding on the United States, noting in the process that U.S. practice conforms to Article 75. *See* Letter from John B. Bellinger, III, Legal Adviser, Dep't of State, to William J. Haynes, II, Gen. Counsel, Dep't of Def. (Jan. 16, 2008) (on file with the Yale Law School Library). These Legal Advisers were reaffirming a position declared

[14] The State Department Legal Adviser is charged with negotiating and enforcing treaties and thus his views are given significant weight. *See Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.").

more than two decades ago under then-Deputy Legal Adviser Michael Matheson. *See* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int'l L. & Pol'y 419, 427 (1987) ("We support in particular the fundamental guarantees contained in article 75. . . ."). It is therefore appropriate to interpret the binding legal obligations on the United States under Common Article 3 in light of Article 75's obligation to release detainees as soon as the reason for their detention has ceased.

The United States' obligation under Common Article 3 to ensure the courts have the authority to order release of detainees when there is no lawful basis for detention can be enforced by this Court through the habeas statute. Section 2241 expressly provides that habeas relief is available where detention is contrary to U.S. treaty obligations. 28 U.S.C. § 2241(c)(3) (2006) (noting that writ extends to prisoners held "in custody in violation of the Constitution or laws or treaties of the United States"); *see Mali* v. *Keeper of the Common Jail*, 120 U.S. 1, 17 (1887) (holding that because a "treaty is part of the supreme law of the United States," the power to issue writs of habeas corpus applies to prisoners held in violation of treaties). At a minimum, Common Article 3 should be used to interpret the domestic habeas corpus statute. *See Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

Section 5 of the MCA does not remove the requirement of release under section 2241(c)(3). Section 5 provides that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding . . . as a source of rights in any court of the United States or its States or territories." Military Commissions Act of 2006, § 5(a), Pub. L. 109-366, 120 Stat. 2600, 2631 [hereinafter "MCA"]. In a joint statement, Senators McCain, Warner, and Graham made clear that this section was not intended to restrict individuals "from raising claims that the Geneva Conventions have been violated as a collateral matter once they have an independent cause of action." Joint Statement by Senators McCain, Warner, and Graham on Individual Rights Under the Geneva Conventions, 152 Cong. Rec. S10401 (2006); *see also* Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 Am. J. Int'l L. 73, 92-93 (2007) (arguing that, unlike corresponding provision of bill originally proposed, section 5(a) does not purport to make Geneva Conventions unenforceable in all circumstances and suggesting that section 5(a) would likely be unconstitutional if interpreted to bar invocation of the Geneva Conventions in habeas proceedings). Here, that independent cause of action is supplied by the habeas statute.

Even if a broader reading of section 5 were appropriate, it would not apply to the Petitioners' case. Congress did not apply section 5 retroactively to

pending *habeas* cases, such as the Petitioners'. Section 5 contains no language regarding retroactive application. This lies in direct contrast to the specific effective date language appearing two sections later in section 7(b) of the MCA, in which Congress expressly applied the now-void amendments to subsection 7(a) to "all cases . . . pending on or after the date of the enactment of this Act which relate to any aspect of the detention, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." MCA § 7(b). The absence of retroactivity language in section 5 supports a presumption against its retroactive application. *See Landgraf* v. *USI Film Products*, 511 U.S. 244, 264 (1994) ("The presumption against statutory retroactivity is founded upon sound considerations of general policy and practice, and accords with long held and widely shared expectations about the usual operation of legislation.").

Together, the International Covenant on Civil and Political Rights and Common Article 3 of the Geneva Conventions create binding international legal obligations on the United States. Both independently require that detainees held by the United States be provided a right to judicial review of their detention by a court capable of ordering release if detention is found to be unlawful. In this case, where the reviewing court has found that there is no lawful basis for Petitioners' detention and that the Petitioners pose no threat to the United States, these

international legal obligations require that the District Court have the authority to order release.

II. THE DISTRICT COURT'S ORDER TO GRANT PETITIONERS' RELEASE IS CONSISTENT WITH ACCEPTED PRINCIPLES OF INTERNATIONAL LAW GOVERNING PROLONGED ARBITRARY DETENTION.

International human rights law and international humanitarian law reflect the underlying principle that prompt release is the proper remedy for unjustified detention, reflecting a global consensus in support of Petitioners' position.[15] Aside from the Geneva Conventions and the Covenant, *see supra* Part I, these legal instruments do not create binding international legal obligations that control the outcome of the present case. Nonetheless, the opinion of the international community as expressed through multilateral conventions, international institutions, and domestic court rulings, may "provide respected and significant confirmation" for the Court's own conclusions. *Roper* v. *Simmons*, 543 U.S. 551, 578 (2005).[16]

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[15] Most of the agreements cited in this Part have not been ratified by the United States, although several have been signed.

[16] *See also Lawrence* v. *Texas*, 539 U.S. 558, 576-77 (2003) (noting decisions of foreign and international courts as evidence that right to consensual homosexual intercourse "has been accepted as an integral part of human freedom in many other

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A. International human rights law condemns prolonged arbitrary detention and supports the prompt and effective release of individuals whose detention is unjustified.

International human rights norms condemn prolonged arbitrary detention and support prompt release in cases of unlawful detention. The prohibition against prolonged arbitrary detention found in the International Covenant on Civil and Political Rights – a binding treaty on the United States, *see supra* Part I.A. – originates in the Universal Declaration of Human Rights. Articles 8 and 9 of the Universal Declaration flatly prohibit prolonged arbitrary detention and further set forth a "right to an effective remedy" for violations of "fundamental rights." Universal Declaration of Human Rights, G.A. Res. 217A, arts. 8-9, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration].[17] For individuals like Petitioners whose

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countries"); *Atkins* v. *Virginia*, 536 U.S. 304, 316 n.21 (2002) ("[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."); *Thompson* v. *Oklahoma*, 487 U.S. 815, 830 & n.31 (1988) (plurality opinion) (considering views of "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community").

[17] Article 9 states that "[n]o one shall be subjected to arbitrary arrest, detention or exile." Universal Declaration, *supra*, art. 9. Article 8 states that "[e]veryone has the *right to an effective remedy* by the competent national tribunals for acts

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"fundamental rights" are being violated through prolonged arbitrary detention, Article 8's right to an "effective remedy" necessarily means the right to be released.

The United States was a central force behind the promulgation of the Universal Declaration in 1948, *see* Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* 87, 89 (2001), and the United States has consistently urged the Declaration's adoption as "a common standard of achievement for all nations and all peoples." Proclamation No. 2999, 3 C.F.R. 46 (1953). Today, the Universal Declaration is embraced across the globe. Its provisions are regarded as foundational international norms.[18]

A core concept of international human rights law is the right to an effective remedy where a violation of

violating the fundamental rights granted him by the constitution or by law." *Id.* art. 8 (emphasis added).

[18] U.S. courts have referenced the "clear international prohibition against arbitrary . . . detention" deriving from the Universal Declaration, *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998), and have honored it as an international norm, *see, e.g.*, *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."). *See also* Restatement (Third) of Foreign Relations Law of the United States § 702(e) & cmt. h (1987) ("[A]rbitrary detention violates customary law if it is prolonged and practiced as state policy."); *id.* § 702 cmt. n (stating that prohibition against prolonged arbitrary detention is *jus cogens* norm).

rights is found. This right to an effective remedy is the linchpin supporting the protection of all other rights. Thus, the Universal Declaration refers generally to the right to an "*effective* remedy," *supra* art. 8 (emphasis added), and the American Convention on Human Rights provides that "[e]veryone has the right to simple and prompt recourse, or any other *effective* recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights. . . . *The State Parties . . . ensure that the competent authorities shall enforce such remedies when granted*." Organization of American States, American Convention on Human Rights art. 25, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 131 [hereinafter American Convention] (emphasis added); *see also* Council of Europe, European Convention on Human Rights art. 13, Nov. 4, 1950, 213 U.N.Y.S. 232 (1955) [hereinafter European Convention] (providing that "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an *effective remedy* before a national authority" (emphasis added)); Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms art. 29, May 26, 1995, Council of Europe Doc. H (95) 7 rev. (stating that "[e]veryone whose rights and freedoms are violated shall be entitled to be *effectively restored to his rights and freedoms*" (emphasis added)); *Case of Chaparro Álvarez and Lapo Íñiguez* v. *Ecuador*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 170, ¶ 133 (Nov. 21, 2007) (interpreting Article 7 of Inter-American Convention to require that "it is not enough that . . . a remedy exists

formally, it must be effective; that is, it must provide results or responses to the violations of rights established in the Convention").

In the case of prolonged arbitrary detention, the right to an "effective remedy" necessarily requires that the competent court be able to order release. Indeed, the right to release as an "effective remedy" for unjustified detention is made explicit in numerous international agreements. As already mentioned, *supra* Part I.A., the Covenant provides that for "[a]nyone who is deprived of his liberty by arrest or detention," there is a right to judicial review "without delay" and a court shall "order . . . release if the detention is not lawful." Covenant, *supra*, art. 9(4). The Covenant has been ratified by 165 countries. The American Declaration of the Rights and Duties of Man contains similar language.[19] It provides that "[e]very individual . . . has the right to have the legality of his detention ascertained without delay . . . and the right to be tried without undue delay or, otherwise, *to be released*." American Declaration of the Rights and Duties of Man, OAS Res. XXX, art. 25, Int'l Conf. of Am. States, 9th Conf., OAS Doc. OEA/Ser. L./V/II.23, doc. 21 rev. 6 (1948) (emphasis added). The American Convention, which the United States signed in 1977 but has ratified, also requires

[19] The non-binding American Declaration on the Rights and Duties of Man, OAS Res. XXX, was adopted by the Ninth International Conference of American States in 1948, with the United States participating.

release as the remedy for unlawful detention: "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful." American Convention, *supra*, art. 7(6); *see* Convention on the Rights of the Child art. 37(d), *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) (protecting the right of every child "to challenge the legality of the deprivation of his or her liberty before a court" and to "a prompt decision on any such action"); European Convention, *supra*, art. 5(4) ("Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.").

It is important to note that an "effective remedy" for prolonged arbitrary detention cannot include transferring detainees to locations where they will be arbitrarily detained again or tortured. Under the Convention Against Torture, which United States and 145 other countries have ratified, "No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3(1), *adopted* Dec. 10, 1984, 108 Stat. 382, 463-64, 1465 U.N.T.S. 85. *See also*

American Convention, *supra*, art. 22(8) ("In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."); Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 ("No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.").

Domestic and international courts and international organizations have enforced the norm against prolonged arbitrary detention, including the right to release from unlawful detention.[20] U.S. courts have invoked the norm as a prism through which to interpret domestic law. *See, e.g.*, *Rodriguez-Fernandez* v. *Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) ("It seems proper then to consider international law principles for notions of fairness as to propriety of holding aliens in detention. No principle of

[20] Justice Scalia has written on the related need to look to the interpretations of the courts of other signatories of a treaty on an issue governed by that treaty: "We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties." *Olympic Airways* v. *Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting).

international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."). The United Nations Human Rights Committee regularly gives effect to the international norm against prolonged arbitrary detention and the norm supporting the right to prompt release. In *Shafiq* v. *Australia*, the Committee held that under international law, "court review of the lawfulness of detention" had to "include the possibility of ordering release." U.N. Hum. Rts. Comm., Communication No. 1324/2004, ¶ 7.4, U.N. Doc. CCPR/C/88/D/1324/2004 (2006); *see also A* v. *Australia*, U.N. Hum. Rts. Comm., Communication No. 560/1993, ¶ 9.5, U.N. Doc. CCPR/C/59/D/560/1993 (1997) ("[W]hat is decisive for the purposes of article 9 [of the ICCPR] . . . is that such review is, in its effects, real and not merely formal. . . . [T]he court [must] be empowered to order release, if the detention is incompatible with the requirements in article 9. . . .").

International courts have also held that detainees who are unlawfully held must be released. The European Court of Human Rights invoked the international norm supporting prompt release for detention that is "arbitrary." *Ilascu* v. *Moldova*, 2004-VII Eur. Ct. H.R. 1134; *see also Case of Assanidze* v. *Georgia*, 2004-IV Eur. Ct. H.R. 659 (holding that because detention of applicant was "arbitrary," state authorities were obliged to "secure the applicant's release at the earliest possible date"). In 1980, the International Court of Justice invoked the international norm supporting the right to release to

demand that Iran free several American hostages. *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 42 (May 24, 1980) ("The Islamic Republic of Iran . . . must immediately terminate the unlawful detention of the . . . United States nationals now held hostage in Iran, and must immediately release each and every one and entrust them to the protecting Power."). The United States excoriated Iran for failing to comply. *See* Houston A. Stokes, *Broadening Executive Power in the Wake of Avena: An American Interpretation of* Pacta Sunt Servanda, 63 Wash. & Lee L. Rev. 1219, 1231-32 (2006) (quoting President Carter's reaction that "Iran was showing 'contempt, not only for international law, but for the entire international structure for securing the peaceful resolution of differences among nations.' ").

B. International humanitarian law consistently demands the prompt release of detainees when the circumstances justifying their detention cease to exist.

International humanitarian law as expressed in the Geneva Conventions contains a clear and consistent principle: States must release detainees as soon as the circumstances justifying their detention cease to exist. That obligation applies to the full range of detention regimes permitted by the Geneva Conventions: prisoners of war, enemy aliens, and civilians in occupied territories. Petitioners – who

have been wrongfully detained for more than seven years on the basis of now disproven assertions – are deserving of at least the fundamental protections afforded individuals detained in connection with armed conflict. The Government should not be permitted to use the laws of war to justify the seizure and continued detention of individuals, yet deny them the most fundamental right under those same laws to be released when their detention is determined to be unjustified.

1. Prisoners of war in international armed conflicts possess an inalienable right to release and repatriation upon the cessation of hostilities.

The Third Geneva Convention, which governs the detention and treatment of prisoners of war, permits the detention of enemy soldiers but clarifies that they "shall be *released* and *repatriated* without delay after the cessation of active hostilities." Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (emphasis added) [hereinafter Third Geneva Convention]. The International Committee of the Red Cross (ICRC)'s official Commentary interprets this provision as providing prisoners of war with "an inalienable right" to repatriation and establishing a duty for detaining authorities to "carry out repatriation and to provide the necessary means for it to take place." 3 Int'l Comm. of the Red Cross, *Commentary: Geneva Convention Relative to the Treatment of*

Prisoners of War 546 (Jean S. Pictet ed., 1960) [hereinafter ICRC Commentary on Third Geneva Convention].

The Commentary plainly contemplates that prompt release will be effected, with delays permitted only where "there are serious reasons for fearing that a prisoner of war who is himself opposed to being repatriated may, after his repatriation, be the subject of unjust measures affecting his life or liberty" so as to make repatriation "contrary to the general principles of international law for the protection of the human being." *Id.* at 547.[21] Neither the Commentary nor the Third Geneva Convention provides any explicit guidance on how individuals exempt from repatriation should be handled, but both contemplate that the parties to a conflict will conclude special agreements that resolve the disposition of prisoners of war through alternative means even where repatriation is not an option. *See* Third Geneva Convention, *supra*, art. 6 (permitting special agreements that provide added benefits or protections to

[21] While the Third Geneva Convention and Commentary place a special emphasis on repatriation, the Commentary makes clear that the detaining authorities have separate if related obligations to both release and repatriate. *See* ICRC Commentary on Third Geneva Convention, *supra*, at 547 ("There is no need to attempt to determine whether repatriation is a separate operation from release . . . at most, one may consider that release without repatriation may occur when prisoners of war are detained on the territory of their own country which is occupied.").

prisoners of war); *id.* arts. 109-11 (encouraging belligerent parties to make special agreements addressing the disposition of prisoners of war during hostilities); ICRC Commentary on Third Geneva Convention, *supra*, at 549 (allowing parties to agree under Article 6 to resolve cases of prisoners of war who "ask to be sent to a country other than their country of origin" through means other than repatriation).

The Third Geneva Convention's provision of special relief to prisoners of war who have been detained for extended periods of time, even prior to the cessation of hostilities, further underlines the norm against prolonged and unnecessary detention. During the course of a conflict, the Convention encourages the belligerent parties to reach special agreements that provide "able-bodied prisoners of war who have undergone a long period of captivity" with "direct repatriation or internment in a neutral country" in a manner similar to that mandated for wounded or ill prisoners of war. Third Geneva Convention, *supra*, art. 109; *see also id.* art. 111 (encouraging agreements that allow for the internment of all categories of prisoners of war in neutral countries). Upon the cessation of hostilities, the Commentary indicates that long-term detainees should be provided a high priority when determining the order in which prisoners of war should be repatriated, after only severely sick and wounded prisoners. *See* ICRC Commentary on Third Geneva Convention, *supra*, 550-51. This support for the

release and repatriation of even healthy former combatants both during and after periods of active conflict underscores the importance that the Third Geneva Convention places on limiting prolonged detention and promoting release after the justification for detention has ceased.

2. Civilians detained during international armed conflicts must be released when security conditions no longer require their detention.

The Fourth Geneva Convention, which governs the treatment of civilians in interstate conflicts, mandates that civilian detainees be released "as soon as the reasons which necessitated . . . internment no longer exist." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 132, Aug. 12, 1949, 6 U.S.T. 3526, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].[22] Under the Fourth Geneva Convention, states may only intern aliens within their territory if they are citizens of a country with which they are at war and doing so is deemed "absolutely necessary" to preserve the

[22] The Fourth Geneva Convention groups detention, internment, and the placing of civilians in assigned residences as different aspects of the same limited authority to restrict civilians' autonomy and place of residence. *See, e.g.*, Fourth Geneva Convention, *supra*, arts. 41, 115. This section refers to all three as "detention."

detaining state's security interests. *Id.* art. 42. Similarly, foreign civilians in territories under occupation by a state may only be detained where necessitated by "imperative reasons of security." *Id.* art. 78. To protect against unnecessary detention, the Fourth Geneva Convention provides detained individuals with an immediate opportunity to appeal the detention decision and subsequent opportunities for regular review. *See id.* art. 43 (requiring review for detained aliens "at least twice yearly"); *id.* art. 78 (requiring review for detained civilians "if possible every six months"). A finding that the individual's detention is no longer required by prevailing circumstances must result in a discontinuation of detention. *See* 4 Int'l Comm. of the Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 261 (Jean S. Pictet ed., 1958) [hereinafter ICRC Commentary on the Fourth Geneva Convention]. Similarly, all civilian detentions must end "as soon as possible after the close of hostilities." *Id*. art. 133. Upon release, the detaining authorities must "ensure the return of all internees to their last place of residence, or to facilitate their repatriation," *id.* art. 134, unless such repatriation would expose the released detainee to persecution on the basis of his religious or political beliefs, *see id.* art. 45 (limiting transfer where it will result in persecution).

These limitations on detention reflect the principle that "internment and the placing of a person in assigned residence are the *severest measures of*

control that a belligerent may apply to protected persons." ICRC Commentary on the Fourth Geneva Convention, *supra*, at 257 (emphasis added); *see also* Fourth Geneva Convention, *supra*, art. 41 (stating that State party "may not have recourse to *any other measure of control more severe* than that of assigned residence or internment. . . ." (emphasis added)); *id*. art. 78 ("If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, *at the most*, subject them to assigned residence or to internment." (emphasis added)). That same principle is reflected in the Fourth Geneva Convention's endorsement of agreements between parties during an ongoing conflict that facilitates "the release, the repatriation, the return to places of residence or the accommodation in a neutral country" of vulnerable classes of detainees, including "internees who have been detained for a long time." Fourth Geneva Convention, *supra*, art. 132. The underlying motivation behind these policies was a desire to avoid "the indefinite prolongation of [detention] situations. . . ." ICRC Commentary on the Fourth Geneva Convention, *supra*, at 515.

The Third and Fourth Geneva Conventions share a fundamental commitment: Whatever the context or reason for the detention of an individual – whether a combatant or civilian – the individual must be released once the justification for detention has ceased. That same principle must apply as well to Petitioners, whose original detention has been shown

to have been unjustified and yet who remain in custody after more than seven years.

III. THE UNITED STATES SHOULD LIVE UP TO THE STANDARDS OF INTERNATIONAL LAW TO WHICH IT HAS HELD OTHER COUNTRIES BY PROVIDING EFFECTIVE JUDICIAL REVIEW OF UNLAWFUL DETENTION

Since the mid-1970s, the United States has compiled annual reports on the human rights practices of other countries. By law, the reports reflect the Secretary of State's assessment of the "status of internationally recognized human rights" in the states under review.[23] These reports have consistently criticized foreign countries for failing to provide effective judicial review of detention. They have further made clear that the United States considers courts' capacity to order release essential to effective judicial review. They therefore provide powerful evidence of the importance of the shared international norm requiring release upon a finding that a detention is unlawful. If the United States now fails to live up to this shared norm, it will not only breed

[23] The "Country Reports on Human Rights Practices" are submitted each year by the Department of State to Congress in compliance with the requirement that the Secretary of State transmit to Congress "a full and complete report regarding the status of internationally recognized human rights" in countries that receive foreign aid or are members of the United Nations. 22 U.S.C. § 2151n.

resentment but will also undermine its ability to encourage other countries to follow basic principles of international law in the future.

In evaluating other countries' human rights practices, the United States has considered whether habeas corpus review is not simply available but is *effective*. The United States has criticized the Philippines for providing formal habeas corpus review but not making that process "effectively available to persons detained by the regime. . . ." *See* 1 Dep't of State, Country Reports on Human Rights Practices 261 (1978). It has similarly criticized Cuba for "theoretically provid[ing] a safeguard against unlawful detention" but failing to provide any effective remedy. *See* 13 Dep't of State, Country Reports on Human Rights Practices for 1988, at 520 (1989). The United States has criticized many other countries for providing ineffective habeas review, including Paraguay, 9 Dep't of State, Country Reports on Human Rights Practices for 1984, at 637 (1985) ("the right of habeas corpus . . . can be ignored by government officials."), Ethiopia, *id.* at 110 ("A writ of habeas corpus on [Ethiopia]'s statutes has not been successfully invoked in any known case."), Ghana 8 Dep't of State, Country Reports on Human Rights Practices for 1984, at 150 (1984) ("There has been no instance of the successful exercise of the right of habeas corpus."), Afghanistan, 10 Dep't of State, Country Report on Human Rights Practices for 1985, at 1166 (1986) ("nor is the right of habeas corpus respected"), and Bolivia, 4 Dep't of State, Country Reports on Human Rights Practices for 1980, at 351

(1981) ("The Garcia Meza regime routinely violates constitutional provisions for habeas corpus."). And the United States regularly criticizes countries for failing to provide effective judicial review for *all* detainees. *See, e.g.*, 27 Dep't of State, Country Reports on Human Rights Practices for 2002, at 345-46 (2003) (noting Liberia had incarcerated "an unknown number of persons . . . during [a] state of emergency as 'illegal combatants,' . . . and denied habeas corpus"); 13-A Dep't of State, Country Reports on Human Rights Practices for 1988, at 844 (1989) ("[H]abeas corpus . . . does not apply to those [in South Korea] charged with violating the National Security Law.").

The United States' criticisms of other countries further makes clear that it regards the power of the courts to order release as essential to effective judicial review. The United States criticized Ghana for responding to writs of habeas corpus by imposing "ex post facto preventive custody orders barring their release." 10 Dep't of State, *supra*, at 129. The United States similarly criticized Nepal for failing to release a prisoner after the Supreme Court issued a writ of habeas corpus. 27-B Dep't of State, Country Reports on Human Rights Practices for 2002, at 2284 (2003). In discussing Zambia's detention policies, the United States noted that "[h]abeas corpus is, in principle, available to persons detained under presidential order, but the Government is not obliged to accept the recommendation of the review tribunal." 10 Dep't of State, *supra*, at 383 (1986). The United States criticized Gambia when its "[p]olice ignored a December 31 court-ordered writ of habeas corpus to

release [Gambian National Assembly Majority Leader Baba] Jobe and his co-detainees." 28 Dep't of State, Country Reports on Human Rights Practices for 2003, at 241 (2004).

The United States has held other countries to account for their failure to live up to "internationally recognized human rights" including effective judicial review of detention. In reviewing the practices of other states, the United States has not regarded as sufficient a formal process allowing detainees to challenge their detention in court. The courts reviewing detention must also have the capacity to order release. The United States should now live up to its own high standards – standards it successfully fought to codify in international law and that it has long sought to encourage the rest of the world to follow.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the opinion below and order reconsideration in accordance with the international law principles set forth above.

Respectfully submitted,

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