Nos. 03-334; 03-343

IN THE

Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF HUMAN RIGHTS INSTITUTE OF THE INTERNATIONAL BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Interest of the Amicus Curiae

The Human Rights Institute of the International Bar Association (the "Institute") is an international body headquartered in London, England, that helps promote, protect and enforce human rights under a just rule of law, and works to preserve the independence of the judiciary and legal profession worldwide.[1] Founded in 1995 under the Honorary Presidency of Nelson Mandela, the Institute now has more than 7,000 members worldwide.

The interest of the Institute is to urge the Court to respect international law in interpreting the jurisdiction of the U.S. courts. International law protects individuals from prolonged arbitrary detention at the hands of a state, regardless of where the detention occurs. This guarantee applies in times of war, as well as peace. Without access to judicial authority, this fundamental right is hollow. Under international law, the U.S. courts cannot be powerless to consider the lawfulness of Petitioners' detention.

This case challenges principles upon which the Institute was founded, particularly its commitment to the rule of law and international law as means of safeguarding fundamental human rights.[2] The Institute does not frequently intervene in litigation.

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[1] No counsel for a party authored this brief in whole or in part. This brief was prepared by the Human Rights Institute of the International Bar Association and its counsel: Allen & Overy, New York; Vaughan Lowe, Barrister, Essex Court Chambers and Chichele Professor of Public International Law and a Fellow of All Souls College, University of Oxford; Guy S. Goodwin-Gill, Barrister, Blackstone Chambers, Senior Research Fellow of All Souls College and formerly Professor of International Refugee Law at the University of Oxford. No person other than amicus and its counsel made any monetary contribution to the preparation or submission of this brief. Consents of the parties are being lodged herewith.

[2] The International Bar Association established a Task Force on International Terrorism co-chaired by Justice Richard Goldstone (Justice of the Constitutional Court of South Africa and former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda) and Ambassador Emilio Cardenas (President of the International Bar Association and Argentina's former Permanent

This case, however, is exceptional because of the basic nature of the right involved and the leadership role of the U.S. in world affairs. Friendly nations watch the U.S. with expectations based on widely accepted international law and shared legal traditions. Unfriendly nations look for an opportunity to accuse the U.S. of violating minimal standards of international law or to seize upon an American precedent to justify or obscure their own violations.

Statement of Facts

Petitioners are detained at the U.S. Naval Base at Guantanamo Bay by U.S. armed forces. For over two years, Petitioners have been imprisoned without recourse to court process or access to counsel. Petitioners are citizens of the United Kingdom, Australia and Kuwait. Petitioners are not "enemy aliens," since they are citizens of friendly states, nor are they "enemy combatants," since the government has offered no evidence or grounds for such classification. *See Odah v. United States*, 321 F.3d 1134, 1138 (D.C. Cir. 2003).

The U.S. maintains exclusive authority and control over Guantanamo Bay, which it has occupied under an indefinite lease from the Government of Cuba for over a century. While Cuba technically retains "ultimate sovereignty," the U.S. has "control and jurisdiction" until both states agree otherwise. *Agreement Between the U.S. and Cuba for the Lease of Lands for Coaling and Naval Stations*, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418.

The government has contended that, while the Petitioners may have some rights under international law, these as-yet undefined rights are to be determined by the military and

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Representative to the United Nations), and also composed of Professor Badria Al-Awadhi, Professor M. Cherif Bassiouni, Sten Heckscher, Baroness Helena Kennedy QC, Fali Nariman and Professor W. Michael Reisman. The Task Force released its report in October 2003. International Terrorism: Legal Challenges and Responses (Transnational Publishers, Inc., 2003). The report provides a comprehensive analysis of a variety of legal and human rights issues arising from the threat of international terrorism after September 11, 2001, including specifically those raised by Petitioners' case. The report was used extensively in preparation of this Brief.

executive branch, and the courts lack jurisdiction because Petitioners are being held outside the sovereign territory of the U.S.. *See Rasul v. Bush*, 215 F. Supp. 2d 55, 56 (D.D.C. 2002), *aff'd sub nom. Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

The District Court held that it lacked jurisdiction on the grounds that Guantanamo Bay is outside of the sovereignty of the U.S., since "[i]f an alien is outside the country's sovereign territory, then courts have generally concluded that the alien is not permitted access to the courts of the United States to enforce the Constitution." *See Rasul*, 215 F. Supp. 2d at 68. The District Court did not consider international law as part of federal law or as a guide for the interpretation of federal law and the Constitution.

In upholding the decision, the Court of Appeals focused on Petitioners' constitutional claims, referring to international law only briefly when rejecting claims under the Alien Tort Claims Act on the grounds that the "courts are not open" to Petitioners, regardless of whether they allege violations of treaties, federal law or the Constitution. *See Odah*, 321 F.3d at 1145.

The courts below placed heavy reliance on *Johnson v. Eisentrager*, 339 U.S. 763 (1950). The Institute submits that this reliance was based on a misunderstanding. *Eisentrager* actually compels a finding that U.S. courts have jurisdiction to review Petitioners' claims.

Summary of Argument

The jurisdiction of the U.S. courts should be interpreted so as to comply with international human rights law and international humanitarian law, which have developed and become binding on the U.S. since the Second World War. International human rights law guarantees a right against arbitrary detention, which entails a right to access judicial review, regardless of where and when the detention occurs. In times of armed conflict, international human rights law is complemented by international humanitarian law, which requires prompt classification and due process for all detained persons. Prolonged delay of classification without access to counsel or judicial review results in arbitrary detention, contrary to both humanitarian and human rights law.

To find that the U.S. courts lack jurisdiction to hear Petitioners because they are detained outside U.S. borders would violate international law, invite abuse by other states, and compromise the credibility of the U.S. as a proponent of human rights and the rule of law.

Argument

I. UNITED STATES LAW SHOULD COMPLY WITH INTERNATIONAL LAW

This Court has held that international law is part of U.S. law, to be ascertained and administered by the federal courts. Even where international law is not applied directly, it is used to interpret U.S. law. This Court followed this approach in many cases, including *Johnson v. Eisentrager*, 339 U.S. 763 (1950). Existing U.S. law, including the flexible remedy of habeas corpus, must be interpreted so as to ensure the protection of the right against arbitrary detention as required by international law.

A. International Law and U.S. Law

The U.S. was founded on a deep respect for international law[3] as reflected in the text of the Constitution, which includes

[3] As stated by Alexander Hamilton:

> The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for injury ought ever to be accompanied by the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all of the causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith than to the security of the public tranquillity.

Alexander Hamilton, The Federalist No. 80, at 536 (J. Cooke ed., 1961); *see also Chisholm v. Georgia*, 2 U.S. 419, 474 (1793) (Chief Justice John Jay noting that "the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed").

treaties as part of the supreme law of the land along with the Constitution itself.[4] This Court has held that, while not explicitly mentioned in the Supremacy Clause, customary international law is nonetheless part of federal law. *See The Pacquette Habana,* 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination"). The competence of federal courts to adjudicate on the effect of treaties and customary international law is established by the Constitution,[5] case law[6] and statute.[7] Indeed, this Court has applied international law to determine the legal status and rights of persons detained in the course of armed conflict. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 28 (1942) (determining the rights of "unlawful combatants" under international law, as well as the Constitution, and observing that "[f]rom the beginning of its history this Court recognized and applied the laws of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals").

While the Constitution provides that treaties are on equal footing with federal law, jurisprudence concerning international human rights treaties ratified by the U.S. after the Second World War is still evolving. One issue that has split lower courts is whether individuals suffering violations of "non-self-executing"

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[4] U.S. Const. Art. VI, s.2 (establishing that the Constitution, federal statutes and treaties are all "the Supreme law of the land").

[5] U.S. Const. Art. III, s.2 (providing that cases arising under "the Laws of the United States…. and Treaties made…under their Authority" are within the federal judicial power).

[6] *See, e.g., Owing v. Norwood's Lesse*, 9 U.S. (5 Cranch) 344 (1809) ("The reason for inserting that clause in the constitution [Art. III, Section 2] was that all persons who have real claims under a treaty should have their causes decided by the national tribunals…Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is protected").

[7] 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

treaties are entitled to remedies from U.S. courts. The Institute argues below that the treaty obligation of the U.S. to respect the right against arbitrary detention requires enforcement in U.S. courts. Judicial review is an inherent and necessary aspect of the right against arbitrary detention under international law, which can be enforced through existing U.S. law, particularly the writ of habeas corpus. This right is entrenched in customary international law, as well as treaty obligations. For these reasons, U.S. courts have jurisdiction to hear Petitioners as a matter of the direct application of international law. *See, e.g.*, *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980) ("Our review of the sources from which customary international law is derived clearly demonstrates that arbitrary detention is prohibited by customary international law" and "[t]herefore, even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remediable as a violation of international law"), *aff'd*, 654 F.2d 1382 (10th Cir. 1981).

However, the Court may also find that U.S. courts have jurisdiction to hear Petitioners by a different route. Rather than applying international law directly, the Court may follow the longstanding rule that U.S. law should be interpreted in accordance with international law wherever possible.

B. The Rule in Favor of Harmony with International Law

The principle that domestic law should be interpreted so as to avoid violations of international obligations wherever possible is well-established in the U.S. and other nations. *See, e.g., Restatement (Third) of Foreign Relations Law of the United States* §§ 114-15 (1987); Ian Brownlie, *Principles of Public International Law*, 40-48 (6th ed. 2003).[8]

[8] Even when deciding constitutional questions without international dimensions, this Court considers international law as a reflection of the "values that we share with a wider civilization." *Lawrence v. State*, 123 S. Ct. 2472, 2483 (2003); *see also Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002).

This Court has applied the principle of construction in favor of harmony with international law - often termed the Charming Betsy rule - in a wide variety of cases. *See, e.g., Weinberger v. Rossi*, 456 U.S. 25, 29-30, 32-33 (1982) (looking to international law in interpreting statute that prohibited employment discrimination against U.S. citizens on military bases overseas unless permitted by treaty); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (in maritime tort case, looking to law of nations in determining statutory construction of Jones Act); *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (in admiralty case, noting that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country"); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19-21 (1963) (finding National Labor Relations Act did not apply to foreign vessels crewed by aliens because such laws "would raise considerable disturbance not only in the field of maritime law but in our international relations as well").

The rationale for interpreting domestic law in harmony with international law loses none of its force when a fundamental human right is involved. The U.S. aims to serve as a model of human rights protection in the world community and recognizes that compliance with international law is indispensable in the pursuit of this objective.[9] By conforming with minimal standards

[9] For example, the role of the U.S. as an example to the world was a significant motivation for the ratification of the International Covenant on Civil and Political Rights in 1992. The Senate Committee on ratification stated: "In view of the leading role that the United States plays in the international struggle for human rights, the absence of U.S. ratification of the Covenant is conspicuous and, in the view of many, hypocritical. The Committee believes that ratification will remove doubts about the seriousness of the U.S. commitment to human rights and strengthen the impact of U.S. efforts in the human rights field." United States: Senate Committee On Foreign Relations Report On The International Covenant On Civil And Political Rights, 31 I.L.M. 645 (May, 1992), *reproduced from* U.S. Senate Executive Report 102-23 (102d Cong., 2d Sess.). These remarks echo those of President Carter, who stated in his message to the Senate recommending ratification:

under international law, the U.S. not only protects the rights of the persons directly involved, but also meets the expectations of other nations, fostering goodwill and compliance. The expectations of nations with whom the U.S. shares common legal and political traditions are particularly poignant.[10] Other countries, including those hostile to the U.S., should be denied the opportunity to cite U.S. violations as "excuses" for their own.

> While the United States is a leader in the realization and protection of human rights, it is one of the few large nations that has not become a party to the three United Nations human rights treaties. Our failure to become a party increasingly reflects upon our attainments, and prejudices the United States in the development of the international law of human rights.

Message From the President of the United States to the Senate of the United States: Transmitting The International Convention on the Elimination of All Forms of Racial Discrimination, Signed on Behalf of the United States on September 28, 1966 (Executive C, 95-2); The International Covenant on Economic, Social And Cultural Rights, Signed on Behalf of the United States on October 5, 1977 (Executive D, 95-2); The International Covenant on Civil and Political Rights, Signed on Behalf of the United States on October 5, 1977 (Executive E, 95-2); and The American Convention on Human Rights, Signed on Behalf of the United States on June 1, 1977 (Executive F, 95-2), February 23, 1978, 1966 U.S.T. LEXIS 521.

[10] In *The Queen on the Application of Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] All E.R. (D) 70 (C.A. 2002), the English Court of Appeal declined to compel the British Secretary of State to make representations to the U.S. concerning the detainees at Guantanamo Bay, but did so, in part based on its expectation that the U.S. would come into compliance with international law:

> What appears to us to be objectionable is that Mr. Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal. It is important to record that the position may change when the appellate courts in the United States consider the matter. … As is clear from our Judgment, we believe that the United States Courts have the same respect for human rights as our own.

Abbasi & Anor, [2002] All E.R. (D) 70 at ¶¶ 66, 107.

C. Applying *Johnson v. Eisentrager* Today

In holding that the U.S. courts lacked jurisdiction to hear Petitioners, the Court of Appeals misinterpreted *Johnson v. Eisentrager*, 339 U.S. 763 (1950). The Court of Appeals failed to recognize that *Eisentrager* follows the rule in favor of harmony with international law. *See Odah v. United States*, 321 F.3d 1134, 1138-1145 (D.C. Cir. 2003). In *Eisentrager*, the Court considered international law and found that it had not been violated, where enemy aliens were charged, tried, convicted and punished overseas. The decision of the Court of Appeals in this case renders international law, which has evolved substantially since *Eisentrager,* irrelevant to the plight of detainees, who have not even been classified or charged, let alone tried, after two years.

In *Eisentrager*, this Court dismissed habeas corpus petitions by Germans who were convicted by a U.S. military tribunal in China shortly after the Second World War for violating the rules of war and were then repatriated to Germany to serve their sentences. *Eisentrager,* 339 U.S. at 765-66. Petitioners were "enemy aliens," since they were citizens of a state that was at war with the U.S. They argued, *inter alia*, that the military tribunal that convicted them lacked jurisdiction under international law. *Id.* at 785-90.

Although the Supreme Court dismissed the petitions, it did so only after Justice Jackson, writing for the majority, reviewed all relevant sources of international law at the time, including treaties and customary international law. *Id.* at 786-90. He observed that petitioners had received all of the due process required under existing international law, including disclosure of the full particulars of their alleged war crimes and a trial before a military tribunal, at which other defendants were acquitted. *Id.* at 766, 786-90. Justice Jackson concluded that there was nothing about the prosecution of petitioners that had infringed their rights under international law existing at the time. *Id.* at 789. Their detention was lawful under international law, which provided that prisoners of war could be detained until the end of war crimes proceedings and, if necessary, until the expiration of the punishment. *Id.*

Much has changed in international law in the half century since *Eisentrager* was decided, yet Justice Jackson's approach

remains correct. The obligations of the U.S. under international law should be rigorously examined and robustly enforced by the courts. Here, the analysis involves international human rights law, which emerged after the Second World War, as well as advances in international humanitarian law since the Second World War.

One of the premises of Justice Jackson's decision in *Eisentrager* was that if the U.S. granted habeas corpus to enemy combatants (already convicted by military tribunals), it could not expect any reciprocity, since apart from in England, the writ of habeas corpus was generally unknown at that time. *Id.* at 779. As discussed further below, this premise no longer pertains, due to major developments in international law since *Eisentrager*. While Justice Jackson's concern in 1950 was that the protections of U.S. law should not advance too far *beyond* those of other legal systems, this case presents a question of how far *behind* international norms U.S. law may be permitted to fall in the 21st century.

D. Habeas Corpus

U.S. law accords great respect to the writ of habeas corpus on account of its place in the Constitution and its flexibility as a remedy. U.S. Const., Art I, s 9, cl. 2 (providing that writ of habeas corpus subjiciendum "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"); *see, e.g.*, *Hensley v. Municipal Court, San Jose Milpitas Judicial District, Santa Clara County, California*, 411 U.S. 345, 349-50 (1973) (noting that "habeas corpus is not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes" and that "[t]he very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected") (internal citations and quotations omitted); *see also Frank v. Magnum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting) (noting that the writ "cuts through all forms and goes to the very tissue of the structure" and that "[i]t comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have more than an empty shell");

Fay v. Noia, 372 U.S. 391, 406 (1963) (adopting Justice Holmes' statement in *Frank v. Magnum* and holding that the Constitution invites, if not compels, a generous construction of the writ).

Nothing in the language of the habeas corpus statute precludes its application to persons detained outside the U.S.. The writ is available to, *inter alia*, persons in custody under the authority of the U.S. or in custody in violation of the laws or treaties of the U.S.. 28 U.S.C. § 2241 (2003). It makes no mention of territorial sovereignty.

In interpreting the scope of habeas corpus, this Court has taken guidance from English law, which would make the writ available to Petitioners, despite their detention outside of sovereign territory. *Jones v. Cunningham*, 371 U.S. 236, 238 (1963); *see also Amicus Curiae Brief on behalf of the Commonwealth Lawyers Association.*

This Court has also emphasized that, given the importance of habeas corpus as a flexible remedy, it should be available unless plainly exempted by law. *Ex Parte Yerger*, 75 U.S. 85, 102 (1868) ("This brief statement shows how the general spirit and genius of our institutions has tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States. . . . We are not at liberty to except from it any cases not plainly excepted by law. . . . These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction"). There is nothing that plainly exempts the application of habeas corpus in this case.

The availability of habeas corpus should also be considered in light of the limited (albeit critical) scope of its inquiry, which is to determine the lawfulness of the detention, not the guilt or innocence of the detainee. *In Re Yamashita*, 327 U.S. 1, 8 (1946). A ruling favorable to a petitioner does not necessitate release, since habeas corpus is broadly empowered to dispose of a matter as law and justice require. 28 U.S.C. § 2243; *see also Carafas v. Lavalle*, 391 U.S. 234, 239 (1968).

Given these considerations, it is not surprising that federal courts have relied on the habeas corpus statute to grant remedies where detention would otherwise be contrary to international law obligations assumed by the United States since the Second World War. *See, e.g.*, *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382,

1388 (10th Cir. 1981) (upholding grant of writ of habeas corpus, reasoning that an excluded alien in physical custody within the U.S. could not be punished without being accorded substantive and procedural due process, and noting that "[n]o principle of international law is more fundamental than the concept that human being should be free from arbitrary imprisonment"); *Beharry v. Reno*, 183 F. Supp. 2d 584, 601 (E.D.N.Y. 2002) (in granting writ of habeas corpus, interpreting immigration statute to require hearing to determine whether alien convicted of felony could remain in the U.S. based on treaties, including the International Covenant on Political and Civil Rights, and customary international law, and observing that "[t]his nation's credibility would be weakened by non-compliance with treaty obligations or with international norms," which "[t]he United States seeks to impose . . . upon other nations," and further observing that as a "moral leader of the world, the United States has obligated itself not to disregard rights uniformly recognized by other nations"), *rev'd on other grounds,* 329 F.3d 51 (2d Cir. 2003); *Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001) (noting that unless statutes are interpreted as authorizing the detention of removable aliens only for reasonable periods of time, the clear international prohibition against prolonged and arbitrary detention would be violated).

II. INTERNATIONAL HUMAN RIGHTS LAW GIVES DETAINEES THE RIGHT TO JUDICIAL REVIEW

International human rights law primarily concerns duties of states towards individuals, rather than relations between states. The U.S. is bound by treaty and customary international law to respect the right of all individuals to be free from arbitrary detention, which entails an entitlement to challenge the lawfulness of their detention in court. The U.S. cannot escape its obligation to provide access to judicial review by detaining persons in locations, such as Guantanamo Bay, which may be said to be technically outside of its sovereign territory. The right against arbitrary detention applies in times of war, as well as peace.

A. International Human Rights Law Primarily Concerns Individuals' Rights, Not Relations Between States

International human rights law developed following the Second World War, largely as a result of U.S. support for the foundation of the United Nations and adoption of the Universal Declaration of Human Rights. At the core of this development was the notion that all human beings possess inherent dignity, enjoy fundamental rights and bear a duty to respect the fundamental rights of others. This focus on individual rights and obligations reflected a significant shift away from the traditional emphasis of international law on the relations between states, which had failed to prevent the atrocities of the war. The Nuremberg Trials signalled that all individuals would be held accountable for certain duties under international law, regardless of what may have been permitted or mandated by their domestic law. *See* Justice Jackson, Opening Statement for the Prosecution, Nuremberg Trials (Nov. 21, 1945), *reprinted in* II *Trial of the Major War Criminals before the International Military Tribunal: Second Day, Wednesday, 11/21/1945, Part 04*, at 98-102 (Nuremberg, IMT, 1947), *available at* http://www.law.umkc.edu/faculty/projects/FTrials/nuremberg/jackson.html ("This principle of personal liability is a necessary as well as logical one if international law is to render real help to the maintenance of peace. An international law which operates only on states can be enforced only by war because the most practicable method of coercing a state is warfare"). Similarly, human rights declarations and treaties established that all individuals are endowed with certain rights beyond whatever protections may be available under their particular domestic law. *See, e.g.*, Human Rights Committee, General Comment 24 (52), U.N. Doc. CCPR/C/21/Rev.1/Add.6, ¶17 (1994) (stating that human rights treaties, including the International Covenant on Civil and Political Rights, which the U.S. has ratified, are "not a web of inter-State exchanges of mutual obligations," but instead "concern the endowment of individuals with rights" and therefore "the principle of inter-State reciprocity has no place").

The international law obligations of the U.S. concerning Petitioners cannot be regarded exclusively, or even primarily, as a

matter of relations between the U.S. and other nations. International human rights law rests on a different foundation: individuals possess rights which they may exercise themselves. The necessity of international law founded on individuals' rights comes into stark perspective here. The detainees at Guantanamo Bay are citizens of a variety of nations – allied, neutral and unfriendly - so the model of negotiations between warring nations does not apply. Over the past two years, diplomacy has produced neither swift nor consistent results, even for detainees who are citizens of nations allied with the U.S.. Since the essence of international human rights law is respect for the inherent dignity and rights of all individuals, its enforcement cannot be left to sluggish deliberations between the U.S. and a host of other nations, which are likely to produce, at best, tardy results that discriminate on the basis of the detainees' nationality. *See International Covenant on Civil and Political Rights,* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 360, 368, art. 2(1) (requiring all state parties to respect its enumerated rights, including the right against arbitrary detention, without distinction of any kind, including, *inter alia*, national origin).

B. U.S. Obligations Pursuant to Treaty and Customary International Law

1. International Covenant on Civil and Political Rights

The U.S. is bound to observe the right against arbitrary detention as matter of treaty obligation because it ratified the International Covenant on Civil and Political Rights ("ICCPR"), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 360, 368 in 1992.[11] The ICCPR provides, in pertinent part:

[11] The ICCPR has been ratified by 149 States. *See* I United Nations, *Multilateral Treaties Deposited with the Secretary General*, 164-65 (2003). The U.S. signed the ICCPR in 1977, and ratified it in 1992. *See Senate Resolution of Ratification of International Covenant on Civil and Political Rights*, 138 Cong. Rec. S 4781, *S4783, 102d Cong. (1992) (ratified Apr. 2, 1992). Congress added reservations. *See* 138 Cong. Rec. at *S4783.

> Article 9(1): Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> . . .
>
> Article 9(4): Anyone 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.

According to the plain language of these Articles, the right against arbitrary detention entails a right to judicial review of the lawfulness of the detention. *See, e.g.*, *Vuolanne v. Finland*, No. 265/1987, Views of the Human Rights Committee, CCPR/C/35/D/265/1987 at ¶ 9.6, 2 May 1989 (finding that review of petitioner's claim before a superior military officer lacked the "judicial character" of a court hearing, thus depriving petitioner of his right of recourse to a "court").

The U.S. did not add any specific reservation or understanding relating to the right against arbitrary detention under Article 9. It did, however, declare that "articles 1 through 27 of the Covenant are not self-executing." *See* Declarations and Reservations by United States of America made upon ratification, accession or succession of the ICCPR, 138 Cong. Rec. at *S4783. The effect, if any, of such reservations on the enforceability of rights under human rights treaties is a matter of controversy that has not been resolved by this Court. However, there are powerful reasons for concluding that the reservation is irrelevant here.

First, in making the reservation, the U.S. did not intend to prevent individuals from using existing U.S. law to assert rights protected under the ICCPR.[12] In fact, the opposite was

[12] To thwart enforcement through domestic law would be contrary to the remedial provisions of the ICCPR, which provide, *inter alia*, that each state party undertakes to "ensure that any person whose rights and freedoms as herein recognized are violated shall have an effective remedy notwithstanding that the violation has been committed by persons acting in an official capacity" and to "ensure that any person claiming such a remedy shall have his right thereto determined by

contemplated.[13] The longstanding, flexible remedy of habeas corpus is available to ensure protection of the ICCPR's right against arbitrary detention. Indeed the habeas corpus statute expressly provides that it is available where detention is contrary to treaties of the U.S.. *See* 28 U.S.C § 2241. No new legislation is necessary to enforce Petitioners' rights under the ICCPR, and therefore even if the reservation is valid, it is not triggered.

Second, even if the ICCPR's right against arbitrary detention is not directly enforceable as U.S. law, it may be used to interpret U.S. law, according to the Charming Betsy rule. This rule requiring the interpretation of domestic law in accordance with international law is particularly apposite where a statute, such as habeas corpus, is "couched in general language" and may be

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competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy." ICCPR, Part II, art. 2, s.3(a) and (b)).

[13] In its Initial Report to the Human Rights Committee, the United States stated:

> This declaration [that Articles 1 through 27 are not self-executing] did not limit the international obligations of the United States under the Covenant. Rather, it means that, as a matter of domestic law, the Covenant does not, by itself, create private rights directly enforceable in U.S. courts. As indicated throughout this report, however, the fundamental rights and freedoms protected by the Covenant are already guaranteed as a matter of U.S. law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases. For this reason it was not considered necessary to adopt special implementing legislation to give effect to the Covenant's provisions in domestic law. In some cases, it was considered necessary to take a substantive reservation to specific provisions of the Covenant, or to clarify the interpretation given to a provision through the adoption of an understanding."

Initial Report of the U.S. to the Human Rights Committee, CCPR/C/81/Add.4, August 24, 1994; *see also* Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, 31 I.L.M. 645 (1992), *reproduced from* U.S. Senate Executive Report 102-23 (102d Cong., 2d Sess).

"applied in an extraterritorial way." *Weinberger v. Rossi*, 456 U.S. 25, 33 (1982).

2. Customary International Law

The right against arbitrary detention is also protected by customary international law, as reflected in a broad range of international instruments, decisions, commentaries and State practice. The Universal Declaration of Human Rights, which is recognized as an authoritative statement of customary international law, contains the obligation to provide detainees with an opportunity to challenge their detention in court. Universal Declaration of Human Rights, Dec. 10, 1948, arts. 9-10, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810. This obligation is included in every other major international human rights convention that contains a general enumeration of rights.[14] There is now a wide international practice in support of a principle akin to habeas corpus under international law.[15]

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[14] *See*, *e.g.*, American Declaration of the Rights and Duties of Man, May 2, 1948, arts. XXV, XXVI, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) (expressing the obligations of members of the Organization of American States, including the U.S.); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5, 213 U.N.T.S. 221; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 9, 999 U.N.T.S. 171, 6 I.L.M. 368; American Convention on Human Rights, Nov. 22, 1969, art. 7(5), 1144 U.N.T.S.123, 9 I.L.M. 673; African Charter on Human and People's Rights, June 27, 1981, arts. 6-7, 21 I.L.M. 58; *see also* African Commission Decisions in Communication Nos. 13/94, 139/94, 154/96, 161/97 (Saro-Wiwa v. Nigeria) (holding that Article 6 prohibited arbitrary detention), 64/92 (Aleke Banda v. Malawi) (same).

[15] For example, the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly by Resolution 43/173 G.A. Res. 173, U.N. GAOR, 43rd Sess., Supp. No. 49, U.N. Doc. A/43/49 (1988), contains a requirement for judicial control (Principle 4), a right to legal assistance (Principle 17), a right to consult counsel (Principle 18) and a right to challenge the lawfulness of detention (Principle 32). The Body of

The consistency and weight of international practice is such that the distinguished authors of the Third Restatement assert that, as a matter of customary international law, a state violates international law if, as a matter of policy, it practices, encourages, or condones "prolonged arbitrary detention." *Restatement (Third) of Foreign Relations Law of the United States* § 702, n.6 (1987).

Unlike in 1950 when Justice Jackson decided *Eisentrager*, the duty to respect the right against arbitrary detention is now clearly binding on the U.S. as a matter of both treaty and customary international law. Moreover, the U.S. cannot excuse itself from its obligations by detaining persons outside of its borders.

C. U.S. Obligations Arise Through Authority and Control

Under international law, the duty to respect the right against arbitrary detention applies whenever a state exercises authority and control over a person, regardless of where the detention occurs. International tribunals consistently hold that the responsibility of a state to secure basic human rights established in international law for the benefit of individual persons does not hinge on the presence of such persons within the sovereign territory of the state, or their nationality, but rather on whether such persons are subject to the authority and control of the state. One of the fundamental purposes of the recognition of the right against arbitrary detention was to prevent abuse by states shifting the site of detention outside their borders, so as to avoid domestic laws. Consequently, Cuba's "ultimate" or technical sovereignty over Guantanamo Bay is irrelevant under international law.

The reach of the prohibition against arbitrary detention under international law has been addressed in the context of the ICCPR and the American Declaration of the Rights and Duties of Man, both of which apply and bind the U.S. *See* ICCPR, art. 2(1) ("Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its

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Principles contains no provision for suspension of the guarantees in times of crisis.

jurisdiction the rights recognised in the present Covenant."); American Declaration of the Rights and Duties of Man, May 2, 1948, arts. XXV, XXVI, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc .6 rev.1 at 17 (1992).

The United Nations Human Rights Committee, which is responsible for monitoring compliance with the ICCPR, determined that a state party may be held accountable for "violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it." *López Burgos v. Uruguay,* No.52/1979, Views of the Human Rights Committee, CCPR/C/13/D/52/1979 at ¶12.3, 29 July 1981 (finding petition concerning the kidnapping and detention of petitioner's husband by Uruguayan agents in Argentina admissible for review); *see also Casariego v. Uruguay*, No.56/1979, Views of the HRC, CCPR/C/13/D/56/1979 at ¶¶10.1-10.3, 29 July 1981 (where petitioner was arrested and detained incommunicado by Uruguayan agents in Brazil, petition against Uruguay admissible for review). The Committee further held that it would be "unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory." *Burgos*, at ¶12.3. These decisions hold that, while jurisdiction is usually linked with territory, a state does not escape the duty to respect fundamental individual rights under the ICCPR when it exercises authority and control over individuals outside of its territory.

Likewise, the Inter-American Commission reached the same result in interpreting the American Declaration of the Rights and Duties of Man, by which the U.S. has conceded it is bound. *See Coard v. United States*, Case 10.951, Inter-Am. C.H.R. Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. at 1283 (1999) at §§ 37, 39, 41 and 43 (addressing the detention of petitioners during U.S. military occupation of Grenada, noting that the U.S. conceded that it was bound by the Declaration, and holding that "[g]iven that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction," that

jurisdiction "may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad," and that "[i]n principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control").

European courts have held that a state is liable for acts of its agents even on another sovereign's territory. While these decisions are not binding on the U.S., they reflect the uniformity of international law regarding the scope of a state's obligations. The European Commission and the European Court of Human Rights have interpreted "jurisdiction" under the European Convention on Human Rights as extending protection to individuals, regardless of their nationality, in places where they are subject to the actual control of agents of states, even if those places are outside the territory of the state. *See Cyprus v. Turkey,* App. No. 8007/77, 13 DR 85 (1977) (holding that a basic tenet of the Convention provides that states are "bound to secure the rights of all persons under their actual authority and responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad"); *see also Loizidou v. Turkey*, App. No. 14318/89, 23 Eur. H.R. Rep. 513 (1996); *Bankovic v. Belgium and 16 Other Contracting States*, App. No. 52207/99, 12 December 2001, 11 B.H.R.C. 435; *Ocalan v. Turkey*, App. No. 46221/99, 37 Eur. H.R. Rep. 10 (2003).

This approach to the extraterritorial reach of the duties of states is further reflected in the principles of international law concerning state responsibility, which define when a state becomes liable for the breach of its international obligations, irrespective of the nature or source of those obligations. These affirm that a state is responsible for the conduct, *inter alia*, of persons or entities exercising elements of governmental authority, or acting on the instructions of, or under the direction or control of, that state. The criterion is the link between the person said to have undertaken the conduct and the state in question. The nationality of the persons affected by the conduct, or their

presence within the sovereign territory of the state in question, is immaterial. *See* United Nations International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 83, U.N. GAOR, 56th Sess., Supp. No. 10 and Corrigendum, U.N. Doc. A/56/83 (2001).

D. Obligations Under International Human Rights Law Continue During Armed Conflict

The Human Rights Committee has identified the obligation to respect the right against arbitrary detention under the ICCPR as one, like the right to life and the right to be free from torture, that is so fundamental that it is non-derogable, even during a time of public emergency which threatens the life of the nation. *See* Human Rights Committee, General Comment No. 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶11 (2001) (referring to the right of derogation under Article 4 of the ICCPR and holding that "State parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, or by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence"). Accordingly, this right continues to apply in circumstances of military occupation and military rule - even when other rights guaranteed by the ICCPR might, consistent with the Covenant, be temporarily derogated.

International human rights tribunals have held that, even where national security is involved, the suspension of habeas corpus is impermissible, as access to judicial review is integral to the protection of the enumerated non-derogable rights such as the right not to be tortured. *See* Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87 of 30 January 1987, para. 35 (interpreting the derogation provisions of the American Convention on Human Rights and stating "habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel,

inhumane, or degrading punishment or treatment"); *see also* Human Rights Committee General Comment No. 29, para.16 (interpreting the ICCPR and stating that, "in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant"). Absent the enforcement of the most basic due process guarantees, the universally recognized rights of detainees to life and to be free of torture become, effectively, rights without remedies and render impotent the protections of the ICCPR.

While the right against arbitrary detention is non-derogable, and always entails a right of judicial review, the concept of "arbitrariness" allows for some adaptation to particular contexts. *See, e.g.*, *Aksoy v. Turkey*, 23 Eur. Ct. H. R. 553 (1996) (holding that while "the investigation of terrorist offences undoubtedly presents the authorities with special problems," as each measure has to be strictly necessary under the ICCPR and the European Convention on Human Rights, "it cannot accept that it is necessary to hold a suspect for fourteen days without judicial intervention"). Where there are conditions of armed conflict threatening national security, the test to determine whether detentions are "arbitrary" is informed by international humanitarian law.

III. INTERNATIONAL HUMANITARIAN LAW REQUIRES CLASSIFICATION AND DUE PROCESS

International humanitarian law applies during armed conflict. This law complements international human rights law by prescribing how the right against arbitrary detention is preserved during armed conflict. While the U.S. is entitled to be vigilant in protecting itself against terrorists, there is no legal concept of "war on terror" that releases the U.S from its obligation to respect the right against arbitrary detention. Rather, international humanitarian law establishes how to preserve a just balance between due process and national security interests with respect to detentions arising from all manner of armed conflicts. As it stands, the detainees in Guantanamo Bay find themselves in

precisely the sort of "legal black hole" that international humanitarian law aims to seal off. *See The Queen on the Application of Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] All E.R. (D) 70 (C.A.) 2002 (describing Guantanamo Bay detainee as "arbitrarily detained in a 'legal black hole,'" which the court viewed as contrary to "fundamental principles recognised by both jurisdictions [the U.S. and the United Kingdom] and by international law").

A. Obligations of the U.S.

The U.S., along with 190 other states, has ratified both the 1949 Geneva Convention Relating to the Treatment of Prisoners of War ("P.O.W. Convention"), Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, and the 1949 Geneva Convention Relating to the Protection of Civilian Persons in Time of War ("Civilian Convention"), Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, which apply to "all cases of declared war or any other armed conflict which may arise between two or more High Contracting Parties, even if the state of war is not recognized by one of them." P.O.W. Convention, art. 2; Civilian Convention, art. 2.

The Geneva Conventions are regarded as pillars of international humanitarian law and binding as a matter of customary international law, as well as treaty law.[16] *Legality of*

[16] While the Geneva Conventions are widely recognized as the central documents of modern international humanitarian law, the beginnings of the field pre-dates them by almost a century. On April 24, 1863, President Lincoln promulgated General Order 100, widely known as the Lieber Code, codifying the laws of war for U.S. forces. Francis Lieber, Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War (24 April 1863), *reprinted in* D. Schindler and J. Toman, *The Laws of Armed Conflicts*, at 3-23, (the "Lieber Code"), (Martinus Nihjoff Publisher, 1988). This code had significant influence on the international debate regarding the further codification of the laws of war and is viewed as a starting point for subsequent international conventions such as the 1899 and 1907 Hague Conventions on land warfare. *See, e.g.*, Manooker Mofidi and Amy Eckert, *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 Cornell Int'l L.J. 59, 62 (Spring 2003).

the Threat of Use of Nuclear Weapons, (Advisory Opinion), 1996 I.C.J. 226, 257 (Jun 24) (holding the terms of the Conventions binding as a matter of customary international law, since the rights they protect are so "fundamental" as to be "intransgressible"). Two additional protocols relating to the Conventions are also regarded as part of customary international law. *See* Protocol Additional to Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, ("First Additional Protocol"), 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 (1977); *see also* Protocol II Additional to Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Second Additional Protocol"), 1977 U.S.T. LEXIS 465 (June 10, 1977). Although the U.S. has not ratified the additional protocols, it has recognized the importance of the documents as part of the body of customary international law.

The principles of the Conventions and protocols have been incorporated in U.S. military regulations[17] and followed by the U.S. in previous conflicts.[18] The treatment of Petitioners in this

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[17] In its *Operational Law Handbook*, the Judge Advocate General's School, U.S. Army, states "that the US views [among others, Articles 45 and 75 of the First Additional Protocol] as customary international law." Judge Advocate General's School, U.S. Army, *Operational Law Handbook*, JA 422 at 18-2 (1997). This statement is qualified in the 2002 edition of *Operational Law Handbook,* in which it is now said that the U.S. views Article 45 of the First Additional Protocol as "customary international law or acceptable practice though not legally binding." Judge Advocate General's School, U.S. Army, *Operational Law Handbook*, Ch. 2 (2002). However, there is no evidence to suggest that customary international law has changed in this way since 1997, nor is any explanation offered for this attempt to deny the validity of the position adopted by the U.S. in 1997.

[18] During the Vietnam War, the U.S. Military Assistance Command issued comprehensive criteria for the classification and disposition of detainees, providing for the systematic classification of detainees into "prisoner of war" and "non-prisoner of war" categories. *See* Military Assistance Command Vietnam, *Directive Number 381-46*, Annx. A, (27 December 1967). Extensive provision was made for due process in the determination of eligibility for prisoner of war status in cases of "non-prisoners of war and doubtful cases who are captured by or are in the

case is a marked departure from the procedures mandated by international humanitarian law and followed by the U.S. in the past. *See Amicus Curiae Brief of Retired Military Officers* (discussing past U.S. military practice).

B. Rights of Status and Due Process under the Conventions

Among the objectives of the Conventions, two are of overriding importance in this case. First, the Conventions require that all detainees be promptly classified, in order that they may receive rights and privileges appropriate for their status. Second, humanitarian law ensures fundamental due process for all detainees, regardless of their status, so that no person is detained arbitrarily or indefinitely.

The Conventions provide for the protection of persons detained in circumstances of armed conflict, either as prisoners of war entitled to the benefits of the P.O.W. Convention or as civilian detainees protected under the Civilian Convention. *See* P.O.W. Convention, art. 5; Civilian Convention, arts. 71-76, 132, 133*; see also* 4 International Committee of the Red Cross, *Commentary on the Geneva Conventions of 12 August 1949* (1958) ("Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Geneva Convention, a civilian covered by the Fourth Geneva Convention…There is no intermediate status; nobody in enemy hands can be outside of the law").

Any detainee claiming the status of prisoner of war or appearing to be so entitled is presumed to be a prisoner of war, and retains that status until such time as his status has been determined by a competent tribunal. *See* P.O.W. Convention, art. 5 (stating "should any doubt arise as to whether persons, having committed any belligerent act and having fallen into the hands of the enemy,

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custody of U.S. forces." *See* Military Assistance Command Vietnam, *Directive Number 20-5* (15 March 1968). In particular, the military laid down the principle that, "[t]he Detainee shall have the right to be present with his counsel at all open sessions of the tribunal," required time with counsel, free access by counsel and interviews in private, opportunity to confer with essential witnesses and rights of cross-examination. *Id.*

belong to the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal"). Among the rights accorded to prisoners of war are protection against prosecution for taking part in the conflict (unless they committed a violation of the Conventions) and entitlement to release upon the cessation of hostilities. *See* P.O.W. Convention, arts. 87 and 118.

Even where the presumption of prisoner of war status is displaced, the Conventions afford due process protection to all detainees, ensuring that they are not held without justification and that any prosecution brought against them accords with fundamental justice. Combatants who are not members of any armed forces or volunteer corps belonging to a party to a conflict have been described as "unlawful combatants," although no such status is recognized in the Geneva Conventions. If they are not members of the armed forces, they fall within the scope of the Civilian Convention. Accordingly, while unlawful combatants (unlike prisoners of war) may be prosecuted for taking part in the conflict and for any crimes committed in that regard, they are entitled to the judicial guarantees set out within the Civilian Convention should they be prosecuted for their actions. *See* Civilian Convention, art. 72. Article 3, which is common to all of the Conventions, provides that all detainees shall be protected against "[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." P.O.W. Convention, art. 3; Civilian Convention, art. 3. These protections provide a guarantee that no detainee is, because of the vagaries of legal classification, left without a minimum of legal recourse.

Persons not clearly falling into the express categories of the Conventions, including "unlawful combatants," are further protected under Article 75 of the First Additional Protocol, which is widely considered to have formalized the customary international law protections set forth in Article 3 of all four Geneva Conventions. The rights identified in Article 75 are designed for the protection of individuals who fall outside the categories of lawful combatants or civilians. *See* Knut Dörmann,

The legal situation of "unlawful/unprivileged combatants," 849 International Review of the Red Cross 70 (March 2003). Article 75 states that individuals, even those not properly characterized as prisoners of war or civilians must, *inter alia*, not be sentenced or have a penalty imposed on them with respect to "a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedures." First Additional Protocol, art. 75. Article 75 also provides that detainees are entitled to the rights of defense, including assistance by a qualified advocate or counsel "who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence." First Additional Protocol, art. 75(4)(a).

C. U.S. Failure to Classify Petitioners

At present, the Petitioners' legal classification as prisoners of war, civilians or some other distinct status has simply never been determined by any duly constituted tribunal. The U.S. has not acknowledged or determined Petitioners' status as "prisoners of war." This is contrary to the presumption of "prisoner of war" status, which may only be displaced through due process in a competent tribunal. *See* P.O.W. Convention, art. 5; First Additional Protocol, art. 45(1)-(2). Here, the government has refused to accord this presumed status to Petitioners, yet it has simultaneously declined to initiate any formal proceedings to demonstrate that this refusal is merited under the Geneva Conventions.

Instead, the government has claimed that the detainees are "unlawful combatants" or "enemy combatants," though it has introduced no evidence or grounds for such characterization, and the courts below declined to accept the government's unsupported assertions. *See Odah v. United States*, 321 F.3d 1134, 1138 (D.C. Cir. 2003) ("Although the government asked the district court to take judicial notice that the detainees are "enemy combatant," the court declined and assumed the truth of their denials"). As submitted above, while the category of "unlawful combatants" is not expressly used in the Conventions, the attachment of this label

to the detainees does not place them outside of the scope of the bedrock rights ensured by the Conventions to all detainees, regardless of category.

D. Prolonged or Indefinite Detention

By refusing to recognize Petitioners' status in accordance with the Conventions and additional protocols, the government seeks to put them outside the scope of any effective legal framework that can ensure they not be detained any longer than permitted or justified under international law. Under Article 132 of the P.O.W. Convention, prisoners of war must be released upon the cessation of hostilities. P.O.W. Convention, art. 132. The Civilian Convention contains an analogous provision ensuring the release of civilians detained in circumstances of armed conflict (on narrow permissible grounds, such as "definite suspicion" of hostile activity) when the reasons which necessitated their internment no longer exist. *See* Civilian Convention, art. 132. The U.S. is not currently engaged in any armed conflict with Afghanistan or the national state of any of the Petitioners.

Similarly, the protections in Article 3 of all of the Conventions against the sentencing of detainees without the judgment of a regularly constituted court clearly contemplate that the indefinite detention of unlawful combatants (or non-P.O.W. and non-civilian individuals) is impermissible.

In ensuring that detention is not arbitrary, lawful limits on the length of detention are critical. Particularly in the instant situation where, by the President's admission, the "war on terrorism" may last years, if not decades, the government must follow established international law practices limiting the length of detainees' confinement. By failing to make a determination of the Petitioners' status for more than two years, the government has not only contravened the requirements of international law and its own long-standing precedents, but it has also institutionalized the arbitrary nature of the Petitioners' confinement by ensuring that there is no legally recognized standard by which to measure whether the Petitioners are being accorded the due process rights to which they are entitled. The prospect of indefinite imprisonment, without trial or explanation, is precisely the type of

arbitrary detention prohibited under international law. *See Restatement (Third) of the Foreign Relations Law of the United States*, § 702, note h (noting that "[d]etention is arbitrary if it is not pursuant to law" or "if it is incompatible with the principles of justice or with the dignity of the human person," that even "[a] single, brief, arbitrary detention by an official of a state party to one of the principle international agreements might violate that agreement" and that "arbitrary detention violates customary international law if it is prolonged and practiced as a state policy") (internal citations omitted); International Committee of the Red Cross, *Guantanamo Bay: Overview of the ICRC's work for internees* (November 6, 2003) *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/5QRC5V?OpenDocument ("The ICRC's main concern today is that the US authorities have placed the internees in Guantanamo beyond the law. This means that, after more than eighteen months of captivity, the internees still have no idea about their fate, and no means of recourse through any legal mechanism").

E. Humanitarian Law Applies Outside U.S. Borders

A state cannot escape the obligations of international humanitarian law by detaining persons outside its borders. This appears to be conceded by the government. *See Rasul v. Bush*, 215 F. Supp. 2d 55, 56 (D.D.C. 2002), *aff'd sub nom. Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). The protections of the Conventions apply to persons "in enemy hands or who have fallen into the power of the enemy." *See* International Committee of the Red Cross, *Commentary to First Additional Protocol*, para. 2910. The test for the application of humanitarian law is whether the territory falls under the control of the state. *See The Prosecutor v. Dusko Tadic*, IT-94-1-AR72, Decision, 2 October 1995, para. 70.

Conclusion

The prohibition against arbitrary detention is a fundamental principle of international law that applies whenever a state exercises authority and control, and continues in times of war. The present detention of Petitioners is inconsistent with this basic human right. The jurisdiction of the U.S. courts to hear Petitioners should be interpreted to conform to obligations under international law, preserve the role of the U.S. as a guardian of human rights, and meet the expectations of the international community.

Respectfully submitted,

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