

Nos. 05-5064, 05-5095 through 05-5116

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KHALED A. F. AL ODAH, et al.,
Petitioners-Appellees/Cross-Appellants,

v.

UNITED STATES OF AMERICA, et al.
Respondents-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* AND ACCOMPANYING MOTION
FOR LEAVE TO FILE OF THE WORLD ORGANIZATION FOR HUMAN RIGHTS USA IN
SUPPORT OF THE PETITIONERS-APPELLEES

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**MOTION OF THE WORLD ORGANIZATION FOR HUMAN RIGHTS USA
FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE**

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the World Organization for Human Rights USA (“Human Rights USA”) respectfully moves this Court for leave to participate in these proceedings as *amicus curiae*, and to file the attached Brief *Amicus Curiae* in support of the Petitioners-Appellees. Consent to file as *amicus* has been obtained from counsel representing both the Appellants and the Appellees in these cases.

Interest of *Amicus*

The World Organization for Human Rights USA (hereinafter Human Rights USA) is a non-profit, public interest human rights organization dedicated to enforcing compliance with human rights standards in the United States. We are the U.S. affiliate of a worldwide network (L’Organisation Mondiale Contre La Torture (OMCT), or the World Organization Against

Torture international, made up of over 200 similarly situated human rights organizations, each focusing on their own nation's human rights compliance issues and needs. Human Rights USA has been extensively involved in litigation in the immigration and federal courts aimed at protecting refugees and victims of torture from being returned to situations of persecution and abuse in their home countries through the application of international and domestic legal standards prohibiting such returns. We also have been heavily involved in cases challenging the practice of "rendition to torture," or the "extraordinary rendition" of suspected terrorists to foreign countries for interrogation purposes, and the use of the "unlawful enemy combatant" designation as a basis for prosecuting those suspected of terrorism before military tribunals.

For example, Human Rights USA served as *amicus* with the Federal District Court in Illinois, the U.S. Court of Appeals for the Seventh Circuit, and most recently the U.S. Supreme Court, in a case involving a U.S. resident unlawfully detained as an enemy combatant in a South Carolina naval brig (*Al-Marri v. Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003), and *Al-Marri v. Rumsfeld*, 360 F.3d 707 (7th Cir. 2004)). In addition, Human Rights USA serves as lead counsel and counsel of record in the case of Ahmed Abu Ali, an American citizen detained in Saudi Arabia for 20 months due to an U.S. investigation prompted by the war against terrorism. Human Rights USA filed a petition on behalf of his parents in the District Court for the District of Columbia in August of 2004, and received a favorable jurisdictional decision in the case from Judge John Bates on December 16, 2004 that was the subject of an editorial in the *Washington Post* of December 20, 2005 in support of the decision, and that resulted in the Government returning Mr. Abu Ali to the United States.

As is true for the cases cited above, the present case raises a number of significant and very complex questions concerning the United States Government's adherence to international

human rights standards, as well as to standards embodied in domestic law, in this case the military regulations and guidelines implementing the Geneva Conventions, as well as the Convention Against Torture and its implementing legislation and the International Covenant on Civil and Political Rights. Human Rights USA and its staff have had extensive experience dealing with both of these subject areas. We serve as the only international human rights organization in the U.S. focusing primarily on cases and issues relating to U.S. compliance with international human rights standards, and making extensive use of litigation in U.S. courts as the primary method for seeking remedies and for bringing public attention to areas of potential non-compliance. In addition, and unique to most international human rights organizations the Executive Director of Human Rights USA served as a military lawyer with the Judge Advocate General Corps of the U.S. Navy Reserves from 1967-1969, and with a military police prisoner of war unit of the U.S. Army from 1963-1966, and consequently has had direct experience with the application of military law to cases and circumstances similar to the ones associated with this case, including the status and treatment of prisoners of war under the Geneva Conventions, and with the operation of the military justice system more generally.

As a result of these concrete experiences, Human Rights USA is in a unique position to offer this Court important information and legal analysis on how international law and international human rights standards, as well as domestic military law, apply to the present case. We likely are the only non-governmental group and prospective *amicus* able to provide this unique combination of experience and skills, providing a perspective reflecting how both international and domestic military law standards apply to this case.

For these reasons, Human Rights USA respectfully requests that the Court grant this motion for leave to participate as *amicus curiae*, and further requests that the Court grant Human

Rights USA leave to file the accompanying Brief *Amicus Curiae* in Support of the Petitioners-Appellees in the appeal of this case currently pending in this Court.

The required Certification explaining the circumstances that justify our being granted *amicus* status and permission to file a separate *amicus* brief accompanies this Motion.

Respectfully submitted this 27th day of May, 2005 by:

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**LOCAL RULE 29 CERTIFICATION BY COUNSEL
FOR THE FILING OF AN *AMICUS CURIAE* BRIEF**

This is to certify, under penalty of perjury, that pursuant to the requirements of Local Rule 29 that counsel for *amicus curiae*, the World Organization for Human Rights USA, believes that the filing of a separate *amicus* brief was necessary in this case, and that to the best of our knowledge and belief it is not duplicative of other *amici* briefs being filed in support of the Appellees. We believe that the accompanying brief will provide the Court with unique information, legal analysis and perspectives that are not likely to be provided by other *amici*. As indicated in our accompanying Motion for Leave to File, and the accompanying Interest of Amicus section, the World Organization for Human Rights USA provides a unique combination of direct experience and high qualifications in dealing with both international human rights cases and issues in U.S. courts, and the application of military law in circumstances similar to those presented by the present case. We do not know of any other international human rights group or any other prospective *amicus* that provides this unique combination of experience and qualifications. Moreover, the number and complexity of the issues raised by this case would make it difficult if not impossible for all the issues to be properly addressed in one *amicus* submission.

Signed and certified to this 27th day of May, 2005 in Washington, D.C. by:

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The following information is provided pursuant to Circuit Rule 26.1:

Amicus World Organization for Human Rights USA is a not for profit 501(c)(3) corporation, incorporated in the State of Maryland and with its principle place of business in Washington, D.C. We are the U.S. affiliate of a worldwide network of over 200 human rights organizations operating in different countries of the world as part of the World Organization Against Torture (Organisation Mondiale Contre La Torture or OMCT) international network, with the international secretariat located in Geneva, Switzerland. Neither the international network, the secretariat, nor any other affiliate groups of the network exercise any control or controlling interest in the World Organization for Human Rights USA, nor does any other entity in the U.S. or elsewhere exercise such an interest.

We are not affiliated with, and do not represent any party in this case or any of the other amici that have indicated an interest in filing amicus briefs in this case.

The views and analyses provided in this brief are our own, and have not been contributed to nor influenced in any way by any of the parties or any of the other amici.

Law students from the University of Pittsburgh School of Law and New York University School of Law made substantial contributions to the legal research and writing for this brief.

Although we work with volunteer attorneys from a number of law firms in the Washington, D.C. area on other cases and issues who assist us on a *pro bono* basis, none of these volunteer lawyers or law firms assisted us in the preparation of this brief.

Signed and certified to this 27th day of May, 2005 in Washington, D.C. by:

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GLOSSARY

CSRT Combatant Status Review Tribunal

POW Prisoner of War

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The World Organization for Human Rights USA (hereinafter Human Rights USA) is a non-profit, public interest human rights organization dedicated to monitoring and reporting on U.S. compliance with international human rights standards, and heavily engaged in litigation in U.S. courts for this purpose. Human Rights USA has been extensively involved with litigation in U.S. courts applying international law and international human rights legal standards in a number of cases involving the protection of refugees, as well as other issues related to the application of human rights standards to U.S. compliance needs. We are the only international human rights group in the U.S. focusing primarily on U.S. compliance issues, and the only such group extensively using litigation in U.S. courts as the primary method for obtaining remedies, and bringing public attention, to significant instances of noncompliance with human rights standards.

Established in 1996, Human Rights USA, operating in the United States and incorporated in the State of Maryland as a 501(c)(3) tax exempt organization, serves as the United States affiliate of a worldwide network of more than 200 human rights groups, each giving primary attention to human rights compliance by their own governments and in their own countries. The international network has a secretariat located in Geneva, Switzerland, known as L'Organisation Mondiale Contre la Torture (OMCT, or World Organization Against Torture International).

Additional and more detailed information on the specific qualifications and work of our organization is provided in the accompanying Motion for leave to file this amicus brief.

SUMMARY OF ARGUMENT

Amicus supports the view that the provisions of the Geneva Conventions as well as other relevant international treaties, their implementing statutes, and the *jus cogens* portions of their customary international law counter-parts are legally binding on the U.S. and enforceable in U.S. courts, and that many of these standards have been violated by the U.S. government's treatment of the Guantanamo Bay detainees and other detainees similarly situated, most notably in the failure to provide individualized status review determinations that meet Geneva Convention standards, resulting in prolonged arbitrary detention of the detainees. Nor does the CSRT process remedy these deficiencies. These problems constitute violations of binding and enforceable international standards and U.S. law.

ARGUMENT

This *amicus* brief focuses on how international legal standards binding upon the United States and enforceable in U.S. courts apply to the actions of the U.S. government regarding the status and treatment of the Petitioners and other similarly situated Guantanamo Bay detainees, and counters the arguments presented by the government regarding non-enforceability. *Amicus* contend that aliens suspected of terrorism who are captured abroad, particularly those captured in the context of international armed conflicts such as those taking place in Afghanistan and Iraq, are entitled to judicial protection in U.S. courts against acts of indefinite detention, torture and other violations of *jus cogens* standards of international law carried out by or at the request of the U.S. government.

The U.S. Government claims in its brief that the Guantanamo Bay detainees can rely neither on the Due Process Clause of the Fifth Amendment nor on the Geneva Conventions for their habeas claims. Opening Brief for the United States, et al. at 15, 55. [hereinafter Gov't Brief] With respect to the international law element, should the Court uphold these arguments it would be acquiescing in violations by the U.S. government of international laws that are a firm part of our domestic legal system through the ratification of treaties, legislation by Congress implementing these treaties, and through the operation of universally recognized *jus cogens* standards of customary international law.

While as a general matter aliens outside of the U.S. are restricted in their ability to be protected by our domestic legal system and do not have access to U.S. courts to pursue claims generated outside of this country, this principle cannot apply where the U.S.

government is directly implicated in actions against aliens abroad, such as indefinite detention and torture, that violate basic tenants of our legal system.

These treaty and statutory provisions make no distinction between aliens and U.S. citizens and residents, and by their specific terms cover all persons who are indefinitely detained or tortured wherever these actions may take place, even if it is outside the borders of the U.S. The alien status of the victims and the site of their custody and abuse cannot insulate the U.S. government from responsibility for unlawful and universally condemned actions that both the Executive Branch and Congress, through their powers to enter into, ratify and implement treaties, have prohibited on an absolute basis. This is particularly true where the Petitioners' place of custody is "in every practical respect a United States territory." *Rasul v. Bush*, 124 S. Ct. 2686, 2700 (2004)

I. THE GENEVA CONVENTIONS PROTECT ALL THOSE CAPTURED IN THE ARMED CONFLICTS IN AFGHANISTAN AND IRAQ, AND ARE JUDICIALLY ENFORCEABLE.

The Government in its brief claims that the Geneva Conventions are not judicially enforceable. Gov't Brief at 55. This is not a correct description of the nature of the obligations set forth in these treaties.

A. The Geneva Conventions Are Part of the Supreme Law of the Land.

The Supremacy Clause mandates that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const., Art. VI, § 2, cl. 2. The United States has ratified all four of the Geneva Conventions which includes the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III], and the Geneva Convention Relative to the Protection of Civilian Persons in Time of

War, Aug. 12 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV]. As such, Geneva III and Geneva IV must be considered part of the “supreme law of the land” under Article VI of the Constitution and treated as enforceable, as they have been placed on a par with statutes passed by Congress, and just under the provisions of the Constitution itself, as one of the three primary sources of legal standards binding upon the U.S.

D. A Number of Provisions of the Geneva Conventions Setting Forth Rights And Obligations are Mandatory, Vesting And Self-Executing in Nature.

While as a general principle many treaty obligations are considered enforceable largely through diplomatic and international processes, certain types of treaty standards and portions of treaties incorporating them, particularly those setting out *jus cogens* norms, are considered enforceable in U.S. courts by virtue of their vesting language and/or the nature of the standards involved, making them self-executing, or immediately enforceable without further implementing action by the U.S. government. *See e.g. Head Money Cases*, 112 U.S. 580, 598-99 (1884) (“A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.”) *See also* Restatement (Third) of the Foreign Relations Laws of the United States § 111 cmt. h (1987) (“Some provisions of an international agreement may be self-executing and others non-self-executing.”)

Two district courts have expressly held that at least some provisions of the Geneva Conventions are self-executing. *See United States v. Lindh*, 212 F. Supp. 2d 541,

553 (E.D. Va. 2002) (holding that “[Geneva III], insofar as it is pertinent here, is a self-executing treaty”); *United States v. Noriega*, 808 F. Supp. 791, 797 (S.D. Fla. 1992) (“Given the opportunity to address this issue in the context of a live controversy, the Court would almost certainly hold that the majority of provisions of Geneva III are, in fact, self-executing”), *aff’d* 117 F.3d 1206 (11th Cir. 1997). *See generally* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L. Rev. 97, 126.

The binding and enforceable quality of treaty standards also is indicated or confirmed where the standards involved have been “implemented” or “executed” through the adoption of legislation by Congress, which is true for many of the standards of the Geneva Conventions (and the Convention Against Torture) applicable to this case. For example, key aspects of the individual standards set out in the Geneva Conventions relative to the law of war and the treatment of prisoners and those accused of crimes in periods of armed conflict have been implemented as part of U.S. law through passage by Congress of the Uniform Code of Military Justice [hereinafter UCMJ], which is intended to govern the treatment of all those subjected to custody and placed under the criminal justice jurisdiction of the U.S. military, including the Guantanamo Bay detainees. 10 U.S.C. §§ 801-946 (2000). Similarly, Congress has passed the War Crimes Act making it a federal criminal offense to commit a grave breach of the Geneva Conventions, or to commit a violation of Common Article 3. 18 U.S.C. § 2241(c) (2000).

The provisions of Geneva III that are immediately relevant to the Petitioners, specifically Articles 3 and 5, must be considered self-executing and binding on the U.S. in this way because, as the U.S. District Court for the District of Columbia Circuit has

noted, (1) the Geneva Conventions were written to protect individuals, (2) the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, (3) Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and (4) nothing in Geneva III itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation. *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152, 165, (D.D.C. 2004).

C. The Geneva Conventions are Judicially Enforceable In a Habeas Proceeding.

The United States Constitution extends judicial power to “all cases” arising under “Treaties made, or which shall be made” under the authority of the Constitution and laws of the United States. U.S. Const. art. III, § 2. As the Supreme Court has said, “The reason for inserting that clause in the constitution was, that all persons who have real claims under a treaty should have their causes decided by the national tribunals.” *Owings v. Norwood's Lessee*, 9 U.S. 344, 348 (1809)(Marshall, C.J.).

The writ of habeas corpus is specifically extended to prisoners in custody in violation of treaties. 28 U.S.C. § 2241(c)(3) (2000). Although the Geneva Conventions may not entitle the Petitioners to immediate release, *see* Gov't Brief at 55, habeas relief should be granted to the Petitioners at least to the extent that it would require their status to be properly determined in order that the legality and legitimacy of continued custody can be assessed, and so that their treatment in custody will conform to treaty and other legal standards.

Courts of the United States have “their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.” *Hamdi v.*

Rumsfeld, 124 S. Ct. 2633, 2649-50 (2004) (plurality opinion). “Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.” *Id.* at 2650.

II. OTHER APPLICABLE HUMAN RIGHTS TREATIES PROTECT DETAINEES WHO MAY NOT BE PROTECTED BY THE GENEVA CONVENTIONS.

Although the Geneva Conventions may not apply to detainees captured outside of locations of international armed conflict such as Afghanistan and Iraq, the Government’s Brief conveniently makes no mention of other binding obligations of the U.S. government that are applicable to all Guantanamo Bay detainees, regardless of their status, and that provide a further basis for the Petitioners’ habeas claims.

Even if the Geneva Conventions do not apply to all detainees, they nevertheless are protected against arbitrary, indefinite detention and torture under other enforceable treaty standards. The standards articulated in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85 (entered into force for the United States November 20, 1994) [hereinafter Convention Against Torture] and the International Covenant on Civil and Political Rights, Mar. 23, 1976, 6 I.L.M. 368, 999 U.N.T.S. 171 (entered into force for the United States September 8, 1992) [hereinafter ICCPR] apply to all detainees under U.S. custody in Guantanamo, regardless of the circumstances of their capture, their nationality, and their alleged or actual status under the Geneva Conventions. Persons not protected by the Geneva Conventions because they were not captured in Afghanistan or Iraq, for example, are nevertheless protected by the Convention Against Torture and the

ICCPR. *See* Convention Against Torture, arts. 2, 16; ICCPR, arts. 4, 7, 9, 14. The threat of terrorism and/or unlawful enemy combatant status does not eliminate these protections. The long-term indefinite detention of suspected terrorists violates these additional international legal standards prohibiting arbitrary detention, and requires meaningful judicial review of the lawfulness of the detentions even apart from Geneva Convention requirements.

A. The Convention Against Torture Has Been Fully Executed By Two Congressional Statutes, and Must Be Considered An Enforceable Part of U.S. Domestic Law.

The standards embodied in the Convention Against Torture have been fully implemented by Congress and made a part of enforceable domestic law by two statutes that followed the ratification of the treaty by the U.S. Senate. The first statute recognized the criminal nature of torture, and made acts of torture committed “outside the United States” crimes under U.S. law punishable by up to 20 years imprisonment, or a life term if death results from the abuse. 18 U.S.C. §§ 2340 *et seq* (2000). The second statute adopted and made part of U.S. law the Article 3 provision of the Convention, imposing an absolute prohibition against returning or sending anyone to a situation of torture. 8 U.S.C. § 1231 (2000).

The Convention Against Torture and its implementing statutory standards dealing with both the civil and criminal aspects of the Convention are applicable to this case in two ways. First, allegations of specific abuses amounting to torture have been made by a number of detainees in connection with their treatment at the Guantanamo Bay facility, or prior to their transfer there. Second, and most important, long-term, indefinite detention, in and of itself, has been recognized to constitute an extreme form of punishment of the

type subject to Convention Against Torture standards. *See e.g. Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980) (finding that even though indefinite detention of an excludable alien could not be said to violate the Constitution or statutory laws, it was “judicially remedial as a violation of international law.”) *aff’d on different grounds*, 654 F.2d 1382, 1387 (10th Cir. 1981) (finding that indefinite detention constitutes “impermissible punishment” in violation of the Fifth Amendment.)

III. UNIVERSALLY RECOGNIZED *JUS COGENS* STANDARDS OF CUSTOMARY INTERNATIONAL LAW PROVIDE AN ADDITIONAL BASIS FOR ENFORCEABILITY BY U.S. COURTS.

Certain fundamental standards have reached the status of being so universally recognized in the practice of nations that they have been given the status of *jus cogens* norms of customary international law, entitled to preemptory status and to automatic observance under all circumstances and without exception. Such principles include basic human rights such as freedom from torture, slavery, and arbitrary detention that are recognized by the Restatement (Third) of the Foreign Relations Laws of the United States as constituting *jus cogens* norms of international law: “A state violates international law if, as a matter of state policy, it practices, encourages, or condones... prolonged arbitrary detention.” §702. The Restatement indicates that like torture, genocide and other *jus cogens* standards, prolonged arbitrary detention must be considered to have non-derogable status, and cannot be restricted except in the most highly extenuating, emergency circumstances. *Id.* at reporter’s note 11.

These *jus cogens* standards meet the standard articulated by the Supreme Court in *Sosa v. Alvarez-Machain* as they are “specific, universal and obligatory.” 124 S. Ct. 2739, 2766 (2004), citing *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467,

1475 (9th Cir. 1994). U.S. courts have a duty to recognize and apply these fundamental *jus cogens* standards of customary international law, and take steps to prevent these acts, regardless of whether these human rights have been codified in a treaty, whether a treaty as a whole codifying these rights is considered self-executing, or whether such a treaty has been implemented domestically through the adoption of legislation. *See The Paquete Habana*, 175 U.S. 677, 700 (U.S. 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 upon it are duly presented for their determination.”)

U.S. courts have held that individuals whose fundamental rights of this type have been violated, such as the right to not be subjected to arbitrary, long-term and indefinite detention, may seek judicial redress, without needing to reach the question of whether the right was self-executing or had been “executed” and made part of domestic law through legislation. *See Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2764 (2004) (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”); *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. at 798.

The Geneva Conventions and the ICCPR, since they embody many of these *jus cogens* standards, provide guidance in interpreting and applying the principles of customary international law in U.S. courts. Even in circumstances where they may be considered non-self-executing and not judicially enforceable *per se*, treaties of this type have been used to provide the courts with authoritative, widely-accepted guidelines for interpreting and applying how international standards can be applied in domestic courts. For example, U.S. courts have repeatedly held that the Geneva Conventions and the ICCPR embody the “law of nations,” and that abuses involving the fundamental human

rights recognized by the Geneva Conventions and the ICCPR are considered strong evidence that international law has been violated. *See e.g., Iwanowa v Ford Motor Co.*, 67 F.Supp.2d 424, 439-40 (D.N.J. 1999) (ruling that a violation of plaintiff's right to be free from forced labor under Geneva III was evidence of a violation of "law of nations" under the Alien Tort Claims Act); *Mehinovic v. Vukovic*, 198 F.Supp.2d 1322 (N.D. Ga. 2002) (holding defendant liable under Alien Tort Claims Act for violating Common Article 3 of the Third and Fourth Geneva Conventions).

The Supreme Court also has relied on these treaties as indicators of fundamental international norms that require domestic observance. In *Thompson v. Oklahoma*, the Court cited the ICCPR prohibition on the execution of juveniles in the course of a decision finding it unconstitutional to execute person who was fifteen years of age at the time of the offense. 487 U.S. 815, 831 n.34 (1988). Similarly, in *Roper v Simmons*, the ICCPR and other international human rights treaties formed the basis for the Supreme Court's most recent decision to eliminate the juvenile death penalty in its entirety and for its statement that the "the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." 125 S. Ct. 1183, 1199-1200 (2005).

Applying these principles to the present case, given that arbitrary detention and torture are deemed *jus cogens* violations of customary international law, the detainees should be permitted to rely on these standards in seeking habeas relief from concrete abuses by the U.S. government affecting their core liberty interests, even if the ICCPR and Geneva Conventions as a whole are not deemed self-executing. Because those treaties' prohibitions against torture and arbitrary detention are regarded as authoritative

embodiments of *jus cogens* standards of customary international law, the detainees may invoke the treaties as evidence that their fundamental liberty interests and legally protected rights have been violated.

Courts in a number of cases have properly expressed reluctance to exempt violations of fundamental rights that adversely affect basic liberty and security interests from the general application of the non-self executing treaty standard. For example, the Supreme Court itself in *Sosa* made clear that “it would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals,” where fundamental interests and universally accepted international standards were involved. 124 S. Ct. at 2764-65. This is particularly true in situations where the international standards are being invoked to prevent direct violations by the U.S. government of core protections involving fundamental liberty interests, as is the case here.

IV. THE AUTHORIZATION FOR THE USE OF MILITARY FORCE DOES NOT SPECIFICALLY AUTHORIZE, NOT CAN IT BE CONSTRUED TO AUTHORIZE, ACTIONS BY THE EXECUTIVE BRANCH THAT VIOLATE TREATY STANDARDS, STATUTES IMPLEMENTING TREATY OBLIGATIONS, OR CUSTOMARY INTERNATIONAL LAW.

The Authorization for the Use of Military Force Joint Resolution, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18 2001) [hereinafter AUMF], has been held to authorize the capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants. *Hamdi*, 124 S. Ct. at 2639-40. However, the statute does not authorize the U.S. government to violate treaty standards such as the Geneva Conventions, the Convention Against Torture, and the ICCPR, nor does it immunize the

government for actions involving torture or other violations of *jus cogens* standards of international law.

To argue otherwise ignores well-established principles of statutory interpretation: “Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.” Restatement (Third) of Foreign Relations Laws of the United States § 114 (1987). Applying this principle, the Supreme Court in *Clark v. Allen* refused to find that a treaty provision had been abrogated by Congress, articulating the standard that “the outbreak of war does not necessarily suspend or abrogate treaty provisions,” absent a specifically articulated Congressional intent to do so. 331 U.S. 503, 508 (1947). *The Paquete Habana* similarly held that the Executive may not override customary international law unless there is explicit Congressional approval to do so. 175 U.S. at 710-11. *See also Murry v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (holding that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”); *Tag v. Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959).

Based on this well-established standard, the AUMF, which contains no language indicating Congressional intent to violate particular standards of international law or the provisions of existing treaties, cannot be construed to authorize action that contravenes the provisions of the Geneva Conventions, the ICCPR, the Convention Against Torture and other binding standards of international law, nor the provisions of prior statutes adopting and implementing these treaty-based principles. The Supreme Court recognized that this was the correct standard to use in interpreting and applying the AUMF when it held in *Hamdi* that the AUMF authorized “necessary and appropriate” detention of

enemy combatants, but only pursuant to “longstanding law-of-war principles,” citing specifically Geneva III, Art. 118, and thereby affirming that the AUMF cannot be interpreted as authorizing abrogation of the Geneva Convention standards. 124 S. Ct. at 2641. *See also Morton v. Mancari*, 417 U.S. 535, 549-50 (1974) (holding that the repeal or violation of fundamental legal safeguards “recognized as indispensable by civilized peoples” are disfavored.)

V. THE U.S. GOVERNMENT’S TREATMENT OF THE GUANTANAMO BAY DETAINEES VIOLATES THE GENEVA CONVENTIONS AS WELL AS OTHER BINDING HUMAN RIGHTS TREATIES AND UNIVERSALLY RECOGNIZED STANDARDS OF CUSTOMARY INTERNATIONAL LAW.

The government’s blanket designation of captured suspected terrorists as enemy combatants violates a number of standards set out in the Geneva Conventions, the ICCPR, the Convention Against Torture and customary international law. The broad definition of “enemy combatant” that the government has applied covers anyone “who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners [and] includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” Deputy Secretary of Defense, Order Establishing Combatant Status Review Tribunal (July 7, 2004)¹ [hereinafter CSRT Order] ¶ (a). In making this blanket designation of unlawful enemy combatants, the government ignores a number of basic and universally recognized protections, whether the captured detainees are considered members of government-sanctioned armed forces protected by the Geneva III, persons captured in armed conflict protected by Geneva IV, or other “belligerent” actors

¹ Available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>

captured elsewhere who are subject to detention and trial as criminals. *See* Geneva III, arts. 4-5; Geneva IV, art. 4; ICCPR, arts. 9, 14; Covention Against Torture. The U.S. is duty bound to observe these standards and to protect the rights of the detainees under international human rights and humanitarian law even if they are considered to be unlawful enemy combatants.

A. The Third and Fourth Geneva Conventions Protect All Detainees Captured in Afghanistan and Iraq.

All detainees captured in connection with the international armed conflicts in Afghanistan and Iraq are protected, either as prisoners of war or as civilians, under the Third and Fourth Geneva Conventions. All Guantanamo Bay detainees who were captured in Afghanistan or Iraq are therefore subject to the protections of Common Article 3 of the Third and Fourth Geneva Conventions, including prohibitions against extra-judicial punishment and “outrages upon personal dignity, in particular humiliating and degrading treatment.” Geneva III, art. 3; Geneva IV, art. 3. U.S. courts have rejected previous attempts to limit the scope of coverage of these protections. *E.g. Kadic v. Karadzic*, 70 F. 3d 232, 243 (2d Cir. 1995), *cert. denied* 518 U.S. 1005 (1996); *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 142, 162-63 (D.D.C. 2004); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d at 1351.

Together, Geneva III and IV provide protection for all persons captured in connection with any international armed conflict (excluding medical personnel of armed forces protected under Geneva I). Geneva III protects prisoners of war, including members of the armed forces or militias, war correspondents, and civilians engaged in spontaneous resistance to occupation. Geneva III, art. 4. Individuals who do not qualify for protection as prisoners of war under Geneva III are protected under Geneva IV so

long as they are captured in connection with an international armed conflict and are nationals of states engaged in warfare that are parties to the Convention. Geneva III, art. 4; Geneva IV, art. 4. Article 4 of Geneva IV deliberately defines the category of protected persons in broad terms: “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” Geneva IV, art. 4. It only excludes (1) nationals of non-contracting States, (2) nationals of a neutral State who find themselves in the territory of a belligerent State and nationals of a co-belligerent State while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are, and (3) persons protected by the other three Geneva Conventions. *Id.*

The International Committee on the Red Cross, in a commentary that has been recognized by United States courts as an authoritative interpretation of the Geneva Conventions, *see Noriega*, 808 F. Supp. at 795 n.6, emphatically states that Geneva IV applies to *all* persons not protected by other Geneva Conventions, so long as such persons were captured in international armed conflict:

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 Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.

Int’l Comm. of the Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 51 (Jean Pictet ed. 1958) (emphasis added). The commentary further clarifies that Geneva IV excludes nationals of non-hostile powers because it presumes that such persons are not “in enemy hands.” *Id.* In

this case, nationals of countries not hostile to the United States but captured in Afghanistan or Iraq must nevertheless be considered “in enemy hands” as a result of an international armed conflict, even though they are nationals of non-hostile governments, and they are therefore subject to the protections of Geneva IV.

United States military authority also supports this interpretation of Geneva IV. The field manual used to educate American military personnel on the laws of war states: “[T]hose protected by Fourth Geneva also include all persons who have engaged in hostile or belligerent conduct but who are not entitled to treatment as prisoners of war.” Dep’t of the Army, Field Manual 27-10, *The Law of Land Warfare*, ¶ 247 (1956) [hereinafter FM 27-10]. Applying this same interpretation, the U.S. Army Court of Military Review rejected the possibility that individuals, even alleged unconventional fighters, could be deemed outside both the protections of Geneva III because they did not qualify as POWs and the protections of Geneva IV. *U.S. v. Calley*, 46 C.M.R. 1131, 1174 (A.C.M.R. 1973).

B. All Detainees Captured in Connection with an International Armed Conflict Are Entitled to Protection as Prisoners of War Until Their Status is Determined By a Competent Tribunal.

Under Article 5 of Geneva III, if any doubt arises as to a person’s entitlement to the protections of that Convention, and that person asserts that he is entitled to treatment as a POW, he shall be protected as a POW until “a competent tribunal” determines his status. *See* Geneva III, art. 5; FM 27-10 at ¶ 71. Although the Geneva Conventions do not provide a great deal of detail or explanation as to what constitutes “a competent tribunal,” what is clear is that neither the procedures initially used by the President for this determination, nor the CSRT process, meet this standard.

If following a hearing before a “competent tribunal” a detainee captured in connection with the armed conflict in Afghanistan or Iraq were determined not to be entitled to protection as a POW under Geneva III, he would still be entitled to protection under Geneva IV. He could be prosecuted for his belligerent acts in a “regular trial” conducted by “competent courts.” Geneva IV, arts. 64-75. However, no matter what his or her status, the detainee is entitled to certain Geneva Convention protections including the right to be “treated with humanity,” to be granted all “the rights of [a] fair and regular trial [as] prescribed by the present Convention,” and to enjoy freedom from “physical or moral coercion,” especially coercion applied to obtain information. *Id.*, arts. 5, 31.

A Presidential determination of enemy combatant status making a blanket determination on a group rather than on an individualized basis certainly does not satisfy the “competent tribunal” standard. *See* White House Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002).² President Bush cannot substitute his own broad categorical declaration that all suspected terrorist detainees are unlawful enemy combatants for the “competent tribunal” requirement. The Supreme Court in *Hamdi* pointed out that such an *a priori* determination of the detainees’ status is at odds with the Army regulations designed to implement the “competent tribunal” requirement and to settle doubts as to the status of any “given individual.” 124 S. Ct. at 2658-59 (citing Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* §§ 1-5, 1-6 (1997) ³ [hereinafter A.R. 190-8]). United States Army policy also mandates an individualized status determination any time a detainee claims the status of a POW. A.R. 190-8, at § 1-6(b).

² Available at <http://www.whitehouse.gov/news/releases/2002/02/>

³ Available at http://adp.army.mil/pdf/files/r190_8.pdf

C. The CSRT Process Does Not Conform to Either International or Domestic Standards, and Therefore Can Not Be Relied Upon to Justify the Indefinite Long-Term Detention (and Consequently Torture) of Guantanamo Bay Detainees.

The District Court was correct in finding that the U.S. government violated applicable international and domestic legal standards by initially leaving it to the President and his subordinates in the Executive Branch and the military, instead of “a competent tribunal,” as mandated in the Geneva Conventions, to determine whether captured individuals should be considered “unlawful enemy combatants” and therefore ineligible for POW status. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480 (D.D.C. 2005). Nor, as the District Court properly concluded, did the subsequent adoption of the CSRT process after the Supreme Court’s decisions in *Hamdi* and *Rasul* remedy the problem, because it does not meet a number of international and domestic legal standards that are applicable to the making of POW and unlawful enemy combatant determinations. *Id.* The CSRT process falls short of the “competent tribunal” standard since it does not provide essential due process protections inherently a part of an independent and competent judicial decision-making process. Its mandate was strictly limited to the very limited assessment of whether or not the detainee was an “unlawful enemy combatant.”

1. The CSRT Process Does Not Conform With Geneva Convention Standards.

Pursuant to Article 5, detainees are to be treated as prisoners of war until a “competent tribunal” determines that they are not eligible for this status. Geneva III, art. 5. The CSRT process on the other hand serves a far more limited function. Created to comply with the Supreme Court’s decision in *Hamdi* that “a citizen-detainee seeking to

challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the government's factual assertions before a neutral decisionmaker,” 124 S. Ct. at 2648, the CSRTs were given the narrow mandate of approving or disapproving the unlawful enemy combatant designation in individual cases. CSRT Order ¶ (g)(12). According to the Department of Defense memorandum mandating the CSRT process, the mandate of the CSRT does not extend beyond the task “to review the detainee’s status as an enemy combatant.” CSRT Order ¶ (d). Rather than making broader individual status assessments based on the specific actions of each detainee and guided by the classification criteria set forth in the Geneva III, the CSRT is not authorized to do anything more than review the adequacy of prior unlawful enemy combatant classifications previously made by the Department of Defense “through multiple levels of review by officers of the Department of Defense,” and simply to confirm or reverse these findings. CSRT Order ¶ (a). Classification as a POW is not available through CSRT review. The only possible designations are “enemy combatant” or “non-enemy combatant.” *See* CSRT Order ¶¶ (12), (13)(i).

Inherent in this process is that the CSRT begins with a different presumption about detainees’ status than that set out in the Geneva Convention which requires that captives be treated as prisoners of war until proven otherwise. Geneva III art. 5. Instead, the CSRT is not empowered to designate a detainee a POW at the close of proceedings. The CSRT process is “intended solely to improve management within the Department of Defense concerning its detention of enemy combatants at Guantanamo Bay Naval Base, Cuba, and is not intended to, and does not, create any right or benefit, substantive or procedural....” CSRT Order ¶ (j). This is the opposite of the intent of the Article 5

requirement which mandates a status determination ascertaining the status and thus the rights due a detainee under the laws of war and international humanitarian law.

Army Regulation 190-8 “executes” or implements the Geneva Convention Article 5 standard by affirming that individuals in the custody of the United States will be treated as prisoners of war until “some other legal status is determined by a competent tribunal.” A.R. 190-8 at § 1-6(a). It identifies four possible status outcomes for such a hearing, including EPW (Enemy Prisoner of War). A.R. 190-8 at §1-6(10). If the CSRT were a properly constituted tribunal under Geneva III Article 5 or A.R. 190-8, it would have the authority to make these alternative status determinations, instead of simply affirming unlawful enemy combatant status.

At the drafting of Geneva III, the term “competent tribunal” in Article 5 was selected as an alternative to the term “military tribunal” because some nations feared that the outcome of a proceeding before a military tribunal, especially one convened close to the battlefield, had the potential to impose penalties and to be punitive in nature, rather than a mechanism to determine a captive’s status. 2B Diplomatic Conference for the Establishment of Int’l Conventions for the Protection of Victims of War, *Final Record of the Diplomatic Conference of Geneva of 1949*, 270 (1949). *See also* Int’l Comm. of the Red Cross, *Commentary: Geneva Convention Relative to the Treatment of Prisoners of War*, 77 (Jean Pictet ed. 1958). A status determination was seen as an initial step in the processing of detainees taken into custody by a detaining power to help determine their classification and treatment.

Since an Article 5 tribunal makes a determination that affects the treatment detainees will receive, including the possible imposition of penalties, it carries with it

many aspects of a criminal trial. For this reason, all the procedural guarantees of the Geneva Conventions should be present in Article 5 status determination proceedings. All tribunals making determinations affecting the status and treatment of detainees captured in armed conflict, and most specifically determinations affecting fundamental liberty and security interests, must abide by those procedural requirements. *See* Department of Defense Directive Number 45-2, United States European Command Unit 30400, § 8(b) (2002).

The Geneva Conventions and other international human rights treaties, as well as customary international law, mandate due process-type protections for judicial-type proceedings that affect fundamental liberty interests. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 9, 1977, art. 45, 1125 U.N.T.S. 3; Int'l Comm. of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) ⁴ Commentary to Article 45 of Protocol I states that the authors of the Protocol did not mandate judicial-type procedures for tribunals making status determinations only because "it did not seem feasible to burden a tribunal called upon to intervene on the battlefield with such a difficult task." *Id.*, art. 45, ¶ 1751, at 555. Since Guantanamo Bay is far removed from the site of capture of the detainees and from any active hostilities, such concerns are inapplicable, and judicial protections should be afforded to the detainees.

⁴ While the Protocols have not been ratified by the United States, Article 45 has been accepted by the U.S. as customary international law. Remarks of Michael J. Matheson, Deputy Legal Adviser, U.S. Dept. of State, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: a Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Protocols*, 2 Am. U. J. Int'l L. & Pol'y 419, 427 (1987). 162 states are parties to the Protocol.

The judicial-type procedures that a status determination tribunal operating in a setting such as Guantanamo must provide are found in Geneva III. Article 84 of the Convention emphasizes the essential procedural safeguards that must be available to all prisoners facing proceedings involving the potential imposition of penalties:

In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defense provided for in Article 105.

Geneva III, art. 84.

The CSRT process does not provide many of these essential protections, notably the guarantee of impartiality and the right to assistance of counsel. The Personal Representative available to the detainees in the CSRT process is not a substitute for an advocate or counsel. The Secretary of the Navy, describing the CSRT process made clear that “the detainee shall not be represented by legal counsel.” Secretary of the Navy, Memorandum, Implementation of Combatant Status Review Tribunal, July 29, 2004, Enclosure (1) (“Combatant Status Review Tribunal Process”), ¶ (F)(5).⁵ Communications between the Representative and the detainee are not privileged, as the Department of Defense forbids a confidential relationship between the detainee and the Personal Representative. *Id.*, Enclosure (3) (“Personal Representative Qualifications, Roles, and Responsibilities”) ¶ (C)(1). Additionally, the Personal Representative is obligated to divulge information recounted to him by the detainee to the Tribunal. *Id.* ¶ (D). Given these limitations, the Personal Representative cannot in any meaningful sense be considered an independent legal representative.

⁵ Available at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>

The CSRT also lacks the “independent and impartial” nature of a judicial body. The officers serving on the CSRT, insofar as they are reviewing a status determination already made by the Department of Defense at a much higher level in the military chain of command, cannot be considered independent. The District Court found support in the record in the case of petitioner Murat Kurnaz for “petitioners’ allegation that the ‘CSRTs do not involve an impartial decisionmaker.’” *In re Guantanamo Detainees*, 355 F.Supp.2d at 471.

2. The CSRT Process Does Not Conform With Standards Applied by the U.S. in Previous Conflicts.

The deficiencies in the CSRT process are further demonstrated by the fact that status determination tribunals used in past conflicts followed a very different pattern. In the past, the United States’ treatment of persons detained in the course of armed conflict has carefully observed due process standards while maintaining the level of security needed for different kinds of conflicts.

The Government argues in its brief that Geneva III, Article 4 defining prisoners of war lends itself to group application. Gov’t Brief at 62. This argument completely ignores Article 5 which refers to “persons” who shall enjoy the protection of the Convention until their status is determined by a competent tribunal. The Government also cites to a Vietnam-era Directive to argue that in the past the United States has made group determinations of captured enemy combatants. Gov’t Brief at 63. However, a closer analysis reveals that while the U.S. military did make group distinctions between categories and sub-categories of the enemy—Viet Cong, North Vietnamese Army, irregulars, guerillas, etc.—this was used to facilitate classification of individual captives by Geneva III Article 5 tribunals. Headquarters, United States Military Assistance

Command, Vietnam, Directive No. 20-5 of March 15, 1968, Inspections and Investigations—Prisoners of War—Determinations of Eligibility, ¶ 2(c), *reprinted in* 62 Am. J. Int'l L. 765, 768 (1968). Such tribunals were convened whenever there was doubt about a detainee's status or if, having been determined to not have POW status, a detainee or someone in his behalf claimed POW status. *Id.* at ¶ (5)(f)(2). Furthermore, in contrast to present circumstances in Guantanamo Bay and the CSRT procedures, “no person [could] be deprived of his status as a prisoner of war without having had an opportunity to present his case with the assistance of a qualified advocate or counsel.” *Id.*, Annex A, Tribunal Procedures at ¶¶ 7(a), 8. Even if the detainee did not wish to select counsel, the convening authority automatically appointed a judge advocate or other military lawyer familiar with the Geneva Conventions as counsel for the detainee. *Id.* at ¶ 8. Unlike the “personal representative” afforded by the CSRT process, such counsel had full rights to meet privately with the detainee and essential witnesses. *Id.* at ¶ 9. Geneva III Article 5 was also followed during the Persian Gulf War. *See* Department of Defense, Report on the Conduct of the Persian Gulf War, Final Report to Congress (April 1992).

CONCLUSION

For all of the reasons set out above, *Amicus* supports affirmance of the portions of the District Court's decision supported by the Petitioner/Appellees.

Respectfully submitted this 27th day of May, 2005 by:

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**CERTIFICATE OF COMPLIANCE
WITH FEDERAL RULES OF APPELLATE PROCEDURE STANDARDS**

This is to certify, under penalty of perjury, that the accompanying Amicus Brief and related submissions comply in all respects to the best of our understanding with the requirements for this type of submission set out in Rules 29 and 32 of the Federal Rules of Appellate Procedure, including specifically Rule 32(a)(7)(B) regarding the type-volume limitation. The Brief is printed in New Times Roman 12 font, consists of 6,993 words of text, and is accompanied by all the required certifications and disclosure forms.

Signed and certified to this 27th day of May, 2005 by:

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CERTIFICATE OF SERVICE

This is to certify, under penalty of perjury, that a true and complete copy of this *amicus curiae* submission to the Court in the above-captioned case, including Motion for Leave to Submit and all accompanying certifications and forms, were served on counsel for both parties in this case by electronic means (as requested by the parties) and by U.S. Postal Service first class mail as indicated below:

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[AND OTHERS AS LISTED IN THEN GOVERNMENT'S OPENING BRIEF]

Signed and certified to this 27th day of May, 2005 in Washington, D.C. by:

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