CASE NOS. 02-5284 AND 02-5288 Consolidated

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAMDOUH HABIB, MAHA HABIB,
as Next Friend of MAMDOUH HABIB, et al.,

Appellants
v.

GEORGE WALKER BUSH, et al.,

Appellees

SHAFIQ RASUL, SKINA BIBI,
as Next Friend of Shafiq Rasul, et al.,

Appellants
v.

GEORGE WALKER BUSH, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
THE HONORABLE COLLEEN KOLLAR-KOTELLY

BRIEF OF AMICI CURIAE INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND LAW SCHOLARS IN SUPPORT OF PETITIONERS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties And Amici Curiae

Except for the following, all parties, intervenors, and amici appearing in this court are listed in the Appellants' Brief:

Bar Human Rights Committee of England & Wales

Center for Economic and Social Rights

Center for Justice & Accountability

Human Rights Watch

International Human Rights Law Group

William J. Aceves

Arturo Carillo

Joan Fitzpatrick

Garth Meintjes

Jordan J. Paust

John Quigley

Naomi Roht-Arriaza

Beth van Schaack

(B) Rulings Under Review

Consolidated appeals are taken from two Orders by United States District Judge Colleen Kollar-Kotelly of the United States District Court for the District of Columbia: Order of July 30, 2002, and accompanying Memorandum Opinion, in Civil Action No. 02cv00299, granting Respondents' Motion to Dismiss Petitioners' First Amended Petition for Writ of Habeas Corpus, and dismissing the case with prejudice (reported only unofficially to date at 2002 U.S. Dist. LEXIS 14031); and the Order of August 8, 2002, in Civil Action No. 02cv01130, granting Respondents' Motion to Dismiss Petition for Writ of Habeas Corpus and Request for Adequate Process, and dismissing the case with prejudice (unreported).

(C) Related Cases

The cases in which these consolidated appeals are filed have not previously been reviewed by this or any other Court of Appeals. These cases are related to Odah, et al. v. United States, et al., Civil Action No. 02cv00828 in the United States District Court for the District of Columbia, which was dismissed with prejudice by the same July 30, 2002, Order and Memorandum as in Civil Action No. 02cv00299, and which is now on appeal before this Court as Case No. 02-5251.

CORPORATE DISCLOSER STATEMENT

Amici have no parent corporations and issue no shares of stock.

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INTEREST OF THE AMICI

This Brief of Amici Curiae International Human Rights Organizations and Law Scholars is respectfully submitted pursuant to Federal Rule of Appellate Procedure 29 and District of Columbia Circuit Rule 29 in support of the Appellants.[1]

Amici are international human rights organizations and legal scholars specializing in international law. The international human rights organizations are the Bar Human Rights Committee of England & Wales, Center for Economic and Social Rights, Center for Justice & Accountability, Human Rights Watch, and the International Human Rights Law Group. The law scholars are William J. Aceves (California Western School of Law), Arturo Carillo (Columbia Law School), Joan Fitzpatrick (University of Washington Law School), Garth Meintjes (Notre Dame Law School), Jordan J. Paust (University of Houston Law School), John Quigley (Ohio State University Law School), Naomi Roht-Arriaza (University of California, Hastings College of Law), and Beth van Schaack (Santa Clara University School of Law: effective 2003).

Amici believe this case raises important issues concerning international law and human rights law. Accordingly, they would like to provide this Court

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[1] All parties have consented to the filing of this Brief of Amici Curiae.

with an additional perspective on these issues. They believe this submission will assist the Court in its deliberations.

SUMMARY OF ARGUMENT

This Brief of Amici Curiae is respectfully submitted in support of Appellants' argument that they may not be detained indefinitely without charge or trial and without judicial review of their detention simply because they are being detained by the United States at Guantanamo Bay.[2]

As a preliminary matter, international law requires states to protect the human rights of all persons subject to their control, regardless of where they are physically located. Accordingly, U.S. obligations under international law extend to the territory of Guantanamo Bay. One such international obligation involves the prohibition against arbitrary detention. Continuing and indefinite detention without judicial review violates the international human rights norm against arbitrary detention.

It has long been recognized that U.S. courts should interpret federal statutes in light of international law whenever possible. Indeed, U.S. courts have demanded an expression of clear intent before they will conclude that Congress intended to supercede international law in any of its statutes. In this case, the relevant habeas statutes should be interpreted so as to enable U.S.

[2] The United States has indicated it will not apply the 1949 Geneva Conventions to persons detained at Guantanamo Bay.

courts to exercise jurisdiction to review the Appellants' claims of arbitrary detention.

ARGUMENT

I.

ARBITRARY DETENTION VIOLATES INTERNATIONAL LAW

Few concepts are more fundamental to the principle of ordered liberty than the right to be free from arbitrary detention and the concomitant right of judicial review. These basic human rights have been recognized by almost every multilateral and regional human rights agreement of the twentieth century. They have also been affirmed in both national and international fora.

A. Arbitrary Detention is Prohibited By International Human Rights Law

The right to be free from detention in the absence of incarceration pending trial or other disposition of a criminal charge can be traced to the seminal document on personal liberty and civil governance -- the Magna Carta. The Magna Carta was drafted in 1215 to check the abuse of power manifested by the English monarchy. In particular, Chapter 39 proclaimed that "[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him,

except by the lawful judgment of his peers and by the law of the land."[3] Since their affirmation in the Magna Carta, the prohibition on arbitrary detention and the concomitant right of judicial review have had a profound impact on the elaboration of due process of law. They have been affirmed in national constitutions throughout the world. Equally significant, they have also been recognized by virtually every human rights instrument of the twentieth century.

The Universal Declaration of Human Rights is the most well-recognized and respected elaboration of international human rights norms of the twentieth century. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). While the Universal Declaration of Human Rights is not a treaty obligation, it embodies the rules of international law in the realm of human rights.[4] See generally Mark Janis, An Introduction to International Law 256-257 (3d ed. 1999); Jordan Paust, International Law as Law of the United States 246 (1996). Article 9 of the

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[3] As noted by Blackstone in his Commentaries on the Laws of England, Chapter 39 alone merited the title of the Great Charter. William Blackstone, IV Commentaries on the Laws of England 424 (photo reprint. 1978) (1783).

[4] As noted by President Reagan in 1983, "the Universal Declaration remains an international standard against which the human rights practices of all governments can be measured." Proclamation of Bill of Rights Day, Human Rights Day and Week, Dec. 9, 1983, U.S. Dept of State, Selected Documents No. 22 (December 1983).

Universal Declaration of Human Rights provides that "[n]o one shall be subjected to arbitrary arrest, detention or exile." According to the *travaux préparatoires*, the term "arbitrary" was meant to protect individuals against both illegal and unjust laws. See generally Parvez Hassan, "The Word "Arbitrary" As Used in the Universal Declaration of Human Rights: 'Illegal' Or 'Unjust?'" 10 Harvard International Law Journal 225 (1969). Therefore, even an arrest or detention implemented pursuant to an existing law can be categorized as "arbitrary."

In 1964, the United Nations prepared a study on the right to be free from arbitrary arrest, detention, and exile. The study affirmed that the term "arbitrary" was not synonymous with "illegal" and that "the former signifies more than the latter." United Nations, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile 7 (1964). Accordingly, "[a]n arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person." Id.

The International Covenant on Civil and Political Rights ("ICCPR") was adopted in 1966 and formally codifies many of the rights set forth in the

Universal Declaration of Human Rights.[5] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. For example, Article 9(1) provides that A[e]veryone 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." The *travaux préparatoires* once again make clear that the term "arbitrary" means far more than "illegal." Cases of deprivation of liberty provided for by law must not be manifestly disproportionate, unjust, or unpredictable. According to Manfred Nowak, "[i]t is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily." Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 172 (1993). In addition, Article 9(4) of the ICCPR adds that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in

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[5] As of August 21, 2002, there are 148 States Parties to the ICCPR. The United States ratified the Covenant in 1992. In December 1998, President Clinton forcefully reasserted the U.S. commitment to the Covenant by issuing Executive Order, No. 13107, 63 FR 68991 (Dec. 10, 1998). According to Section 1(a) of the Executive Order, A[i]t shall be the policy and practice of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights agreements to which it is a party, including the [ICCPR] . . . ."

order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

The Human Rights Committee, established to monitor compliance with the ICCPR, has stated that Article 9 is applicable to all deprivations of liberty. Human Rights Committee, General Comment No. 8, U.N. Doc. HRI/GEN/1/Rev. 5 (2001). In numerous cases, the Human Rights Committee has affirmed the prohibition against arbitrary detention. See, e.g., Ana Maria Garcia Lanza de Netto v. Uruguay, Communication No. 8/1977 (1980), U.N. Doc. CCPR/C/OP/1 at 45 (1984); Nqalula Mpandanjila et al. v. Re, Communication No. 138/1983 (1986), U.N. Doc. Supp. No. 40 (A/41/40) at 121 (1986).

Several other U.N. organizations have also affirmed the prohibition against arbitrary detention.[6] For example, the Working Group on Arbitrary Detention, established by the United Nations to investigate cases of detention that are inconsistent with international standards, has developed the following typology for considering cases of arbitrary detention:

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[6] See also Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173 (Dec. 9, 1988) ("Principle 11: A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or be assisted by counsel as prescribed by law.").

> (A) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (Category I);
> (B) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (Category II)
> (C) When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character. (Category III).

Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1998/44 (1997).

The prohibition against arbitrary detention is recognized in each of the regional human rights systems. See American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (Article 7(3): "No one shall be subject to arbitrary arrest or imprisonment." Article 7(5): "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings." Article 7(6): "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the

lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies." Article 8(1): "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature." Article 25(1): "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.");[7] American Declaration on the Rights and Duties of Man, May 2, 1948, OEA/Ser. L/V/I.4 Rev. (1965) (Article I: "Every human being has the right to

[7] As of September 6, 2002, there are 25 States Parties to the American Convention on Human Rights. The United States has signed the American Convention on Human Rights.

life, liberty and the security of the person." Article XVIII: "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." Article XXV: "Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay, or otherwise, to be released.");[8] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (Article 5(1): "Everyone has the right to liberty and security of the person." Article 5(4): "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.");[9] African Charter on Human and Peoples= Rights, June 27,1981, OAU Doc. CAB/LEG/67/3/Rev. 5 (Article 6: "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions

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[8] As a member of the Organization of American States, the United States is obligated to respect the provisions of the American Declaration.

[9] As of September 21, 2002, there are 44 States Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

previously laid down by law. In particular, no one may be arbitrarily arrested or detained." Article 7(1): "Every individual shall have the right to have his cause heard.").[10]

In its own statements before international tribunals, the United States has argued that arbitrary detention is a violation of international law. For example, the United States argued before the International Court of Justice that arbitrary detention is contrary to fundamental international norms. Significantly, the International Court of Justice agreed. "[T]o deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights." Case Concerning United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 42, at para. 91.

In its annual Country Reports on Human Rights Practices, the U.S. Department of State has identified numerous instances of arbitrary detention throughout the world.[11] In 2002, for example, the State Department criticized

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[10] As of March 31, 1999, there are 53 States Parties to the African Charter on Human and Peoples= Rights.

[11] U.S. legislation also recognizes the prohibition against arbitrary detention. See, e.g., 22 U.S.C. § 2151n(a) (No assistance may be given to "the

numerous countries for arbitrary detention practices, including China (finding that arbitrary arrest and detention remains a serious problem and that over 200,000 people are serving sentences that were not subject to judicial review), Turkey (noting that pre-trial detention without charge often occurs and the law provides for no immediate access to an attorney), and Russia (finding lengthy pre-trial detention remains a serious problem). U.S. Department of State, Country Reports on Human Rights Practices (2002). Similar statements condemning the use of arbitrary detention are found in reports on Bangladesh, Bolivia, Egypt, Panama, Paraguay, and Uzbekistan.

U.S. courts have repeatedly held that arbitrary detention violates international law. See Wiwa v. Royal Dutch Petroleum Co., 2002 WL 319887, *6 (S.D.N.Y. 2002) (arbitrary detention constitutes a fully recognized violation of international law because it is "inconsistent with the 'inherent dignity and [] the equal and inalienable rights of all members of the human family.'"); Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998) (finding that "there is a clear international prohibition against arbitrary arrest and detention" and finding detention arbitrary if "it is not accompanied by notice of charges; if the person detained is not given early

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government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including . . . prolonged detention without charges."). See also 7 U.S.C. § 1733, 22 U.S.C. § 262d, 22 U.S.C. § 2304.

opportunity to communicate with family or to consult counsel; or is not brought to trial in a reasonable time."); Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995) (stating that arbitrary detention is a "fully recognized violation[] of international law."); Paul v. Avril, 901 F. Supp. 330, 335 (S.D. Fla. 1994) (holding that plaintiffs were victims of arbitrary detention); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541-42 (N.D. Ca. 1987) (finding that the international norm prohibiting prolonged arbitrary detention is obligatory); Rodriguez-Fernandez v. Wilkinson, 505 F.Supp. 787, 798 (D. Kan. 1980) (finding that a review of the sources that comprise customary international law "clearly demonstrates that arbitrary detention is prohibited by customary international law"), aff'd on other grounds, 654 F.2d 1382, 1388 (10th Cir. 1981) (noting that "[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment.").

Commentators have similarly concluded that the prohibition against arbitrary detention is well-established customary international law. See, e.g., Nigel Rodley, The Treatment of Prisoners under International Law (2d ed. 1999). As noted by the authoritative Restatement (Third) of the Foreign Relations Law of the United States ' 702 (1987) ("Restatement (Third)"), "[a] state violates international law if, as a matter of state policy, it practices,

encourages, or condones . . . prolonged, arbitrary detention. . . ." In turn, "[d]etention is arbitrary if it is not pursuant to law; it may be arbitrary also if "it is incompatible with the principles of justice or with the dignity of the human person." [citation omitted]. Id. at ' 702 cmt. (h). Indeed, the Restatement (Third) ' 702 cmt. (n) recognizes that the prohibition against arbitrary detention has attained the status of jus cogens, a non-derogable norm that is binding on all states.[12]

B. Judicial Review of Detention Even Applies in Time of Public Emergency

The right to be free from arbitrary detention includes the right to seek judicial review of detention. In light of the profound implications of judicial review for the protection of human rights, the right to judicial review even extends in time of public emergency.

Thus, the U.N. Human Rights Committee has imposed significant restrictions on a state's ability to limit judicial review. In General Comment No. 29, for example, the Committee considered whether restrictions on

[12] A jus cogens norm is a peremptory norm that is considered binding on all states. Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988). See also Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992). No state may seek release from these obligations. See Restatement (Third) of the Foreign Relations Law of the United States ' 102, cmt. (k) (1987).

judicial review were derogable. Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001). The Committee noted the important role played by judicial review in ensuring compliance with other fundamental norms. Id. at para. 16. While Article 4 of the ICCPR allows derogation from certain rights, the Committee determined that the provisions of Article 9 with respect to judicial review must be respected. Id. at para. 11. See also U.N. Doc. CCPR/C/79/Add.93 (1998), at para. 21 ("[A] State party may not depart from the requirement of effective judicial review of detention.").

The U.N. Working Group on Arbitrary Detention has also recognized the unique role of judicial review in protecting fundamental rights. In Ocalan v. Turkey, the Working Group considered a communication brought by Abdullah Ocalan, the leader of Turkey's militant Kurdish Worker's Party (PKK). Ocalan v. Turkey, U.N. ESCOR, Comm'n on Human Rights, Opinions Adopted by the Working Group on Arbitrary Detention, 57th Sess., Item 11(a), U.N. Doc. E/CN.4/2001/14/Add.1 (2000). The communication argued that detaining an individual incommunicado without access to counsel for ten days in a "state security" case constitutes arbitrary detention. In its decision, the Working Group acknowledged that incommunicado detention and denial of counsel for ten days was "particularly grave" because access to

counsel is of a determinatory character for the defendant during the detention period.

The Inter-American Commission on Human Rights, which is authorized to monitor compliance with the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, has recognized the essential role of judicial review in the protection of fundamental rights. In Coard v. United States, the Inter-American Commission considered the detention of several persons by the U.S. military during the U.S. invasion of Grenada. Coard v. United States, Case No. 10.951, Report No. 109/99, Annual Report of the IACHR (1999). The petitioners were held incommunicado by the United States military for several days. Despite their purported status as military personnel and their capture during military operations, the United States refused to classify the detainees as prisoners of war; they were accordingly treated as civilians. While the Commission noted that detention of civilians for reasons of security is permissible, such detention must comply with international law. For example, decisions on detention must include the right of the detainee to be heard and to appeal their detention. "These are the minimal safeguards against arbitrary detention." Id. at para. 54. The need for judicial review is evident.

> Supervisory control over detention is an essential safeguard, because it provides effective assurance

> that the detainee is not exclusively at the mercy of the detaining authority. This is an essential rationale of the right of habeas corpus, a protection which is not susceptible to abrogation.[13]

Id. at para. 55.

The Inter-American Court on Human Rights, which is authorized to issue binding rulings on the interpretation and application of the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, has also stressed the importance of judicial review and the relevance of this fundamental right even in time of public emergency. In Advisory Opinion OC-9/87, the Inter-American Court addressed the importance of judicial guarantees in states of emergency. See Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights) (October 6, 1987). The Court noted that the American Convention allows states to derogate from certain obligations. It concluded, however, that states cannot derogate from judicial guarantees, including the right to *habeas corpus* and any other effective judicial remedy. In Advisory Opinion OC-8/87, the Court was even

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[13] "The application of *habeas corpus* and similar remedies plays a fundamental role in, *inter alia*, protecting against arbitrary arrest and unlawful detention, and clarifying the situation of missing persons. Such remedies, moreover, may 'forestall opportunities for persons exercising power over detainees to engage in torture or other cruel, inhuman or degrading treatment or punishment.'" Coard v. United States, Case No. 10.951, Report No. 109/99, Annual Report of the IACHR (1999), at para. 55 (citations omitted).

more emphatic about the importance of *habeas corpus* protection and its relevance in times of public emergency. Advisory Opinion OC-8/87, Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights) (January 30, 1987).

> In order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here 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.

Id. at para. 35. Accordingly, the Court concluded that the right of judicial review, including *habeas corpus*, cannot be suspended, even in time of war, public danger, or other emergency that threatens the independence or security of the state. See also Castillo Petruzzi, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 52 (1999).

The European Court of Human Rights, which is authorized to issue binding rulings on the interpretation and application of the European Convention for the Protection of Human Rights and Fundamental Freedoms, has determined that detention based solely on the order of the Executive branch and with no judicial review renders such detention incompatible with

human rights law. In Aksoy v. Turkey, 23 E.H.R.R. 553 (1997), a Turkish law permitting the detention of persons suspected of involvement in terrorism offences for up to 30 days without any form of judicial review. Pursuant to this legislation, Turkish authorities detained a Turkish citizen for two weeks. As a preliminary matter, the European Court noted the importance of judicial review.

> The Court would stress the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimise the risk of arbitrariness and to ensure the rule of law. Furthermore, prompt judicial review intervention may lead to the detection and prevention of serious ill-treatment . . . .

Id. at 588. While detention schemes may be permissible under certain scenarios, ample safeguards must be present. In the Aksoy case, however, such safeguards were lacking. The denial of access to a lawyer, doctor, relative, or friend, and the absence of any realistic possibility of being brought before a court to test the legality of the detention, meant that the applicant "was left completely at the mercy of those holding him," which was incompatible with the prohibition against arbitrary detention. Id. at 590.

Accordingly, the Court found Turkey in violation of the European Convention and its obligation to provide judicial review.[14]

In sum, few international human rights norms are more clear and fundamental than the prohibition against arbitrary detention and the concomitant right of judicial review. Indeed, the right of judicial review is of such a fundamental character, it is considered a nonderogable obligation that even applies in time of public emergency.

II.

INTERNATIONAL OBLIGATIONS ARE NOT SUBJECT TO TERRITORIAL RESTRICTIONS

Under international law, a state is obligated to respect and ensure the human rights of persons who are within its sovereign territory and also to those who are subject to its jurisdiction and control.

For example, the ICCPR requires member states "to ensure to all individuals within its territory and subject to its jurisdiction" the rights

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[14] In Brannigan and McBride v. United Kingdom, 17 E.H.R.R. 539 (1994), the European Court upheld a law permitting detention for up to seven days without judicial review. It did so, however, only because: (1) the remedy of habeas corpus was available to test the lawfulness of the original arrest and detention; (2) there was an absolute and legally enforceable right to consult a solicitor forty-eight hours after the time of arrest; and (3) detainees were entitled to inform a relative or friend about their detention and to have access to a doctor. See also Ireland v. United Kingdom, 2 E.H.R.R. 25 (1979-80).

recognized in the present Covenant.[15] ICCPR, supra, at art. 2(1). The U.N. Human Rights Committee has interpreted this provision as imposing an obligation on member states to extend the protections of the ICCPR to all individuals subject to their jurisdiction or control. In Sergio Euben Lopez Burgos v. Uruguay, Communication No. R.12/52 (6 June 1979), U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981), for example, members of the Uruguayan security forces kidnapped a Uruguayan national living in Argentina and forcibly returned him to Uruguay. Although the arrest and mistreatment of Lopez Burgos allegedly took place on foreign territory, the Committee found Uruguay responsible for such actions. Indeed, "it would be unconscionable to so interpret the responsibility under 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." Id. at para. 12.3. See also Lilian Celiberti de Casariego v. Uruguay, Communication No. 56/1979 (29 July 1981), U.N. Doc. CCPR/C/OP/1 at 92 (1984).

[15] Commentators have interpreted this provision "as a disjunctive conjugation indicating that a state party must be deemed to have assumed the obligation to respect and ensure the rights recognized in the Covenant 'to all individuals within its territory' and 'to all individuals subject to its jurisdiction.'" Theodor Meron, Human Rights In Internal Strife: Their International Protection 40 (1987).

The European Court of Human Rights has determined that the protections afforded by the European Convention apply to all territories and people over which member states have effective control. In Loizidou v. Turkey, 23 E.H.R.R. 513 (1997), for example, a Greek Cypriot alleged that Turkish forces in northern Cyprus had denied her access to her land. As a result, she alleged Turkey was in violation of the European Convention. As a preliminary matter, the European Court determined that Turkey exercised "effective overall control" of the policies and actions of the authorities in northern Cyprus. It then determined that Turkey could be held liable for breaching European Convention obligations even though such acts were committed outside Turkish territory.

> The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

Id. at 530. Thus, the European Court found Turkey in violation of its obligations under the European Convention.[16]

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[16] See also Cyprus v. Turkey, 18 Y.B.Eur. Conv. Hum. Rgts., 83, 118 (1975) ("The High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual responsibility, whether that authority is exercised within their own territory or abroad."); Drozd and Janousek v. France and Spain, 14 E.H.R.R. 745, 788 (1992) ("The term jurisdiction is not limited to the national territory of the High Contracting

The Inter-American Commission on Human Rights has made similar statements in relation to the extraterritorial application of human rights obligations. In Coard v. United States, the Commission stated:

> Given 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. While this most commonly refers to persons within a state's territory, it 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.

Coard et al. v. United States, supra, at para. 37. More recently, the Inter-American Commission reaffirmed this fundamental principle in its decision to adopt Precautionary Measures in relation to persons detained at Guantanamo Bay. The Commission found:

> The determination of a state's responsibility for violations of the international human rights of a particular individual turns not on the individual's nationality or presence within a particular geographic area, but rather whether under specific circumstances, that person fell within the state's authority and control.

Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory.").

Decision of the Inter-American Commission on Human Rights of the Organization of American States To Adopt Precautionary Measures In Relation to Detainees In Guantanamo Bay, Cuba, March 13, 2002, at 2. Interestingly, this proposition was one of the few that the United States, in its response to the Commission's request, did not challenge.[17]

III.

FEDERAL STATUTES MUST BE INTERPRETED IN LIGHT OF INTERNATIONAL LAW

In the present case, the habeas statute confers jurisdiction on U.S. federal courts to entertain applications from persons in custody where such custody "is in violation of the Constitution, laws or treaties of the United States." 22 U.S.C. § 2241. The statute does not explicitly exclude the jurisdiction of federal courts to entertain habeas applications from aliens detained by the United States in areas that are within its exclusive jurisdiction and control but outside its technical sovereignty, such as Guantanamo Bay. Moreover, the statute contains no clear statement purporting to violate the international principle which provides that a State has an obligation to respect and ensure the human rights of all persons situated within territory over which

[17] See Response Of The United States To The Inter-American Commission on Human Rights Decision To Adopt Precautionary Measures, April 15, 2002.

it has authority and control, including the prohibition against arbitrary detention. In the absence of any statute that clearly and unequivocally states an intention to supersede these principles, this Court should interpret the statute consistent with our Government's obligations under international law. See Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); Weinberger v. Rossi, 456 U.S. 25 (1982); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984). See also Paust, supra at 99, 105, 107-108; Jordan J. Paust, Joan M. Fitzpatrick, and Jon M. Van Dyke, International Law and Litigation in the U.S. 141-142 (2000).

It is a well-known doctrine of statutory construction that federal law must not be interpreted in a manner that conflicts with international law if any other construction is fairly possible.[18] Restatement (Third) ' 114. Indeed, U.S. courts have demanded an expression of clear intent before they will conclude that Congress intended to supercede international law in any of its statutes. Restatement (Third) ' 115(1)(a). See also Louis Henkin, Foreign Affairs and the U.S. Constitution 486 (2d ed. 1996). This doctrine does not require courts to use international law as a means for overriding domestic

[18] The phrase "where fairly possible" derives from one of the principles of interpretation to avoid serious doubts as to the constitutionality of a federal statute. See Ashwander v. TVA, 297 U.S. 288, 346-348 (1936); Restatement (Third) ' 114 rpt. n. 2.

law; rather, courts are urged to harmonize domestic and international law whenever possible.

This doctrine of statutory construction has a long history.[19] The Supreme Court's decision in Talbot v. Seeman, 5 U.S. 1 (1801) represents, perhaps, the first elaboration of this principle of statutory construction. In Talbot, Chief Justice Marshall indicated that "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law." Id. at 43.

In Charming Betsy, 6 U.S. (2 Cranch) 64, the Supreme Court considered whether an Act of Congress adopted to suspend trade between the United States and France authorized the seizure of neutral vessels, an action that would violate customary international law. Writing for the Court, Chief Justice Marshall enunciated a doctrine of statutory construction that affirmed the importance of international law:

> It has also been observed 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

[19] This doctrine is not unique to American jurisprudence. See Ian Brownlie, Principles of Public International Law 48-50 (4th ed. 1990). See also Leroux v. Brown, 138 Eng. Rep. 1119 (C.P. 1852); Le Louis, 165 Eng. Rep. 1464 (Adm. 1817).

> neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

Id. at 118.

Since its elaboration in Charming Betsy, this doctrine of statutory construction has been extended to apply to treaties, in addition to customary international law. In Chew Heong v. United States, 112 U.S. 536 (1884), the Supreme Court considered whether immigration restrictions adopted by Congress pursuant to the Chinese Restriction Act were inconsistent with a treaty between the United States and China, which regulated the rights of Chinese nationals to enter and remain in the United States. The Court had to determine whether Congress intended to violate the Astipulations of a treaty, so recently made with the government of another country.@ Id. at 539. Writing for the Court, Justice Harlan emphasized the importance of treaties and recognized the profound implications that arise when a country violates an international obligation. Id. at 540. Reviewing the treaty language and subsequent federal legislation, Justice Harlan refused to override the treaty absent explicit congressional authorization. Id. at 550.

Throughout its case law, the Supreme Court has repeatedly emphasized that it will not interpret statutory provisions to conflict with international law, particularly in the absence of clear congressional intent, if any other

construction is fairly possible. In Weinberger v. Rossi, the Supreme Court considered whether a 1971 federal statute on employment discrimination superseded two agreements entered into between the United States and the Philippines, the 1947 Military Bases Agreement and the 1968 Base Labor Agreement. Writing for a unanimous Court, Justice Rehnquist reaffirmed the Charming Betsy doctrine.[20] Weinberger v. Rossi, 456 U.S. at 32. Accordingly, "some affirmative expression of congressional intent to abrogate the United States= international obligations is required . . . ." Id. Reviewing the legislative history of the relevant statute, Justice Rehnquist found no "support whatsoever for the conclusion that Congress intended in some way to limit the President's use of international agreements that may discriminate against American citizens who seek employment at United States military bases overseas." Id. at 33. Accordingly, Justice Rehnquist concluded that the international agreements were not superseded by the subsequent federal legislation.

In one of the most recent elaborations of the Charming Betsy doctrine, Justice Scalia, joined by Justices O'Connor, Kennedy, and Thomas, reaffirmed the validity of this doctrine of statutory construction. In Hartford

[20] Justice Rehnquist did not distinguish between treaties and executive agreements for purposes of applying this doctrine of statutory construction.

Fire Insurance Co. v. California, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting), the Supreme Court considered the extraterritorial reach of the Sherman Act. While the majority opinion did not address the Charming Betsy doctrine, Justice Scalia acknowledged and affirmed the relevance of this doctrine of statutory construction in his dissenting opinion:

> It is relevant to determining the substantive reach of a statute because "the law of nations," or customary international law, includes limitations on a nation=s exercise of its jurisdiction to prescribe. [citation omitted] Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international law limits on jurisdiction to prescribe.

Id. at 815. Accordingly, Justice Scalia indicated that "statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." Id.

This doctrine of statutory construction is not an historical anomaly or isolated extrapolation. On the contrary, it is a longstanding doctrine of statutory construction that has been affirmed by the U.S. Supreme Court in numerous decisions.[21] It is based upon comity, a respect for other nations, and

[21] Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993); Washington v. Washington Commercial Passenger Fishing Vessel Assn., 443 U.S. 658, 690 (1979); Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-413 (1968); Lauritzen v. Larsen, 345 U.S. 571, 578 (1953); Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934); Cook v. United States, 288 U.S. 102, 120 (1933); United States v.

the law which binds the international community. It is influenced by the reality that violations of international law, unlike violations of purely domestic law, may have profound foreign policy consequences. Accordingly, courts should be particularly cautious when engaging in statutory construction that may affect U.S. compliance with its international obligations.

The habeas statute does not explicitly restrict its application to persons who are situated within territory over which the United States exercises sovereignty. Significantly, it does not purport to exclude from its protections claims by aliens who are detained under the exclusive jurisdiction and control of the United States government. Moreover, the statute contains no clear statement purporting to violate the ICCPR or the principle of customary international law that imposes an obligation on the United States to respect and ensure that the human rights of persons over whom it exercises authority and control are protected, including the right to be free from arbitrary detention. Accordingly, the habeas statute should be interpreted in such a manner so as to grant jurisdiction to U.S. federal courts to entertain the Appellant's habeas petition. See generally Jordan J. Paust, "Antiterrorism

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Payne, 264 U.S. 446, 448-449 (1924); MacLeod v. United States, 229 U.S. 416, 434 (1913); Brown v. United States, 12 U.S. 110, 125 (1814). See also Paust, supra, at 107-108; Paust, Fitzpatrick, Van Dyke, supra, at 141-142.

Military Commissions: The Ad Hoc DOD Rules of Procedure," 23 Michigan Journal of International Law 677, 690-94 (2002).

CONCLUSION

For these reasons, Amici respectfully request this Court to reverse the judgment of the District Court and remand this matter for consideration of the merits of Appellants' claims.

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Respectfully Submitted,

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