

**Nos. 09-5265, 09-5266, 09-5277
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**FADI AL MAQALEH, et al.,
Petitioners-Appellees,
v.
ROBERT GATES, et al.,
Respondents-Appellants.**

**AMIN AL BAKRI, et al.,
Petitioners-Appellees,
v.
BARACK OBAMA, et al.,
Respondents-Appellants.**

**REDHA AL-NAJAR, et al.,
Petitioners-Appellees,
v.
ROBERT GATES, et al.,
Respondents-Appellants.**

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

**BRIEF OF AMICI CURIAE PROFESSORS OF INTERNATIONAL HUMAN RIGHTS
LAW AND RELATED SUBJECTS IN SUPPORT OF PETITIONERS-APPELLEES**

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GLOSSARY

BTIF	Bagram Theater Internment Facility
DRPs	Detainee Review Procedures at Bagram Theater Internment Facility Afghanistan
ECHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
UDHR	Universal Declaration of Human Rights

INTERESTS OF *AMICI CURIAE*²

Amici curiae are professors of international human rights law and related subjects. *Amici* support affirmance of the District Court and write to situate the issues in this case within the broader context of international human rights law. Prolonged arbitrary detention has long been rejected by international conventions. Its prohibition rises to the level of *jus cogens*. *Amici* believe that this should inform this Court's analysis of the District Court's decision. *Amici* counsel against endorsement of executive power to apprehend non-combatants on foreign soil, far from a battlefield, and to transport them to Afghanistan for prolonged detention without judicial review.

² *Amici* certify that no corporation, association, joint venture, partnership, syndicate, or similar entity, or member thereof, authored this brief in whole or in part, which would require disclosure under CT. APP. D.C. CIR. R. 26.1. Petitioners and Respondents have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The seizure, isolation, rendition without process, and detention without access to judicial review of non-combatant civilians by the Executive Branch present profound challenges to human rights. This Court's answers to those challenges must be guided by the Supreme Court's holding in *Boumediene v. Bush*,³ that the writ of habeas corpus is intended to secure individual liberty as "an essential mechanism in the separation-of-powers scheme."⁴ The Suspension Clause and the Great Writ protect detainees' rights by affirming "the duty and authority of the Judiciary to call the jailer to account."⁵ Freedom "from arbitrary and unlawful restraint" is among "freedom's first principles."⁶ Such judicial action neither deprecates governmental authority to protect national security nor violates appropriate principles of judicial deference.

Amici suggest that this Court's interpretation of these powerful admonitions should comply with, and be informed by, the standards of international human rights law. To the extent that international humanitarian law may apply, it supports habeas corpus review for Fadi Al Maqaleh, Amin Al Bakri, and Redha Al-Najar ("Petitioners"). Such interpretation respects the history of habeas corpus while

³ *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

⁴ *Id.* at 2246.

⁵ *Id.* at 2247 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) and *In re Jackson*, 15 Mich. 417, 439-440 (1867) (Cooley, J., concurring)).

⁶ *Id.* at 2277.

affirming an evolutionary understanding of its crucial modern importance. The rules could not be clearer: civilian non-combatants may *not* be seized far from the battlefield and held indefinitely without judicial review, even if designated as “enemy combatants.” A contrary ruling by this Court would subvert fundamental human rights norms developed over hundreds of years. Petitioners were forcibly brought under United States government control from peaceful locations and transferred to Bagram so as to place them beyond the reach of habeas corpus review.⁷ One can hardly imagine a procedure more clearly designed “to switch the Constitution on or off at will.”⁸ The reach of the Suspension Clause depends not on formalistic geographical considerations, but rather “on objective factors and practical concerns.”⁹ *Amici* thus conclude that the proper interpretation of such factors and concerns, informed by the norms of human rights law, clearly supports habeas corpus review.

⁷ *See* (Petr.’s Br. 24-25.) U.S. agents seized Mr. Al-Bakri during a five-day business trip in Bangkok, Thailand in December 2002; Mr. Al-Najar, from his home in Karachi, Pakistan, with his wife and child present; and Mr. Al-Maqaleh, outside Afghan borders. (Petr.’s Br. 25.)

⁸ (Petr.’s Br. 34) (quoting *Boumediene*, 128 S. Ct. at 2259).

⁹ *Boumediene*, 128 S. Ct. at 2258.

ARGUMENT

I. INTERNATIONAL HUMAN RIGHTS LAW PROHIBITS PROLONGED ARBITRARY DETENTION OF ANY PERSON AND MANDATES MEANINGFUL JUDICIAL REVIEW

A. International Law Is Part of United States Law and Should Inform This Court's Analysis

International law is now – and always has been – part of U.S. law.¹⁰ International treaties are “the supreme law of the land,”¹¹ and U.S. judicial power “shall extend to all...treaties made” under U.S. authority.¹² Our domestic legal system has also long incorporated customary international law.¹³ In the late eighteenth century, the law of nations was seen as part of natural law and, as such, obligatory.¹⁴ Thus, as the Supreme Court noted in 1796, “When the United States declared their independence, they were bound to receive the law of nations, in its

¹⁰ Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561-62 (1984). *See also*, Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2385-86 (1991).

¹¹ U.S. CONST. art. VI, cl. 2.

¹² U.S. CONST. art. III, § 2, cl. 1. *See also* *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801) (certain treaties should be regarded as acts of Congress).

¹³ *See generally*, Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 464 (1997).

¹⁴ *See generally* Harold H. Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280, 282-85 (1932); *see also* Edwin D. Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT'L L. 239, 253 (1932).

modern state of purity and refinement.”¹⁵ The Restatement (Third) of Foreign Relations Law of the United States (“The Restatement”) notes that, “international law and international agreements ... are the law of the United States.”¹⁶ Cases arising under international law or international agreements to which the U.S. has acquiesced are within the jurisdiction of U.S. courts, which “are bound to give effect to international law.”¹⁷

Few legal principles are as well-entrenched as the proposition that U.S. law should be construed in a manner that does not conflict with international law:¹⁸

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.¹⁹

¹⁵ *Ware v. Hylton*, 3 Dall. 199, 281 (1796) (Wilson, J., concurring). *See also Chisholm v. Georgia*, 2 U.S. 419, 474 (1793) (“[T]he [U.S.] [has] ... become amenable to the laws of nations ... [and] those laws should be respected and obeyed....”); 1 OP. ATT'Y GEN. 26, 27 (1792) (“[T]he law of nations ... is essentially a part of the law of the land....”).

¹⁶ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1) (1987) [hereinafter RESTATEMENT].

¹⁷ *See id.* § 111(2), (3). Moreover, the President has the obligation and authority to ensure faithful execution of international law. *See id.* § 111 cmt. c.

¹⁸ *See Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“[A]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”); RESTATEMENT § 114 (U.S. statutes should be construed to avoid conflict with international law). *See also Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953).

¹⁹ *See The Paquete Habana*, 175 U.S. 677, 700 (1900).

The Supreme Court has recognized the importance of respecting the “values we share with a wider civilization.”²⁰ Indeed, the venerable idea of a “decent respect to the opinions of mankind” requires that evolving standards be measured against international norms.²¹ This Court should therefore strive to construe domestic laws in a manner consistent with international law principles.

Laws and executive actions are to be read in conformity with international law where possible. Where government actions appear to contradict international law – as do the Executive’s actions here – the Judiciary should construe the matter so as to resolve the contradiction, if possible.²² Where, as here, the rule is a fundamental protection, this Court should not simply ratify any presidential act as a valid “override.”²³ In order to overrule customary international law, domestic legal

²⁰ See *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (citing decisions of the European Court of Human Rights). See also *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (discussing the consensus of “the world community.”).

²¹ Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 45-46 (1994) (citing THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)).

²² See Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1143 n.177 (1990); *Beharry v. Reno*, 183 F. Supp. 2d 584, 598-600 (E.D.N.Y. 2002) *overruled on other grounds by Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003).

²³ See U.N. Human Rights Comm., General Comment 24 (52), *General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, paras. 11-12, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 2, 1994) [hereinafter General Comment 24] (“[W]hen there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and,

action must *clearly* repeal the norm at issue.²⁴ Any ambiguity as to the authority to detain civilian non-combatants should be read in light of the powerful requirements of human rights law.

B. International Human Rights Law Should Inform This Court's Analysis of Habeas Corpus

Nearly 200 years ago, Chief Justice Marshall affirmed that our judicial tribunals “are established . . . to decide on human rights.”²⁵ This responsibility looms especially large in the context of habeas corpus. The Great Writ has served as an important limitation on executive power to detain since the beginning of the Anglo-American legal system.²⁶ It has long extended to various types of executive detention.²⁷ Indeed, even enemy aliens convicted of war crimes during periods of

further, a failure to allow individual complaints to be brought to the Committee . . . all the essential elements of the Covenant guarantees have been removed.”)

²⁴ See, e.g., *Maria v. McElroy*, 68 F. Supp. 2d 206, 231 (E.D.N.Y. 1999) (“Congress can be assumed, in the absence of a statement to the contrary, to be legislating in conformity with international law....”).

²⁵ See *Fletcher v. Peck*, 10 U.S. 87, 133 (1810).

²⁶ The Great Writ emerged to limit the King’s detention power and to ensure all detentions were legally authorized. See Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 563 (2002).

²⁷ See Brief *Amici Curiae* of Legal Historians in Support of Respondent at 16, *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767).

declared war have obtained review under the writ.²⁸ The Supreme Court has noted that, “[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest.”²⁹ The writ protects fundamental human rights to judicial review and freedom from arbitrary detention. It is “the precious safeguard of personal liberty....”³⁰

Historically, habeas review has been especially important in times of emergency. As the Supreme Court has explained, “It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and liberty clash most acutely.”³¹ To serve this crucial historical purpose, habeas review of executive detention cannot be formalistic or rigidly cabined. Rather, as international legal bodies recognize, habeas corpus must be flexible to ensure compliance with human rights norms.³²

²⁸ See *In re Yamashita*, 327 U.S. 1, 8, 25 (1946); *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942).

²⁹ *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). See also *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result) (“The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.”).

³⁰ See *Bowen v. Johnston*, 306 U.S. 19, 26 (1939).

³¹ See *Fay v. Noia*, 372 U.S. 391, 401 (1963).

³² See Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8, para. 35 (Jan. 30, 1987) (“[H]abeas corpus performs a vital role in ensuring that a person’s life and physical integrity are respected, in preventing his disappearance ... and in protecting him against torture or other

As the *Hamdan v. Rumsfeld* and *Boumediene* decisions demonstrate, the interpretation of habeas review itself has evolved substantially in recent years, as the understanding of the fundamental human rights on which it is based changes.³³ It is a “flexible remedy adaptable to changing circumstances.”³⁴ As the Supreme Court has long understood, “[H]abeas corpus is not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes.”³⁵ Affirming the District Court’s decision would thus be consonant both with evolving international human rights norms, which must inform our understanding of habeas corpus review, and with the progression of a more nuanced understanding of the writ, already recognized by U.S. jurisprudence.³⁶

cruel, inhumane, or degrading punishment or treatment.”). *See also* Castillo Petruzzi et al. Case, 1999 Inter-Am. Ct. H.R. (ser. C) No. 52, para. 187 (May 30, 1999).

³³ *See generally* *Boumediene*, 128 S. Ct. 2229; *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

³⁴ *Regina v. Sec’y of State for the Home Dep’t, ex parte Muboyayi*, (1992) Q.B. 244, 269 (C.A.).

³⁵ *Hensley v. Mun. Ct., San Jose Milpitas Judicial Dist., Santa Clara County, Cal.*, 411 U.S. 345, 349-50 (1973) (quoting *Jones v. Cunningham*, 371 U.S. 236, 243 (1963), quoting *Harris v. Nelson*, 394 U.S. 286, 291 (1969)) (internal quotations omitted).

³⁶ *See de Sanchez v. Banco Central De Nicaragua*, 770 F.2d 1385, 1397 (1985); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (1981) (“No principle of international law is more fundamental than ... that human beings should be free from arbitrary imprisonment.”); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541

C. International Human Rights Law Prohibits Prolonged Arbitrary Detention

The U.S. exercises exclusive control over Petitioners at the Bagram Theater Internment Facility (“BTIF”). Petitioners are not “enemy aliens,” “belligerents,” or combatants of any kind—notwithstanding the various definitions Respondents have advanced over the years of their detention. Thus, Petitioners clearly are entitled to the protections of international human rights law against prolonged arbitrary detention. These protections are fundamental.

Contemporary international human rights law clearly prohibits arbitrary detention. The Universal Declaration of Human Rights (“UDHR”), which is recognized as both the prototype for and the embodiment of many international human rights norms, states that “[n]o one shall be subjected to arbitrary arrest, detention or exile.”³⁷ This is a central concept of the International Covenant on Civil and Political Rights (“ICCPR”), which the U.S. has ratified.³⁸ Article 9(1) of the ICCPR provides that:

(N.D.Cal. 1987) (citing case law evincing a customary international human rights norm against arbitrary detention.).

³⁷ Universal Declaration of Human Rights, G.A. Res. 217A, art. 9, U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR]. See HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAWS, POLITICS, MORALS 138-39 (2d ed. 2000).

³⁸ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Mar. 23, 1966), 999 U.N.T.S. 171 [hereinafter ICCPR]. The U.S. ratified the ICCPR in 1992 with certain “reservations, understandings, and declarations” including that articles 1 to

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such ground and in accordance with such procedure as are established by law.³⁹

Deprivation of liberty may only be carried out “in the cases and according to the procedures established in preexisting law.”⁴⁰ Therefore, at a bare minimum, arrest and detention must be initiated upon legitimate legal grounds and State authorities must follow accepted legal procedure.⁴¹ Yet, mere compliance with national law is not sufficient. Neither the law, nor the enforcement thereof, may be “arbitrary.”⁴² The drafting history of Article 9(1) of the ICCPR confirms that:

‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in

27 of the ICCPR will not be self-executing in the U.S. U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 102d Cong., 2d Sess., 138 Cong. Rec. S478-01 (daily ed. Apr. 2, 1992). S. Exec. Rep., No. 102-23, at 15 (1992).

³⁹ ICCPR, *supra* note 38, art. 9(1).

⁴⁰ See MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 171 (1993).

⁴¹ See *id.*; Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503, 507 (2003).

⁴² See NOWAK, *supra* note 40, at 172. See also *Wintwerp v. The Netherlands*, App. No. 6301/73, 33 Eur. Ct. H.R. (ser. A), para. 39 (1979) (“... no detention that is arbitrary can ever be regarded as ‘lawful.’”). The UDHR’s *travaux preparatoires* (drafting history) indicate that the term “arbitrary” covers detentions that are unauthorized by law, as well as detentions pursuant to unjust laws. See 3 U.N. GAOR, Pt. I, Third Comm. 247, 248 (1948). See generally Parvez Hassan, *The Word “Arbitrary” As Used in the Universal Declaration of Human Rights: “Illegal” or “Unjust”?*, 10 HARV. INT’L L.J. 225 (1969).

custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances.”⁴³

Detention must not be unjust, unreasonable, or infringe upon human dignity.⁴⁴

“Prolonged” detention clearly violates customary international human rights law.⁴⁵

While there is no precise definition for the term “prolonged,” the United Nations Human Rights Committee has suggested that a five-day delay could violate the law.⁴⁶ Furthermore, the European Court of Human Rights (“ECHR”) has held that even in the context of a public emergency caused by terrorist activities, detention without judicial review for, respectively, fourteen days, six days and sixteen and a half hours, five days and eleven hours, and four days and six hours, constituted

⁴³ NOWAK, *supra* note 40, at 172.

⁴⁴ See NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE 376 (2002) (citing U.N. Docs. A/2929, ch. VI, secs. 29,30, 31; A/4045, sec. 49) (“The discussions during the drafting of ICCPR 9 suggest that the word ‘arbitrary’ was understood to mean ‘unjust’, or incompatible with the principles of justice or with the dignity of the human person.”). See also U.N. Comm’n on Human Rights, *Study of the Right of Everyone to Be Free From Arbitrary Arrest, Detention and Exile*, at 7, U.N. Doc. E/CN.4/826/Rev./1 (1964) (“An arrest 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.”).

⁴⁵ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 (2004); RESTATEMENT § 702.

⁴⁶ *Jijón v. Ecuador*, U.N. Human Rights Comm., Communication No. 277/1988 (Mar. 26, 1992).

arbitrary detention.⁴⁷ Surely, Petitioners' multi-year detentions surpass any relevant international standard.

Widespread condemnation of prolonged arbitrary detention by multilateral instruments, declarations, and intergovernmental bodies demonstrates that its prohibition is customary international law and indeed a *jus cogens* norm.⁴⁸ As the ECHR has noted,

⁴⁷ See *Aksoy v. Turkey*, App. No. 21987/93, 1996-VI Eur. Ct. H.R., para. 81 (1996); *Brogan v. United Kingdom*, App. No. 11209/84; 11234/84; 11266/84; 11386/85, A-145B Eur. Ct. H.R., paras. 57, 62 (1988). See also *A. v. United Kingdom*, App. No. 3455/05, Eur. Ct. H.R., paras. 181-90 (2009) (holding that a statutory scheme permitting the indefinite detention in high security conditions of non-nationals certified as terrorist suspects was not permissible even in a state of public emergency).

⁴⁸ There is a short list of human rights violations that unquestionably rise to the level of *jus cogens*, including genocide and slavery. The Restatement lists prolonged arbitrary detention alongside those norms. See RESTATEMENT § 702. Other relevant instruments include: Organization of American States, American Convention on Human Rights, art. 7, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) (signed by the U.S. on June 1, 1997) [hereinafter American Convention]; Organization of American States, American Declaration on the Rights and Duties of Man, art. XXV, O.A.S. Res. XXX, OEA/Ser.L.V/II82 doc.6 rev.1, at 17 (1948) [hereinafter American Declaration]; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953). [hereinafter European Convention]; Organization of African Unity, African [Banjul] Charter on Human and People's Rights, art. 6, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev.5 21 I.L.M. 58 (entered into force Oct. 21, 1986); League of Arab States, Arab Charter on Human Rights, art. 8, Sept. 15, 1994, reprinted in 18 HUM. RTS. L.J. 151 (1997). See also Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, princ. 2, 4, G.A. Res. 43/173, U.N.GAOR, Supp. No. 49, at 298, U.N. Doc. A/43/49 (1988).

Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment ... What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.⁴⁹

Habeas corpus is critical to ensure that a detainee will not be subjected to torture and to prevent detention itself from becoming torture.⁵⁰

D. International Human Rights Law Requires Meaningful Judicial Review of Detention

While certain limitations may be put on one's right to liberty, specific core guarantees are retained in all circumstances, including that "no person should be detained for an indefinite period of time."⁵¹ Further, "where persons are detained without charge, the need for their continued detention shall be considered periodically by an independent review tribunal."⁵² To ensure that detention is not

⁴⁹ Kurt v. Turkey, App. No. 24276/94, 1998-III Eur. Ct. H.R., para. 123 (1998).

⁵⁰ See e.g., Kafkaris v. Cyprus, App. No. 21906/04, Eur. Ct. H.R., para. 97 (2008) ("[T]he imposition of an irreducible life sentence on an adult [without any prospect of release] may raise an issue under Article 3." See also A. v. United Kingdom, App. No. 3455/05, Eur. Ct. H.R., para. 130 (2009).

⁵¹ See U.N. Econ. & Soc. Council [ECOSOC], Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, para. 70, U.N. Doc E/CN.4/1985/4, Annex (1985) [hereinafter Siracusa Principles].

⁵² *Id.* para. 70(d). See also Cherie Booth & Max Du Plessis, *Home Alone? The US Supreme Court and International and Transnational Judicial Learning*, 2 Eur. Hum. Rts. L. Rev. 127, 144 n.88 (2005) (citing NIGEL RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* (2nd ed. 1999)).

arbitrary, international human rights law guarantees a right to *meaningful* review. Any individual – other than a combatant captured on a battlefield – who is arrested or detained has the rights to appear before a court without delay, to ask the court to determine the legality of detention, and to be released if the detention is unlawful.⁵³ The related rights to “a fair and public hearing by an independent and impartial tribunal” and an effective remedy for violations ensure these guarantees.⁵⁴ At the very least, this means the Judiciary may not simply decline to hear the case as a matter of law.⁵⁵ As the Inter-American Court of Human Rights (“ICHR”) has noted, judicial review is only meaningful when it is “truly effective in establishing whether there has been a violation of human rights and in providing redress.”⁵⁶ The right to speedy review is implicit,⁵⁷ and the right to counsel may also be

⁵³ See, e.g., ICCPR, *supra* note 38, art. 9(4); American Declaration, *supra* note 48, art. XXV.

⁵⁴ See ICCPR, *supra* note 38, arts. 2(3), 14(1); American Declaration, *supra* note 48, art. XXVIII; UDHR, *supra* note 37, art. 10.

⁵⁵ See Castillo Petruzzi et al. Case, 1999 Inter-Am. Ct. H.R. (ser. C) No. 52, paras. 184-88 (May 30, 1999) (finding the absence of effective remedies violates Article 7 of the American Convention and “the very rule of law in a democratic society....”).

⁵⁶ *Id.*; see also Vuolanne v. Finland, Views of the H.R. Comm. under Article 5, ¶4, of the Optional Protocol to the ICCPR, 35th Sess., Communication No. 265/1987, U.N. Doc.CCPR/C/35/D/265/1987 (1989) (finding that review by a supervisory military officer did not offer a meaningful recourse).

⁵⁷ See G.B. v. Switzerland, App. No. 27426/95, Eur. Ct. H.R., para. 38 (2000) (finding Swiss court’s two-tiered procedure prevented the detainee from a “speedy” result).

required.⁵⁸ Additionally, the Restatement states that detention is arbitrary when “the [detainee] is not given early opportunity to communicate with family or to consult counsel; or is not brought to trial within a reasonable time.”⁵⁹

E. International Human Rights Law Does Not Support Analysis of This Case as a Derogation

While extenuating circumstances may permit States to derogate temporarily from some international human rights obligations,⁶⁰ this case is not appropriate for derogation. Article 4 of the ICCPR states the permissible conditions for derogation:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties ... may take measures derogating from their obligations ... to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law....⁶¹

Amici do not in any way underestimate the gravity of the September 11th attacks or the threat they may still present. Nor do *amici* fail to appreciate the

⁵⁸ *Öcalan v. Turkey*, App. No. 46221/99, 2005-IV Eur. Ct. H.R., para. 69 (2005). See also Inter-Am. Comm’n on Human Rights, *Report on Terrorism and Human Rights*, paras. 19, 121, 127, OEA/Ser.L./V/II.116 doc. 5 rev. 1 corr. (Oct. 22, 2002).

⁵⁹ RESTATEMENT § 702 cmt. h.

⁶⁰ U.N. Human Rights Comm., General Comment 29, *States of Emergency (Article 4)*, para. 1, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) [hereinafter General Comment 29].

⁶¹ ICCPR, *supra* note 38, art. 4(1). For similar derogation provisions see European Convention, *supra* note 48, art. 15(1); American Convention, *supra* note 48, art. 27(1).

dangerous situation faced by U.S. forces in Afghanistan. However, standing alone, the continuing, generalized threat of terrorist activity without foreseeable end cannot justify an indefinite derogation under Article 4.⁶² Moreover, under the ICCPR, derogation requires an official proclamation of a state of emergency that “threatens the life of the nation.”⁶³ Derogation is strictly limited to what is necessary under the circumstances in terms of proportionality, material scope, duration, and geographical coverage.⁶⁴ The strict necessity of each individual measure should be examined objectively, not allowing derogation if ordinary measures are sufficient.⁶⁵ Certain rights, such as those against torture and slavery, are explicitly exempt from derogation in any situation.⁶⁶ Although the right against arbitrary detention is not listed as non-derogable, the U.N. Human Rights Committee includes it among norms from which States parties may not derogate.⁶⁷ Similarly, the ICHR has ruled that the right to judicial remedies, including habeas corpus and other forms of judicial review available to detainees, are not derogable

⁶² See Derek Jinks, *International Human Rights Law and the War on Terrorism*, 31 DENV. J. INT’L L. & POL’Y 58, 67 (2002).

⁶³ See ICCPR, *supra* note 38, art. 4(1); European Convention, *supra* note 48, art. 15(1); American Convention, *supra* note 48, art. 27(1). The U.S. has not submitted any such official statement.

⁶⁴ See General Comment 29, *supra* note 60, para. 4.

⁶⁵ *Siracusa Principles*, *supra* note 51, paras. 51-54.

⁶⁶ See ICCPR, *supra* note 38, art. 4(2).

⁶⁷ See General Comment 29, *supra* note 60, paras. 6, 11.

because they are essential to protect all other non-derogable rights.⁶⁸ Thus, indefinite detention is generally prohibited, as is being held incommunicado from family, friends, or legal representation for more than a few days.⁶⁹ Periodic evaluation by an independent tribunal is required.⁷⁰ In sum, a State party to the ICCPR may not derogate from the right to effective judicial review of detention: “National authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved.”⁷¹

F. The Senate Declaration That the ICCPR Is Not Self-Executing Does Not Render It Meaningless

Although the Senate has declared that the ICCPR is not “self-executing,”⁷² it is binding on the U.S. as a ratified treaty.⁷³ It may not provide a direct “rule for the Court,” but ICCPR ratification obliges the President and Congress faithfully to

⁶⁸ Judicial Guarantees in States of Emergency (Arts. 8, 25 and 27(2) American Convention), Advisory Opinion No. OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, paras. 24, 41 (Oct. 6, 1987); Habeas Corpus in Emergency Situations (Arts. 7(6), 25(1) and 27(2) American Convention), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8, paras. 42, 44 (Jan. 30, 1987).

⁶⁹ *Siracusa Principles*, *supra* note 51, para. 70(b)-(c).

⁷⁰ *Id.* para. 70(d)-(e).

⁷¹ *Al-Nashif v. Bulgaria*, App. No. 50963/99, Eur. Ct. H.R. para. 94 (2002). *See also Aksoy v. Turkey*, App. No. 21987/93, 1996-VI Eur. Ct. H.R. para. 78 (1996).

⁷² 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992).

⁷³ *See e.g., United States v. Duarte-Acero*, 208 F.3d 1282, 1284 (11th Cir. 2000) (recognizing ICCPR as “supreme law of the land” notwithstanding non-self-executing declaration). *See also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 198-203 (2d ed. 1996).

implement it.⁷⁴ Indeed, courts have given non-self-executing treaties domestic effect,⁷⁵ particularly where, as here, they embody binding principles of customary international law.⁷⁶ This court should recognize that the Executive has proceeded against Petitioners in a manner that is contradictory to both the letter and the spirit of the ICCPR. It should therefore construe any ambiguity in the non-self-executing doctrine in favor of applicability. Such a construction is critical to uphold the ICCPR's proscription of arbitrary detention.⁷⁷

⁷⁴ See RESTATEMENT § 111 rep. n.5 (noting “[i]f a treaty is not self-executing for a state party, that state is obligated to implement it promptly, and failure to do so would render it in default under its treaty obligations.”). See also *id.* § 115(1)(b) (stating “[t]hat a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the [U.S.] of its international obligation or of the consequences of a violation of that obligation.”).

⁷⁵ See e.g., *United States v. Duarte-Acero*, 132 F. Supp.2d 1036, 1040 n.8 (S.D. Fla. 2001) (finding declaration does not apply to defensive claims); *United States v. Bakeas*, 987 F. Supp. 44, 46 n.4 (D. Mass. 1997) (finding policies of the Federal Bureau of Prisons may violate the ICCPR).

⁷⁶ See e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 881-82, 882 n.9 (2d Cir. 1980) (affirming that, although a treaty may be non-self-executing, “this observation alone does not end our inquiry.”); *United States v. Toscanino*, 500 F.2d 267, 276-77 (2d Cir. 1974) (considering the applicability of the non-self-executing U.N. and O.A.S. Charters as evidence of “long standing principle[s] of international law” to which the U.S. is bound). But see *Beazley v. Johnson*, 242 F.3d 248, 263-68 (5th Cir. 2001); *De La Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (per curiam).

⁷⁷ Covenant provisions that represent peremptory norms of customary international law may not be the subject of reservations. See General Comment 24, *supra* note 23, paras. 11-12.

II. INTERNATIONAL HUMANITARIAN LAW DOES NOT SUPPORT RESPONDENTS

Because Petitioners' detention began with their seizure in peaceful zones, *amici* consider their detention to be primarily governed by international human rights law. International humanitarian law (also known as the "law of war") does not displace international human rights law even if the government characterizes this as a wartime situation. As the International Court of Justice ("ICJ") has affirmed, human rights law does not cease even in times of war.⁷⁸

To the extent that international humanitarian law may apply, it serves as the *lex specialis*, or specific rule, to implement the most fundamental human rights guarantees.⁷⁹ International humanitarian law does not support the arrest, detention, transport and isolation of persons who are not "combatants" in an "armed conflict."⁸⁰ A civilian who takes *direct* part in hostilities may of course be treated

⁷⁸ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Reports 226, para. 25 (July 8, 1996).

⁷⁹ See Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT'L REV. OF RED CROSS 737, 738-39 (2005).

⁸⁰ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 43-45, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I]; Geneva Convention [III] Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Geneva III]. See also *Ex parte Quirin*, 317 U.S. at 21-23, 31 (designating as "enemy combatants" *members of the armed*

as a combatant.⁸¹ However, this rule cannot be extended uncritically to civilians captured far from the battlefield, without largely obliterating the dividing line between civilians and combatants and implicitly rendering civilians legitimate targets of military attack. This Court should not acquiesce to such a radical extension of the law of war.⁸²

Additionally, international humanitarian law supports Petitioners' right to judicial review. The U.S. has ratified all four of the 1949 Geneva Conventions, as have 193 other states, including Afghanistan.⁸³ Common Article 3 uniquely provides protections in non-international armed conflict, establishing absolute guarantees against inhumane treatment, including the right to adequate legal process before punishment.⁸⁴ As the International Committee of the Red Cross has

forces of a belligerent country who shed their uniforms and enter the U.S. as saboteurs).

⁸¹ Protocol I, *supra* note 79, art. 51(3) ("Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.").

⁸² *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Reports 136, para. 106 (July 9, 2004); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Reports 226, para. 25 (July 8, 1996).

⁸³ *See* International Committee of the Red Cross, International Humanitarian Law – Treaties and Documents, <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView> (last visited Oct. 30, 2009).

⁸⁴ *See* Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Geneva Convention [II] for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the

noted, “No possible loophole is left; there can be no excuse, no attenuating circumstances,” for violating Common Article 3.⁸⁵ It must be interpreted with the widest possible scope of application, particularly to civilians who do not qualify for prisoner-of-war status protections and do not engage in hostilities.⁸⁶

Furthermore, Protocols I and II, drafted in 1977, expand the protections given to people in both international and non-international conflicts, respectively.⁸⁷

While the U.S. is not a party to these Protocols, they are recognized as part of

Armed Forces at Sea, art. 3, Aug. 12, 1949, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); Geneva III, *supra* note 80, art. 3; Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter Geneva IV]. *See also* Sean D. Murphy, *Applying the Core Rules to the Release of Persons Deemed “Unprivileged Combatants”*, 75 GEO. WASH. L. REV. 1105, 1134 (2007) (“[O]ver time [Common Article 3] has come to be regarded as setting minimum standards of humanity applicable in all armed conflicts....”).

⁸⁵ OSCAR M. UHLER ET AL., INT’L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 38 (Major Ronald Griffin & C.W. Dumbleton trans., 1958).

⁸⁶ *Id.* at 40 (“Article 3 has an extremely wide field of application and covers members of the armed forces as well as persons who do not take part in the hostilities.”). *See also* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27, 1986) (quoting Corfu Channel U.K. v. Alb., 1949 I.C.J. Reports 4, 22 (Apr. 9)) (“[T]hese rules also constitute a minimum yardstick, in addition to the more elaborate rules which [also apply to] international conflicts; and they ... reflect what the Court in 1949 called ‘elementary considerations of humanity.’”).

⁸⁷ *See generally* Protocol I, *supra* note 80; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978).

evolving customary international law.⁸⁸ The principles of the Conventions and Protocols have been incorporated into U.S. military regulations and followed by the U.S. in previous conflicts.⁸⁹

Article 75 of Protocol I, frequently used to interpret the meaning of Common Article 3, protects those “in the power of a Party to the conflict.”⁹⁰ The Supreme Court used Article 75 in *Hamdan* to interpret the Common Article 3

⁸⁸ See Murphy, *supra* note 84, at 1146; Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. OF RED CROSS 175, 187 (2005) (“[T]he basic principles of Additional Protocol I have been very widely accepted, more widely than the ratification record ... would suggest.”).

⁸⁹ See International and Operational Law Department, Judge Advocate General’s Legal Center & School, U.S. Army, Operational Law Handbook 11 (Maj. John Rawcliffe ed., (2007) (listing Protocols I and II among the international instruments embodying the customary “law of war.”). During the Vietnam War, the U.S. Military Assistance Command issued comprehensive criteria for the classification and disposition of detainees. See Military Assistance Command, Vietnam, Directive No. 381-46, Annex. A (Dec. 27, 1967), *reprinted in Contemporary Practice of the United States Relating to International Law*, 62 AM. J. INT’L L. 754 (1968). Extensive provision was made for detainees’ due process as well, including giving detainees the “right to be present with his counsel at all open sessions of the tribunal,” requiring time with counsel, allowing free access by counsel and private interviews, furnishing opportunity to confer with essential witnesses, and preserving cross-examination rights. See Military Assistance Command, Vietnam, Directive No. 20-5 (Mar. 15, 1968), *reprinted in Contemporary Practice of the United States Relating to International Law*, 62 AM. J. INT’L L. 754 (1968).

⁹⁰ For example, “Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.” Protocol I, *supra* note 80, art. 75(3).

language, “all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁹¹ Article 75 is recognized by the U.S. as customary international law and is, therefore, binding.⁹²

The limited procedures afforded to Petitioners violate both Common Article 3 and customary international law. For example, Mr. Al Bakri has been denied the right to appear before the military panel that determined his status and was not given access to counsel or to evidence.⁹³ This denial prevented him from exercising his “rights and means of defense.”⁹⁴ Detainees are entitled to the rights of defense, including assistance by a qualified advocate or counsel “who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defense.”⁹⁵

The Administration’s new *Detainee Review Procedures at Bagram Theater Internment Facility Afghanistan* (“DRPs”) are inadequate to meet the requisite standards. The DRPs do not provide detainees access to an independent, impartial,

⁹¹ See *Hamdan*, 548 U.S. at 633-34 (internal quotations omitted). See also Murphy, *supra* note 84, at 1148. The U.S. did not ratify Protocol I, but not because of an objection to Article 75. Indeed, the U.S. Government “regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.” See *Hamdan*, 548 U.S. at 663 (quoting William H. Taft IV, *Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 322 (2003) (alteration in original)).

⁹² Murphy, *supra* note 84, at 1148.

⁹³ (Petr.’s Br. 5.)

⁹⁴ See Protocol I, *supra* note 80, art. 75(4)(a).

⁹⁵ See *id.*

or “regularly constituted court.”⁹⁶ The accused are appointed personal representatives, instead of lawyers, to assist them.⁹⁷ The “written procedural script” promised to detainees gives them no opportunity to examine the witnesses who testify against them.⁹⁸ Detainees’ right to adduce exculpatory evidence is compromised by the government’s promise to make only “reasonable investigation[s]” on the detainees’ behalf. Finally, the accused can only present “reasonably available” documentary information and witnesses,⁹⁹ which may also prevent Petitioners from presenting crucial exculpatory evidence.

III. CONCLUSION

This case presents issues of the deepest historical importance. Its resolution will mark the territorial boundaries of liberty for generations to come. As Justice Jackson once noted,

Judicial construction ... that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself... A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution....¹⁰⁰

⁹⁶ Geneva IV, *supra* note 84, art. 3(1)(d).

⁹⁷ Department of Defense, Detainee Review Procedures at Bagram Theater Internment Facility (BTIF), Afghanistan (U) 3 (2009).

⁹⁸ Government’s Brief, Addendum, p. 3

⁹⁹ DEPARTMENT OF DEFENSE, DETAINEE REVIEW PROCEDURES AT BAGRAM THEATER INTERNMENT FACILITY (BTIF), AFGHANISTAN (U) 4 (2009).

¹⁰⁰ *Korematsu v. United States*, 323 U.S. 214, 245-46 (1944) (Jackson, J., dissenting) (citations omitted).

Amici believe that the judgment of the District Court should be affirmed.

Respectfully submitted,

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I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14-point Times New Roman font and contains 6974 words (which does not exceed the applicable 7,000 word limit).

/s/ Douglas Baruch
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CERTIFICATE OF SERVICE

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