Nos. 06-1195, 06-1196

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL.,

Petitioners,

—v.—

GEORGE W. BUSH, ET AL.,

Respondents.

KHALED A. F. AL ODAH, ET AL.,

Petitioners,

—v.—

UNITED STATES OF AMERICA, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Treaties and Federal Statutes:

Constitutional Provisions:

United Nations Materials:

PAGE

Other Authorities:

PAGE

INTEREST OF *AMICUS CURIAE*

Amicus curiae United Nations High Commissioner for Human Rights Louise Arbour is the senior United Nations official responsible for human rights.[1] By General Assembly resolution 48/141, adopted by consensus of all States, she is charged to promote the effective enjoyment by all persons of their civil, cultural, economic, political, and social rights; to prevent human rights violations; and to enhance international cooperation in the promotion and protection of human rights. In fulfilling her mandate, the High Commissioner monitors, investigates, and reports on individual States' compliance with their obligations under international human rights law. The Office of the High Commissioner also serves as the Secretariat for all human rights treaty monitoring bodies within the United Nations. Given those responsibilities, she has gained great expertise in the interpretation and application of international human rights law, in both conventional and customary form, in a wide variety of contexts.

One of the principal instruments of international human rights law is the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [the "ICCPR" or the "Covenant"], to which the United States is party. Among the rights guaranteed by the Covenant are the right to be free from arbitrary arrest and detention and the right to have a court determine whether a detention is lawful and, if it is not, order release. The prohibition of prolonged arbitrary detention also con-

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[1] No counsel for a party authored this brief in whole or in part; no person or entity other than *amicus curiae* and her counsel made a monetary contribution to its preparation or submission; and the parties have consented to its filing by letters on file with the Clerk.

stitutes customary international law. *See*, *e.g.*, *The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, Annex, Principle 11 (Dec. 9, 1988); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 701–02 (1987) [the "RESTATEMENT"] (United States bound by customary international law of human rights, including protection against prolonged arbitrary detention).

The cases now before this Court squarely implicate these rights. The High Commissioner recognizes that the United States Constitution makes treaties of the United States, along with the Constitution and federal statutes, part of the "supreme law of the land." U.S. CONST. art. VI, cl. 2. The High Commissioner also recognizes that, consistent with the rule of international law that a State may not invoke its own law to excuse a failure to comply with a treaty or other international obligation,[2] this Court has held, from its very beginnings, that the United States's domestic law should be interpreted, if at all possible, to comply with the United States's international obligations. *See*, *e.g.*, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 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. The United States Constitution and this Court have thereby expressed their profound respect for the rule of *pacta sunt servanda*—a State must comply with its agreements—"perhaps the most important principle of international law." RESTATEMENT § 321 cmt. a.

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[2] *See* Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, arts. 3-4, U.N. Doc. A/Res/56/83 (Dec. 12, 2001).

The High Commissioner therefore files this brief to emphasize to this Court the importance of the questions raised by these cases and to express her views on the United States's international obligations as they apply to those questions. Much of the High Commissioner's work consists of identifying a given State's obligations under international human rights law, publicly and privately urging compliance with those obligations, and marshalling all appropriate actors in support. To be sure, in developed democracies, national standards of protection will often meet, or even surpass, the requirements of international law. That result cannot be assumed, however; whether national standards fully satisfy the requirements of international law must be carefully assessed on a case-by-case basis.

A State's compliance with its obligations under the Covenant and other human rights treaties reflects its basic commitment to the rule of law. The High Commissioner's experience accordingly has been that a State's domestic courts, and in particular its courts of last resort, have a definitive role in vindicating human rights guarantees conferred under applicable international human rights treaties. In exercise of the mandate entrusted to her by the international community, the High Commissioner calls on this Court to give full effect to the United States's international obligations in adjudicating the questions presented.

SUMMARY OF ARGUMENT

The obligations of the Covenant, voluntarily assumed by the United States by its ratification of the treaty in 1992, extend to the Petitioners in these cases, regardless of their detention at Guantánamo Bay, their status as non-citizens, or the concurrent applicability of any pro-

visions of international humanitarian law. Basic principles of treaty interpretation, as well as consistent authoritative interpretation of the Covenant by the International Court of Justice, the United Nations Human Rights Committee, and respected commentators, confirm that the treaty's provisions apply extraterritorially to all persons within the power or effective control of a State Party, such as Petitioners. Moreover, because the rights protected by the Covenant are universal, they do not stand aside in times of armed conflict, and the provisions of the Covenant continue to apply. To the extent that provisions of international humanitarian law also apply, international human rights law informs their interpretation, complements them, and frequently provides clarity and detail as to their requirements, as in the case of judicial review of detention.

Article 9(4) of the Covenant requires that individuals deprived of their liberty have access to a court in order to test the lawfulness of their detention. As a matter of international law, this judicial review must consider whether the detention is reasonable in all the circumstances, encompassing an assessment of the full justification for the detention, and must permit reference to both national and international law. In addition, the reviewing court must have the power to order release if the detention is judged unlawful. Continued detention without justification and review by the State is inherently arbitrary, and therefore a breach of international law as codified in Article 9 of the Covenant.

As construed by the United States Court of Appeals for the District of Columbia in these cases, United States law falls substantially short of the requirements of Article 9 for persons detained at Guantánamo. The procedures and evidentiary rules employed by the Combatant Status Review Tribunals frustrate subsequent effective

judicial review of the lawfulness and reasonableness of a prisoner's detention. These processes, even combined with the scope of review by the Court of Appeals, do not satisfy the obligations of the United States under the Covenant.

As a matter of international law, the United States is obliged to respect and ensure the rights set forth in the Covenant, including the substantive and procedural protections of Article 9, with regard to these Petitioners. The current system fails to do so. This Court should ensure that provisions of domestic law are construed and applied consistent with the United States's international obligations, and thereby confirm the United States's continued commitment to the protection and promotion of human rights.

ARGUMENT

I. To Hold Petitioners, the United States Must Comply with Article 9 of the Covenant.

When it ratified the Covenant, the United States undertook "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized [there], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICCPR art. 2(1). It also agreed that every person "has the right to liberty and security of person," that no person "shall be subjected to arbitrary arrest and detention," and that no person "shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." ICCPR art. 9(1). Finally, it agreed that any person "who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in

order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR art. 9(4).[3]

The High Commissioner respectfully submits that these rights and obligations apply fully to the United States's treatment of Petitioners even if (1) Guantánamo Bay is not a territory of the United States; (2) the detainees are aliens; and (3) any provisions of international humanitarian law might also apply.

A. The United States Must Afford Petitioners the Protections of Article 9 Regardless of Their Detention at Guantánamo Bay.

A State Party to the Covenant undertakes to apply its protections to "all individuals within its territory and subject to its jurisdiction." ICCPR art. 2(1). The United States has expressed the view that "the obligations assumed by the United States under the Covenant apply only within the territory of the United States."[4] The

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[3] Under Article 4 of the Covenant, certain of the Covenant's protections may be suspended in a time of national emergency. Under that provision, any party "availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated." ICCPR art. 4(3). The United States has made no such communication, but instead has expressly recognized that its obligations under the Covenant remain binding. *See, e.g.*, Written Reply of U.S. Government to the List of Issues To Be Taken Up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America to the Human Rights Committee, 14–15 (July 17, 2006), *available at* http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/USA-writtenreplies.pdf ("[C]ounterterrorism measures as a general matter satisfy U.S. obligations under the Covenant.").

[4] *See* U.N. Hum. Rts. C'ttee, *Third Periodic Report of the United States to the Human Rights Committee*, ¶ 130, Annex I, U.N.

United States's attempt to restrict the scope of its commitment is inconsistent with basic principles of treaty interpretation and authoritative interpretations of Article 9.

Under Article 31 of the Vienna Convention, the Covenant must "be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *See Reports of the International Law Commission to the General Assembly*, [1966] 2 Y.B. Int'l L. Comm'n 217, 219-20, U.N. Doc. A/CN.4/SER.A/1966/Add.1 [hereinafter *ILC Commentary*] (official commentary of International Law Commission on Vienna Convention) ("the application of the means of interpretation in [Article 31] would be a single combined operation" involving all elements there specified).[5] Applying that rule, a State Party's obligations under the Covenant apply wherever it exercises authority capable of affecting enjoyment of Covenant rights by individuals subject to that authority or, put another way, whenever an individual is within the State Party's power or effective control. *See* U.N. Hum. Rts. C'ttee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter

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Doc. CCPR/C/USA/3 (Nov. 28, 2005); *see also* U.N. Hum. Rts. C'ttee, *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 10, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) [hereinafter *Concluding Observations*].

[5] Although the United States has not ratified the Vienna Convention, United States courts have recognized that its provisions codify customary international law. *See, e.g., Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001); *see also* S. Exec. Doc. L, 92d Cong., 1st Sess. 1 (1971) (letter of submittal from Secretary of State to President) ("Although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice.").

General Comment No. 31].[6] Hence, Article 2(1) plainly extends the protections of the Covenant to all persons within a State Party's territory *and also* to all persons within its jurisdiction.[7]

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[6] The Human Rights Committee is the expert body established under the Covenant to monitor compliance with the treaty. States Parties to the Covenant, including the United States, report to the Human Rights Committee on their implementation of its provisions. The Committee's concluding observations on periodic reports submitted by States Parties, views on individual communications submitted under the First Optional Protocol to the Covenant, or General Comments elaborating the understanding of specific provisions of the Covenant, while not formally binding as a matter of law, constitute authoritative interpretations of the treaty. International courts, as well as national courts in both common and civil law jurisdictions, have regularly relied on the Committee's statements when interpreting and applying the Covenant. *See, e.g.*, *Minister for Immigration & Multicultural & Indigenous Affairs v. B* (2004) 219 C.L.R. 365, ¶ 148 (High Court of Australia) ("In ascertaining the meaning of the ICCPR . . . it is permissible, and appropriate, to pay regard to the views of the UNHRC."); *A and others v. Sec'y of State for the Home Dep't*, [2005] UKHL 71, [2006] 2 A.C. 221 (H.L.).

[7] The High Commissioner recognizes that, even if Article 2(1) were given the restrictive, "territory"-only interpretation the United States has urged, the Covenant would still extend to the United States's detention of Petitioners for the simple reason that Guantánamo Bay "is in every practical respect a United States territory." *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring); *see also id.* at 480 (Stevens, J.) (plurality opinion) ("[T]he United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses."). For purposes of the applicability of the Covenant, however, the Court need not parse the status of Guantánamo Bay. Given the authority and control the United States exercises over the Guantánamo detainees, its Covenant obligations apply whether or not Guantánamo Bay constitutes United States territory.

First, the ordinary meaning of the relevant terms leads to that result. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 602 (6th ed. 2003) ("what matters" in treaty interpretation "is the intention of the parties *as expressed in the text*") (emphasis in original). As a purely formal matter, it might be argued that the phrase "all individuals within [a State Party's] territory and subject to its jurisdiction" is susceptible of two different readings: the word "and" could be read either conjunctively, limiting the scope of the treaty to a State Party's territory, or disjunctively, requiring a State Party to comply with its treaty obligations with regard to any person subject to its jurisdiction, regardless of their location. The more limited reading can be promptly rejected, however. By recourse to the basic principle of territoriality, a person within a State's territory would generally be subject to its jurisdiction. Hence, the conjunctive reading would render the phrase "subject to its jurisdiction" mere surplusage, offending the basic interpretive principle of textual effectiveness (*effet utile*) as well as standard canons of treaty interpretation. *Cf. Air France v. Saks*, 470 U.S. 392, 398 (1985).

Second, the context also supports the extraterritorial reading. Under Article 31(2)(b) of the Vienna Convention, the context of a treaty term includes "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." The First Optional Protocol to the ICCPR, which permits individuals to make submissions to the Human Rights Committee on alleged violations of the treaty, contains no territorial restriction. Optional Protocol to the International Covenant on Civil and Political Rights, art. 1, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, 999 U.N.T.S. 302 (*entered into force* Mar. 23, 1976) (Committee may receive com-

munications from "individuals subject to [a State Party's] jurisdiction"). Needless to say, there would be no reason to allow the Human Rights Committee to receive complaints from persons not entitled to the protections of the treaty in the first place. *See* Thomas Buergenthal, *To Respect and To Ensure: State Obligations and Permissible Derogations*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 74–75 (Louis Henkin ed., 1981); THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 106–07 (1986) ("A better interpretation is that suggested by Buergenthal" supported by "[t]he language of the Optional Protocol, formulated after [Art. 2(1)] had been completed.").

Finally, the object and purpose of the provision also supports the extraterritorial reading. The rights guaranteed by the Covenant are, by definition, universal.[8] Limiting a State Party's obligations to its own territory "would be unconscionable," because that reading would "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." U.N. Hum. Rts. C'ttee, *López Burgos v. Uruguay*, ¶ 12.3, U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981). *See* Buergenthal, *supra*, at 73–74 (restrictive territorial reading of Article 2(1) "is specious and would produce results that were clearly not intended," because it would nullify other rights clearly set forth in the treaty); MANFRED NOWAK, CCPR COMMENTARY 44 (2d ed. 2005) ("When

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[8] *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), Preamble, U.N. Doc A/810 (Dec. 10, 1948) ("Member States have pledged themselves to achieve . . . the promotion of universal respect for and observance of human rights and fundamental freedoms," in order "to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction").

State parties . . . take actions on foreign territory that violate the rights of persons subject to their sovereign authority, it would be contrary to the purpose of the Covenant if they could not be held responsible.").[9]

The International Court of Justice has expressly endorsed the extraterritorial reading of Article 2(1). *See* Statute of the International Court of Justice art. 38(1)(d),

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[9] Since the conclusion that the Covenant applies extraterritorially results from the text of the treaty read in context and in light of its object and purpose, *see* Vienna Convention art. 31, there is no need to refer to the negotiating and drafting history, or *travaux préparatoires*. *See id.* art. 32 ("preparatory work" as supplementary means of interpretation if means identified in Article 31 insufficient); *ILC Commentary*, at 220 ("[P]reparatory work . . . does not . . . have the same authentic character as an element of interpretation, however valuable it may sometimes be in throwing light on the expression of the agreement in the text."). In any event, distinguished scholars have concluded that the *travaux* confirm the extraterritorial interpretation. *See* Buergenthal, *supra*, at 74 (concluding upon review of the *travaux* that "Article 2(1) permits and requires a different construction" than one which limits its scope to a State's territory); *accord* Meron, *supra*, at 106–09. At a minimum, even if the *travaux* could be read to show that some delegates expressed a concern to avoid imposing obligations on States Parties either to exert extraterritorial legislative jurisdiction, or to act with regard to persons under the sovereign authority of another State, nothing in the *travaux* supports immunizing States Parties from the obligations and prohibitions of the Covenant when they in fact exercise power and control over persons outside their territory. *See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 109 (July 9) [hereinafter *Wall* Advisory Opinion] ("The *travaux préparatoires* of the Covenant . . . show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory."); *see also* U.N. Hum. Rts. C'ttee, *Summary Record of the Hundred and Ninety-Fourth Meeting*, ¶ 32, U.N. Doc. No. E/CN.4/SR.194 (May 25, 1950) (United States delegation explaining that military "troops, although maintained abroad, remained under the jurisdiction of the State").

June 26, 1945, 59 Stat. 1055, 1060 ("judicial decisions" as means of determining international law). In 2004, the Court observed that, "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory." Hence, the Court continued, "[c]onsidering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions." *Wall* Advisory Opinion, *supra*, at ¶ 109. The Court therefore concluded that the Covenant applied to Israel's conduct in the West Bank. *Id.* at ¶¶ 110-11.

The following year, in the *Case Concerning Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. __, ¶ 216 (Dec. 19), the Court reiterated that precise point, holding that "international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory,' particularly in occupied territories." Having concluded that during the relevant period Uganda was an occupying power in Ituri, a district in the northeast region of the Congo, the Court held that it had violated its obligations under several international human rights and international humanitarian law treaties, including the Covenant. *Id.* at ¶ 219.

Likewise, in a series of cases submitted under the Optional Protocol that predate the ratification of the Covenant by the United States, the Human Rights Committee confirmed that the obligations under the Covenant extended beyond the territorial control of the State and applied the Covenant to cases of kidnapping by State agents abroad. *See López Burgos*, *supra*, at ¶¶ 12.1 –

12.3; U.N. Hum. Rts. C'ttee, *Celiberti de Casariego v. Uruguay*, ¶¶ 10.1 – 10.3, U.N. Doc. CCPR/C/13/D/56/1979 (July 29, 1981).[10]

The Human Rights Committee recently reaffirmed the extraterritorial scope of obligations under the Covenant, stating that a State Party "must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." *General Comment No. 31*, *supra*, at ¶ 10. The Committee continued: "This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peacekeeping or peace-enforcement operation." *Id.* The February 2006 report to the Human Rights Council by the Chairperson-Rapporteur of the Council's Working Group on Arbitrary Detention and other Special Rapporteurs expressly applied that understanding to the Guantánamo Bay detainees, concluding that "the particular status of Guantánamo Bay under the international lease agreement between the United States and Cuba and under United States domestic law does not limit the obligations of the United States under international human

[10] The same interpretive approach has been followed by other human rights treaty bodies. *See, e.g.*, U.N. C'ttee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, ¶ 32, U.N. Doc. CERD/C/ISR/CO/13 (June 14, 2007); U.N. C'ttee Against Torture, *Conclusions and Recommendations of the Committee Against Torture*, ¶¶ 14-16, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006); U.N. C'ttee on the Rts. of the Child, *Concluding Observations*, ¶ 2, U.N. Doc. CRC/C/15/Add.195 (Oct. 9, 1992).

rights law towards those detained there."[11] And the extraterritorial interpretation was confirmed at the highest political level of the United Nations when the General Assembly, in its Resolution 45/170 on the situation of human rights in occupied Kuwait, confirmed the application of Iraq's obligations under the Covenant in territory occupied by it in Kuwait. *See* G.A. Res. 45/170, U.N. Doc. A/RES/45/170 (Dec. 18, 1990) (adopted by vote of 144-1, with United States in favor).

B. The United States Must Afford Petitioners the Protections of Article 9 Regardless of Their Status as Aliens.

The United States's obligations under the Covenant extend to "*all* individuals within its territory and subject to its jurisdiction . . . *without distinction of any kind* . . . ." ICCPR art. 2(1) (emphasis added). Hence, whatever interpretation might be given the phrase "all individuals within its territory and subject to its jurisdiction," there can be no suggestion that the protections afforded by Article 9 of the Covenant do not extend to citizens and non-citizens alike. Indeed, Article 26 of the Covenant expressly prohibits discrimination in the administration of justice. ICCPR art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.").

The United States recognized the point when it explained its implementation of specific provisions of the Covenant:

> Aliens living in the United States, even though not U.S. citizens, generally enjoy the constitutional and

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[11] U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Hum. Rts., *Report of the Working Group on Arbitrary Detention and Special Rapporteurs: Situation of Detainees at Guantánamo Bay*, ¶ 11, U.N. DOC. E/CN.4/2006/120 (Feb. 27, 2006).

> Covenant rights and protections of citizens, including . . . freedom from torture or cruel, inhuman or degrading treatment or punishment; prohibition of slavery; *the right to liberty and security of person*; the right to humane treatment for persons deprived of their liberty . . . .

U.N. Hum. Rts. C'ttee, *Initial Report of the United States to the Human Rights Committee*, ¶ 95, U.N. Doc. CCPR/C/81/Add.4 (Aug. 24, 1994) (emphasis added). *See also Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); *cf. Rasul*, 542 U.S. at 481 ("Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under [the federal habeas statute].").

The application of the Covenant to persons under the control of State Parties without regard to citizenship inheres in the Covenant's purpose to ensure respect for human rights. "[T]he rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness." U.N. Hum. Rts. C'ttee, *General Comment No. 15: The Position of Aliens Under the Covenant*, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.6 at 140 (Apr. 11, 1986). "Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens." *Id.* at ¶ 2.

The limited number of provisions in the Covenant that do allow for distinctions between citizens and non-citizens do so explicitly. For example, the rights guaranteed under Article 25, including the right to vote, are restricted to "citizens," and the right to freedom of movement secured by Article 12(1) applies only to those

within the relevant territory. By contrast, the provisions of Article 9 apply, without qualification, to "all individuals" subject to arrest or detention by a State Party. *General Comment No. 8*, at ¶ 1.

C. The United States Must Afford Petitioners the Protections of Article 9 Regardless of the Possible Concurrent Applicability of International Humanitarian Law.

Given the universality of international human rights, the protections of the Covenant neither disappear nor are set aside in times of armed conflict. Apart from the limited provisions for formal notification of derogation in public emergencies provided for by Article 4 (to which the United States has not resorted),[12] there is no provision in the Covenant providing for the suspension of its guarantees in times of armed conflict. It is instead well established that the application of international humanitarian law in the context of armed conflict does not preclude the concurrent enforcement of international human rights obligations:

> Human rights are inherent to the human being and protect the individual at all times, in war and in peace. International humanitarian law only applies in situations of armed conflict. Thus, in times of armed conflict international human rights law and international humanitarian law both apply in a complementary manner.

Int'l C'ttee of the Red Cross, International Humanitarian Law and Human Rights, http://www.icrc.org/Web/eng/siteeng0. nsf/htmlall/section_ihl_and_human_rights. *See also* 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 299-306 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

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[12] *See* note 3, *supra*.

In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, ¶ 25 (July 8), the International Court of Justice expressly so held with respect to the Covenant, stating that "the protection of the International Covenant of Civil and Political Rights does not cease in times of war." In the *Wall* Advisory Opinion, *supra*, at ¶¶ 105–06, the Court reiterated that human rights law applies in times of conflict, and in addition held that, while some rights may be exclusively matters of international humanitarian law or international human rights law, "others may be matters of both these branches of international law." *See also General Comment No. 31*, *supra*, at ¶ 11 ("While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.").

Consequently, even in times of armed conflict, human rights law applies. Where provisions of international humanitarian law apply, human rights law may also inform their interpretation or complement them. For instance, the fundamental guarantees of judicial process in times of non-international armed conflict assume clearer content from the more detailed rules of human rights law that are codified in the Covenant and other human rights instruments, and their interpretation by courts and international monitoring bodies. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 972 [hereinafter Common Article 3] (setting out in generally phrased language the minimum guarantees to be respected in armed conflict, including "judgment pronounced by a regularly constituted court affording *all the judicial guarantees which are recognized as indispens-*

able by civilized peoples") (emphasis added); *cf.* ICCPR arts. 9, 14 (requiring prompt hearing after arrest or detention "before a judge or other officer authorized by law," upholding right to fair trial and to petition court for review of legal basis of detention, and specifying basic judicial guarantees). As a result, in a non-international armed conflict, the relevant provisions of the Covenant provide clarity and detail to the more general protection contained in Common Article 3 to govern issues related to detention, including the judicial guarantees afforded, the competence, independence and impartiality of the tribunal, the permissible duration of proceedings, and the scope of review by a court or tribunal.

The determination of whether a particular individual has been captured and detained in the course of armed conflict, whether international or non-international as those terms are understood in international humanitarian law, is a fact-intensive inquiry governed by the rules of that body of international law.[13] Regardless of whether any provision of international humanitarian law might apply to any of the Petitioners, however, the United States's obligations under the Covenant and customary international law of human rights remain intact as to all of them.

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[13] In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795-97 (2006), this Court applied the provisions of Common Article 3 to the conflict between the United States and Al Qaeda in Afghanistan.

II. The United States's Treatment of the Guantánamo Detainees Violates Article 9 of the Covenant.

A. Article 9 Guarantees Petitioners a Right to Judicial Review of Their Detention.

Pursuant to Article 9(4), a State Party must ensure that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR art. 9(4).[14] While Article 9(4) reflects a broad practice among national legal traditions, many built on principles of habeas corpus and *amparo*, the obligation of the United States arising from Article 9(4) is neither fully defined by nor dependent on constitutional provisions or federal statutes affording access to habeas relief *per se*. Hence, in order to ensure compliance by the United States with its obligations under the Covenant, the judicial access afforded by the United States to persons it has detained must be assessed for compliance with each of the requirements set forth in Article 9(4).

First, Article 9(4) requires that individuals deprived of their liberty be "entitled to take proceedings *before a court*." ICCPR art. 9(4) (emphasis added). For purposes of Article 9(4), the "court" must observe the basic procedural guarantees that ensure a fair hearing as required by Article 14(1) of the Covenant. ICCPR art. 14(1)

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[14] Similar provisions appear in the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(4), Nov. 4, 1950, 213 U.N.T.S. 222 ("ECHR"), the American Convention on Human Rights art. 7(6), Nov. 22, 1969, 1144 U.N.T.S. 123, and the African [Banjul] Charter on Human and People's Rights art. 6, *adopted* June 27, 1981, 1520 U.N.T.S. 217.

("[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.").[15] In particular, a court's procedures must grant a prisoner meaningful access to the evidence used against him and afford him the opportunity to obtain evidence and testimony in his defense.[16] For the same reason, a court's procedures must allow prisoners adequate access to legal counsel[17] and cannot consider evidence obtained by torture.[18]

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[15] *See generally* U.N. Hum. Rts. C'ttee, *General Comment No. 32: Right to Equality Before Courts and Tribunals and to Fair Trial (article 14)*, ¶¶ 17-18, U.N. Doc. CCPR/C/GC/32/CRP.1 (June 19, 2007); U.N. Hum. Rts. C'ttee, *General Comment No. 29: States of Emergency (article 4)*, ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) ("The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.").

[16] *See generally Wloch v. Poland*, 34 Eur. Ct. H.R. 9, ¶¶ 126-131 (2000) (interpreting the provision of ECHR analogous to ICCPR art. 9(4) to find detention lawful only where defense has equal access to government's evidence presented in court); *Cantoral-Benavides v. Peru*, 2000 Inter-Am. Ct. H.R. (ser. C) No. 69, ¶ 15 (Aug. 18, 2000) (recognizing the right of parties "to prepare a proper defense . . . [and] to question witnesses."); U.N. Hum. Rts. C'ttee, *Perterer v. Austria*, ¶ 9.2, U.N. Doc. CCPR/C/81/D/1015/2001 (Aug. 20, 2004) (describing "principles of impartiality, fairness and equality of arms as implicit [in Article 14(1)]"); U.N. Hum. Rts. C'ttee, *Morael v. France*, ¶ 9.3, U.N. Doc. CCPR/C/36/D/207/1986 (July 28, 1989) ("[T]he Covenant should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings, preclusion of *ex officio reformatio in pejus*, and expeditious procedure.").

[17] *See, e.g., Hilaire, Constantine and Benjamin, et al. v. Trinidad and Tobago*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 152(b) (June 21, 2002) (detainee entitled to "adequate legal assistance for the effective preservation of constitutional motions"); *Imbrioscia v. Switzerland*, 17 Eur. Ct. H.R. 441, ¶¶ 33-34, 38 (1993).

[18] U.N. Hum. Rts. C'ttee, *General Comment No. 20: Concerning Prohibition of Torture and Cruel Treatment or Punishment (arti-*

Second, the court must have the power to decide "without delay on the *lawfulness* of [the] detention." ICCPR art. 9(4) (emphasis added); *see also* U.N. Hum. Rts. C'ttee, *General Comment No. 8: Right to liberty and security of persons (Art. 9)*, ¶1, U.N. Doc. HRI/GEN/1/Rev.7 (June 30, 1982).[19] The Human Rights Committee has made clear that "lawfulness" within the meaning of Article 9(4) is not limited merely to an assessment of compliance with national law or of procedural regularity, but also compliance with international law, including the prohibition of arbitrary detention contained in Article 9(1) of the Covenant itself,[20] the requirement of legal certainty, here with respect to the standards supporting detention contained in Article 15 of

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cle 7), ¶12, U.N. Doc. HRI/GEN/1/Rev.1 (1992); *see also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 15, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984) ("Convention against Torture") ("Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.").

[19] Article 9(4) requires that judicial review be provided "without delay." While detailed consideration of the facts of individual cases is beyond the scope of this brief, the High Commissioner notes that it is difficult to conceive of any possible justification for the delay in many of these cases of many years.

[20] ICCPR art. 9(1) ("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 grounds and in accordance with such procedure as are established by law."). In a series of cases relating to immigration detention, the Human Rights Committee found that the reviewing court's limited mandate violated both Article 9(1) and Article 9(4). *See, e.g.*, U.N. Hum. Rts. C'ttee, *Shafiq v. Australia*, ¶7.4, U.N. Doc. CCPR/C/88/D/1324/2004 (Nov. 13, 2006).

the Covenant,[21] and customary international law.[22] The prohibition against arbitrary detention set forth in Article 9(1) applies to "all deprivations of liberty," including executive detentions "for reasons of public security." U.N. Hum. Rts. C'ttee, *General Comment No. 8, supra*, at ¶¶ 1, 4. Accordingly, to suffice under Article 9(4), a court's inquiry into the lawfulness of detention must be broad enough to encompass an assessment of the overall arbitrariness *vel non* of the detention.

In order to avoid a characterization of arbitrariness, detention must "not only be lawful but reasonable in all the circumstances." U.N. Hum. Rts. C'ttee, *Alphen v. The Netherlands*, ¶ 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (Aug. 15, 1990); *see also* U.N. Hum. Rts. C'ttee, *Mukong v. Cameroon*, ¶ 9.8, U.N. Doc. CCPR/C/51/D/458/1991 (Aug. 10, 1994) (" '[A]rbitrariness' is not to be equated with 'against the law,' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law.").

Finally, the court must have the power to order release if the detention is not lawful. "Judicial review of the lawfulness of detention under article 9, paragraph 4, is

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[21] ICCPR art. 15(1) ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."). *See* U.N. Hum. Rts. C'ttee, *Nicholas v. Australia*, ¶ 7.5, U.N. Doc. CCPR/C/80/D/1080/2002 (Mar. 24, 2004).

[22] *See United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 42 (May 24) ("Wrongfully to 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.").

not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1." U.N. Hum. Rts. C'ttee, *Baban et al. v. Australia*, ¶ 7.2, U.N. Doc. CCPR/C/78/D/1014/2001 (Sep. 18, 2003). If a State Party is incapable of justifying the continued detention of a prisoner, the failure to release the prisoner would be inherently arbitrary, and a violation of Article 9(1). U.N. Hum. Rts. C'ttee, *Mpaka-Nsusu v. Zaire*, ¶ 10, U.N. Doc. CCPR/C/27/D/157/ 1983 (Mar. 26, 1986). Under these circumstances, continued detention of Petitioners would also constitute a direct violation of Article 9(2). ICCPR art. 9(2) ("Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.").

B. United States Law as Construed by the Court of Appeals Would Not Satisfy Article 9.

In the United States, rights guaranteed by Article 9(4) have traditionally been protected by the writ of habeas corpus. U.N. Hum. Rts. C'ttee, *Initial Report of the United States to the Human Rights Committee*, *supra*, at ¶ 254 ("Through habeas corpus a person may obtain an immediate judicial hearing on the legality of the detention and an order directing the official who holds him in custody to release him, if appropriate.") (citing *Wales v. Whitney*, 114 U.S. 564, 574 (1885)). Because the United States relied on existing statutes and constitutional provisions to ensure that the "fundamental rights and freedoms protected by the Covenant . . . can be effectively asserted and enforced by individuals in the judicial system," *id.* at ¶ 8, restrictions on the reach and availability

of habeas corpus implicate the United States's obligations under the Covenant.

According to the Court of Appeals, the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 [hereinafter MCA] stripped the federal courts of jurisdiction to hear pending habeas claims by Petitioners. Whether Congress intended such a result, and whether, if Congress so intended, the legislation violates constitutional provisions, are matters for this Court to decide as a matter of national law. If United States law were as construed by the Court of Appeals to preclude habeas corpus, however, the United States would be in breach of its obligations under the Covenant for failing to provide judicial review of the lawfulness of detention that satisfied the three components of Article 9(4).

First, the administrative CSRTs clearly cannot themselves qualify as "courts" under Article 9(4), if only because their structure within the executive branch and their composition of military officers render them insufficiently independent and impartial to discharge the judicial function.[23] In addition, the rules and evidentiary procedures employed do not provide the basic procedural protections necessary to safeguard the rights set forth in the Covenant.[24] Contrary to the requirement that

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[23] U.N. Hum. Rts. C'ttee, *Vuolanne v. Finland*, ¶ 9.6, U.N. Doc. CCPR/C/35/D/265/1987 (May 2, 1989) (review of petitioner's case by superior military officer "did not have a judicial character [and therefore] cannot be deemed to be a 'court' within the meaning of article 9, paragraph 4").

[24] On its review of the United States's most recent periodic report under the Covenant, and following a lengthy written and oral dialogue with senior United States officials, the Human Rights Committee expressed its concern that the procedures governing the CSRTs "may not offer adequate safeguards of due process" in light of Article 9(4). *Concluding Observations*, *supra*, at ¶ 18.

detainees be given equal access to the government's evidence supporting detention, CSRTs provide the detainees only superficial and oftentimes wholly incomplete information. According to the Department of Defense's instructions for CSRTs, the Government need only provide detainees with a summary of the Government's unclassified evidence supporting continued detention and none of the classified information otherwise considered by the CSRT.[25] Further, while detainees are ostensibly able to obtain the attendance of witnesses on their own behalf who are "reasonably available," Implementation Enclosure (1) at 6, detainees appear to be restricted in practice to seeking testimony from other Guantánamo Bay detainees, and even those requests are reported to be regularly refused.

The injury done by the imposition of such evidentiary hurdles is compounded by the rules denying detainees access to counsel. Rather than legal counsel, detainees are assigned a "Personal Representative." Implementation Enclosure (1) at 2. The Personal Representative, however, is not a lawyer, and indeed, must inform the detainee at their initial meeting: "I am neither a lawyer nor your advocate . . . . None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing." Implementation Enclosure (3) at 3.

There is also unacceptable risk that the evidentiary record generated during the CSRT phase will reflect evidence obtained through torture or cruel, inhuman, or

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[25] Deputy Secretary of Defense, Memorandum for the Secretaries of the Military Departments et al., "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba" (July 14, 2006), Enclosure (1) at 7(H)(5), *available at* http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf [hereinafter Implementation].

degrading treatment of others or of the prisoner himself. Neither the Detainee Treatment Act of 2006, Pub. L. No. 109-148, 119 Stat. 2939 (2006) [hereinafter DTA], nor the Government's instructions for CSRTs categorically exclude the use of evidence obtained by torture.[26] Any underlying act of torture or cruel, inhumane or degrading treatment would itself be a gross violation of human rights obligations, as would its use as evidence in a detention hearing. *See* Convention against Torture art. 15; ICCPR art. 7 (as explained in *General Comment No. 20*, ¶ 12). Any court that accepts into evidence statements obtained through torture, and allows the continued detention of a prisoner on the basis of that evidence, ceases to function as a court and becomes, instead, an instrument of oppression. *See A and others*, [2006] 2 A.C. 221, *supra*, at ¶ 164 (use of coerced statements in court is not question of power of executive "but rather the integrity of the judicial process").

Without effective access to the evidence relied on by the government to justify continued detention, without the effective ability to obtain additional material evidence, without sufficient access to counsel, and without meaningful ability to determine whether inculpatory evidence is the result of torture or other impermissible coercion, the process afforded by the CSRTs leaves detainees without any meaningful opportunity to mount an effec-

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[26] Under procedures issued after the DTA's passage that were not applied to Petitioners, a CSRT may consider "any information it deems relevant and helpful to a resolution of the issues before it," Implementation Enclosure (1) at 6, and "(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and (B) the probative value (if any) of any such statement." DTA § 1005(b)(1). Neither the DTA nor the Government's Implementation instructions for CSRTs contain any analog to the prohibition on the use of statements obtained through torture in military commissions established under the MCA. *See* MCA § 3(a) (adding 10 U.S.C.A. § 948r(b)).

tive defense or otherwise receive a fair hearing. A body that cannot provide a fair hearing cannot, by definition, provide meaningful judicial review of detention as required by Article 9(4).

The factual record presented to the Court of Appeals for the District of Columbia Circuit under the DTA is necessarily tainted by the procedural shortcomings of the CSRT. That court is, of course, a "court" within the meaning of the Covenant. However, given the structural deficiencies of the CSRT, effective judicial scrutiny would be stymied even if ordinary principles of review applied. Given the narrow review authorized by the DTA, the Court of Appeals, for its part, is rendered incapable of engaging in the full review of detention required by Article 9(4) of the Covenant.

Second, the review of CSRT determinations afforded under § 1005(e)(2) of the DTA is insufficient in scope and substance to ensure that Petitioners obtain judicial review of the lawfulness of their detention as required by Article 9 of the Covenant.

As a threshold matter, effective judicial inquiry into the lawfulness and reasonableness of detention is seriously frustrated by the unduly vague definition of "unlawful enemy combatant," which results in impermissible uncertainty regarding the applicable legal standards. At various times material to the Petitioners, the executive has applied an unreasonably vague definition to the term, *see* Memorandum from Deputy Secretary of Defense to Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf (defining "enemy combatant" as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in

hostilities against the United States or its coalition partners"), or refused to articulate any definition at all. *See In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443, 474-78 (D.D.C. 2005). Nor has subsequent legislation clarified the issue. Indeed, in addition to exposing Petitioners to the prospect of continued arbitrary detention in violation of Article 9 of the Covenant, this failing breaches the principle of certainty of law protected by Article 15 of the Covenant. *See Nicholas v. Australia*, *supra*, at ¶ 7.5.

Even if a sufficiently clear legal standard applied, the narrow scope of review afforded by the DTA precludes effective judicial review of the lawfulness of detention. Rather than amounting to a substantive review of justification for detention, the DTA apparently limits the D.C. Circuit's review of CSRT decisions simply to "(i) whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] . . . and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(c) (emphasis added). The Government interprets the DTA to forbid the Court of Appeals from engaging in factual inquiries beyond the narrow record before the CSRT to determine whether the CSRT did in fact reach a defensible result. *See* Government's Response in Opposition to Motion to Compel at 10-20, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Aug. 21, 2006); *see also* Government's Motion for Entry of Protective Order at 13, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Aug. 25, 2006) ("Because review under the DTA is on the record of the CSRT, counsel does not have a need to engage in factual development[.]"); Government's Reply in Support of Motion for Entry of Protective Order at 3,

Bismullah v. Gates, No. 06-1197 (D.C. Cir. Nov. 13, 2006) ("[D]iscovery is not appropriate because this Court's review under the DTA is on the record."). The disparity between the scope of judicial review required by the Covenant and the limited review apparently permitted by the DTA is further exacerbated by the requirement that the Court of Appeals review the CSRT determination in light of the "rebuttable presumption in favor of the Government's evidence." DTA § 1005(e)(2)(C)(i).

As a result, under the executive's interpretation of the DTA, the Court of Appeals lacks both the authority and the practical ability to make an inquiry into whether continued detention is substantively justified as a matter of fact and law. In the absence of such review, the court has exceedingly limited ability to identify arbitrary detention. It may be that DTA § 1005(e)(2) permits an inquiry into "whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with . . . the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence." As Judge Rogers pointed out, however, "[b]ecause a detainee still has no means to present evidence rebutting the government's case—even assuming the detainee could learn of its contents—assessing whether the government has more evidence in its favor than the detainee is hardly the proper antidote" to the suspension of habeas. *Boumediene v. Bush*, 476 F.3d 981, 1006 (D.C. Cir. 2007) (Rogers, J., dissenting). Such a state of affairs is inimical to "the fundamental requirements of the law . . . that a person cannot be subject to detention unless a neutral and detached magistrate makes an independent finding that there is sufficient probable cause to believe that person committed an offence." Hum. Rts. C'ttee, *Initial Report of the United States to the Human Rights Committee*, *supra*, at ¶ 256 (citing *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975)).

Finally, if, as Judge Rogers stated, "neither the DTA nor the MCA require [that a detainee unlawfully held be released]," *Boumediene*, 476 F.3d at 1006 (Rogers, J., dissenting), the scope of CSRT determinations by the Court of Appeals is inadequate for the additional reason that the court is not invested with the authority to release prisoners who, in its determination, are unlawfully detained. The authority to release unlawfully detained prisoners is an explicit requirement of Article 9(4), because it is the crucial mechanism by which judicial review protects the fundamental right against arbitrary detention embodied by the Covenant.

The individuals detained by the United States at Guantánamo Bay are individuals invested with rights under the Covenant that the United States has voluntarily agreed by treaty to respect and ensure. Their continued detention under the legal regime described by the Court of Appeals squarely violates the United States's obligations under Article 9 of the Covenant. This Court should act to bring the United States into compliance with the commitments it made when it ratified the Convention.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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