No. 08-1234

IN THE

Supreme Court of the United States

JAMAL KIYEMBA, *et al.*,
Petitioners,
v.
BARACK H. OBAMA, *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* AMNESTY INTERNATIONAL, HUMAN RIGHTS WATCH, THE INTERNATIONAL COMMISSION OF JURISTS IN SUPPORT OF PETITIONERS

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INTERESTS OF THE AMICI

Pursuant to Rule 36 of the Rules of this Court, Amnesty International, the International Commission of Jurists, and Human Rights Watch respectfully submit this brief as *amici curiae* in support of Petitioners. The interests of *amici* are set forth in "Appendix A" hereto.[1]

SUMMARY OF ARGUMENT

The holding of this court in *Boumediene v. Bush*, 553 U.S. __ (2008), 128 S. Ct. 2229 (2008), that individuals detained at Guantánamo Bay were entitled to *habeas corpus* review of the lawfulness of their detention, was consistent with the United States of America's international obligations under both international treaties to which it is a party and customary international law.[2] Notwithstanding the Court's recognition of these detainees' right to access to justice, the arguments made in this case by the Government would render the rights recognized and affirmed in *Boumediene* illusory. The Government argues that it may continue to hold for an indefinite period, apparently at its sole

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[1] *Amici* state that no party or their counsel has authored this Brief in whole or in part nor has any person or entity other than *amici* and their counsel made monetary contribution to its preparation. All parties have consented to the filing of this Brief. Letters of consent have been lodged with the Clerk of the Court.

[2] *See, e.g.*, International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 9, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) ("ICCPR").

discretion, individuals found on *habeas* review to be unlawfully detained. These *amici* respectfully submit that this Court should reject any such argument. Continued indefinite detention of Petitioners at the discretion of the executive in the face of a finding by the court that they are unlawfully detained would contravene international law and would leave the United States in breach of its international legal obligations.

Article 9(1) of the ICCPR recognizes the right to liberty and security of person and prohibits arbitrary deprivation of liberty, including in instances where an individual is detained without legal basis. The Government itself concedes that it was unable to support on *habeas* review the basis on which it had relied to justify the Petitioners' detention.[3] Accordingly, Petitioners' detention is arbitrary under ICCPR article (9)(1).

Further, under article 2(3) of the ICCPR, a State Party has a duty to provide any individual who has suffered a violation of the human rights recognized by the ICCPR with an effective remedy, and the government must ensure that the competent authorities enforce the remedy when granted. In the case of an unlawful deprivation of liberty, any effective remedy must at a minimum include immediate release of the detained individual and not merely a promise by the executive to do so at some indeterminate future

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[3] The understanding of *amici* is that the lawfulness of the grounds originally invoked by the government to justify the detention of these Petitioners is not at issue in the present appeal. *Amici* accordingly make no arguments on that matter in this Brief.

time. Article 9(4) of the ICCPR further reinforces the general duty to provide an effective remedy, by expressly providing that all detainees must be afforded the right to take proceedings before a court, in order that the court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful.

International jurisprudence reinforces the conclusion that a court's power to obtain the immediate release of an unlawfully held individual must be "real and effective," not illusory. Individuals determined by the court to have been unlawfully deprived of their liberty have the right to be released immediately following the prompt determination of the lawfulness of the detention by the court; international law does not permit the executive to postpone compliance with the court's order to some indeterminate and discretionary point in the future.

Furthermore, international law prohibits the return of these petitioners to their country of origin because of the risk of torture they would face there.[4] The United States created the situation in

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[4] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51, art. 3 (1984) 1465 UNTS 85 ("Convention against Torture");ICCPR, art. 7; U.N. Human Rights Committee, *General Comment No. 20 on Article 7: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment* ¶ 9 (1992) U.N. Doc. HRI/GEN/1/Rev.1 at 30, ¶ 9 (1994); U.N. Human Rights Committee, *General Comment No. 31 on the nature of the general legal obligation imposed on States Parties to the Covenant*, (2004), UN Doc CCPR/C/21/Rev.1/Add.13, ¶ 12. *See also* Elihu Lauterpact & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement, in* REFUGEE

which these individuals presently find themselves, by bringing them from abroad to Guantánamo Bay. If the only *habeas* relief that will actually achieve their immediate release is an order that includes specific directions as to how they are to be released—in this case by specifying that the individuals be brought physically before the court and released in the mainland United States—the court conducting *habeas* review must have jurisdiction to make such an order if the right to remedy, and indeed the *habeas* review itself, is to be real and effective, as international law requires, and not simply illusory.

I.
INTERNATIONAL LAW PROTECTS THE RIGHT TO LIBERTY AND PROHIBITS ARBITRARY DETENTION.

The right to liberty, including the right to be free from arbitrary detention, is a universally recognized legal norm, essential for upholding the inherent dignity of all human beings and reaffirmed in every general human rights treaty pertaining to civil and political rights.[5]

PROTECTION IN INTERNATIONAL LAW: UNHRC'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 155-164 (E. Feller, et al. eds. 2003). The obligation of *non-refoulement* also extends to a range of other human rights violations.

[5] *See* ICCPR, art. 9; American Convention on Human Rights, Nov 22,1969, art.7(3),(5),(6), 1144 U.N.T.S. 123,9 I.L.M. 99 (entered into force July 18, 1978) ("American Convention"); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 5(1),(4),213

ICCPR article 9(1) provides: "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."[6] There are

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U.N.T.S. 221 (entered into force Sept. 3, 1953) ("European Convention"); African Charter on Human and Peoples' Rights, June 27, 1981, arts. 6, 7(1), O.A.U. Doc. CAB/LEG/67/3/rev. 5 U.N.T.S. 217, 21 ILM 58 (1982) (entered into force Oct. 21, 1986) ("African Charter"); League of Arab States, Revised Arab Charter on Human Rights, (May 22, 2004), art. 14 (1)(2)(6), reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005) ("Arab Charter").

[6] The ICCPR continues to apply in situations of armed conflict. *See* Legality of the Threat or Use of Nuclear Weapons Advisory Opinion, 1996 ICJ Rep 226, 240 (July 8, 1996) ("[T]he protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency"); *see also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion, 2004 ICJ Rep 136, 178 (July 9, 2004); Human Rights Committee, *General Comment no. 29 on article 4: Derogations during a State of Emergency*, UN Doc CCPR/C/21/Rev.1/Add.11, ¶ 3 (2001). Even then, no derogations are permissible that would purport to justify arbitrary deprivation of liberty, avoid the obligation to provide an effective remedy as required by article 2(3), or deny the right of access to a court to challenge the lawfulness of detention as required by article 9(4): *General Comment no. 29*, at ¶¶ 11, 14, 16.

On matters where more detailed provisions apply under international humanitarian law, as with the grounds and procedures for detention of individuals recognized as prisoners of war in an international armed conflict as specified in the Third Geneva Convention, these may give a

two distinct senses in which a detention may be deemed arbitrary within the meaning of article 9(1). First, because the basis for any deprivation of liberty must be established by law, any detention which is not supported by a clearly established provision of national law is arbitrary and, therefore, in breach of the obligations contained in ICCPR article 9(1).[7] Second, arbitrariness may arise either from the substantive grounds invoked in justification of any deprivation of liberty, or from the procedure for establishing whether those grounds actually apply to an individual instance of detention (or from both). The test as to whether the grounds or procedure is arbitrary involves more than a mere consideration as to whether the

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particular contextual meaning to the terms of human rights law. *See* Nuclear Weapons Advisory Opinion, at 240; Legal Consequences of the Construction of a Wall Advisory Opinion, at 178. It is the understanding of *amici* that the Government has not asserted that the Petitioners were detained as prisoners of war under the Third Geneva Convention. International human rights law has a particularly important role to play on matters unaddressed by international humanitarian law, as for instance with respect to the grounds and procedures for detaining individuals in a non-international armed conflict, where it is presumed that national laws that comply with international human rights norms will continue to regulate. *See* Gabor Rona, *An Appraisal of U.S. Practice Relating to 'Enemy Combatants'*, 10 Y.B. INT'L HUMANITARIAN L. 232, 240-41, 248 n.64 (2007).

[7] *See, e.g.*, U.N. Human Rights Committee, *Domukovsky v. Georgia*, UN Doc CCPR/C/62/D/623, 624, 626 & 627/1995, ¶ 18.2 (1998); *Sarma v. Sri Lanka*, UN Doc CCPR/C/78/D/950/2000, ¶ 9.4 (2003); *Ashurov v. Tajikistan*, UN Doc CCPR/C/89/D/1348/2005,¶ 6.4. (2007).

detention violates an express provision of national law, but also consists in an assessment of a broader range of *indicia*, including "inappropriateness, injustice, lack of predictability and due process of law."[8]

The United Nations Human Rights Committee (UN Human Rights Committee), mandated under article 40 of the ICCPR to review the compliance of state parties, has indicated the need for the state to establish that any deprivation of liberty is justified in relation to the particular individual's circumstances and that there are "no less invasive means of achieving the same ends."[9] In addition, given the failure of the Government to invoke any valid basis in national law for the detention of the Petitioners, the situation of the Petitioners' detention—marked by eight years imprisonment during which the continuing legal and factual basis for their deprivation of liberty has

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[8] U.N. Human Rights Committee, *Mukong v. Cameroon*, UN Doc CCPR/C/51/D/458/1991, ¶ 9.8 (1994). *See also A v. Australia*, UN Doc CCPR/C/59/D/560/1993, ¶¶ 9.2-9.4 (1997); *C. v. Australia*, Comm. No 900/1999, UN Doc CCPR/C/76/D/900/1999, ¶¶ 8.2 and 8.3 (2002); *Omar Sharif Baban v. Australia*, Comm. No. 1014/2001, UN Doc CCPT/C/78/D/1014/2001, ¶ 7.2 (2003); *Bakhtiyari v. Australia* Comm. No. 1069/2002, UN Doc CCPR/C/79/D/1069/2002, ¶¶ 9.2-9.4 (2003); *Danyal Safiq v. Australia* Comm. No. 1324/2004, UN Doc CCPR/C/88/D/1324/2004, ¶¶ 7.2-7.4 (2006); *Saed Shams and others v. Australia*, Comm. No's. 1255/2004, UN Docs CCPR/C/90/D/1255,1256,1259, 1260, 1266,1268,1270&1288/2004, ¶¶ 7.2-7.3 (2007).

[9] *Shams and others v. Australia*, Comm. No's. 1255/2004, at ¶ 7.2.

never been made clear—must also be evaluated in light of these considerations.

Moreover, the prohibition of arbitrary detention is also a binding rule of customary international law.[10] Indeed, the United States invoked the universal prohibition on arbitrary detention before the International Court of Justice almost thirty years ago, proclaiming that there is "a responsibility under international law, independent of any specific treaty commitment" to adhere to a "minimum standard of treatment which is recognized by the international community as due to all aliens," under which "aliens are entitled to be free from arbitrary ... arrest and detention." *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Memorial of the Government of the United States of America, 181-182 (1980). The duty of every state to respect the right not to be arbitrarily detained is "reflected, inter alia, in the Charter of the United Nations, the Universal Declaration of Human Rights and corresponding portions of the International Covenant on Civil and Political Rights, regional conventions and other instruments defining basic human rights." *Id.*

In the time since the United States made this argument before the International Court of Justice, the international community has only strengthened its commitment to the universal prohibition on arbitrary detention. As of December

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[10] U.N. Human Rights Committee, *General Comment No. 29*, UN Doc CCPR/C/21/Rev.1/Add.11 at ¶ 11; *Restatement (Third) of Foreign Relations Law of the United States* §702 (1987).

7, 2009, 165 countries had become party to the ICCPR, including the United States in 1992. The ICCPR establishes not only the right to be free from arbitrary detention, as recognized in article 9(1), but also requires each state party to provide effective remedies for all such violations (article 2(3)),[11] and specifically provides for meaningful judicial review of the legality of all detention, including the right of the court to order the release of any individual whose detention has been found to be unlawful (article 9(4)).[12] These obligations are not only treaty obligations affirmatively accepted by the United States without reservation, but are requirements of customary international law binding on all states.

As this Court has long held, international law is an integral part of United States law. *The Paquete Habana*, 175 U.S. 677 (1900). This practice seeks to inform the interpretation and understanding of core legal principles, such as due process and fundamental fairness. Many of this Court's rulings have relied, in part, on a comparative analysis and consideration of the international obligations of the United States.[13]

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[11] *See* Section II, *infra*.

[12] See part III, *infra*.

[13] A plurality of this Court referred to the ICCPR in *Hamdan v. Rumsfeld*, 542 U.S. 507, 633 n. 66 (2006). *See also Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) ("It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains..."); *Roper v. Simmons*, 543 U.S. 551 (2005) ("It does not lessen our fidelity to the Constitution or

The United States has continued to stress its commitment to uphold its obligations under the ICCPR, characterizing that treaty as "the most important human rights instrument adopted since the UN Charter and the Universal Declaration of Human Rights, as it sets forth a comprehensive body of human rights protections" containing "parallels [to] the rights and freedoms protected under the US Constitution."[14]

In respect of the instant case, the Government recognizes that "there is no dispute that 'petitioners should be released.'"[15] Also not in

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our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."); *Lawrence v. Texas*, 539 U.S. 558 (2003) ("The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."); *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (the overwhelming disapproval of the world community in the imposition of the death penalty for offenders with mental disability "lends further support to our conclusion that there is a consensus among those who have addressed the issue."). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 114-15 (1987).

[14] Opening Statement to the U.N. Human Rights Committee by Matthew Waxman, Principal Deputy Director of Policy Planning at the Department of State, Head of US Delegation, Geneva, Switzerland, July 17, 2006, *available at* http://2001-2009.state.gov/g/drl/rls/70392.htm.

[15] *Kiyemba v. Obama*, Case No. 08-1234. *Brief for the Respondents in Opposition*, 8 (2009). For the purposes of the questions considered in this brief, *amici* do not address the question as to whether Petitioners' initial arrests were lawful or at which point during their eight-years the detentions

dispute is the fact that obstacles remain to the transfer of detainees to their home country or to third countries. Petitioners' detention is necessarily arbitrary and unlawful, where the sole reason they are deprived of liberty is that they are non-nationals whose removal to their home state or a third country is legally or factually precluded by a risk of torture in their home state and non-cooperation by third states. *See* Report of the UN Working Group on Arbitrary Detention to the General Assembly, UN Doc. A/HRC/10/21, ¶ 67 (Feb. 16, 2009).

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became unlawful, as *amici* do not understand those issues to have been placed before the Court in this hearing.

II.
STATES MUST PROVIDE EFFECTIVE REMEDIES AND REPARATION TO INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW.

International law requires that a person who is arbitrarily detained have access to an effective remedy, procedurally in the form of access to a judicial body, and substantively, through cessation of the unlawful detention. In concrete terms, this obligation entails immediate release of the person from the arbitrary detention. This result is required by general principles of international law and is binding on the United States through its ratification of the ICCPR.

The right to an effective remedy is a cardinal rule of international human rights law. It is prescribed in all major universal and regional human rights treaties.[16] It is also a rule of customary international law.[17]

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[16] *See e.g.*, ICCPR, art. 2(3); Convention against Torture, art. 13; European Convention, art.13; American Convention, arts. 7(1)(a) and 25; African Charter, art. 7(1)(a); Arab Charter, art. 9. It is also recognized in non-treaty instruments. *See* Universal Declaration of Human Rights GA res. 217A (III), UN Doc A/810 at 71, art. 8 (1948); the American Declaration of the Rights and Duties of Man O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003); 43 AJIL Supp. 133, article XVIII (1949).

[17] *Cantoral Benavides Case*, Judgment of Dec. 3, 2001, Inter-Am Ct. H.R. (Ser. C) No. 88, ¶ 40 (2001) ("Article 63(1) of the American Convention embodies a rule of customary law that is one of the basic principles of contemporary international

The recognition in international law that individuals have a right to an effective remedy for violations of their internationally protected human rights is a particularized application of rules originally developed in the context of inter-state responsibility.[18] An examination of the principles governing effective remedies under international

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law as regards the responsibility of States. When an unlawful act imputable to a State occurs, that State immediately becomes responsible in law for violation of an international norm, which carries with it the obligation to make reparation and to put an end to the consequences of the violation."). *See also, The "White Van" Case (Paniagua Morales et al.)*, Inter-Am Ct. H.R. Judgment of May 25, 2001 (Reparations), Series C No. 76, ¶ 78 (2001). *See also* M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203, 218 (2006); CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES, Rule 150, 537-550 (Jean-Marie Henckaert & Louise Doswald Beck, eds. 2005).

[18] *See e.g., Chorzów Factory (Germany v Poland)*, Indemnity PCIJ (ser. A) No. 17, ¶ 21 (1928) ("[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation in an adequate form."). Among the many cases to apply this rule is *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v Uganda), 2005 I.C.J. 116, 82, ¶ 259 (Dec. 19, 2005). *See also* Article 31 of the Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UN General Assembly Res 56/83, (Dec. 12, 2001), as corrected by UN Doc A/56/49(Vol.I)/Corr.4, with *Commentary* by the International Law Commission, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10, 223-231 (2001) ("Articles on Responsibility of States for Internationally Wrongful Acts and *Commentary*"); Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, Judgment of July 21, 1989 (Reparations), Inter-Am. Ct. H.R. (Ser. C) No. 7, at ¶ 25 (1989).

law supports the conclusion that any effective remedy for detention without legal basis must involve the immediate release of the individual from detention.

ICCPR article 2(3)(a) requires States to provide individuals with an effective remedy for any violation of the human rights recognized and protected by the treaty. Article 2(3)(c) further provides that "the competent authorities shall enforce such remedies when granted."[19] These provisions give effect to the general right under international law of individuals to an effective remedy for violation of human rights. The elements of the right to an effective remedy in any particular case will involve taking the steps necessary to bring the violation of international law to an immediate end (cessation),[20] and to repair the violation either through restitution, compensation, rehabilitation, satisfaction or guarantees of non-

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[19] The right to an effective remedy is so fundamental that it is not subject to total exception or suspension, even during times of national emergency. *See* U.N. Human Rights Committee, *General Comment No. 29* at ¶ 14. *See also* Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, Comm. No 900/1999, ¶¶ 24-25 (1987).

[20] Articles on Responsibility of States for Internationally Wrongful Acts and *Commentary*, art. 30 at 216-222; DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW, 149 (2005); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* Advisory Opinion, 1971 I.C.J. 16 at ¶ 54 (1971).

repetition; or through an appropriate combination of these forms.[21]

In the instant case, cessation and restitution are needed to remedy the violation of deprivation of liberty of the detainees. Restitution seeks to restore a victim to the position he or she was in before the violation occurred.[22] As enunciated in 1928 by the Permanent Court of International Justice in the *Chorzów Factory Case*:

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular in the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe all of the

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[21] *See* U.N. Human Rights Committee, *General Comment No. 31 on the nature of the general legal obligation imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, at ¶ 16; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Basic Principles on the Right to a Remedy"), adopted by consensus and proclaimed by UN General Assembly resolution 60/147 of Dec. 16, 2005, Principles 18-23. *See also*, Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (Ser. C) No. 7, at ¶ ¶ 25-26; European Court of Human Rights, *Papamichalopoulos and Others v. Greece (Article 50)*, Eur. Ct. H.R. Application no. 14556/89 (Judgment of Oct. 31, 1995), Series A No. 330-B,¶ 34 (1995).

[22] Articles on Responsibility of States for Internationally Wrongful Acts and *Commentary*, art. 35 at 237-43.

> consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[23]

The UN Basic Principles on the Right to a Remedy, agreed upon by all states including the United States in 2005, provide that "restitution should, whenever possible, restore the victim to the original situation before the... violations ...occurred. Restitution includes, as appropriate: *restoration of liberty*, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property."[24]

To be "effective," the remedy must not be merely theoretical or illusory. The individual must have practical and meaningful access to a procedure that is capable in principle of ending and repairing the effects of the violation. Where a violation is established the individual must be granted a remedy that actually results in cessation of the violation and the individual must actually receive the relief needed to repair the harm to which he or she has been subjected.[25] The UN

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[23] *Chorzów Factory, (Germany v Poland),* Indemnity PCIJ (ser. A) No. 17 at¶ 47.

[24] Basic Principles on the Right to a Remedy, Principle 19. (emphasis added).

[25] HRC, *General Comment No. 31,* UN Doc CCPR/C/21/Rev.1/Add.13, at ¶ 15. *See also* European Court of Human Rights, *Airey v. Ireland,* Eur. Ct. H.R. (Application no. 6289/73, ¶ 24 (Judgment of Oct. 9, 1979) ("The [European

Human Rights Committee has stressed that even where a State's legal system is formally endowed with what may seem on the surface to be appropriate avenues for seeking a remedy, such remedies must "function effectively in practice,"[26] in other words, such remedies must be "accessible, effective and enforceable"[27] if they are to satisfy the requirements of ICCPR article 2(3). Regional human rights bodies, including the Inter-American Court of Human Rights ("Inter-American Court), the European Court of Human Rights ("European Court"), and the African Commission on Human and People's Rights have also all held that an effective remedy must be capable of providing real relief.[28] The consistency of this principle across

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Convention] is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.").

[26] *General Comment No. 31*, UN Doc CCPR/C/21/Rev.1/Add.13 at ¶¶ 15 and 20

[27] *See e.g., George Kazantzis v. Cyprus*, Comm. No. 972/2001, UN Doc CCPR/C/78/D/972/2001, ¶ 6.6 (Aug. 7, 2003); *Yasoda Sharma v. Nepal*, Comm. No. 1469/2006, UN Doc CCPR/C/94/D/1469/2006, ¶ 9.6. (Oct. 28, 2008).

[28] Inter-American Court of Human Rights, *Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, Comm. No 900/1999, ¶ 24; European Court of Human Rights, *Silver v. the United Kingdom*, Eur. Ct. H.R Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, ¶ 113 (Judgment of Mar. 25, 1983); African Commission on Human and Peoples Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, Principle C(a) (2001).

universal and regional legal systems is evidence of its character as a norm of customary international law.

For a court to provide an effective remedy, it may be necessary in particular circumstances to provide direction as to the specific measures the government must take to end the unlawful situation. In the *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, for instance, in which the United States sought a remedy for the unlawful deprivation of liberty of its nationals, the United States submitted that:

> A declaration by the Court as to the applicability of the relevant treaty provisions to the conduct involved will remove any uncertainty as to the legal status of that conduct but cannot of itself constitute appropriate satisfaction in a case of this kind... Iran is engaged in continuing, damaging, illegal conduct, of an irreparable character and it is therefore incumbent upon the Court to prescribe... the specific steps which Iran must take to cease its violations of its international obligations. The Court should declare not only that the existing situation is illegal but that Iran must bring that situation to an end – and at once.[29]

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[29] *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, 1979 I.C.J. 23, ¶ 187-88 (1979).

The International Court of Justice held that Iran had violated its international obligations to the United States and consequently had to cease this violation and to "immediately release" those held in unlawful detention.[30] Human rights bodies, too, have repeatedly held that the remedy to a detention that lacks a basis in law is to bring the detention to an end, i.e. through the "immediate release" of the detainee.[31]

As mentioned above, in addition to the general duty to provide an effective remedy under ICCPR article 2(3), a specific right to effective *habeas corpus* relief was considered so important by the drafters of the ICCPR that it was expressly provided for in article 9(4). The provisions are

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[30] *Id.* at ¶ 95(3)(a).

[31] *See, e.g.*, UN Human Rights Committee, *Weinberger Weisz v. Uruguay*, UN Doc CCPR/C/11/D/28/1978, ¶ 17 (Oct. 29, 1980); *Lopez Burgos v. Uruguay*, UN Doc CCPR/C/13/D/52/1979, ¶ 14 (July 29, 1981); *El-Megreisi v. Libya*, UN Doc CCPR/C/50/D/440/1990, ¶ 7 (Mar. 24 1994); *Sarma v. Sri Lanka*, UN Doc CCPR/C/78/D/950/2000, at ¶ 11; *Grioua v. Algeria*, UN Doc CCPR/C/90/D/1327/2004, at ¶ 9 (Aug. 16, 2007); European Court of Human Rights, *Ilaşcu and others v. Moldova and Russia*, Eur. Ct. H.R. Application no. 48787/99, ¶ 490 (Judgment of July 8, 2004). Inter-American Court Human Rights, *Loayza Tamayo Case*, Judgment of Sept. 17, 1997, Int-Am. Ct. H.R. (Ser. C) No. 33, ¶¶ 83-84 and operative ¶ 5 (2000); African Commission on Human and Peoples' Rights, *Constitutional Rights Project and Civil Liberties Organization v. Nigeria*, Communication 102/93, ¶ 55 and the concluding "Appeal" (24th Ordinary Session, Oct 1998); *Constitutional Rights Project v. Nigeria*, Communication 148/96 (26th Ordinary Session, Nov. 1999).

mutually reinforcing: failure to comply with article 9(4) can also constitute denial of a right to an effective remedy.[32] The following section focuses on the rules of international law reflected in article 9(4) and the similar provisions in the regional treaties.

III.
INTERNATIONAL HUMAN RIGHTS LAW PROTECTS AGAINST ARBITRARY DETENTION BY REQUIRING EFFECTIVE JUDICIAL CONTROL AND THE IMMEDIATE RELEASE OF ANYONE FOUND TO BE UNLAWFULLY DEPRIVED OF LIBERTY.

The individual's right to have a judicial order for his or her release if the detention is not lawful is expressly provided for in article 9(4) of the ICCPR:

> 9(4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

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[32] Human Rights Committee, *Luyeye Magana ex-Philibert v. Zaire*, Comm. No. 90/1981, U.N. Doc. CCPR/C/OP/2, ¶ 124 (1990); *Baritussio v. Uruguay (Carmen Amendola Masslotti and Graciela Baritussio v. Uruguay)*, Comm. No. R.6/25, U.N. Doc. Supp. No. 40, A/37/40, ¶ 187 (1982). *See also Castillo Petruzzi et al v. Peru*, May 30, 1999 Inter-Am. Ct. H.R. (Ser. C) No. 52, ¶¶ 174, 188 (1999).

The express inclusion of the requirement that the court order release in all cases of unlawful deprivation of liberty makes clear that it is the court, and not the executive, that is to have the ultimate say as to whether or not the state may continue to deprive any given individual of his or her liberty. It is not enough that the court be empowered to state its opinion on the lawfulness of the detention; it also must have the ability actually to effectuate the release by order.

The UN Human Rights Committee has underscored that procedures that meet the requirements of article 9(4) in form but not in substance do not fulfil a state's obligations. In *A v. Australia*, the Committee emphasized that:

> what is decisive for the purposes of [art. 9(4)] is that such review is, *in its effects, real and not merely formal.* By stipulating that the court must have the power to order release "if the detention is not lawful," article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant.[33]

In subsequent cases (until it ultimately amended its domestic legal framework), the

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[33] *A v. Australia*, UN Doc CCPR/C/59/D/560/1993, at ¶ 9.5 (emphasis added).

Australian government conceded that in order to satisfy the requirements of article 9(4) a court "must be able to consider the detention and *must have the real and effective power to order the detainee's release*" if the detention is unlawful.[34]

The UN Human Rights Committee has sometimes found that "the inability of the judiciary to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4."[35] In *Baritussio v. Uruguay (Carmen Amendola Masslotti and Graciela Baritussio v. Uruguay*, Comm. No. R.6/25, U.N. Doc. Supp. No. 40, A/37/40, ¶ 187 (1982), Ms. Baritussio, having completed a prison sentence imposed by a military court for "complicity in a subversive association," was ordered released from prison by the order of the military court. The decision ordering release became enforceable and final in 1975, but she was transferred to another military establishment where she was held until finally released in 1978. Her lawyer made numerous representations to the military judges responsible for her case, but he was informed that, if the prison authorities did not comply with the court's release order, the judges could do no more. The UN Human Rights Committee found Ms. Baritussio's continued detention to have constituted a violation of ICCPR article 9(1) (*i.e.*

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[34] *Shams v. Australia*, Comm. No's. 1255/2004, at ¶ 4.13 (emphasis added).

[35] *C v. Australia* Comm. No 900/1999, at ¶ 8.3; *Shams v. Australia*, Comm. No's. 1255/2004, at ¶ 7.3.

arbitrary detention) and found that the inability of a court to achieve her release during that period constituted a violation of ICCPR article 9(4) in conjunction with article 2(3).[36]

The requirements set out in ICCPR article 9(4) find similar expression in the treaties and jurisprudence of the various regional human rights systems, suggesting that all reflect a common underlying norm of customary international law.[37] Article 5(4) of the European Convention on Human Rights states, in substantially the same terms as article 9(4) of the ICCPR, as follows: "5(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The petitioners to the European Court of Human Rights in the case of *A and others v. The United Kingdom*, App no. 3455/05 (Judgment of

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[36] In *Leopoldo Buffo Carballal v. Uruguay*, Comm. No. 33/1978, UN Doc CCPR/C/12/D/33/1978 (Apr. 8, 1981), after six or seven months of detention in military custody purportedly based on allegations that he was involved in "subversive activities", the complainant was brought before a military court and notified that his release had been ordered. He was nevertheless held for a further six or seven months in spite of the order. The Committee found his continued detention after the release order to constitute a violation of article 9(1), and found a violation of article 9(4) as such detainees were not able to bring applications for *habeas corpus*.

[37] *See generally* NIGEL S. RODLEY & MATT POLLARD, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW, 460-93 (3d ed. 2009).

Feb. 19, 2009), in addition to challenging the basis for the system of indeterminate national security detention to which they had been subjected, argued that the review processes available to them before domestic courts violated article 5(4) of the European Convention because those courts had the power only to make declarations that their detention was incompatible with the European Convention, and had no power to actually order their release if the detentions were unlawful. The Grand Chamber of the European Court characterized article 5(4) as recognizing the right of anyone deprived of liberty "to bring proceedings to test the legality of the detention *and to obtain release* if the detention is found to be unlawful." *Id.* at ¶ 200 (emphasis added). The European Court emphasised that a court conducting the review "must not have merely advisory functions but must have the competence to 'decide' the 'lawfulness' of the detention and to order release if the detention is unlawful."[38]

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[38] *Id.* at¶ 202, citing *Ireland v. the United Kingdom*, Eur. Ct. H.R. Application no. 5310/71 (Judgement of Jan. 18, 1978) ¶ 200 (The body to which interned suspected terrorists had the possibility of making representations "could at most recommend, as opposed to order, release" and therefore did not satisfy the requirements of article 5(4)); *Weeks v. the United Kingdom*, Eur. Ct. H.R. Application no. 9787/82 (Judgment of Mar. 2, 1987), ¶¶ 61, 64, 68, Series A no. 114; *Chahal v. The United Kingdom*, ¶ 130. *See also, X v. the United Kingdom* Eur. Ct. H.R. Application no. 7215/75, ¶ 61 (Judgement of Nov. 5, 1981) (finding a violation of article 5(4) because the Mental Health Review Boards in question lacked the competence to decide the lawfulness of the detention and to order release if the detention was unlawful, and thus had essentially advisory functions only).

In *Ismoilov and Others v. Russia* (Application no. 2947/06), Judgment of Apr. 24, 2008, the European Court said in relation to article 5(4): "A remedy must be made available during a person's detention to allow that person to obtain speedy judicial review of the lawfulness of the detention, *capable of leading, where appropriate, to his or her release.* The existence of the remedy required by Article 5 § 4 *must be sufficiently certain, not only in theory but also in practice, failing which it will lack the* accessibility and *effectiveness* required for the purposes of that provision."[39]

The European Court also found a violation of article 5(4) in *Benjamin & Wilson v the United Kingdom*, Application no. 28212/95 (Sept. 26, 2002).

In *A and others v. The United Kingdom* itself, the European Court ultimately found the detention regime itself to violate the European Convention because it was incompatible with article 5(1) of the Convention, and was not a valid derogation on grounds of national emergency in that it discriminated unjustifiably between nationals and non-nationals. *Id.* at ¶ 190. As regards article 5(4), the European Court stated that in light of the finding of a violation of article 5(1) it did not consider it necessary to reach a separate finding under Article 5 (4) in connection with the applicants' complaints that the UK courts were unable to make a binding order for their release, though it did find a violation based on the unfairness of the review procedure in question. *Id.* at ¶ 213.

[39] *Id.* at ¶ 145 (emphasis added). The European Court ultimately found a violation of article 5(4) on the ground that none of the procedures cited by the Russian government conducted a substantive review of the petitioners' individual cases. *Id.* at ¶ 152.

There, the applicants were faced with the possibility of having their continued detention in a hospital reviewed by an independent Mental Health Review Tribunal which had the power to make a recommendation, but no power to order the executive actually to effectuate their release. The government argued that the Secretary of State "followed a practice of following the Tribunal's recommendation" and thus the lack of power actually to order release did not deprive the Tribunal's review of an effective decision-making function.[40] The European Court rejected this argument, noting that "the plain wording" of article 5(4) "refers to the decision-making power of the reviewing body." That article, said the European Court, "presupposes the existence of a procedure in conformity with its provisions without the necessity to institute separate legal proceedings in order to bring it [release] about."[41] The fact that "the decision to release would be taken by a member of the executive and not by the Tribunal" was not merely a matter of form, the European Court said; it "impinges on the fundamental principle of separation of powers and detracts from a necessary guarantee against the possibility of abuse."[42]

In *Assanidze v. Georgia* (Application no. 71503/01), Apr. 8, 2004, there was some ambiguity before the Court as to the degree of control that the

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[40] *Id.* at ¶¶ 35-36.

[41] *Id.* at ¶ 36.

[42] *Id.*

central executive government was able actually to exercise over the local authorities detaining the complainant, the particular constitutional status of that region, and the validity of a presidential pardon under national law. However, the Court pointed out that the internal structure of the state was of no relevance to the question of whether the actions of any particular body within the government were consistent with the state's international obligations.[43] The European Court's

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[43] *Id.* at ¶¶ 132-150 (emphasis added). *See also* Article 32 of the Articles on State Responsibility for Internationally Wrongful Acts, and *Commentary*, art. 32 at 231-233; Permanent Court of International Justice, *Treatment of Polish Nationals in Danzig case*, Series A/B no. 44, 24 (1932); and Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 27 (1969). The United States has signed but not ratified the treaty, but "The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties." *See* US Department of State, Vienna Convention on the Law of Treaties, *available at* http://www.state.gov/s/l/treaty/faqs/70139.htm.

This point is also of significance to the issue of whether an order that an individual be released in the mainland United States is precluded by operation of the allocation of responsibility over immigration matters under US law. Interpretation or application of internal statutory or constitutional provisions to exclude a court from evaluating and remedying in substance the compatibility of a detention with national and international law cannot be invoked as a matter of international law to justify the failure of a court to conduct a substantive review of the lawfulness of detention and to order release if the detention is found to be unlawful. *See* U.N. Human Rights Committee, *A v. Australia*, UN Doc CCPR/C/59/D/560/1993, at ¶ 9.5 ("court review of the lawfulness of detention under article 9, paragraph 4, which

conclusion on the law could not have been clearer: "As to the conformity of the applicant's detention with the aim of Article 5 to protect against arbitrariness, the Court observes that *it is inconceivable that in a State subject to the rule of law a person should continue to be deprived of his liberty despite the existence of a court order for his release.*"[44] Yet that would be precisely the result in the present case were the Government's argument to be accepted.

The same principles are applied in the regional human rights system for the Organisation of American States. Though the United States of America has not as yet ratified the American Convention on Human Rights, the jurisprudence of the Inter-American Court of Human Rights is relevant because article 7(6) of the Convention is substantially the same as article 9(4) of the ICCPR, providing in relevant part: "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide

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must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law... article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements of in article 9, paragraph 1, or in other provisions of the Covenant."); European Court, *A and others v. The United Kingdom*, App no. 3455/05, at ¶ 202 ("the arrested or detained person is entitled to a review of the 'lawfulness' of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5§1").

[44] *Id.* at¶ 173; *see also id.* at ¶¶ 185-187.

without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful."[45]

In its *Advisory Opinion on Habeas Corpus in Emergency Situations, Opinion OC-8/87*, of Jan. 30, 1987, Series A No. 8, ¶ 40, the Inter-American Court stated that "in a system governed by the rule of law it is entirely in order for an autonomous and independent judicial order to exercise control over the lawfulness of such measures by verifying, for example, whether a detention based on the suspension of personal freedom complies with the legislation authorized by the state of emergency" and that "[i]n this context, *habeas corpus* acquires a new dimension of fundamental importance."

The Inter-American Court has repeatedly stressed that *habeas corpus* procedures must actually be capable of obtaining an effective remedy. In cases of unlawful detention, an effective

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[45] Further, Article XXV of the American Declaration of the Rights and Duties of Man provides in relevant part: "No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law... Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released." While the Declaration is not a treaty, it does define certain human rights obligations of member states of the OAS, including the United States of America, under the Charter of the OAS: See Inter-American Court of Human Rights, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights.* Advisory Opinion OC-10/89 Int-Am. Ct. H.R. July 14, 1989, (Ser. A) No. 10, ¶¶ 39-47 (1989).

remedy necessarily entails the immediate release of the individual. It has drawn an explicit link between the *habeas* provision in article 7(6) and the general requirement for judicial guarantees in article 25 of the American Convention, and has emphasized that "it is not enough for the remedies to exist formally, as they *must yield positive results or responses to human rights violations, for them to be deemed effective.*"[46] It has said that "the right enshrined in article 7(6) of the American Convention is not exercised with the mere formal existence of the remedies it governs...[t]hose remedies must be effective."[47] Where a person is "in the power of agents of the State", the State must "create the necessary conditions for any remedy to attain effective results" as part of its obligations under articles 7(6) and 25.[48]

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[46] *Juan Humberto Sánchez v Honduras*, Int-Am. Ct. H.R. Judgment of June 7, 2003, (Ser. C) No. 99, ¶ 121 (2003) (emphasis added). *See also Bámaca Velásquez v Guatemala*, Int-Am. Ct. H.R. Judgment of Nov. 25, 2000, Series C No. 70, ¶ 191 (2000).

[47] *Suárez-Rosero v. Ecuador*, Int-Am. Ct. H.R. Judgment of Nov. 12, 1997, (Ser. C) No. 35, ¶ 63 (1997).

[48] *Juan Humberto Sánchez v. Honduras*, (Ser. C) No. 99, at ¶ 85 (emphasis added), citing *Bámaca Velásquez*, , Series C No. 70,¶ 194; and *Case of the "White Van" (Paniagua Morales et al. v. Guatemala)*, Int-Am. Ct. H.R. Judgment of Mar. 8, 1998, Series C No. 37, ¶ 167 (1998). *See also Tibi v. Ecuador*, Int-Am. Ct. H.R. Judgment of Sept. 7, 2004, Series C No. 114, ¶¶ 123-137 (2004); *Acosta-Calderón v. Ecuador*, Int-Am. Ct. H.R. Judgment of June 24, 2005, Series C No 129, ¶¶ 85-100 (2005).

IV.
THE ORDER OF THE DISTRICT COURT WAS THE ONLY CERTAIN, PROMPT AND EFFECTIVE RELIEF AVAILABLE IN THE CIRCUMSTANCES

In the instant case, the Government essentially proposes to treat orders for release, issued by a court following a *habeas* review in which the detention of the individuals has been found to be unlawful, as *not* requiring that the individuals' physical liberty be restored, unless and until the executive decides to give effect to the order at some unspecified future date (perhaps never). This flies in the face of the requirement that a court conducting *habeas* review must be able to remedy unlawful detention with an order that is both real and effective (as required under ICCPR article 9(4) and customary international law). The continued indefinite detention of such individuals also constitutes a failure to provide an effective remedy to bring their arbitrary detention to an end and provide restitution in the form of restoration of their liberty (as required *inter alia* under ICCPR article 2(3) in combination with 9(1)). If the only order guaranteed to achieve the immediate release of the individuals is an order in a form that expressly directs their release in the mainland United States, then the court must be empowered to make such an order if the United States is to fulfil its obligations under international law. The Court should avoid any interpretation of judicial

powers that would prevent a court from making the only order that can fulfil such solemn obligations.

Here a number of circumstances combine to limit the range of effective remedies available. International law prohibits the transfer of individuals to the territory or custody of a state where they would face a real risk of torture. Sources of that prohibition include: the express provision of the UN Convention against Torture article 3 ("No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture"); ICCPR article 7 as interpreted and applied by the UN Human Rights Committee ("States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*");[49] and customary international law.[50]

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[49] *General Comment No. 20*, U.N. Doc. HRI/GEN/1/Rev.1 at ¶ 9 (1992); *see also General Comment No. 31*, UN Doc CCPR/C/21/Rev.1/Add.13, at¶ 12 (2004) ("[T]he article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.").

No third states without such risk, that were willing to take the Petitioners, had been identified at the time of the order. The Government invokes the impossibility of permitting the petitioners to move freely about the Naval Station at Guantánamo Bay.

It inexorably follows that there is only one form of order that can possibly satisfy the requirements of certainty, promptness, and effectiveness in the circumstances of these particular cases: release in the mainland United States. If the Government refuses to implement any general order for immediate release by exercising this one available option to achieve it, then the Court must have the power to make the order specifically directing release in the mainland United States. Otherwise, the courts' authority, the value of the right to individual liberty, the obligations owed to every human being under international human rights law, and the rule of law itself, are deprived of real meaning.

The United States brought the petitioners against their will into its exclusive jurisdiction and custody, and transported them from a territory where they had previously been at liberty to territory under its exclusive control and *de facto* jurisdiction where they now find themselves. The case may therefore be distinguished from cases of detention pending deportation in which an

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[50] Elihu Lauterpact & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement, in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHRC'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 155-164 (E. Feller, et al. eds. 2003). The prohibition against *refoulement* applies also to a range of violations of human rights other than torture or other ill-treatment.

individual has sought unlawful access to a country.[51]

In the case of a finding of detention without legal basis, the result required both as a matter of effective remedy and as matter of real *habeas corpus* review must be the immediate restitution to liberty of those unlawfully held. Any other result would render the judicial supervision of these detainees' detention simply illusory.

The inability to find a third state willing to accept the individuals on its territory in lieu of release to US territory did not free the United States from the obligation to provide effective relief. Taking into account that remedies should be commensurate to the gravity of the violation of rights that an individual has suffered,[52] the need for immediate and effective relief in the form of actual restoration of the liberty they formerly enjoyed is even more urgent in cases such as those before the Court today, where the individuals have already been held in detention for many years.

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[51] *Amici* make no submissions here on the situation of individuals who voluntarily seek to enter a state's territory without following lawfully required procedures, other than to point out that cases decided in that context should not govern the very different facts of the present case.

[52] Basic Principles on the Right to a Remedy, adopted by consensus and proclaimed by UN General Assembly resolution 60/147, Dec. 16, 2005, Principle 15; *see also* MANFRED NOWAK, COVENANT ON CIVIL AND POLITICAL RIGHTS: COMMENTARY 70 (2d ed. 2005).

CONCLUSION

For the reasons set out above, *amici* respectfully submit that this Court should reverse the judgment below and uphold the jurisdiction of the District Court to make the order challenged by the Government in these proceedings.

December 11, 2009

Respectfully Submitted,

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APPENDIX

AMNESTY INTERNATIONAL

Amnesty International (AI) is a worldwide movement of people who aim to secure respect by states and non-state actors for internationally recognized human rights and international humanitarian law. AI conducts research into violations and abuses of human rights and publicizes its findings to 2.2 million members, supporters and subscribers in over 150 countries, who mobilize the public to achieve better protection for individuals as well as systemic reforms. The organization works independently and impartially to promote respect for human rights, based on research and international standards agreed by the international community. It does not take a position on the views of persons whose rights it seeks to protect.

INTERNATIONAL COMMISSION OF JURISTS

International Commission of Jurists (ICJ) is an international non-governmental organization dedicated to the promotion and observance of the rule of law and human rights. The ICJ was created in 1952 and is integrated by 60 well-known jurists representing different legal systems. It has its headquarters in Geneva, Switzerland, has three regional offices, and approximately 90 national sections and affiliated organizations throughout the globe. It enjoys consultative status before the

United Nations Economic and Social Council, UNESCO, the Council of Europe and the Organizations of African Union. It maintains cooperation ties with the Organization of American States. The ICJ also provides legal expertise in international law in the context of national and international litigation.

HUMAN RIGHTS WATCH

Human Rights Watch (HRW) is one of the leading independent organizations dedicated to defending and protecting the human rights of people around the world. For over 30 years, HRW has investigated and exposed human rights violations and challenged governments to end abusive practices, respect human rights, and hold abusers accountable. To fulfill its mission, HRW investigates allegations of abuse by gathering information from governmental and other sources, interviewing witnesses, and issuing detailed reports. Where abuses of human rights are found, HRW advocates for the victims before governmental officials and in the court of public opinion.

CERTIFICATE OF COMPLIANCE

No. 08-1234

JAMAL KIYEMBA, *et al.*,
Petitioner,

v.

BARACK H. OBAMA, *et al.*,
Respondents.

As required by Supreme Court Rule 33.1(g)(xiii) and Rule 33.1(h), I certify that the Brief of Amici Curiae Amnesty International, Human Rights Watch, International Commission of Jurists in Support of Petitioners contains 8,858 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of December, 2009.

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Attorneys for Amici Curiae
Amnesty International, Human
Rights Watch, International
Commission of Jurists

CERTIFICATE OF SERVICE BY MAIL
(Declaration under 28 U.S.C. § 1746)

In Re: BRIEF OF *AMICI CURIAE*; No. 08-1234
Caption: Jamal Kiyemba, et al. v. Barack H. Obama, et al.
Filed: IN THE SUPREME COURT OF THE UNITED STATES

I, E. Gonzales , hereby declare that: I am a citizen of the United States and a resident of or employed in the County of Los Angeles. I am over the age of 18 years and not a party to the said action. My business address is 900 Wilshire Blvd., Suite 1530, Los Angeles, California 90017. On this date, I served the within document on the interested parties in said action by placing three true copies thereof, with priority or first-class postage fully prepaid, in the United States Postal Service at Los Angeles, California, in sealed envelopes addressed as follows:

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(Service continued on Page 2.)

That I made this service for Paul L. Hoffman, Counsel of Record, Schonbrun DeSimone Seplow Harris & Hoffman, LLP, Attorneys for *Amici Curiae* herein, and that to the best of my knowledge all persons required to be served in said action have been served. That this declaration is made pursuant to United States Supreme Court Rule 29.5(c).

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 11, 2009, at Los Angeles, California.

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