IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KARIN BOSTAN, Petitioner, v. BARACK OBAMA, President of the United States, *et al.*, Respondents.	Civil Action No. 05-cv-0883 (RBW)
ISSAM HAMID ALI BIN ALI AL JAYFI, *et al*, Petitioners, v. BARACK OBAMA, President of the United States, *et al.*, Respondents.	Civil Action No. 05-cv-2104 (RBW)
MAHER EL FALESTENY, *et al.*, Petitioners, v. BARACK OBAMA, President of the United States, *et al.*, Respondents.	Civil Action No. 05-cv-2386 (RBW)

RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION ENFORCING THIRD GENEVA CONVENTION

Petitioners assert that the conditions of their confinement violate the Third Geneva Convention,[1] and that this alleged treaty violation is remediable under the federal habeas statute, 28 U.S.C. 2241(c)(3). *See* Supplemental Mem. in Supp. of Mot. for a Prelim. Inj. Enforcing Third Geneva Convention, Civ. No. 05-2386, Mar. 3, 2009 (Dkt. No. 1084) ("Supplemental Memorandum") at 4-5, 17-19; Mot. for a Prelim. Inj. Ordering Resp'ts to Cease Violations of the Geneva Conventions and to Treat Pet'r El Falesteny as a Prisoner of War, Civ. No. 05-2386, June 2, 2008 (Dkt. No. 440, filed with the Court Security Office) ("Motion for a Preliminary Injunction"). Compliance with the Third Geneva Convention constitutes an important and longstanding commitment of the United States. *See, e.g.*, Department of the Army, Field Manual 27-10, The Law of Land Warfare (July 1956) (published shortly after the Geneva Conventions came into force for the United States); Department of Defense Directive 5100.77, DoD Law of War Program (Nov. 5, 1974, last reissued May 9, 2006) (prescribing that Department policy is to "comply with the law of war in the conduct of military operations and related activities in armed conflict however such conflicts are characterized" and that "[t]he Armed Forces of the United States will insure that programs to prevent violations of the law of war to include training and dissemination as required by the Geneva Conventions . . . are instituted and implemented."). Indeed, just two days after taking office, the President issued an Executive Order addressing the treatment of persons in United States custody "to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions." Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan 22, 2009) Introduction. This Executive Order provides that:

[1] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 ("Third Geneva Convention").

> Consistent with the requirements of . . . Common Article 3 [of the Geneva Conventions] . . . individuals detained in any armed conflict . . . shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.

Exec. Order No. 13,491 at §3(a); *see also id.* at §3(c).

Notwithstanding the Third Geneva Convention's role as a critical compact between the United States and its international partners, however, petitioners cannot use the federal habeas statute to seek relief for detention conditions that are alleged to violate that treaty. The habeas statute can be used only to challenge the fact, duration, or location of confinement, not conditions of confinement. Moreover, Congress has recently and unambiguously precluded reliance on or invocation of the Geneva Conventions in habeas cases or in any other civil action; the Military Commissions Act of 2006 ("MCA") reflects the well-established principle that the Geneva Conventions are not judicially enforceable by private individuals. Despite both the statute and case law, petitioners seek a preliminary injunction addressing conditions of confinement at Guantanamo Bay and enforcing their view of the Geneva Conventions. *See* Motion for a Preliminary Injunction; Supplemental Memorandum. Petitioners' Motion for a Preliminary Injunction should be denied.

ARGUMENT

The Supreme Court recently emphasized that "[a] preliminary injunction is an extraordinary and drastic remedy"—"the exception," rather than "the rule." *Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008). Petitioners, in seeking such a remedy, must satisfy four factors: "1) a substantial likelihood of success on the merits, 2) that [they] would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction." *Katz v. Georgetown Univ.*, 246 F.3d 685, 687 (D.C. Cir. 2001). And, as with any other action, the Court must have jurisdiction to hear the claim asserted in the first instance; even "jurisdictional issues present[ing] questions so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation," are not sufficient to support preliminary injunctive relief. *Munaf*, 128 S. Ct. at 2219. All four elements, as well as jurisdiction, must be established for a preliminary injunction to properly issue.

As explained below, petitioners cannot establish a likelihood of success on the merits.[2] Accordingly, this Court should deny petitioners' Motion.[3]

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[2] Whatever the merits of petitioners' substantive claims that they are wrongfully detained, it is not the likelihood of success on those claims that matters for purposes of the Motion. Rather, the likelihood of success analysis must focus on the legal basis for petitioners to obtain an order addressing their conditions of confinement. *Cf. Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 194 (D.D.C. 2005) (Bates, J.) (in case seeking injunction related to advance notice of any transfer from Guantanamo, Court explains, "[T]he presence of a sound basis to challenge the legality of one's *detention* does not at all imply that there exists a sound basis to challenge the legality of one's *transfer*. Put differently, the 'merits,' if you will, to be assessed for purposes of the present claim for preliminary injunctive relief, is petitioners' challenge to their *transfer* from Guantanamo, not to their *detention* at Guantanamo.") (emphasis in original).

[3] Petitioner El Falesteny attacks virtually every aspect of his detention. *See* Motion for Preliminary Injunction at 1-2. Contrary to petitioners' contention in the Motion for a

I. Habeas cannot be used to challenge conditions of confinement.

The writ of habeas corpus is a means to challenge the fact, duration, or location of detention. *See Boumediene v. Bush*, 128 S. Ct. 2229, 2244 (2008) ("The Framers . . . understood the writ of habeas corpus as a vital instrument to secure . . . freedom"); *Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (Scalia, J., concurring) (noting that conditions of confinement claims in habeas would "utterly sever the writ from its common-law roots"). Thus, in *Miller v. Overholser*, 206 F.2d 415 (D.C. Cir. 1953), the Court of Appeals held that habeas "is not the correct remedy" for challenging "discipline or treatment." 206 F.2d at 419. There, the Court allowed a petitioner to challenge his confinement in a mental institution on the basis that he was not insane, emphasizing that the proceedings "test[ed] only the legality of his . . . confinement" in that location. 206 F.2d at 418. Although the Court of Appeals and the U.S. Supreme Court have not categorically ruled out the possibility that some sort of conditions claims might be brought under habeas, courts typically do not entertain conditions claims through

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Preliminary Injunction, *see* Motion for a Preliminary Injunction at 7, respondents do dispute the alleged factual basis for petitioners' motion. *See* Review of Department Compliance with President's Executive Order on Detainee Conditions of Confinement, Feb, 23, 2009, *available at* http://www.defenselink.mil/pubs/pdfs/REVIEW_OF_DEPARTMENT_COMPLIANCE_WITH_PRESIDENTS_EXECUTIVE_ORDER_ON_DETAINEE_CONDITIONS_OF_CONFINEMENTa.pdf. However, because conditions of confinement claims are not cognizable on habeas, as well as the unequivocal bar presented the MCA (discussed below), respondents do not address petitioners' factual allegations or the related legal standards at this time. Rather, respondents respectfully request that the Court address the threshold issues discussed herein first. If the Court should find that conditions of confinement claims can be adjudicated on habeas and that the plaintiffs' claims are not barred, respondents would seek an opportunity to address the appropriate legal standards and petitioners' factual allegations in an additional submission to the Court.

habeas.[4] Indeed, the majority of Circuits to consider the issue have recognized that claims addressing conditions of confinement are outside the scope of the writ. *See, e.g.*, *Doe v. Pennsylvania Bd. of Probation & Parole*, 513 F.3d 95, 100 n.3 (3d Cir. 2008) (noting that habeas is limited to "[a]ttacks on the fact or duration of the confinement" and does not include "[c]hallenges to conditions of confinement"); *Hutcherson v. Riley*; 468 F.3d 750, 754 (11th Cir. 2006) (explaining that habeas actions challenge "the validity of [a] conviction and/or sentence," rather than "circumstances of . . . confinement"); *Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991) ("Habeas corpus proceedings are the proper mechanism for a prisoner to challenge the 'legality or duration' of confinement," but not to "challeng[e] 'conditions of . . . confinement'") (citation omitted); *accord Williams-Bey v. Buss*, No. 06-4204, 2008 U.S. App. LEXIS 5968 (7th Cir. Cir. Mar. 19, 2008); *Friedman v. Anderson*, No. 07-4161, 2007 U.S. App. LEXIS 22978, at *2 (10th Cir. Sept. 28, 2007); *Schipke v. Van Buren*, No. 06-10897, 2007 U.S. App. LEXIS 20839, at **1-2 (5th Cir. Aug. 30, 2007).

Petitioners' motion here seeks the very relief that courts have held are not cognizable in habeas; they seek a change in their conditions of confinement.[5] Therefore,

[4] *See Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979) (treating as open the question of whether conditions claims are cognizable on habeas); *Blair-Bey v. Quick*, 151 F.3d 1036, 1041-42 (D.C. Cir. 1998) (acknowledging that while habeas "might be available to challenge prison conditions in at least some situations," "pure prison-conditions cases" are "easy to identify" as outside the scope of habeas corpus); *Brown v. Plaut*, 131 F.3d 163 168-69 (D.C. Cir. 1997) (holding that employing habeas proceedings to challenge conditions of confinement would extend "beyond the 'core' of the writ" but acknowledging that "[h]abeas corpus might conceivably be available to bring challenges to . . . prison conditions").

[5] *See, e.g.*, Order, Civ. No. 04-1164, Mar. 27, 2009 (Dkt. No. 207), at 6 n.2 (referring to the "motion regarding the conditions of the petitioners' confinement").

"habeas is not an available remedy" here, and the Court should deny petitioners' motion. *Miller*, 206 F.2d at 419.

II. The Military Commissions Act removes jurisdiction to entertain the substance of petitioners' claims.

As noted above, petitioners style their actions as petitions for habeas corpus, but claims challenging conditions of confinement cannot be asserted through habeas. Moreover, Section 7 of the MCA bars the substantive relief petitioners seek. Through Section 7 of the MCA, codified in 28 U.S.C. § 2241(e)(1) and (2), Congress limited the claims which may be brought by persons classified and detained as enemy combatants. Section 2241(e)(1) addresses applications for the writ of habeas corpus, while Section 2241(e)(2) provides:

> [N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to *any aspect of the detention, transfer, treatment, trial, or conditions of confinement* of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant.

28 U.S.C. § 2241(e)(2) (emphasis added). It is undisputed that the relief petitioners seek—a change in their conditions of confinement—falls within this prohibition. Notwithstanding petitioners' use of the habeas label, their claims are precisely the kind of "other action[s]" prohibited by Section 2241(e)(2). *See Dickerson v. Diguglielmo*, No. 08-2832, 2009 U.S. App. LEXIS 831, at ** 3-4 (3d Cir. Jan 15, 2009) (recognizing that "the label placed on a petition . . . is not determinative," ordering the district court to dismiss a habeas petition for lack of jurisdiction because "[t]he claim [wa]s essentially a challenge to the conditions of confinement and [would] properly [be] brought as a civil rights action," not in habeas).

When they initially filed their motion, petitioners did not dispute that the text of Section 2241(e)(2) bars their claims. Instead, they predicted that *Boumediene* would invalidate Section 2241(e)(2), and they now assert that *Boumediene*'s invalidation of the MCA's withdrawal of habeas jurisdiction "removes any doubt about this [C]ourt's jurisdiction." *See* Supplemental Memorandum at 2-3.

As the Court of Appeals and four Judges of this Court have concluded, however, Section 2241(e)(2)'s removal of jurisdiction remains intact after *Boumediene*. *See* *Kiyemba v. Obama*, No. 05-5487, --- F.3d ----, 2009 WL 910997, at *2 (D.C. Cir. Apr. 7, 2009); *Al-Adahi v. Obama*, No. 08-280, 2009 U.S. Dist. LEXIS at **10-16 (D.D.C. Feb. 10, 2009) (Kessler, J.); *Khadr v. Bush*, 587 F. Supp. 2d 225, 234-37 (D.D.C. 2008) (Bates, J.); *In re Guantanamo Bay Litig.*, 577 F. Supp. 2d 312, 313-14 (D.D.C. 2008) (Hogan, J.); *In re Guantanamo Bay Litig.*, 570 F. Supp. 2d 13, 17-18 (D.D.C. 2008) (Urbina, J.).

In *Kiyemba*, the Court of Appeals noted that, although the Court in *Boumediene* occasionally refers to MCA Section 7 in its decision, rather than singling out a subsection of Section 2241(e), *see*, *e.g.*, 128 S. Ct. at 2274 ("MCA § 7 thus effects an unconstitutional suspension of the writ"), the opinion "clearly indicates it was referring only to that part of § 7 codified at § 2241(e)(1)." *Kiyemba*, 2009 WL 910997, at *2 n.1. Section 2241(e)(2), therefore, survives and bars petitioners' conditions of confinement claims.[6]

[6] The Court of Appeals in *Kiyemba* concluded in that case that although Section 2241(e)(2) addresses transfer claims, that section did not bar consideration of a challenge in habeas to a petitioner's transfer because Section 2241(e)(2) only concerns "any other action," that is any action other than a habeas petition addressed in Section 2241(e)(1). 2009 WL 910997, at *2. The Court went on to note that the petitioners' claims were "not in the nature of an action barred by § 2241(e)(2) because, based upon longstanding

II. The Geneva Conventions are not privately enforceable.

Even if petitioners could use the habeas statute to challenge the conditions of their confinement, they cannot predicate such a challenge on alleged violations of the Third Geneva Convention. Section 5(a) of the MCA provides that

> [n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

28 U.S.C. § 2241 (note). Because this provision bars invocation of the Conventions in all civil proceedings or actions, including habeas cases, petitioners have no likelihood of success on their Motion.

Indeed, in a decision issued yesterday, the Eleventh Circuit ruled that, by its plain terms, Section 5(a) of the MCA precludes habeas claims that seek to enforce the Third Geneva Convention. *Noriega v. Pastrana*, No. 08-11021, --- F.3d ----, 2009 WL 929960 (11th Cir. Apr. 8, 2009). The court explained that, "while the United States' international obligations under the Geneva Conventions are not altered by the enactment of § 5 of the MCA," Section 5(a) "prohibits" use of the Conventions as a "source of rights" enforceable in a habeas action. *Id.* at **4-5. This "unambiguous," *id.*, meaning of Section 5(a) is fully applicable here, and bars the injunctive relief petitioners seek.

Moreover, as applied to this case, Section 5(a) of the MCA is consistent with—indeed, it is merely declarative of—pre-MCA law. The Supreme Court recently stated

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precedents, it is clear they allege a proper claim for habeas relief, specifically an order barring their transfer to or from a place of incarceration." *Id.* at *2. With respect to this case, however, the claims asserted in petitioners' Motion for a Preliminary Injunction cannot be asserted through habeas, as discussed above; contrary to the situation in *Kiyemba*, petitioners do not "allege a proper claim for habeas relief." The claims are "other" than habeas; thus, Section 2241(e)(2)'s bar on conditions of confinement claims is fully applicable.

that, "[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." *Medellin v. Texas*, 128 S. Ct. 1346, 1357 n.3 (2008).[7] With respect to the Geneva Conventions, however, there is no need to rely on background presumptions: the Supreme Court ruled nearly 60 years ago that the Conventions are not judicially enforceable, and that ruling remains the law today.

In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Supreme Court concluded that the predecessor to the Third Geneva Convention—the Third Geneva Convention of 1929—conferred rights on alien enemies that could be vindicated "only through protests and intervention of protecting powers," not through the courts. *Id.* at 789 n.14. Based on *Eisentrager*, the D.C. Circuit has held that the provisions of the Third Geneva Convention cannot be enforced by private individuals in court. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd on other grounds*, 548 U.S. 557, 627 (2006). Although on review of the D.C. Circuit's ruling, the Supreme Court deemed *Eisentrager*'s footnote "curious," *Hamdan v. Rumsfeld*, 548 U.S. 557, 627 (2006), the Court did not repudiate *Eisentrager*'s conclusion that the Conventions cannot be judicially enforced by individuals. To the contrary, the Court reversed the D.C. Circuit on other grounds. *See id.* at 627-628 (concluding that the statute that authorized use of military commission to try persons such as Hamdan conditioned that authority on compliance with the Geneva Conventions).

[7] *See also McKesson v. Islamic Republic of Iran*, 539 F.3d 485, 488-89 (D.C. Cir. 2008) (emphasizing that "whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies," and concluding that treaty at issue did not overcome the presumption that even self-executing treaties do not create rights that are judicially enforceable by private individuals) (internal quotation omitted).

Thus, enforcement of treaties that, like the Geneva Conventions, cannot be enforced judicially by individuals, "becomes the subject of international negotiations and reclamation, not the subject of a lawsuit.'" *Medellin*, 128 S. Ct. at 1357 (quoting *Head Money Cases*, 112 U.S. 580, 597 (1884)). MCA Section 5(a) merely embodies this "obvious" and well-established principle. That this case involves a habeas petition does not render the treaty in question here any more enforceable—indeed, Section 5(a) refers specifically to habeas petitions, and the Eleventh Circuit has confirmed that, in accordance with its plain language, the statute precludes use of the Third Geneva Convention as a source of rights in civil litigation. *Noriega*, 2009 WL 929960, at **4-5.[8]

Finding no support in the language of the MCA and the extensive case law addressing the judicial enforceability of treaties, petitioners predicted that the Supreme Court in *Boumediene* would invalidate MCA Section 5(a). *See* Motion for a Preliminary Injunction at 10, 12. After the Supreme Court left this provision intact, petitioners were reduced to urging, in a single sentence at the end of the Supplemental Memorandum, that the Court read MCA Section 5(a) as barring only a "free standing cause of action based on the [Geneva] Conventions themselves." *See* Supplemental Memorandum at 19-20. There is no support for this reading in the text, which states that the Conventions may not be invoked "as a source of rights," in "any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party." 28 U.S.C. § 2241 (note).

[8] *Cf. Bannerman v. Snyder*, 325 F. 3d 722 (6th Cir. 2003); *Poindexter v. Nash*, 333 F.3d 372 (2d Cir. 2003); *Wesson v. United States Penitentiary Beaumont*, 302 F.3d 343 (5th Cir. 2002); *Hain v. Gibson*, 287 F.3d 1224 (10th Cir. 2002); *United States ex rel. Perez v. Warden*, 286 F.3d 1059 (8th Cir. 2002).

In the final sentence of their Supplemental Memorandum, petitioners also assert that insofar as Section 5(a) bars their claims, it is unconstitutional on two grounds: as a violation "of the principles" of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871); and as "an unauthorized suspension of the privilege of habeas corpus." Supplemental Memorandum at 20. Neither constitutional argument is correct.

Klein is inapposite at best. In *Klein*, the Supreme Court invalidated a post-Civil War statute that instructed courts to conclusively presume that a presidential pardon demonstrated a person's disloyalty and to make a finding of disloyalty even where the evidence was to the contrary; further, if evidence of a pardon had been submitted, the courts were instructed to dismiss a case for lack of jurisdiction. *See* 80 U.S. at 143-44. The Court emphasized that the statute was unconstitutional because it encroached upon the pardon power constitutionally vested with the President; impermissibly required the court to deny itself jurisdiction *if and only if* the court made findings of fact which would lead to a ruling adverse to the government; and required the court to disregard its own interpretation of the evidence, giving a fact the opposite effect of that which it should have, in the court's judgment. *See* 80 U.S. at 147; *see also Jung v. Ass'n of Am. Med. Colleges*, No. 04-7023, 2006 U.S. App. LEXIS 14079, at **9-10 (D.C. Cir. Cir. June 1, 2006) (discussing the very limited scope of *Klein*); *Nat'l Coalition to Save Our Mall v. Notron*, 269 F.3d 1092, 1096-97 (D.C. Cir. 2001) (same).

In their supplemental brief, petitioners do not explain *Klein*'s relevance here. In their opening brief (at 11-12), petitioners' conclusory argument is simply that "Congress' attempt to limit the use of the [Geneva] Conventions as a rule of decision in pending cases clearly interferes with the judicial function" because "the Geneva Conventions are a

vital part of the law of the United States." Motion for a Preliminary Injunction at 12. But MCA Section 5(a) bears no resemblance to the statute at issue in *Klein*.

There is nothing constitutionally dubious about Congress deciding that the Geneva Conventions may not be a "rule of decision" in habeas cases. The Constitution did not require Congress in the first instance to provide detainees with the authority to enforce treaty-based rights in a habeas petition, and therefore there is nothing suspect about Congress's decision—consistent with pre-MCA law—that habeas petitions are not an appropriate means of enforcement with respect to a particular set of U.S. treaty obligations. *Cf. Miller v. French*, 530 U.S. 327, 348-349 (2000) (explaining limited scope of *Klein*).

Also irrelevant here is *Klein*'s holding that Congress could not instruct courts to conclusively presume that a presidential pardon demonstrated a person's disloyalty and to make a finding of disloyalty even where the evidence was to the contrary. MCA Section 5(a) does not require a court to make any findings or legal determinations contrary to the court's best judgments of the evidence, or create a rule requiring a court examining the facts of a case to "deny to itself . . . jurisdiction . . . because and only because its decision, in accordance with the settled law, must be adverse to the government." 80 U.S. at 146. Instead, Section 5(a) merely precludes certain parties from asserting claims based on the Geneva Conventions in the first instance. *See Jung*, 2006 U.S. App. LEXIS 14079, at **9-10 (rejecting a *Klein* challenge to legislation because "Congress may amend substantive laws, even when doing so affects pending litigation") (citing *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992)); *Nat'l Coalition to Save Our Mall*, 269 F.3d at 1096 (*Klein* "cannot be read as a prohibition against Congress's changing a rule

of decision in a pending case, or (more narrowly) changing the rule to assure a pro-government outcome"; noting that "Congress has the power to impose new standards for final judgments"). Moreover, as noted above, MCA Section 5(a) does not even create a new rule. Rather, it expresses the existing state of the law, clarifying that private individuals cannot invoke the Geneva Conventions in a habeas action.

This does not mean, as petitioners assert, Motion for a Preliminary Injunction at 12, that the Geneva Conventions are no longer "a vital part of the law of the United States," nor that the Executive may "breach[]" them with impunity—it means only that the mechanisms for their enforcement do not include habeas and other civil actions against the United States and its officers employees and agents. See *Noriega*, 2009 WL 929960, at *3 (noting that "the United States' international obligations under the Geneva Conventions are not altered by the enactment of § 5 of the MCA"). Petitioners argue only that the provisions of the Geneva Conventions are enforceable in habeas actions, but does not point to anything suggesting that the Constitution requires Congress to make such a remedy available as a means of enforcement of the United States' treaty obligations. Here, Congress has expressly foreclosed the enforcement of these treaty obligations through habeas—a power Congress clearly has. *See id.* at *3 ("[I]t is within Congress' power to change domestic law, even if the law originally arose from a self-executing treaty.").

For similar reasons, there is no support for petitioners' unelaborated proposition that MCA Section 5(a) violates the Suspension Clause. *See* Supplemental Memorandum at 20. Plaintiffs do not attempt to demonstrate–nor could they—that the Suspension Clause requires Congress to provide detainees with the right to enforce all treaty-based

rights on habeas, let alone that Congress must provide detainees with a right to use a habeas petition to challenge whether the *conditions* of their confinement comport with all applicable treaties. *See Noriega*, 2009 WL 929960, at *2 (finding no Suspension Clause issue because Section 5(a) "at most changes one provision of substantive law upon which a party might rely in seeking habeas relief"). What is more, the Suspension Clause cannot be violated where a petitioner did not have a judicially enforceable right to begin with, and Congress merely clarified that fact through statute. In sum, there is simply no reason not to apply MCA Section 5(a). Accordingly, petitioners have no likelihood of success on the merits of their condition of confinement claims, and their Motion should be denied.

CONCLUSION

For the reasons stated above, the Court should deny Petitioners' Motion for a Preliminary Injunction.

Dated: April 9, 2009

Respectfully submitted,

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