

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MAHER EL FALESTENY, *et al.*,)
)
Petitioners,)

v.)

Civil Action No. 05-cv-2386 (RBW)

BARACK OBAMA,)
President of the United States, *et al.*,)
)
Respondents.)

KARIN BOSTAN,)
)
Petitioner,)

v.)

Civil Action No. 05-cv-0883 (RBW)

BARACK OBAMA,)
President of the United States, *et al.*)
)
Respondents.)

ISSAM HAMID ALI BIN)
ALI AL JAYFI, *et al.*,)
)
Petitioners,)

v.)

Civil Action No. 05-cv-2104 (RBW)

BARACK OBAMA,)
President of the United States, *et al.*,)
)
Respondents.)

**REPLY BRIEF IN SUPPORT OF
PETITIONERS' MOTION FOR
A PRELIMINARY INJUNCTION ENFORCING
THIRD GENEVA CONVENTION**

The most remarkable features of respondents' opposition are what it does not say. We discuss these aspects first.

1. While employing self-help to reserve the right to assert their compliance with the Third Convention, respondents neither dispute nor draw in question, for example, that the present inmates of Camps V and VI are not quartered in facilities equivalent to those of the detaining power as required by Article 25 of the Convention.¹ Petitioner here, El Falesteny, is so held for many months despite his being "cleared" for transfer. Thus, the violation of the Convention is conceded notwithstanding respondents' unseemly attempt to avoid addressing the issue.

2. Nor do respondents contest that they are subject to the provisions of the Third Convention. They admit they are bound by it, in effect, and not only by Common Article 3, but the many other provisions as well. Indeed, they state that such compliance is an important obligation of the United States. This is in fact an

¹ Other provisions are also violated. See Petitioners' Supplemental Memorandum at note 4. These include prohibition of a regime of solitary confinement (§§21, 89, 90), prohibition on internment in penitentiaries (§22), access to canteens (§28), and freedom to worship communally (§34). Again, respondents do not trouble to refute or contest these violations but announce to the court they will do so at a time and place of their own choosing.

agreement that petitioners have not been shifted out of their presumptive POW status.

3. Most remarkable, respondents do not mention the governing Supreme Court authority, *Mali v. Keeper of the Common Jail*, 120 U.S. 1 (1887), establishing that treaty rights are enforceable in a *habeas* action such as this one. There is no contrary Supreme Court authority.

4. Respondents do not contest that if they are unwilling or unable to abide by the Conventions that some form of release or transfer is appropriate.

With these omissions in mind we now address what respondents do say.

I.

Respondent's view of *habeas* is that it is concerned with release and release alone.² All else is relegated to "conditions of confinement" which are not a genuine part of *habeas* relief. Thus respondents would deem mutilation of prisoner or hostage taking in violation of Common Article 3 to be outside a *habeas* court's power to correct-despite clear treaty language prohibiting such behavior and the clear language of 28 U.S.C § 2241 empowering the court to enter orders in favor of a prisoner "in custody in violation of the Constitution or laws or *treaties* of the United States." (Emphasis supplied.) No doubt the complaint of the hostage or the

² As we discuss in section III below, release is indeed an option here should respondents persist in their intransigent detention regime contrary to the Convention.

mutilated prisoner would be considered by respondents to be a mere beef about conditions of confinement beyond judicial redress on *habeas*. So viewed, respondents' dichotomy between release and everything else proves far too much, leads to absurd results, and is untenable for that reason alone.

But respondents are wrong for another reason as well: the Conventions do in fact deal with conditions of confinement, among other things. Thus there is an undeniable treaty right to certain behavior by respondents affecting conditions of confinement, albeit grounded on a treaty not due process or some other ground, rights which are presently being violated. And respondents concede on brief that there is no Supreme Court authority denying courts the power on *habeas* to affect conditions of confinement, although scattered circuit decisions express hostility to the idea. (Opp. at 5.) Given that the Convention requires certain conduct, and the Supreme Court has stated in *Mali* that a treaty may be enforced in *habeas*, no other position is possible but that this court has the power to correct the treaty violations.

II.

The *deus ex machina* invoked by respondents to avoid this obvious result is citation to the MCA and DTA provisions which prohibit courts from considering "conditions of confinement claims" or "Geneva Convention claims."³ But *Boumediene v. Bush*, 128 S. Ct. 229 (2008), teaches that Congress is not at liberty

³ See 28 U.S.C. 2241(e)(2) .

to tamper with the writ, to whittle it down, or otherwise restrict its scope. Such truncations are suspensions *pro tanto* of the writ to the extent they alter its historic office and reach, which here include the power to grant relief based on a treaty.

It bears recall that Congress had decreed that *this court* lacked jurisdiction over the present *habeas* cases and the Supreme Court expressly held that the Congressional removal of this court's jurisdiction under 2241 was constitutionally ineffective. This left intact the following language, which describes the historic reach of *habeas* as available to those "in custody in violation of the Constitution or laws or *treaties* of the United States." (Emphasis supplied.) It follows from *Boumediene*, then, that Congressional attempts to eviscerate *habeas* by eliminating certain Treaty grounds as the basis for relief must suffer the same fate as the "jurisdiction strip" found bad in *Boumediene*: i.e., the elimination of jurisdiction facially wrought by Section 7 of the MCA. The same may also be said of any congressional attempt to limit or cut back on treaty litigation in *habeas* cases even though the particular treaty claim may touch upon conditions of confinement.

The *Klein* case cited in our earlier briefs makes this exact point: Congress may not use an enumerated power (there the power to regulate inferior court jurisdiction and exceptions to the appellate jurisdiction of the Supreme Court) in order to achieve an object prohibited by another part of the Constitution (there interference with the President's power of pardon). Here, as *Boumediene* more

recently makes clear, the writ, its historic status, reach, and office raises a constitutional bar to certain legislative actions, namely those which would cut back or limit the writ. Both the "conditions of confinement" restrictions and the "no private right of action" under the Conventions do exactly this and are thus bad, fully as bad as the "jurisdiction strip" of the MCA. They must suffer the same fate, then, on this motion.

III.

As our supplemental brief made abundantly clear, the provisions of the Conventions at issue here are readily applied by a court and need no implementing legislation to flesh them out. All they need, according to *Mali*, is the underlying *habeas* statute which is concededly available.

The Convention prohibitions were intended to be, according to dispositive commentary, "self-executing" quite apart from the wholly domestic interpretive principles we discussed in detail in our Supplemental brief establishing the same result. (Suppl. 4-19) *See Int'l Comm. for the Red Cross, Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 84 (1952). ("It should be possible in States which are parties to the Convention...for the rules of the Convention to be evoked before an appropriate national court by the protected person who has suffered a violation");

GCII Commentary at 92; GCIV Commentary at 79.⁴

Further as noted in our Supplement "If the Detaining Power is unable or unwilling to fulfill its obligation in respect of maintenance, it should no longer detain any prisoners of war." *Int'l Comm. of the Red Cross, Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* 153 (Jean S. Pictet ed. 1960). "[T]here are, in fact, two remedial courses of action available to the Detaining Power under these circumstances: (1) the transfer of the prisoners of war to another Party ... or (2) repatriation." Levie, *Prisoners of War in International Armed Conflicts*, 59 *In't Law Stud.* at 127-28 (Naval War College 1979). However on this motion petitioners seek compliance, not release. Should respondents flout a judicial declaration of their violation, release would indeed be available under the Convention and 2241.

⁴ In *Johnson v. Eisentrager*, 339 U.S. 557 (1950) the Supreme Court mentioned no comparable commentary regarding the earlier versions of the Conventions it there commented on in its mysterious note 14. Although the D.C Circuit in *Hamdan* regarded this footnote as the "alternate holding" of *Eisentrager*, the Supreme Court in *Hamdan* described the note as a "curious statement" ... "buried in a footnote" to the effect that the earlier Conventions could not be enforced in court. 126 S.Ct. 2794. The Court left this question open by relying on the Conventions' conceded status as a part of the law of war and then enforcing Common Article 3 of the Convention. *Id.*

Respectfully submitted,

Shayana Kadidal (DC #454248)
CENTER FOR CONSTITUTIONAL
RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
Tel: (212) 614-6439
Fax: (212) 614-6499

Of Counsel for Petitioner

/s/ Stephen M. Truitt
Stephen M. Truitt (DC # 13235)
600 Fourteenth Street, N.W., Suite 500
Washington, DC 20005-2004
Tel: (202) 220-1452
Fax: (202) 220-1665

Charles H. Carpenter (DC #432004)
PEPPER HAMILTON LLP
600 Fourteenth Street, N.W., Suite 500
Washington, DC 20005-2004
Tel: (202) 220-1452
Fax: (202) 220-1665

Counsel for Petitioner

Dated: April 16, 2009

/s/ Kristin B. Wilhelm
Kristin B. Wilhelm (Pursuant to LCvR 83.2(g))
Sara Toering (Pursuant to LCvR 83.2(g))
SUTHERLAND ASBILL &
BRENNAN LLP
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3996
Telephone: (404) 853-8000
Facsimile: (404) 853-8806

Brian C. Spahn (Pursuant to LCvR 83.2(g))
Richard G. Murphy, Jr. (D.C. Bar No. 472769)
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2415
Telephone: (202) 383-0635
Facsimile: (202) 637-3593

John A. Chandler (Pursuant to LCvR
83.2(g))

King & Spalding LLP
1180 Peachtree St NE
Atlanta, Ga. 30309-3521
Telephone: 404-572-4646
Facsimile: 404 573 5142

*Counsel for Petitioner Sharkawi Abda
Al-Haag*

/s/ Martha Rayner

Martha Rayner (NY-MR-1423)
LINCOLN SQUARE LEGAL
SERVICES
Fordham University School of Law
33 W. 60th Street, 3rd Floor
New York, NY 10023
Telephone: (212) 636-6934
Fax: (212) 636-6923

*Counsel for Petitioner Sanad Al-Kazimi
(ISN 1453)*

/s/ Prof. Richard J. Wilson

Prof. Richard J. Wilson (DC # 425026)
Director, International Human Rights
Law Clinic
American University, Washington
College of Law
4801 Massachusetts Ave., N.W.
Washington, DC 20016-8184
Telephone: 202-274-4147

*Counsel for Petitioner Al Zaher (ISN
089)*

/s/ Darin Thompson

DARIN THOMPSON (LCvR 83.2(e))
Assistant Federal Public Defender
Office of the Federal Public Defender,
Northern District of Ohio
1660 West Second Street, Suite 750
Cleveland, Ohio 44113
Telephone: (216) 522-4856
Fax: (216) 522-4321
Email: darin_thompson@fd.org

/s/ Andy Hart

ANDY HART (LCvR 83.2(e))
Assistant Federal Public Defender
Office of the Federal Public Defender,
Northern District of Ohio
617 Adams Street
Toledo, Ohio 43604
(419) 259-7370 Fax: (419) 259-7375
andy_hart@fd.org

/s/ Jonathan Witmer-Rich

JONATHAN WITMER-RICH (LCvR
83.2(e))
Attorney at Law
Office of the Federal Public Defender,
Northern District of Ohio
1660 West Second Street, Suite 750
Cleveland, Ohio 44113
(216) 522-4856 Fax: (216) 522-4321
jonathan_witmer-rich@fd.org

*Counsel for Petitioner Idris Ahmed
Abdu Qader Idris, a.k.a. Edress LNU
(ISN 035)*

/s/ Vicki Werneke

VICKI WERNEKE (LCvR 83.2(e))
Assistant Federal Public Defender

Office of the Federal Public Defender,
Northern District of Ohio
1660 West Second Street, Suite 750
Cleveland, Ohio 44113
Telephone: (216) 522-4856
Fax: (216) 522-4321
Email: vicki_werneke@fd.org

/s/ Amy Cleary

AMY CLEARY (LCvR 83.2(e))
Office of the Federal Public Defender,
Northern District of Ohio
1660 West Second Street, Suite 750
Cleveland, Ohio 44113
Telephone: (216) 522-4856
Fax: (216) 522-4321
Email: amy_cleary@fd.org

*Counsel for Petitioner Abdul Al Rahman
Al Ziahri AKA Abdulrahman LNU (ISN
441)*

/s/ Peter B. Ellis

Peter B. Ellis
Mass. BBO #153500
Usha-Kiran K. Ghia
Mass. BBO #666711
Foley Hoag LLP
155 Seaport Boulevard
Boston, Massachusetts 02210-2600
617.832.1000

*Counsel for Petitioner Mohammed
Ahmed Saeed Hidar, a/k/a Mohammed
Ahmed Said Haidel (ISN #498)*

/s/ Doris Tennant

Doris Tennant (Pursuant to LCvR

83.2(g)
Ellen Lubell (Pursuant to LCvR 83.2(g))
TENNANT LUBELL, LLC
288 Walnut Street, Suite 500
Newton, MA 02460
Telephone: (617) 969-9610

Counsel for Petitioner Abdul Aziz Naji

Wesley R. Powell
Andrew M. Jacobs
HUNTON & WILLIAMS LLP
200 Park Avenue
New York, NY 10166
(212) 309-1000
(212) 309-1100 (facsimile)
Email: wpowell@hunton.com
Email: ajacobs@hunton.com

Karma B. Brown (Bar No. 479744)
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 955-1500
(202) 778-2201 (facsimile)
Email: kbbrown@hunton.com

Counsel for Petitioner Hussein

/s/ Joseph S. Berman
Joseph S. Berman, BBO NO. 566006
(admitted pursuant to Local Rule
83.2(g))
LOONEY & GROSSMAN, LLP
101 Arch Street, 9th Floor
Boston, MA 02110
Tel: (617) 951-2800

Fax: (617) 951-2819

*Counsel for Petitioner Sayf Bin
Abdallah (ISN 046)*

/s/ Paul M. Rashkind
PAUL M. RASHKIND, Supervisory
Assistant Federal Public Defender
Chief of Appeals
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
Tel. (305) 536-6900 x 205
email: Paul_Rashkind@fd.org

Counsel for Karin Bostan

/s/ J. Andrew Moss
Lowell E. Sachnoff
Matthew J. O'Hara
J. Andrew Moss
Anne E. Pille
REED SMITH LLP
10 S. Wacker Drive, Suite 4000
Chicago, Illinois 60606
Tel. (312) 207-1000

*Counsel for Petitioners Walid Ibriham
Mustafa Abu Hijazi and Umar
Hamzayevich Abdulayev*