[ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005]

No. 04-5393

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SALIM AHMED HAMDAN
Petitioner-Appellee,

v.

DONALD H. RUMSFELD, U.S. SECRETARY OF DEFENSE, ET AL.,
Respondents-Appellants

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

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER-APPELLEE AND IN SUPPORT OF AFFIRMANCE OF THE DISTRICT COURT

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INTEREST OF *AMICI CURIAE*

Amici curiae are law professors whose areas of expertise include international law, federal jurisdiction, and U.S. foreign relations law. We have an interest in providing this Court with materials illuminating the law relevant to the judicial enforcement of treaties in U.S. courts. *Amici* and their institutional affiliations (provided for purposes of identification only) are set forth in the accompanying Unopposed Motion for Leave to File a Brief *Amici Curiae*. *Amici* respectfully submit this brief to address issues pertaining to the judicial enforcement of treaties raised in the Brief for Appellants, December 8, 2004.

SUMMARY OF ARGUMENT

The Geneva Conventions are judicially enforceable in U.S. courts because the treaties create primary rights for individuals and the federal habeas statute provides a remedial mechanism that authorizes private suits to enforce those primary rights. The government's claim that the Geneva Conventions do not provide judicially enforceable rights conflates two distinct issues: whether the treaties grant primary rights to individuals, and whether domestic law provides a remedial mechanism to enforce those rights. It is evident from the text of the Conventions that many provisions do create primary rights for individuals because the treaties regulate the

government's treatment of individual detainees. Moreover, the primary individual rights created by the Geneva Conventions exist as a matter of domestic law, as well as international law, because the treaties are the Law of the Land under the Supremacy Clause.

The federal habeas statute expressly authorizes suits by private individuals to obtain judicial remedies for treaty violations. The government contends that the Conventions are not judicially enforceable because the treaties themselves do not expressly create domestic judicial remedies. This argument is at odds with two centuries of jurisprudence in which the Supreme Court has repeatedly enforced treaties that did not expressly create domestic judicial remedies. The Supreme Court has consistently applied a simple principle: where a treaty creates primary rights for individuals, and where other provisions of domestic law create a procedural mechanism for enforcement of treaty rights, individuals whose treaty rights have been violated can use those domestic remedial mechanisms to obtain judicial remedies. As applied to the present case, this principle shows that the Geneva Conventions are judicially enforceable because the treaties create primary rights for individuals and the federal habeas statute provides a remedial mechanism for enforcement of those treaty rights.

ARGUMENT

I. THE GENEVA CONVENTIONS CREATE PRIMARY RIGHTS FOR INDIVIDUALS UNDER BOTH INTERNATIONAL AND DOMESTIC LAW

More than a century ago, the Supreme Court distinguished between treaty provisions that are "primarily a compact between independent nations," and treaty "provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other." *Head Money Cases*, 112 U.S. 580, 598 (1884). In short, there is a critical distinction between treaty provisions that create primary rights for individuals, and those that merely regulate relations between states.

The question whether a treaty creates primary rights for individuals is a question of treaty interpretation.

Courts look to the plain meaning of the text to ascertain the correct interpretation of a treaty. *See Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (when interpreting treaties, "words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law"). Where the plain meaning of the treaty text manifests the drafters' intent to protect individual rights, the treaty creates primary rights for individuals. *See* LaGrand (Germany v. U.S.), 2001 I.C.J. (June 27) ¶¶ 75-77, *available at* www.icj-cij.org (rejecting

U.S. argument that Vienna Convention on Consular Relations (VCCR) does not create individual rights, and relying on plain meaning of treaty text to support holding that Article 36(1) of VCCR creates primary rights for individuals). Application of these principles demonstrates that the Geneva Conventions create primary rights for individuals.

A. The Geneva Conventions Create Primary Rights for Individuals Under International Law

Under the Geneva Conventions, there are two types of armed conflicts: international (i.e., conflicts between states) and non-international (i.e., conflicts that are not between states). The bulk of the Conventions apply to international armed conflict – "armed conflict which may arise between two or more of the High Contracting Parties." Geneva Convention [No. III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter "Geneva III"]. Common Article 3 applies to "armed conflict not of an international character." *Id.*, art. 3. If Mr. Hamdan was fighting on behalf of the Taliban during the conflict between the United States and Afghanistan, he is protected by Convention provisions that address international armed conflicts. If Mr. Hamdan was not aligned with the Taliban, he is protected by common Article 3. *See* ICRC, Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War 57 (Jean S. Pictet ed., 1960) (noting that

militias that are independent of a state's armed forces are covered by Convention provisions addressing international conflicts when they are "fighting on behalf of a 'Party to the conflict' . . . otherwise the provisions of Article 3 relating to non-international conflicts are applicable"). The government's position – that Mr. Hamdan is outside the law because the conflict with Al Qaeda is neither international nor non-international – is utterly without foundation.

Geneva III contains numerous provisions that create primary rights for individual POWs. For example, the Convention states: "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." Geneva III, art. 102. It is evident from the plain meaning of the text that this provision protects individual rights; it does not merely regulate international relations. Therefore, if Mr. Hamdan is properly classified as a POW, he is protected under article 102 and other provisions of Geneva III that create primary rights for individuals.

If Mr. Hamdan was fighting on behalf of the Taliban, but does not qualify as a POW, then he is protected as a civilian under Geneva Convention [No. IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter

"Geneva IV"]. The ICRC Commentary provides that if members of militias "who have fallen into enemy hands do not fulfil" the requirements for POW status under Article 4(A)(2) of Geneva III, "they must be considered to be protected persons within the meaning of" Geneva IV. ICRC Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 50 (Jean S. Pictet ed., 1960). The Commentary adds:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no* intermediate status; nobody in enemy hands can be outside the law. *Id.* at 51.

Like Geneva III, Geneva IV also contains numerous provisions that create primary rights for individuals. For example, for individuals accused of grave breaches of the Conventions, Geneva IV provides that "accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the [Third] Geneva Convention." Geneva IV, art. 146. It is evident from the plain meaning of the text that this provision protects individual rights; it does not merely regulate relations between states. Several other provisions of Geneva IV also provide fair trial rights for protected persons. *See, e.g.,* Geneva IV, arts. 64-76. Therefore, if Mr. Hamdan is properly classified as a civilian under Geneva IV, he is protected

under the various provisions of that treaty that create primary rights for individuals.

Common Article 3, by its terms, applies to "armed conflict not of an international character." GC III, art. 3; GC IV, art. 3. The International Criminal Tribunal for the Former Yugoslavia has stated that the principles codified in common Article 3 "are so fundamental that they are regarded as governing both internal and international conflicts." *Prosecutor v. Delalic (Celibici Case)*, Judgment, IT-96-21-A, ¶ 143 (ICTY Appeals Chamber 2001). Similarly, the International Court of Justice has stated: "There is no doubt that, in the event of international armed conflicts, [common Article 3] also constitute[s] a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts." *Nicaragua v. United States*, 1986 I.C.J. 14, 114 (Judgment of June 27). Therefore, Mr. Hamdan is protected by common Article 3, regardless of whether he is being detained in the context of an international armed conflict or a non-international armed conflict.

Common Article 3 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." GC III, art. 3; GC IV, art.

3. As above, it is evident from the plain meaning of the text that this provision creates primary rights for individuals; it is not designed to regulate inter-state relations. Thus, whether Mr. Hamdan is a POW under Geneva III, or a civilian under Geneva IV, or is merely entitled to the minimum protections of common article 3, the Geneva Conventions create primary rights for individuals, and Mr. Hamdan is entitled to protection under the Conventions.

B. The Geneva Conventions Create Primary Rights for Individuals Under Domestic Law

The Constitution specifies: "[A]ll Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. It is undisputed that the Geneva Conventions are treaties made under the Authority of the United States. Hence, every court that has squarely addressed the issue has held that the Conventions are the "supreme Law of the Land" under the Supremacy Clause. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002); *United States v. Lindh*, 212 F. Supp. 2d 541, 554 (E.D. Va. 2002); *United States v. Noriega*, 808 F. Supp. 791, 794 (S.D. Fla. 1992).

The Senate record associated with ratification of the Geneva Conventions supports the proposition that the Conventions have the status of supreme federal law. *See* Derek Jinks & David Sloss, *Is the President*

Bound by the Geneva Conventions, 90 Cornell L. Rev. 97, 121-29 (2004) [hereinafter, Jinks & Sloss, *Is the President Bound?*] (providing detailed analysis of the Senate record). Both the Senate and the executive branch stated that most of the Convention's provisions would be implemented without enacting new legislation. *See* Geneva Conventions for the Protection of War Victims: Hearing on Executives D, E, F and G Before the Senate Comm. On Foreign Relations, 84th Cong. 59 (1955) (letter from Assistant Attorney General) (stating that, upon ratification of the Conventions, "the United States will be required to enact only relatively minor legislation" to implement the Conventions); Senate Comm. On Foreign Relations, Geneva Conventions for the Protection of War Victims, S. Exec. Rep. No. 84-9 (1955), *reprinted in* 84 Cong. Rec. 9958, 9971 (1955) ("From information furnished to the committee it appears that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four conventions."). These statements demonstrate that, at the time of ratification, the political branches believed that the vast majority of the Conventions' provisions were self-executing, in the sense that no additional implementing legislation was required to give the Conventions the force of law in the United States.[1] *See* Restatement

[1] The term "self-executing," as applied to treaties, has multiple meanings. *See* Committee of United

(Third) of Foreign Relations Law § 111, n.5 (1987) ("[I]f the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts.")

Additionally, the subsequent practice of the U.S. military demonstrates that the executive branch has understood the Conventions to have the status of supreme federal law. On October 1, 1997, the government published Army Regulation 190-8, which establishes policies and procedures "for the administration, treatment, employment, and compensation of enemy prisoners of war, retained personnel, civilian internees and other detainees in the custody of the U.S. Armed Forces." Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997) § 1.1(a). The regulation does not cite any federal statute as a basis of authority for its adoption. Rather, it cites the Geneva Conventions as the basis for the military's legal authority to promulgate the regulations. *Id.*, § 1.1(b).

States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 939 (D.C. Cir. 1988) (the "question whether a particular treaty requires implementing legislation is different from the international law question of whether [the] treaty aims at the immediate creation of rights and duties of private individuals . . . but both questions are part of the concept of self-executing treaties") (internal quotations and citations omitted). Part I.A demonstrated that some provisions of the Conventions are self-executing in the sense that they create primary rights for individuals. This section establishes that the Conventions are self-executing in the sense that they have the status of law in the absence of implementing legislation.

Moreover, the regulation states: "In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence." *Id.*, § 1.1(b). In short, the U.S. military asserts that the Geneva Conventions are directly binding on U.S. military forces as a matter of domestic law, even where the Conventions conflict with the military's own regulations.

Given that the Conventions have the status of supreme federal law, and that the Conventions create primary rights for individuals under international law, it follows that the Conventions also create primary rights for individuals under domestic law. *See United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801) ("[W]here a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress."). Indeed, the core meaning of the Supremacy Clause, as applied to treaties, is that the Clause converts primary international rights and duties into primary domestic rights and duties, without the need for implementing legislation. *See* David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. Davis L. Rev. 1, 46-55 (2002).

Several judicial opinions assert that the Geneva Conventions are not self-executing. *See, e.g., Al Odah v. United States*, 321 F.3d 1134, 1147

(D.C. Cir. 2003) (Randolph, J., concurring); *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-09 (D.C. Cir. 1984) (Bork, J., concurring). However, those decisions state that the Conventions are not self-executing in the sense that they do not create private rights of action.[2] *See Al Odah*, 321 F.3d at 1147 (Randolph, J., concurring) (stating that the Geneva Convention "is not self-executing . . . No American citizen, therefore, has a cause of action under this treaty."); *Hamdi*, 316 F.3d at 468 (holding that the POW Convention is not self-executing, because "the document, as a whole, [does not] evidence an intent to provide a private right of action"); *Tel-Oren*, 726 F.2d at 809 (Bork, J., concurring) (finding that the Conventions do not create a private right of action). A private right of action is a remedial right, not a primary right. *See* Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 122-25, 137-38 (1994). Thus, the cases stating that the Geneva Conventions are not self-executing do not contradict the conclusion that the Conventions create primary rights for individuals under domestic law, because it is entirely consistent to maintain that the Conventions create domestic primary rights, even if they do not expressly create domestic remedial rights. Moreover, for the reasons

[2] Apart from the question whether a treaty has the status of law in the absence of implementing legislation, and whether the treaty creates primary rights for individuals, *see supra* note 1, the doctrine of self-execution also implicates the question whether a treaty creates a private right of action.

discussed below, the Geneva Conventions are judicially enforceable in U.S. courts, regardless of whether they create domestic remedial rights.

II. THE FEDERAL HABEAS STATUTE PROVIDES A REMEDIAL MECHANISM THAT AUTHORIZES INDIVIDUAL SUITS TO ENFORCE TREATY-BASED RIGHTS

The government cites *Head Money Cases*, 112 U.S. 580 (1884), for the proposition that a treaty "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it [and] . . . judicial courts . . . can give no redress" for treaty violations. *Id.* at 598 (quoted in Brief for Appellants, at 24-25). Other language in the same paragraph, though, shows that *Head Money Cases* actually supports judicial enforcement of the Geneva Conventions. The Court continued: "A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Id.* at 598-99. Inasmuch as the Geneva Conventions prescribe rules by which the primary rights of private individuals may be determined, *Head Money Cases* establishes a strong presumption in favor of judicial enforcement, at least in cases where domestic law supplies a private right of action.

The federal habeas statute expressly authorizes suits by individuals who allege that they are being detained in violation of U.S. treaty obligations. *See* 28 U.S.C. §2241(c)(3) (providing that the writ of habeas corpus extends to any prisoner who "is in custody in violation of . . . treaties of the United States"). In practice, the treaty prong of the habeas statute has limited applicability because few treaties regulate government detention of private individuals. Regardless, the Geneva Conventions do regulate government custody of private individuals, and Mr. Hamdan has alleged that he is in custody in violation of the Conventions. Inasmuch as the treaty provisions he invokes have the status of supreme federal law and create primary rights for individuals, *see supra* Part I, the federal habeas statute creates a private right of action that authorizes Mr. Hamdan to bring suit to enforce his treaty-based primary rights.

A. The Fact that the Geneva Conventions do not Expressly Create Domestic Judicial Remedies is Irrelevant

The government contends that even if the Geneva Conventions create primary rights for individuals, and even if the federal habeas statute authorizes judicial enforcement of treaties, the Conventions are not judicially enforceable because the treaties themselves do not expressly create domestic remedial rights. The government's approach would bar judicial enforcement of most treaties because very few treaties expressly create

domestic remedial rights. In contrast, the Framers of the Constitution generally favored domestic judicial enforcement of treaties, as evidenced by their decision to grant federal courts the power to decide treaty cases, U.S. Const. art. III, § 2, cl. 1, and to give state courts the duty to enforce treaties. U.S. Const. art VI, cl. 2. *See* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 Colum. L. Rev. 2095 (1999) (demonstrating, through detailed historical analysis, that the Framers favored domestic judicial enforcement of treaties). Thus, the government's position is at odds with the original intent of the Framers.

The government's argument implicitly assumes that a plaintiff's primary rights and remedial rights must be derived from the same source. That assumption is clearly mistaken. In the statutory context, the Administrative Procedure Act (APA) creates a private right of action that authorizes individual suits to enforce other federal statutes that do not themselves create a private cause of action. In *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. __, 124 S. Ct. 2373 (2004), plaintiffs sued the Secretary of the Interior to enforce the Federal Land Policy and Management Act (FLPMA). Plaintiffs asserted a private right of action under the APA because the FLPMA does not itself create a private cause of action. Justice

Scalia, writing for a unanimous court, stated that "[t]he APA authorizes suit" for federal statutory violations "[w]here no other statute provides a private right of action." 124 S. Ct. at 2378. Similarly, the federal habeas statute creates a private right of action that authorizes individual suits to enforce treaties that do not create a private cause of action. The government's position -- that the habeas statute can be utilized to enforce treaties only if the particular treaty at issue expressly provides for domestic judicial remedies -- would make the treaty prong of the federal habeas statute a legal nullity because very few treaties expressly create domestic remedial rights, and even fewer such treaties regulate government custody of individuals.[3]

The claim that treaties are not judicially enforceable unless the treaty itself creates domestic remedial rights runs counter to two centuries of jurisprudence in which the Supreme Court has consistently enforced treaties that did not expressly create domestic judicial remedies. In *Ware v. Hylton*, 3 U.S. 199 (1796), a British citizen sued two Virginia citizens to recover payment on a bond. Defendants argued that they had discharged their debt

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[3] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, expressly creates domestic remedial rights and regulates government custody of individuals. *See id.*, Art. 2 (prohibiting torture of individuals in government custody); Art. 14 (guaranteeing victims of torture an enforceable right of compensation in the domestic legal system). However, the Senate declared that the Convention is not self-executing. 136 Cong. Rec. S17491-92 (1990). Moreover, the legislation implementing the Torture Convention states: "[N]othing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention." Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822. Hence, if the habeas statute cannot be utilized to enforce the Geneva Conventions, as the government maintains, it necessarily follows that the habeas statute cannot be utilized to enforce the Torture Convention. Thus, the government's position leads to the absurd conclusion that the treaty prong of the habeas statute cannot be utilized to enforce any treaty.

in accordance with a Virginia statute. *Id.* at 220-21. Plaintiff replied by invoking article IV of the peace treaty with Great Britain. Definitive Treaty of Peace, Sept. 3, 1783, U.S.-Gr. Brit., 8 Stat. 80, *reprinted in* 2 Treaties and Other International Acts of the United States of America 151, 154 (Hunter Miller ed., 1931). The treaty granted plaintiffs a primary right to recover their debt. *Id.*, art. IV ("It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted."). However, the treaty did not grant plaintiffs a remedial right to sue in U.S. courts. The lack of a domestic remedial right in the treaty was not a bar to recovery, though, because the common law action for recovering payment on a bond gave plaintiff a private right of action. Thus, the Court held that plaintiff was entitled to recover his debt. *Ware*, 3 U.S. at 245. The treaty was judicially enforceable because the treaty created a primary right and state common law provided a remedial mechanism that authorized a private suit to enforce the treaty.

In *Chew Heong v. United States*, 112 U.S. 536 (1884), a Chinese laborer who was detained on a ship near San Francisco filed a habeas corpus petition in federal court to obtain release from custody. *Id.* at 538. Chew Heong alleged that his detention violated Article II of an 1880 treaty

between the United States and China, which stated: "Chinese laborers who are now in the United States shall be allowed to go and come of their own free will." Treaty Concerning Immigration, Nov. 17, 1880, U.S.-China, 22 Stat. 826 [hereinafter, U.S.-China Treaty]. The treaty itself did not grant Chew Heong a right to file a habeas petition in a U.S. court; indeed, the treaty was silent with respect to domestic judicial remedies. Even so, the Supreme Court granted Chew Heong's habeas petition, holding that he was "entitled to enter and remain in the United States." *Chew Heong*, 112 U.S. at 560. In short, the treaty was judicially enforceable because the treaty created a primary right and the habeas statute provided a domestic remedy to enforce that right. *Chew Heong* is thus indistinguishable from the present case. Both cases involve aliens who allege that their detention violates U.S. treaty obligations. Both cases involve treaties that create primary rights for individuals, but do not expressly authorize private suits in U.S. courts. In both cases, the petitioner invoked the federal habeas statute as the basis for a domestic remedial right. Therefore, this court should follow *Chew Heong* and hold that petitioner's treaty rights are judicially enforceable.

The pattern of treaty enforcement described above, which combines treaty-based primary rights with domestic remedial rights, continued into the twentieth century. In *Asakura v. City of Seattle*, 265 U.S. 332 (1924), the

plaintiff was a Japanese national who operated a pawnbroker business in Seattle. *Id.* at 339. Seattle passed an ordinance that prohibited non-U.S.-citizens from operating a pawnbroker business in the city. *Id.* at 339-40. Plaintiff sued to enjoin enforcement of the ordinance on the grounds that it violated a bilateral treaty with Japan. Treaty of Commerce and Navigation, Feb. 21, 1911, U.S.-Japan, 37 Stat. 1504. The treaty granted Japanese citizens a primary right "to carry on trade" in the United States "upon the same terms as native citizens or subjects." *Id.*, Art. I. However, the treaty did not expressly grant Japanese citizens a right to sue for injunctive relief. Moreover, there was no domestic legislation that specifically authorized Japanese citizens to sue to enjoin enforcement of a local ordinance on the grounds that it conflicted with a treaty. Nevertheless, the Supreme Court affirmed an injunction in favor of the plaintiff, relying on the traditional equitable action for injunctive relief as the basis of a domestic remedial right to enforce the plaintiff's treaty-based primary rights.

Just two terms ago, in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), the Supreme Court upheld a judicial remedy for a private plaintiff who sued to enforce international agreements that did not create domestic judicial remedies. In *Garamendi*, a trade association sued in federal court to enjoin enforcement of a California statute that required

insurance companies to disclose information about "'insurance policies' issued 'to persons in Europe, which were in effect between 1920 and 1945.'" *Id.* at 409. The Court held that certain bilateral agreements between the United States and European governments preempted the California law.[4] *Id.* at 420-27. The bilateral agreements manifest the drafters' expectations that the federal government might invoke the agreements in support of motions to dismiss private lawsuits. *See* U.S.-Germany Agreement, art. 2, para. 1 ("The United States shall, in all cases in which the United States is notified that a claim described in article 1(1) has been asserted in a court in the United States, inform its courts . . . that dismissal of such cases would be in its foreign policy interest."). In *Garamendi*, though, the insurance companies invoked the bilateral agreements offensively in support of a suit against the state Insurance Commissioner to enjoin enforcement of a California statute. *See Garamendi*, 539 U.S. at 412. There is no language in any of the agreements indicating that the drafters intended to authorize this

[4] The Court's preemption analysis relies primarily on three bilateral executive agreements: Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, U.S.-F.R.G, 39 I.L.M. 1298 [hereinafter, "U.S.-Germany Agreement"]; Agreement Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," October 24, 2000, U.S.-Aus., 40 I.L.M. 523; Agreement Concerning Payments for Certain Losses Suffered During World War II, January 18, 2001, U.S.-Fr., Temp. State Dep't No. 01-36. All three agreements acknowledge the creation of certain "funds" or "foundations" by European governments that are designed to compensate victims for harms they suffered during World War II. All three agreements provide that the designated funds or foundations are intended to provide the exclusive remedy for such victims. *See, e.g.*, U.S.-Germany Agreement, *supra*, art. 1, para. 1 ("The parties agree that . . . it would be in their interests for the Foundation to be the exclusive remedy and forum for the resolution of, all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II.").

type of private lawsuit. Even so, the Court granted relief to plaintiffs on the grounds that the agreements preempted California law under the Supremacy Clause. *Id.* at 427-29. Thus, the Court in *Garamendi* implicitly relied on the Supremacy Clause as a basis for a private right of action to enforce international agreements that did not provide plaintiffs a right to sue in U.S. courts.[5]

There are numerous other cases where courts have invoked domestic remedial mechanisms to authorize judicial enforcement of treaties that do not create domestic remedial rights. *See* Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, 1143-57 (1992) (analyzing various sources for domestic rights of action to enforce treaty-based primary rights). In contrast, there is not a single case in which the Supreme Court has stated that domestic judicial enforcement of treaties is barred unless the treaty itself creates domestic remedial rights. Therefore, the government's position is utterly baseless.

B. There is No Evidence That the Treaty Makers Intended to Bar Domestic Judicial Remedies for Violations of the Geneva Conventions

Under international law, there is a presumption in favor of domestic

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[5] There are numerous cases in which the Supreme Court has implicitly relied on the Supremacy Clause as a basis for a private right of action to enjoin enforcement of state laws that are preempted by federal statutes. *See* David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355 (2004). *Garamendi* differs from those cases in that the preemptive federal laws are international agreements, not federal statutes. Even so, the private right of action analysis is identical.

judicial remedies for violations of treaty provisions that create primary individual rights. *See LaGrand* (Germany v. U.S.), 2001 I.C.J. (June 27), ¶¶ 117-27, *available at* www.icj-cij.org (holding that the Vienna Convention on Consular Relations obligates the United States to provide domestic judicial remedies for violations of the primary individual rights protected by the treaty). Despite this presumption, it might be appropriate for a court to bar domestic judicial enforcement of a treaty that protects primary individual rights if there was affirmative evidence that the treaty makers, at the time of ratification, manifested an intention to preclude domestic judicial remedies for treaty violations. However, there is no evidence that the treaty makers, at the time of ratification, intended to preclude judicial review of claims based on the Geneva Conventions.

The government invokes *Johnson v. Eisentrager*, 339 U.S. 763 (1950), in support of its argument that the Conventions' drafters intended to bar domestic judicial remedies for treaty violations. Appellants' Brief at 26-27. This argument is misguided for two reasons. First, since *Eisentrager* was addressing the 1929 Geneva Conventions, not the 1949 Geneva Conventions, *see* 339 U.S. at 789-90, *Eisentrager* says nothing about the intentions of the people who drafted the 1949 treaties. Second, *Eisentrager* was a decision about federal jurisdiction. The Court discussed the Geneva

Conventions in the context of its jurisdictional analysis, holding that there was "no basis for invoking federal judicial power in any district." *Id.* at 790. In contrast, it is undisputed in the present case that the district court had jurisdiction to entertain Hamdan's habeas petition, because the Supreme Court expressly authorized jurisdiction in *Rasul v. Bush*, 542 U.S. __, 124 S. Ct. 2686 (2004). Thus, this case presents the question whether district courts should grant remedies for violations of the Geneva Conventions in cases where they have jurisdiction. *Eisentrager* did not address that issue.

The Fourth Circuit has suggested that language in the Geneva Conventions providing for diplomatic remedies manifests the drafters' intent to preclude domestic judicial remedies for treaty violations. *See* Hamdi v. Rumsfeld, 316 F.3d 450, 469 (4th Cir. 2003), *vacated by* 542 U.S. __, 124 S. Ct. 2633 (2004). The Supreme Court's decision in *Chew Heong v. United States*, 112 U.S. 536 (1884), demonstrates that the Fourth Circuit's rationale is erroneous. In *Chew Heong*, a Chinese laborer alleged that he was detained in violation of an 1880 treaty between the United States and China. *Id.* at 538-39. That treaty, like the Geneva Conventions, provided expressly for diplomatic negotiations to resolve problems related to treaty implementation.[6] Nevertheless, the Supreme Court granted the writ of

[6] *See* U.S.-China Treaty, *supra*, art. IV

habeas corpus, even though the treaty text established diplomatic remedies, but did not expressly provide for domestic judicial remedies. Thus, *Chew Heong* supports the proposition that the treaty makers' decision to craft diplomatic remedies, without more, cannot support an inference that the treaty makers intended to bar domestic judicial remedies.

Apart from the fact that the Geneva Conventions provide for diplomatic remedies, there is not a shred of evidence that the treaty makers intended to bar domestic judicial remedies for treaty violations. If the treaty makers had intended to limit domestic judicial enforcement of the Conventions, they could have adopted a declaration specifying that the treaties were not self-executing. Indeed, the treaty makers have adopted non-self-executing declarations for several other treaties. *See, e.g.*, 138 Cong. Rec. S4783-84 (1992) (stating, in the Senate resolution of ratification for the International Covenant on Civil and Political Rights, that the treaty is not self-executing). The treaty makers' decision to ratify the Geneva Conventions without a non-self-executing declaration supports the inference

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"[W]henever the government of the United States shall adopt legislative measures [related to the treaty], such measures will be communicated to the Government of China. If the measures . . . are found to work hardship upon the subjects of China, the Chinese Minister at Washington may bring the matter to the notice of the Secretary of State of the United States, who will consider the subject with him; and the Chinese Foreign Office may also bring the matter to the notice of the United States Minister at Peking and consider the subject with him, to the end that mutual and unqualified benefit may result."

that they did not intend to preclude domestic judicial enforcement of the Conventions.

III. THE JUDICIAL BRANCH HAS THE POWER TO PROVIDE REMEDIES FOR TREATY VIOLATIONS BY THE EXECUTIVE BRANCH

The government contends that the Geneva Conventions are not judicially enforceable because "the courts of this country have uniformly held that it is not for the judiciary to determine whether a treaty has been broken either by the legislature or the executive." Brief for Appellants, at 24. This argument mistakenly equates executive action with legislative action. It is well established that Congress has the constitutional authority to violate treaties by enacting later-in-time legislation that supersedes an earlier treaty for purposes of domestic law. *See, e.g., Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888). In contrast, the President has a constitutional duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The President's duty under the Take Care Clause includes a duty to execute treaties. *See* Jinks & Sloss, *Is the President Bound?,* at 154-64. Recognizing the President's duty to execute treaties, courts have frequently utilized their judicial authority to restrain executive action that violates treaties.

The Supreme Court has even enforced treaties to restrain the President's exercise of the Commander-in-Chief power in wartime. *United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801), was one of the first cases in which the Supreme Court addressed treaty-based constraints on executive action in wartime. In October 1797, a French privateer plundered and burned a merchant ship in the harbor at Charleston, South Carolina.[7] There followed a series of hostile acts against U.S. merchant ships, committed under the authority of the French government, and deemed by Congress to be "a system of predatory violence." *See* An Act to Declare the Treaties Heretofore Concluded with France, no Longer Obligatory on the United States (July 7, 1798). Congress responded to these acts of terrorism by terminating U.S. treaties with France. *Id.* Congress also enacted a statute authorizing U.S. ships to capture armed French vessels. An Act Further to Protect the Commerce of the United States, § 1 (July 9, 1798).

In accordance with that statute, the President instructed duly commissioned U.S. ships "to take any armed French vessel or vessels sailing under authority, or pretence of authority from the French republic, which shall be found within the jurisdictional limits of the United States, or elsewhere on the high seas." *Schooner Peggy*, 5 U.S. at 103. Acting

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[7] *See* John Adams, Message to the Senate and House of February 5, 1798 Regarding a French Privateer, *available at* www.yale.edu/lawweb/avalon/presiden/messages/.

pursuant to that Presidential order, the Trumbull, a U.S. warship, captured the Schooner Peggy, a French merchant ship that fell within the statutory definition of an "armed French vessel." The circuit court for the District of Connecticut declared the Schooner Peggy a lawful prize, and condemned the ship "as forfeited to the use of the United States, and of the officers and men of . . . the Trumbull." *Id.* at 106-07.

The circuit court issued its order on September 23, 1800. One week later, on September 30, 1800, the United States signed a treaty with France. The fourth article of the treaty, which became effective on the date of signature, stipulated as follows: "'Property captured, and not yet definitively condemned . . . shall be mutually restored.'" *Id.* at 107. On October 2, 1800, the French owners of the Schooner Peggy filed a writ of error in the Supreme Court. *Id.* at 108. The case before the Supreme Court pitted the French owners, who sought restoration of their ship in accordance with the treaty, against the United States, who sought condemnation and forfeiture, in accordance with the Presidential order.

The Supreme Court first held that the Schooner Peggy had not been "definitively condemned" within the meaning of the treaty, because the French claimant still had a right to appeal the circuit court judgment. *Id.* at 108-09. Since the ship had not yet been condemned, the treaty required

restoration of the ship to its French owners. Having construed the treaty to require restoration, the Court was forced to confront a conflict between the treaty, which precluded condemnation and forfeiture, and the combined effect of the congressional statute, the Presidential order, and the circuit court judgment, all of which required condemnation and forfeiture.[8] Even assuming that the treaty barred forfeiture as a matter of international law, the Court had to decide, as a matter of domestic law, whether the treaty took precedence over the statute, Presidential order, and circuit court judgment.

The executive branch argued that the circuit court judgment was correct when made, and "cannot be made otherwise by any thing subsequent to its rendition." *Id.* at 109. The Supreme Court agreed that the circuit court judgment was correct at the time it was issued, and that the judgment gave the captors (U.S. naval officers) "vested rights" in the captured property. Even so, the Court said: "The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted." *Id.* at 109. Moreover, the Court stated that it "must decide according to existing laws," *id.* at 110, and the treaty was the "existing law" at the time of the Supreme Court's

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[8] The statute provided explicitly that armed French vessels captured pursuant to the statute "shall be duly proceeded against and condemned as forfeited." An Act Further to Protect the Commerce of the United States, § 1 (July 9, 1798). Pursuant to the statute, the circuit court had decreed explicitly that the Schooner Peggy "with her apparel, guns and appurtenances . . . be, and the same are hereby condemned as forfeited . . . ." *Schooner Peggy*, 103 U.S. at 107.

decision. The Court concluded: "[I]f it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law [i.e., the treaty], the judgment must be set aside." *Id.* at 110.

In sum, the Supreme Court ordered the executive branch to return the Schooner Peggy to its French owners in accordance with the treaty, despite the fact that the officers and men of the Trumbull had captured the Schooner Peggy as a lawful prize, acting pursuant to a valid Presidential order issued in the context of an armed conflict with France. Inasmuch as the Supreme Court had the power to order executive branch compliance with that treaty, thereby voiding executive action pursuant to a wartime Presidential order, there is no question that this court has the power to order executive branch compliance with the Geneva Conventions, even if that entails voiding a wartime Presidential order.

CONCLUSION

For the foregoing reasons, the Geneva Conventions are judicially enforceable.

Respectfully submitted,

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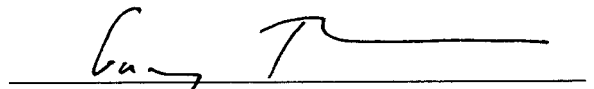
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rules 32(a) and 29(c), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 7,000 words (which does not exceed the applicable 7,000 word limit for *amici*).



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of *Amici Curiae* in Support of Petitioner-Appellee was served by electronic mail and/or regular U.S. Postal Service on the following counsel of record this 29th day of December, 2004:

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