

Appeal No. 09-56941

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ABDALA WARSAME ABDILLE,

Petitioner-Appellant,

v.

ROBIN BAKER, Field Officer Director, San Diego District, United States Bureau of Immigration and Customs Enforcement (ICE); JOHN GARZON, Assistant Field Office Director, San Diego District, ICE; JOHN MORTON, Assistant Secretary, ICE; JANET NAPOLITANO, Secretary, Department of Homeland Security; ERIC HOLDER, United States Attorney General,

Respondents-Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

The Honorable Jeffery T. Miller, Presiding
District Court No. 09 CV 2446

**BRIEF OF AMICUS CURIAE LAWYERS' COMMITTEE FOR CIVIL
RIGHTS IN SUPPORT OF PETITIONER-APPELLANT ABDILLE AND
REVERSAL OF JUDGMENT BELOW**

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INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("Lawyers' Committee") is a civil rights and legal services organization devoted to advancing the rights of people of color, low-income individuals, immigrants and refugees, and other underrepresented persons. The Lawyers' Committee is affiliated with the Lawyers' Committee for Civil Rights Under Law in Washington, D.C., which was created at the behest of President John F. Kennedy in 1963. In 1968, the Lawyers' Committee was established by leading members of the private bar in San Francisco. Throughout its history, the Lawyers' Committee has dedicated itself to ensuring access to the judicial system, particularly for the most vulnerable individuals and groups in our society.

In 1981, the Lawyers' Committee initiated its National Refugee Rights Project, which has become one of the leading immigrant and refugee advocacy programs in the country. Through its *Pro Bono* Asylum Program, the Lawyers' Committee assists low-income refugees by providing legal advice, referrals, and representation to over 250 new clients per year. In addition, the Lawyers' Committee has litigated scores of cases implicating the constitutional and human rights of immigrants and refugees. Because they implicate matters of great consequence for immigrants and refugees, the questions under consideration in this appeal are of critical importance.

SUMMARY OF ARGUMENT

(1) International law, including the International Covenant on Civil and Political Rights (“ICCPR”), is frequently relied upon by United States courts and unequivocally prohibits arbitrary and prolonged detention. Indeed, there is a presumption against detaining asylum-seekers, and the government must demonstrate that exceptional grounds justify detention.

(2) Detention is arbitrary under international law if it results from proceedings that violate fundamental due process rights. At a minimum, international law requires that detainees have the right to challenge their detention in a hearing before a neutral decision-maker. Parole proceedings absent meaningful and substantive review—such as checking boxes on a boilerplate form—cannot satisfy these standards of due process and fundamental justice.

(3) Prolonged detention in an asylum case is particularly harmful because of the physiological effects of prolonged detention that asylum-seekers suffer in detention. By definition, asylum-seekers are fleeing persecution in their home countries. It is hardly surprising that study after study concludes that locking them up is physiological damaging.

In this case, the government denied Mr. Abdille’s parole claim without any meaningful review into whether his detention was necessary, and his prolonged detention continues to this day, in violation of international law. His detention is

arbitrary and is contrary to the international obligations of the United States. Following well-established principles of statutory construction, this Court should construe section 1225(b) to provide Mr. Abdille a bond hearing before a neutral decision-maker at which the government must justify his continuing detention, consistent with the United States' obligations under international law.

ARGUMENT

I. SECTION 1225(b) SHOULD BE CONSTRUED CONSISTENT WITH THE UNITED STATES' OBLIGATIONS UNDER INTERNATIONAL LAW.

The Supreme Court has long recognized that U.S. law incorporates international laws. *See The Paquete Habana*, 175 U.S. 677, 700 (1900); *see also The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (holding that “[i]nternational law is part of our law” and that U.S. courts are “bound by the law of nations which is part of the law of the land”); *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995), *overruled in part on other grounds by Khulumani v. Barclay Nat’l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007) (recognizing that it is a “settled proposition that federal common law incorporates international law”).

It is black letter law in the United States that international laws, even if not directly enforceable in U.S. courts, are persuasive authority. *Kadic*, 70 F.3d at 246. Following this authority, in *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) the Supreme Court held that “an act of Congress ought never

to be construed to violate the law of nations, *if any other possible construction remains.*” *Id.* at 118 (emphasis added).¹

Under this doctrine, legislative silence is insufficient to infer that the government intended to violate its obligations under international law; rather, “some affirmative expression of congressional intent to abrogate the United States’ international obligations is required.” *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Ma v. Ashcroft*, 257 F.3d 1095, 1114 n.30 (9th Cir. 2001) (requiring a showing that “Congress has abrogated international law through legislation” and holding that relevant statute did not evince intent to abrogate U.S. obligations under the ICCPR²); *see also* Restatement (Third) of Foreign Relations Law § 115(1)(a) (“An Act of Congress supersedes an earlier rule of international law or a provision of an international agreement . . . if the purpose of the act to supersede the earlier rule or provision is clear . . .”).

¹ This Court has also repeatedly recognized the persuasive authority of international law in its decisions. *See Nuru v. Gonzales*, 404 F.3d 1207, 1222-23 & n.12 (9th Cir. 2005) (citing international law on treaty interpretation); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1994) (guidance from UDHR on arbitrary detention, specifically citing to Article 9); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-15 (9th Cir.1992).

² *See International Covenant on Civil and Political Rights* (“ICCPR”), opened for signature December 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976).

This Court recently reaffirmed that under *Charming Betsy*, the Immigration and Nationality Act (INA) should be interpreted “in such a way as to avoid any conflict with” the United States’ obligations under the U.N. Protocol Relating to the Status of Refugees if possible.³ *Khan v. Holder*, 584 F.3d 773, 783-84 (9th Cir. 2009).⁴ *See also Ma*, 257 F.3d at 1114-15 (applying *Charming Betsy* and construing 8 U.S.C. § 1231(a)(6) so as to avoid conflict with the ICCPR’s prohibition against arbitrary detention). Accordingly, under *Charming Betsy*, the statute at issue here, 8 U.S.C. § 1225(b), should be construed consistent with international law.

³ Upon acceding to the Refugee Protocol, the United States became obligated to give effect to Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees (“Refugee Convention”), *opened for signature* July 28, 1951, entered into force April 22, 1954, 189 U.N.T.S. 137; *see also* Protocol Relating to the Status of Refugees, *opened for signature*, January 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268, Art. 1, *entered into force* October 4, 1967 (hereinafter “Refugee Protocol”)

⁴ In *Khan*, the Court held that the “terrorist activity” asylum bar in the INA was not inconsistent with the Refugee Protocol, which allows for refoulement of an individual “whom there are reasonable grounds for regarding as a danger to the security” of the country of refuge. 584 F.3d at 783-84, *quoting* Article 33.2 of the Protocol. Unlike *Khan*, this appeal implicates none of the “terrorist activity” asylum bars. Mr. Abdille asks only that this Court hold that the United States’ obligations under international law require that 8 U.S.C. § 1225(b) be construed so as to allow him to challenge the legality of his detention in a bond hearing before a neutral decision-maker.

II. INTERNATIONAL LAW PROHIBITS ARBITRARY DETENTION AND ONLY PERMITS THE DETENTION OF ASYLUM-SEEKERS IN EXCEPTIONAL CIRCUMSTANCES.

A. Arbitrary and Prolonged Detention Violates International Law.

International law expressly prohibits arbitrary detention. The Universal Declaration of Human Rights (“UDHR” or “Declaration”), to which the United States is a signatory, states that “*no one shall be subjected to arbitrary arrest, detention, or exile.*” (Emphasis added.)⁵ The UDHR is well recognized by U.S. courts as persuasive authority. *See Filartiga v. Pena-Irala*, 630 F. 2d 876, 882-883 (2nd Cir. 1980) (“[a]lthough there is no universal agreement as to the precise extent of ‘human rights and fundamental freedoms’ guaranteed to all by the Charter . . . These U.N. declarations are significant because they specify with great precision the obligations of member nations under the Charter”), *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 42 (May 24)

⁵ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, Article 9 (3d sess. 1948); *see also* UN Commission on Human Rights, *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2005/6, at ¶ 1 (December 1, 2004), available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/167/19/PDF/G0416719.pdf?OpenElement> (accessed on March 22, 2010); The UDHR’s Preamble states: (“Member States have pledged themselves to achieve . . . the promotion of universal respect for and observance of human rights and fundamental freedoms,” in order “to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction”).

(“Wrongfully to deprive human beings of their freedom . . . is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.”)

The Declaration’s condemnation of arbitrary detention was codified in the ICCPR, and applies to all individuals within the territory of a State, regardless of citizenship. Article 9(1) guarantees:

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.

Further, Article 9(4) of the ICCPR requires:

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 of his release if the detention is not lawful.

Similarly, regional human rights treaties also unanimously prohibit arbitrary detention.⁶

⁶ The American Convention on Human Rights, which the United States has signed but not ratified, provides, “No one shall be subject to arbitrary arrest or imprisonment.” O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, Article 7(3); *see also* European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), E.T.S. No. 5, 213 U.N.T.S. 222, Article 5 (“Everyone has the right to liberty and security of person.”); African Charter on Human Rights and People’s Rights, OAU Doc. CAB/LEG/67/3/Rev. 5, Article 6 (“[N]o one may be arbitrarily arrested or detained”).

The United States ratified the ICCPR in 1992⁷ and affirmed its commitment to upholding the individual rights guaranteed by the treaty in Executive Order No. 13107, 63 Fed. Reg. 68991 (Dec. 10, 1998), which declares:

It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR

In accordance with these clear international instruments, this court and others have long recognized the international norm against arbitrary detention. *See, e.g., Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998); *Siderman de Blake*, 965 F.2d at 714-715; *Xuncax v. Gramajo*, 886 F. Supp. 162, 184-185 (D. Mass. 1995)⁸

⁷ *See* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (accessed on March 26, 2010).

⁸ These cases addressed whether the international norm against arbitrary detention rose to the level of a *jus cogens*, or peremptory, norm such that a tort claim for arbitrary detention could be pursued in federal court under the Alien Tort Statute (ATS). *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 734-38 (2004), in which the Supreme Court held that (“[A] single illegal detention of less than a day . . . violates no norm of customary international law so well defined as to support the creation of a federal remedy [under the ATS]”). *Id.* at 734-38. While the factual scenario at issue in *Sosa* differs significantly from the one here (Mr. Abdille has been detained for upwards of nineteen months), Amicus does not ask this Court to hold that the customary norm against arbitrary detention rises to the level of a peremptory norm that would support a cause of action under the ATS. Amicus only argues that this Court should construe the ambiguous provision

(Footnote continues on next page.)

B. International Law Specifically and Unequivocally Prohibits the Arbitrary Detention of Asylum-Seekers.

The United States is a signatory to the Protocol Relating to the Status of Refugees (“Refugee Protocol”), by which it undertook “to apply articles 2 to 34 inclusive” of the Geneva Convention to refugees as hereinafter defined.⁹ Refugee Protocol, Art. 1; *see also* Convention Relating to the Status of Refugees (“Refugee Convention”), 189 U.N.T.S. 150, *entered into force* April 22, 1954. Article 31 of the Convention prohibits the detention of refugees and asylum-seekers, providing:

- (1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
- (2) The Contracting States shall not apply to the movements of such refugees’ restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

(Footnote continued from previous page.)

of the INA at issue here in a manner that comports with customary international law, which prohibits arbitrary and prolonged detention without periodic and meaningful judicial review.

⁹ Protocol Relating to the Status of Refugees, *opened for signature*, January 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268, Art. 1, *entered into force* October 4, 1967 (hereinafter “Refugee Protocol”).

In 1968, when it acceded to the Refugee Protocol, the United States acknowledged the important principle of ensuring that refugees were not unnecessarily detained.¹⁰

Courts have recognized the international norms against the arbitrary detention of asylum-seekers. Indeed, in his dissent in *Zadvydas v. Davis*, Justice Kennedy cited international standards on refugees and asylum-seekers in support of the proposition that “both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious.” 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting) (citing report of the U.N. Working Group on Arbitrary Detention and the Guidelines of the U.N. High Commissioner for Refugees). Justice Kennedy stressed that the seriousness of a parole determination required more than “some informal procedural guarantees,” and required instead that proceedings be conducted by a “neutral administrative official.” *Id.* at 723.

C. International Law Requires the Government to Prove that Exceptional Grounds Justify the Prolonged Detention of Asylum-Seekers.

International law only permits the detention of asylum-seekers if the government can demonstrate exceptional grounds justifying detention. Concerned with a trend among Contracting States to detain asylum-seekers, the Office of the

¹⁰ 19 U.S.T. 6223; T.I.A.S. No. 6577; 606 U.N.T.S. 267.

United Nations High Commissioner for Refugees (UNHCR)¹¹ issued Guidelines on applicable criteria and standards relating to the detention of asylum-seekers, in accordance with Article 31 of the Geneva Convention Relating to the Status of Refugees.¹² The Guidelines emphasize that “[a]s a general principle asylum seekers should not be detained,” and there is a “presumption against detention.” UNHCR Guidelines, at Guidelines 2 and 3; *see also* UNHCR, *Detention of Refugees and Asylum-Seekers*, Executive Order No. 44 (Oct. 13, 1986), at paragraph (b) (“[D]etention should normally be avoided.”)

The Guidelines further provide that “[c]onsistent with [Article 31], detention should only be resorted to in cases of necessity” and should not be “unduly prolonged.” UNCHR Guidelines, at Introduction. To justify detention, the government must demonstrate “exceptional grounds,” which are limited to verifying identity, determining the elements on which the claim for refugee status

¹¹ The UNHCR was created by the General Assembly with a mandate to “safeguard the rights and well-being of refugees.” *See* <http://www.unhcr.org/pages/49c3646c2.html> (accessed on Mar. 26, 2010).

¹² *UNHCR’s Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* (Feb. 26, 1999), available at: <http://www.unhcr.org/refworld/docid/3c2b3f844.html> (accessed March 22, 2010) (hereinafter “UNHCR Guidelines”); Refugee Protocol; Refugee Convention.

or asylum is based,¹³ protecting national security and public order, or cases of identity fraud. *Id.*, Guideline 3. Detention on the basis of these narrow exceptions must be based on domestic law that comports with “general norms and principles of international human rights law.” *Id.*¹⁴

As international law requires, detention of asylum-seekers should be preceded by “active consideration of possible alternatives” and should only be imposed, if at all, after certification by a qualified medical practitioner that detention will not adversely affect the asylee’s health or well-being.¹⁵

¹³ This exception “cannot be used to justify detention for the entire status determination procedure, or for an unlimited time.” UNCHR Guidelines, Guideline 4.

¹⁴ The U.N. Human Rights Committee has accordingly held that Article 9 of the ICCPR prohibits the detention of asylum-seekers “beyond the period for which the State can provide appropriate justification.” *Av. Australia*, UN Human Rights Committee, UN Doc. No. CCPR/C/59/D/560/1993 (Apr. 30, 1997) at ¶ 9.4. The Human Rights Committee (HRC) was established by Article 28 of the ICCPR and is mandated to implement and monitor compliance with the ICCPR.

¹⁵ Guideline 7, UN High Commissioner for Refugees, *UNHCR’s Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, February 26, 1999, available at: <http://www.unhcr.org/refworld/docid/3c2b3f844.html> (accessed March 22, 2010).

III. INTERNATIONAL LAW REQUIRES THAT ASYLUM-SEEKERS BE ALLOWED TO CHALLENGE THEIR DETENTION IN A HEARING BEFORE A NEUTRAL DECISION-MAKER.

A. Detention Is Arbitrary and Violates International Law When It Is Not Based on Appropriate Proceedings.

The drafters of the UDHR went to great lengths to make clear that the Declaration's use of the term "arbitrary" refers not only to detentions that are unauthorized by law, but *also to detentions that are in accordance with laws that are themselves unjust*. See Statement of U.K. Delegate, 3 U.N. GAOR, Pt. I, Third Comm. 247, 248 (1948). The drafting history of the parallel article 9(1) of the ICCPR confirms that "arbitrariness" is not to be equated with "against the law," but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. *Womack Mukong v. Cameroon*, U.N. Doc. CCPR/C/51/D/458/1991, Article 9.8 (Aug. 10, 1994); see also *Van Alphen v. Netherlands*, U.N. Doc. CCPR/C/39/D/305/1988, at ¶ 5.8 (Aug. 15, 1990) (interpreting Article 9, paragraph 1, to mean that custody must "[n]ot only be lawful but reasonable in all the circumstances" and "[m]ust be necessary in all the circumstances"); Restatement (Third) of Foreign Relations Law § 702 (arbitrary prolonged detention violates international law even if it is the normal practice of the state).

Furthermore, international legal authorities have interpreted the term "arbitrary detention" to include detention resulting from proceedings violating

fundamental due process rights. *See, e.g., Womack* (holding that “arbitrary” detention includes detention imposed without due process, and prolonged detention without periodic, meaningful review). Consistent with these holdings of the HRC, the Working Group on Arbitrary Detention has identified three categories of arbitrary detention. Category III consists of detentions where:

the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character.¹⁶

B. Detention of Asylum-Seekers Without a Hearing Before a Neutral Decision-Maker Violates International Law.

The UDHR, the ICCPR, and other international laws impose procedural safeguards to protect against arbitrary detention, including the right to seek review

¹⁶ U.N. Office of the High Commissioner for Human Rights, *Fact Sheet No. 26, The Working Group on Arbitrary Detention*, available at <http://www.unhchr.ch/html/menu6/2/fs26.htm>. The Working Group on Arbitrary Detention (“Working Group”) was established by Resolution 1991/42 of the HRC former U.N. Commission on Human Rights (“UNHCHR” is now the U.N. Human Rights Council). *Working Group on Arbitrary Detention: Civil and Political Rights, Including the Questions of Torture and Detention* (Dec. 15, 2003), U.N. Doc. E/CN.4/2004/3, available at <http://www2.ohchr.org/english/issues/detention/annual.htm>. The Working Group’s mandate includes “devot[ing] all necessary attention to reports concerning the situation of immigrants and asylum-seekers who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy.” UNHCHR Res. 1997/50, U.N. Doc. E/CN.4/1997/50 (April 15, 1997). “Arbitrary” is not defined in the ICCPR or the UDHR. The UNHCHR adopted the Working Group’s definition in its Resolution 1997/50, U.N. Doc. U.N. Doc. E/CN.4/RES/1997/50 (April 15, 1997).

of the legality of detention before an independent tribunal. Article 9.4 of the ICCPR provides:

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 in the lawfulness of his detention and order his release if the detention is not lawful. (Emphasis added.)

This guarantee “is applicable to ***all*** deprivations of liberty, whether in criminal cases or in other cases such as . . . ***immigration control***,” as well as in so-called “preventative detention” (emphasis added).¹⁷ See also UDHR, *supra*, Articles 3 and 9.

The same right has been codified in many other human rights conventions.¹⁸

¹⁷ U.N. Human Rights Commission, General Comment No. 8 (16th Sess., 1982) at ¶ 1, U.N. Doc. HRI/GEN/1/Rev.1 (emphasis added), *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument) (accessed on March 22, 2010). General Comment No. 15 reaffirms the ICCPR’s application to both citizens and non-citizens. *Id.* at General Comment No. 15 (27th Sess. 1986), U.N. Doc. HRI/GEN/1/Rev.6 at 140 (2003), *available at* <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument> (accessed on March 23, 2010). In particular, General Comment No. 15 provides that “the safeguards of the Covenant relating to deprivation of liberty” extend to non-citizens. *Id.* at ¶¶ 9-10. The United States did not make any reservations or declarations with regard to these General Comments when it ratified the ICCPR in 1992. (A General Comment is the Human Rights Committee’s definitive interpretation of the content of human rights provisions in the ICCPR.)

¹⁸ See American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, Article 7(3); American Declaration on the Rights and Duties of Man, Article XXV (May 2, 1948); Inter-American Commission on Human Rights, (Footnote continues on next page.)

Similarly, The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly Resolution 43/173 (“Body of Principles”),¹⁹ states: “Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or *be subject to the effective control of, a judicial or other authority.*” *Id.*, at Principle 4 (emphasis added).

A “judicial or other authority” is distinct from the detaining authority. *See id.*, at Principle 32 (providing that “[t]he detaining authority shall produce without unreasonable delay the detained person before the reviewing authority” so that he can “take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.”)

(Footnote continued from previous page.)

Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System, OAS Doc. OEA/Ser.L/V/II.65, Doc. 6 (1985); European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, Article 5(4) (November 4, 1950); African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3/Rev. 5, Articles 6 and 7(1) (June 27, 1981).

¹⁹ *Body of Principles for the Protection of All persons Under Any Form of Detention or Imprisonment*, G.A. Doc. A/RES/43/173 (December 9, 1988), available at <http://www.un.org/documents/ga/res/43/a43r173.htm>.

Furthermore, international authorities provide that a detained asylum-seeker, in particular, must have an opportunity to challenge the legality of his detention in a hearing before an impartial decision-maker. The UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers (February 1999) ("UNHCR Guidelines") provide that detained asylum-seekers:

should be entitled . . . to have the decision subjected to automatic *review before a judicial or administrative body independent of the detaining authorities*. This should be followed by *regular periodic reviews* of the necessity for the continuation of detention, which the asylum-seeker or his representative would have the right to attend; [and] either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any findings made. . . .²⁰

The U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has likewise concluded that "court control of the detention must be available" for "all forms of deprivation of liberty, including administrative detention and immigration control measures." The Special Rapporteur further remarked that "[j]udicial control of interference by the executive power with the individual's right to liberty is an essential feature of the

²⁰ Guideline 5. See also UNHCR, *Detention of Refugees and Asylum-Seekers*, 13 October 1986, No. 44 (XXXVII), available at: <http://www.unhcr.org/refworld/docid/3ae68c43c0.html> (accessed on March 24, 2010) ("[D]etention measures taken in respect of refugees and asylum-seekers should be subject to judicial or administrative review").

rule of law.”²¹ The Working Group on Arbitrary Detention has likewise determined that:

[A]dministrative detention under . . . migration laws . . . resulting in a deprivation of liberty for unlimited time or *for very long periods without effective judicial oversight*, as a means to detain persons suspected of involvement in terrorism or other crimes, is not compatible with international human rights law . . . [and that all detained persons must be] afforded the guarantees applicable to criminal proceedings.²²
(Emphasis added)

International courts have accordingly held that a detainee in removal proceedings must be afforded an opportunity to obtain judicial review of his or her

²¹ Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/57/173 (2002) at paras 15, 17, *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/475/60/PDF/N0247560.pdf?OpenElement> (accessed on March 22, 2010).

²² U.N. Commission on Human Rights, *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2005/6 (December 1, 2004), at ¶ 77, *available at*: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/167/19/PDF/G0416719.pdf?OpenElement> (accessed on March 23, 2010); *see also* Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5, Rev. 1, at ¶ 409 (October 2002), *available at*: <http://www1.umn.edu/humanrts/iachr/terrorism-ch3G1.html> (accessed on March 23, 2010) (“[P]roceedings involving the detention . . . of aliens . . . require individualized and careful assessment and [are] subject to the same basic and non-derogable procedural protections applicable in proceedings of a criminal nature.”)

detention.²³ In any such proceedings, the reviewing court must bear in mind that there is a presumption against detention, and that it is therefore the government's burden to proffer individualized evidence that detention is "necessary" (*e.g.*, to verify identity, determine the elements on which the claim for asylum is based, or protect national security and public order). *See* UNHCR Guideline 3; *A v. Australia*, at ¶ 9.4 (noting that the burden is on the State to "provide appropriate justification" for continued detention of asylum-seekers).

Further, detention must be subject to periodic and meaningful judicial review. *A v. Australia*, at ¶ 9.4. "While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal." *Id.* at ¶ 9.5. Accordingly, a reviewing body

²³ *See, e.g., A v. Australia*, U.N. Human Rights Committee, CCPR/C/59/D/560/1993 (April 30, 1997) at ¶¶ 9.4-9.5; *Torres v. Finland*, U.N. Human Rights Committee, CCPR/C/38/D/291/1988 (April 5, 1990), available at: <http://www.unhcr.org/refworld/country,,HRC,,FIN,4562d8b62,47fdfaf5d,0.html> (accessed on March 23, 2010) (reviewing seven-day detentions of an asylum-seeker); *see Case of SD v. Greece*, European Court of Human Rights, Case No. 53541/07 (June 11, 2009), at ¶¶ 2-80 (holding that similar provision in Article 5(4) of the European Convention on Human Rights was violated where Greek law did not provide a detained asylum-seeker with an opportunity to obtain judicial review of his detention); *Al-Nashif v. Bulgaria*, European Court of Human Rights, Case No. 50963/99 (June 20, 2002), at ¶ 92 (finding violation of the right against arbitrary detention where Bulgarian law provided for mandatory detention of non-citizens without judicial review).

must do more than simply rubber-stamp the government's assertion that an asylum-seeker is subject to detention under domestic law. *Id.* at ¶ 9.5. Rather, there must be individualized review to ensure that the designation is valid and the detention is actually necessary. *Id.*

C. To Avoid Conflict with the United States' Obligations Under International Law, 8 U.S.C. § 1225(b) Should Be Construed to Allow a Detained Asylum-Seeker to Challenge Administrative Detention in a Hearing Before a Neutral Decision-Maker.

The Refugee Protocol, ICCPR, UDHR, regional human rights charters, Body of Principles, UNHCR Guidelines, and judicial decisions construing the international prohibition against arbitrary detention evince an overwhelming international consensus that a detained asylum-seeker must be afforded an opportunity to challenge his or her detention in a hearing before a neutral decision-maker.

These international instruments are persuasive in determining what process is necessary to determine whether “exceptional grounds” warrant the prolonged detention of an asylum-seeker. Under the complementary canons of constitutional avoidance and the *Charming Betsy* rule, this Court should construe 8 U.S.C. § 1225(b) in a manner that comports with international law. *See Khan*, 584 F.3d at 783-84; *Ma*, 257 F.3d at 1105, 1114-15 (construing 8 U.S.C. § 1231(a)(6) so as to comport with Article 9 of the ICCPR).

Section 1225(b) is silent with regard to the length of detention it authorizes and the nature and scope of procedural protections required. Absent an explicit abrogation of the United States' obligations under the above-mentioned international law, § 1225(b) must therefore be construed consistently with the international norms against arbitrary detention in general, and against the prolonged and arbitrary detention of asylum-seekers in particular. In other words, it must be interpreted to require that the government demonstrate the existence of exceptional grounds to justify Mr. Abdille's continued detention and to allow Mr. Abdille to challenge the legality of his detention in a hearing before an independent decision-maker.

Mr. Abdille's case is an archetypal example of why such safeguards are necessary. He has been detained for more than *nineteen months* on the basis of a boilerplate determination and without a single opportunity for a bond hearing before a neutral decision-maker. The government has never proffered *any evidence* to support its purported basis for holding Mr. Abdille, much less demonstrated that his continued detention is necessary. Meanwhile, Mr. Abdille continues to suffer from anxiety, depression, and post-traumatic stress disorder as a result of his prolonged detention. This conduct is inconsistent with the principles underpinning the laws of the United States, and it is a blatant violation of international laws, treaties and norms of regarding the detention of asylum-seekers.

IV. PROLONGED DETENTION CAUSES PERMANENT HARMFUL PSYCHOLOGICAL DAMAGE AND EFFECTIVELY DETERS INDIVIDUALS FROM SEEKING ASYLUM

A. Detainees Will Be Further Traumatized by Imprisonment and the Inability to Obtain Necessary Mental Health Treatment.

Prior to their arrival in the United States, asylum-seekers are the victims of trauma and abuse. Their trauma-induced mental conditions often leave them with mental health problems that render them particularly vulnerable to psychological crises.²⁴

Due to this vulnerability, the detention of an asylum seeker in penal-like conditions can significantly impede the asylee's recovery from mental disorders and permanently damage his or her mental health. Many immigrants are detained in actual prisons or jails, and most immigrant detention facilities could themselves

²⁴ See *U.S. Detention of Asylum-seekers: Seeking Protection, Finding Prison Human Rights First*, at 43 (June 2009), available at: <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf> (86% of asylum-seekers suffer from significant depression, 77% suffer from anxiety, and 50% suffer from PTSD).

double as prisons.²⁵ Indeed, with cells and razor wire ringing the walls, ICE detention centers are prisons in all but name.²⁶

Forcing asylum-seekers to live in these prison environments tends to cause grave physiological and psychological stress responses.²⁷ Among the psychological stress responses, increased symptoms of anxiety, depression, and PTSD were prevalent.²⁸ These responses are exacerbated by lengthy detention,²⁹ especially when detainees have already experienced a series of severe traumas

²⁵ See *U.S. Detention of Asylum-seekers: Seeking Protection, Finding Prison Human Rights First*, at 17-29 (June 2009), available at <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf> (describing a 62% increase in the use of “jail-like detention for asylum-seekers and other immigrants” between 2003 and 2009). Other asylum-seekers are held in actual jails. *Id.* at 17.

²⁶ Craig Haney, “*Conditions of Confinement for Detained Asylum-seekers Subject to Expedited Removal*”, in *U.S. Commission on International Religious Freedom, Report on Asylum-Seekers in Expedited Removal*, at 191-192 (2005), available at: http://www.uscirf.gov/index.php?option=com_content&task=view&id=1892&Itemid=1 (accessed March 22, 2010).

²⁷ *Id.* at 192 (discussing James Bonta and Paul Gendreau, *Reexamining the Cruel and Unusual Punishment of Prison Life*, 14 *Law and Human Behavior* 347, 353-359 (1990)).

²⁸ Physicians for Human Rights and the Bellevue /NYC Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum-seekers* (Boston and New York City, June 2003), available at: <http://physiciansforhumanrights.org/library/report-persprison.html> (herein after the “2003 Bellevue/NYU Report”).

²⁹ *Id.* at 55.

before arriving in the United States. *Id.* The time spent in prison-like environments may “re-traumatize” detainees, not only delaying healing, but also re-triggering the disabling psychological reactions and consequences of those earlier damaging experiences.³⁰

Even those detainees who are ultimately granted asylum or returned to their home countries suffer from long-term psychological after-effects. *Id.* This appears to be at least in part due to the fact that even detained asylum-seekers who manifest profound psychological distress are often denied access to mental health services in ICE facilities.³¹

Consistent with this medical and social science research, international standards prohibit the detention of asylum seekers in penal or penal-like conditions. *See* UNHCR Guidelines, Guideline 10(iii) (“The use of prisons should be avoided”). Given that asylum-seekers are not convicted criminals, these standards are consistent with this Court’s recognition that civil detainees “are entitled to more considerate treatment and conditions of confinement than

³⁰ Craig Haney, “*Conditions of Confinement for Detained Asylum-seekers Subject to Expedited Removal*,” in *U.S. Commission on International Religious Freedom, Report on Asylum-seekers in Expedited Removal*, at 191 (2005), available at: http://www.uscirf.gov/index.php?option=com_content&task=view&id=1892&Itemid=1 (accessed March 22, 2010).

³¹ 2003 Bellevue/NYU Report.

criminals whose conditions of confinement are designed to punish.” *Jones v. Blanas*, 393 F.3d 918, 931-32 (9th Cir. 2004), *cert. denied*, 126 S. Ct. 351 (2005) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982)).

B. Prolonged Detention Increases the Likelihood of Permanent Damage to Mental Health.

A number of studies show that prolonged detention causes permanent mental health problems for asylum-seekers.³² One such study of U.S. detainees found that 70% of asylum-seekers reported their mental health had worsened substantially while in detention, and there was a direct relationship between the length of time in detention and the resulting levels of anxiety, depression and post-traumatic stress disorder.³³ Much of this anxiety comes from uncertainty about how long the detention will continue.³⁴ As one asylum-seeker put it, “The main problem is that we don’t know what is going to happen. At least with a prison sentence you know you are lessening your time. . . . It’s another kind of torture — mental torture . . . No one knows we’re here.”³⁵

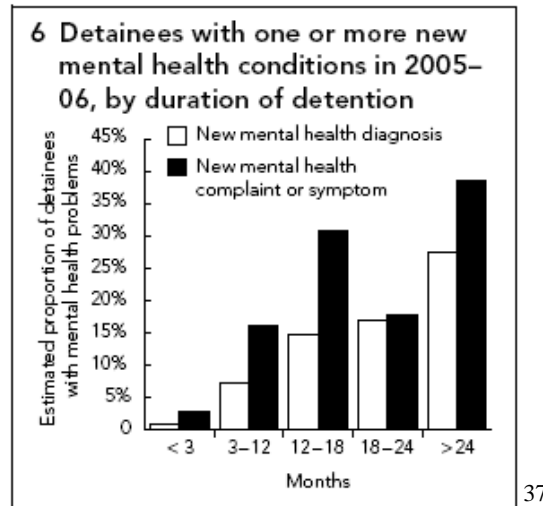
³² See 2003 Bellevue/NYU Report.

³³ Allen S. Keller et al., *Mental Health of Detained Asylum-seekers*, *The Lancet*, 362:1721-1723 (Nov. 22, 2003).

³⁴ See *U.S. Detention of Asylum-seekers: Seeking Protection, Finding Prison* (human rights *first*, June 2009) at 43.

³⁵ 2003 Bellevue/NYU Report at 7.

The Danish Red Cross conducted a similar study, and found a dramatic increase in mental disorders among asylum-seekers as the length of stay increased.³⁶ As the graph below indicates, the correlation is almost direct:



Furthermore, the longer an asylum-seeker is detained, the more likely it is that he will live with the mental repercussions of detention for the remainder of his life.³⁸

³⁶ See Peter Hallas et al., *Length of Stay in Asylum Centers and Mental Health in Asylum-seekers: A Retrospective Study from Denmark*, BMC Public Health at 7:288 (2007).

³⁷ Janette P. Green & Kathy Eagar, *The Health of People in Australian Immigration Detention Centres*, Medical J. of Australia (2010) at 69, available at: http://www.mja.com.au/public/issues/192_02_180110/gre10973_fm.html (accessed March 22, 2010).

³⁸ See 2003 Bellevue /NYC Report at 55 (interviewed 70 asylum-seekers held in immigration detention).

This leads to the unsurprising conclusion that the shortest possible period of detention is best for asylum-seekers' long-term mental health, because it minimizes the chances of irreparable psychological damage.³⁹ Strikingly, refugees released from detention often speak of the *detention* haunting them, rather than the torture they experienced in their home countries. A former torture victim granted asylum stated, "Being in prison was like being dead . . . What I experienced there was very difficult to forget. Every day I think about my life in prison." 2003 Bellevue/NYU Report at 8. Another asylum-seeker described her time in detention, stating:

Before detention, I had never thought of killing myself. I had never had such an idea. My goal was to save my life. It was when I got into detention, that I started losing hope and thought that it is useless to live. In my mind, I just kept thinking there is no reason to live and I thought about what would happen to me if I was sent back to my country—I thought I would be killed if I was sent back. So I thought it would be better to just get it over with now rather than be sent back.

Id. at 76.

As these statements indicate, prolonged detention will tend to discourage asylum-seekers from pursuing asylum applications in the United States, in violation of the United States' obligations under the Refugee Protocol and Article

³⁹ Craig Haney, "Conditions of Confinement for Detained Asylum-seekers Subject to Expedited Removal, in *U.S. Commission on International Religious Freedom, Report on Asylum-seekers in Expedited Removal*," at 191-192 (2005), available at: http://www.uscirf.gov/index.php?option=com_content&task=view&id=1892&Itemid=1 (accessed March 22, 2010); 2003 Bellevue/NYU Report at 7.

14 of the UDHR.⁴⁰ In fact, human rights organizations have documented that asylum-seekers subjected to prolonged detention often choose to abandon their asylum applications and seek repatriation, despite the risk of persecution, rather than remain in detention.⁴¹

V. CONCLUSION

Detention that is arbitrary, prolonged and without independent judicial review causes permanent psychological damage to asylees, and is inconsistent with principles fundamental to both United States and international law.

⁴⁰ Article 14(1) provides “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

⁴¹ Human Rights First 2008/2009 Annual Report, at 11-12, available at: <http://www.humanrightsfirst.org/annual-report/AR-2009-final-for-web-020610.pdf> (accessed March 22, 2010); Amnesty International Immigrant Detention Report, *Jailed Without Justice: Immigration Detention in the USA*, (June 2008), available at: <http://www.amnestyusa.org/immigration-detention/immigrant-detention-report/page.do?id=1641033> (accessed March 22, 2010).

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 29-2(c)(2), that the attached Brief of Amicus Curiae is proportionally spaced, has typeface of 14 points, and is 6,210 words per the word count feature of Microsoft Word.

If this Court would like copies of any of the authorities cited within this amicus brief, I would be happy to provide copies.

Dated:

By: s/L. Scott Oliver
L. Scott Oliver

pa-1393454

9th Circuit Case Number 09-56941

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 31, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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s/ L. Scott Oliver