IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHER EL FALESTENY, *et al.,* Petitioners, *v.* BARACK OBAMA, *et al.,* Respondents.	Civil No. 05-2386 (RBW)
ISSAM HAMID ALI BIN ALI AL JAYFI, *et al.*, Petitioner, v. BARACK H. OBAMA, President of the United States, *et al.*, Respondents.	Civil No. 05- 2104 (RBW)
KARIN BOSTAN, Petitioner, *v.* BARACK OBAMA, *et al.,* Respondents.	Civil No. 05-883 (RBW)

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION ENFORCING THIRD GENEVA CONVENTION

By order of March 3, 2009 (Item # 193), the Court directed Petitioner Falesteny to supplement his memorandum of law supporting his motion for a preliminary injunction filed June 2, 2008 but stayed by Judge Hogan until recently.[1] That motion sought to end Respondents' violation of certain provisions of the Third Geneva Convention ("GC3"). This is the required memorandum – other petitioners before the Court have joined in the motion, through their counsel, as undersigned.

There have been developments since June 2. In particular, the Supreme Court decision in *Boumedienne v. Bush*, 128 S. Ct. 229 (2008) removes any doubt about this court's jurisdiction of the subject matter of this action under

[1] The court's order directed the following questions be addressed: "(1) whether the Geneva Conventions guarantee these petitioners certain conditions of confinement and, if so, what these conditions are; (2) assuming that such protections exist, whether a failure to accord these protections to the petitioners may serve as a basis for the issuance of the writ of habeas corpus; (3) if such protections do not exist, whether the failure to grant petitioners a certain minimum standard of care may nevertheless provide the basis for the issuance of the writ of habeas corpus, and, if so, what constitutes that minimum standard; and (4) whether the court has subject matter jurisdiction over any petition for the writ of habeas corpus relying upon the conditions of a petitioner's confinement as a basis for relief." (Item 193 at 8.)

These questions are answered more fully in the following text as (1)Yes, see §§21, 25, and 34; (2) Yes, (3) petitioners do not rely on any other source than the Convention in this motion,; and (4) Yes , habeas may be used to enforce a treaty term being violated notwithstanding that that term relates to the operation of a prisoner-of-war facility. As to the Court's second question, the commentary to the Conventions provides part of the answer: "If the Detaining Power is unable or unwilling to fulfill its obligations in respect of maintenance, it should no longer detain any prisoners of war." *Int'l Comm. of the Red Cross, Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* 153 (Jean S. Pictet ed. 1960). "[T]here are, in fact, two remedial courses of action available to the Detaining Power under these circumstances: (1) the transfer of the prisoners of war to another Party . . . or (2) repatriation." Levie, *Prisoners of War in International Armed Conflicts*, 59 In't Law Stud. at 127-28 (Naval War College 1979).

28 U.S.C. § 2241. That case held that the legislation repealing the statutory habeas remedy of 28 U.S.C. § 2241 *et seq. a*s to prisoners at Guantanamo was constitutionally void and thus ineffective to eliminate this statutory habeas remedy. A lynchpin of Falesteny's motion had been that the Supreme Court was certain to rule exactly as it did, and thus there was no need to delay taking up the issue of Respondents' violation of the Conventions, particularly since Falesteny had been cleared for release, but was being held in solitary confinement in violation of specific provisions of the GC3.[2]

Falesteny's motion sought to compel Respondents' compliance with provisions of the Third Geneva Convention and alleged flagrant violations thereof in need of remedy. Respondents refused to address this charge in their answer, saying the matter should not be ruled on until *Boumedienne* was decided. In his opening brief, Falesteny addressed the central issues of his prisoner-of-war status under the Conventions, the specific provisions of GC3 that his custody violated and continues to violate, and briefly discussed the enforceability in a habeas action of those provisions, a central issue to which we devote most of our attention below.

[2] Respondents benignly refer to the 22 hour long daily solitary confinement scheme as "single cell occupancy."

I. The Rights Conferred by The Geneva Conventions Are Enforceable in U.S. Courts Because the Provisions at Issue Are "Self-Executing".[3]

We expect Respondents to urge that the Geneva Convention is "a non-self-executing treaty" that is unenforceable in United States courts by individuals in the absence of implementing legislation passed by Congress. There is, however, no such requirement of Congressional enactment as a prerequisite to judicial enforcement, as we show. But to the extent that such a requirement might be thought to exist, Articles 21, 25, and 34 are in fact "self-executing." There can be no dispute that international treaties can and often do give rise to individual "rights" that are "capable of enforcement." *The Head-Money Cases,* 112 U.S. 580, 598 (1884). The question here is whether the Articles cited do so. As we explain below, the text and history of the habeas statute and the Supremacy Clause, on-point Supreme Court precedent, and each of the several "tests" that courts have developed for determining whether a treaty is self-executing, all demonstrate that the Articles of GC3 above cited are indeed enforceable in a habeas proceeding.

A. The Language of the Habeas Statute, the Supremacy Clause, and Article III Demonstrate That Rights Conferred by GC3 Are Enforceable in a Habeas Corpus Proceeding.

The general habeas corpus statute – pursuant to which Falesteny brought the present suit – is clear on its face. It states unambiguously that federal

[3] The rights of particular concern here are set out in Articles 21, 25 and 34, which are set out in Addendum A to this brief.

courts may grant habeas relief to persons in custody in violation of "the Constitution or laws or *treaties* of the United States." 28 U.S.C. § 2241(c)(3) (emphasis added). Notably, section 2241 does *not* say that courts may grant relief only to persons alleging violations of "some treaties," or of "self-executing treaties." Rather, it says simply and plainly that courts may grant relief to those in custody in violation of "treaties." That language alone arguably answers the question of the GC3's enforceability here.

But there is more. The language of section 2241, which the Supreme Court recently noted "descends directly from § 14 of the Judiciary Act of 1789 and the 1867 [Habeas Corpus] Act,"[4] tracks almost verbatim the language of the two constitutional provisions that underlie it. First, the Supremacy Clause states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI, § 2 (emphasis added). Far from admitting of any distinction between self-executing and non-self-executing treaties, the Supremacy Clause expressly affirms that "all treaties … shall be" the supreme and binding law and thus makes clear that duly-concluded treaties – like federal statutes and the Constitution itself – create enforceable legal obligations.

[4] *INS v. St. Cyr,* 533 U..S., 289, 306 n.25 (2001).

Second, Article III of the Constitution, which defines the "judicial Power of the United States," states expressly that federal-court jurisdiction "extend[s] to *all Cases. . . arising under* this Constitution, the Laws of the United States, and *Treaties made, or which shall be made under their Authority...."* U.S. Const. Art. III, § 2, cl. 1 (emphasis added). Article III does not distinguish between different kinds of treaties; it simply gives federal courts jurisdiction over "all Cases ... arising under ... Treaties." Article III thus ensures that federal courts possess the authority to enforce the legal obligations that treaties – again, like federal statutes and the Constitution itself – create.

The plain language of the governing statutory and constitutional provisions thus leaves little doubt that the rights conferred by the Articles in question are enforceable in a *habeas corpus* proceeding.

B. Supreme Court Precedent Demonstrates that the Rights Conferred by GC3 are Enforceable in a Habeas Corpus Proceeding.

The most directly relevant precedent here is *Mali v. Keeper of the Common Jail,* 120 U.S. 1 (1887), which, to our knowledge, is the only case in which the Supreme Court has considered a habeas petition based on an alleged treaty violation. In *Mali,* several Belgian sailors had been arrested and jailed by New Jersey police for crimes arising out of an "affray" aboard a ship docked in a New Jersey port. *Id.* at 2-3. Acting for himself and "in behalf of" the sailors, *id.* at

2, the Belgian consul sought a writ of habeas corpus, claiming that a treaty between Belgium and the U.S. gave the countries' respective consuls "exclusive charge of the internal order of the merchant vessels of their nation ...." *Id.* at 4-5. On the basis of the treaty's plain language, the consul contended that Belgian authorities, and not the local authorities, had jurisdiction over the sailors. *Id* at 4.

Without drawing any distinction between self-executing and non-self-executing treaties, the Supreme Court went straight to the merits of the treaty issue. The Court emphasized that the existing habeas statute (the forebear of section 2241) extended protection to prisoners in "custody in violation of the Constitution or a law or *treaty* of the United States." *Id* at 11 (emphasis added). Thus, the Court said, "the question we *have to consider is* whether these prisoners [*i.e.,* the sailors] are held in violation of the provisions of the existing treaty between the United States and Belgium." *Id.* (emphasis added). Stating that the treaty was "part of the supreme law of the United States," the Court could "see no reason why [the petitioner] may not enforce his rights under the treaty by writ of habeas corpus in any proper court of the United States." *Id.* at 17. That "being the case, the only important question left for [the Court's] determination" was whether the treaty claim should succeed on the merits (which the Court ultimately concluded it should not). *Id.*

The implication of *Mali* for this case is unmistakable. Just as the habeas statute at issue in *Mali* extended to those in custody in violation of "treat[ies]," section 2241, by its express terms, permits habeas petitions based on "treat[ies]." Accordingly, just as the Supreme Court there concluded that it "ha[d] to consider" the merits of the consul's petition on behalf of the sailors, the courts here must consider Falesteny's petition on the merits.

C. The Relevant Framing-Era History Demonstrates that the Rights Conferred by the GC3 are Enforceable.

The Supreme Court's decision in *Mali* follows logically not only from the plain language of the habeas statute and the Supremacy Clause, but also from the relevant founding-era history, which clearly demonstrates that the Framers intended rights conferred by treaties to be enforceable in U.S. courts.[5] At the time of this Nation's founding, treaties in Great Britain were considered to be non-self-executing.[6] This "British rule" resulted from the fact that treaties in Great Britain were concluded by the Crown, while municipal legislation was the province of Parliament.[7] Accordingly, before any legal norm embodied in a treaty could be

[5] The historical narrative provided here relies heavily on the well-documented accounts contained in K. Rosati, *The United Nations Convention Against Torture: A Self Executing Treaty That Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal*, 26 Denv. J. Int'l L. & Pol'y 533 (1998), C. Vazquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int'l L. 695 (1995), and J. Paust, Self-Executing Treaties, 82 Am. J. Int'l L. 760 (1988).

[6] Vazquez, supra note 5, at 697-98.

[7] *Id.*

enforced, it had to be implemented - *i.e.,* written into domestic law by an act of Parliament.[8]

This British rule prevailed during the early years of this country's existence under the Articles of Confederation. Perhaps not surprisingly (but more than a little ironically), the British rule led to widespread violations by the newly-formed States of their obligations under the 1783 Treaty of Peace with Great Britain. The Continental Congress attempted to address the States' repeated violations – for instance, by adopting a report by then-Secretary of Foreign Affairs John Jay that a treaty "made, ratified and published by Congress ... immediately becomes binding on the whole nation, and superadded to the laws of the land."[9] But given the widespread understanding that treaties were not enforceable as law in the face of conflicting state legislation, Congress's efforts were largely unsuccessful.

At the Constitutional Convention, the Framers sought to remedy the defect that had allowed individual States, in essence, to nullify duly-concluded treaties – a defect that was "merely one facet of a more general problem: the Articles lacked a mechanism for enforcing any of the acts of the central

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[8] *Id.*

[9] Report to Congress, Oct. 13, 1786, *reprinted* in J. C. Butler, The Treaty-Making Powers of the United States, 268 n. 4, 270, 389, (1002), *quoted in* Paust, *supra*, at 761.

Government, or the Articles themselves."[10] The Framers considered two such enforcement mechanisms. One, embodied in the "Virginia Plan," would have empowered Congress to "negative" state laws that conflicted with the U.S. Constitution, laws, or treaties. The Virginia Plan would have given Congress sweeping power to enforce federal law (including treaties), but would have required affirmative congressional action to do so. The Convention opted for stronger medicine. Under the "New Jersey Plan," which included a variant of the Supremacy Clause, the Framers declared the U.S. Constitution, laws, and – most importantly here – *treaties* to be the "supreme Law of the Land" and enforceable in their own right, without further implementation.[11]

The records of the Constitutional Convention confirm the Framers' intention that duly-concluded treaties be immediately enforceable. Proposals during the Convention that treaties be ratified by congressional legislation because they "are to have the operation of laws" were rejected,[12] and phrases such as "enforce treaties" were deleted from drafts as "superfluous, since treaties were to be 'laws'" and thus directly enforceable.[13]

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[10] J. Story, 3 Commentaries on the Constitution of the United States, cited in Vazquez, *supra*, at 698.

[11] *Id.*

[12] J. Madison, Notes of Debates in the Federal Convention of 1787, at 520, 597 (Morris, Wilson) (1966 ed.), *quoted in* Paust, *supra*, at 761; 2, The Records of the Federal Convention of 1787, at 297, 538 (M. Farrand, ed., 1937) (Mercer, Wilson), *quoted in* Paust, *supra*, at 761.

[13] Madison, *supra*, at 517, *quoted in* Paust, *supra*, at 761.

The evidence from the ratification period is to the same effect. Perhaps most notably, Alexander Hamilton wrote in the *Federalist Papers* that "treaties of the United States to have any force at all, must be considered as part of the law of the land" and, more to the point, he emphasized that "[t]heir true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations." *The Federalist* No. 22, at 143 (G. Cooke ed., 1961); *see also id.* No. 64, at 436) ("treaties when made are to have the force and effect of laws"); Paust, *supra*, at 762-63 (collecting evidence from North Carolina, Pennsylvania, South Carolina, and Virginia conventions).

Finally, early Supreme Court decisions echoed the Framers' view that duly concluded treaties are *ipso facto* the binding and supreme law of the land. In 1801, for instance, Chief Justice Marshall wrote for the Court that because "[t]he constitution of the United States declares a treaty to be the supreme law of the land," a treaty's "obligation on the courts of the United States must be admitted." *United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 103, 109 (1801). Accordingly, Marshall said, where a treaty "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." *Id.* at 110.

In short, Marshall concluded, "[i]f [a treaty] be constitutional ... I know of no court which can contest its obligation." *Id.* A few years later,

Marshall similarly wrote that "[w]henever a right grows out of, or is protected by, a treaty, ... it is to be protected," and, further, that "[t]he reason for inserting [Article III, §2, cl. 1] in the constitution was, that all persons who have real claims under a treaty should have their causes decided by national tribunals." *Owings v. Norwood's Lessee,* 9 U.S. (5 Cranch) 344, 348 (1809).[14]

D. Under Any of the Doctrinal "Tests" That Have Arisen for Determining Whether a Treaty is "Self-Executing," the Rights Conferred by GC3 Are Enforceable.

1. Because the Treaty Language Does Not Itself Call for Further Congressional Action, the Rights It Confers Are Enforceable.

The distinction between self-executing and non-self-executing treaties was seemingly introduced (though not by name) in *Foster v. Neilson,* 27 U.S. (2 Pet.) 253 (1829). The plaintiffs there claimed land in Florida under a grant from Spain. The treaty transferring sovereignty of that part of Florida from Spain to the United States stated, according to its English text, that "all the grants of land made before the 24th of January 1818, by his catholic majesty, &c. shall be ratified and confirmed to the persons in possession of the lands ...." *Foster,* 27 U.S. at 314. The question, the Supreme Court said, was whether "these words act directly on

[14] As Justice Story later summarized in his Commentaries, "[i]t is ... indispensable that [treaties] should have the obligation and force of a law, that they may be executed by the judicial power, and be obeyed like other laws." 3 Story, *supra* note 21, at 696.

the grants, so as to give validity to those not otherwise valid; or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?" *Id.*

To answer that question, the Court first summarized the traditional British rule that a treaty is "in its nature a contract between two nations, not a legislative act" and "does not generally effect, of itself, the object to be accomplished." *Id.* But, the Court emphasized, "[i]n the United States, a different principle is established. Our constitution declares a treaty to be the law of the land." *Id.* Thus, the Court said, in the U.S. a treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." *Id.* A treaty's enforceability, therefore, depends on whether its language "operates of itself' or, instead, "imports a contract, when either of the parties engages to perform a particular act." *Id.*

Because the treaty provision at issue did not declare that the claimants' land grants "shall be valid" or "are hereby confirmed," the Court found the treaty to be unenforceable. *Id.* "Had such been the language, [the treaty] would have acted directly on the subject" and been enforceable without further implementation. *Id.* at 314-15. But, instead, the treaty merely stated that the grants "shall be ratified and confirmed," language that, the Court held, expressly called for further legislative action. *Id.* at 315.

United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833), is a sequel to *Foster,* and confirms the centrality of a treaty's language to the enforceability inquiry. The Court in *Percheman* interpreted the very same provision at issue in *Foster,* only using the Spanish version of the treaty, which, properly translated, provided that the land grants "shall *remain* ratified and confirmed." *Id.* at 88 (emphasis added). Unlike the words "shall *be* ratified and confirmed," which the Court had thought were in the nature of an executory contract, the words "shall *remain* ratified and confirmed" did not depend on "some future legislative act." *Id.* at 89. Rather, they operated "by force of the instrument itself." *Id.*

The inquiry mandated by *Foster* and *Percheman,* therefore, is straightforward: Does the treaty's language "operate of itself" or, instead, expressly call for further legislative action? If the former, the treaty is enforceable without implementing legislation; if the latter, "the legislature must execute the [treaty] before it can become a rule for the Court." *Foster,* 27 U.S. at 314.

Nothing in the language of Article 21 of the GC3 (on which Falesteny's claim here is based) suggests a need for what the Court in *Percheman* called "some future legislative act." 32 U.S. at 89. On the contrary, Article 21 states a clear and mandatory rule that "prisoners of war may not be held in close confinement except where necessary to safeguard their health."

2. Because the Treaty Language Prescribes a Rule by Which Private Rights May Be Determined, the Rights it Confers Are Enforceable.

In the *Head-Money Cases,* 112 U.S. 580, the Supreme Court reiterated the importance of treaty language to the enforceability inquiry, but with a slightly different emphasis. In one respect, the Court there noted, a treaty is a "compact between independent nations" whose enforcement ultimately depends on "the interest and the honor of the governments which are parties to it." *Id.* at 598. But, the Court emphasized, "a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country." *Id.* The Supremacy Clause, the Court said, places those provisions "in the same category as other law of congress." *Id.* A treaty, then, is immediately enforceable whenever its provisions "prescribe a rule by which the rights of the private citizen or subject may be determined." *Id.* at 598-99.

Courts and commentators have looked to a handful of factors in determining whether a treaty provision "prescribe[s] a rule by which [private] rights" may be determined – and is thus "capable of enforcement" – within the meaning of *Head-Money.* Three considerations appear to be most significant. *First,* is the provision cast in mandatory, or merely precatory, terms? *INS v. Stevie,*

467 U.S. 407, 429 n.22 (1984); *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J. concurring). On this score, the GC3 leaves little doubt; the Articles in question are either directly prohibitory (art. 21) or directly mandatory (arts. 25, 34). None are precatory or cast in vague general terms. They are in essence a recipe for running a prisoner-of-war camp, voiced in the imperative mood. *Second,* does the treaty "provide specific standards," *Diggs v. Richardson, 555* F.2d 848, 851 (D.C. Cir. 1976), or is it instead "phrased in broad generalities," *Frolova v. USSR,* 761 F.2d 370, 374 (7th Cir. 1985), that are "too vague for judicial enforcement," *People of Saipan,* 502 F.2d 90, 99 (9th Cir. 1974)? Here, again, GC3 passes muster. The Articles in question are pointed and at the very least their "…language is no more general than such terms as 'due process of law,' 'seaworthiness,' 'equal protection of the law,' 'good faith,' or 'restraint of trade,' which courts interpret every day." *Id.*

Finally, does the provision at issue purport to create individual rights or, instead, only rights that inure to the various state signatories? *Head-Money,* 112 U.S. at 598-99 ("rights of the private citizen"); *Diggs,* 555 F.2d at 851 (UN resolutions non-self-executing where "[t]hey do not by their terms confer rights upon individual citizens; they call upon governments to take certain action"). The drafters of GC3 themselves have said that the treaty should have been enforceable by individuals in the courts of signatory nations. *See also Int'l Comm. for the Red*

Cross, Commentary: Geneva Convention for the Amelioration of the condition of the Wounded and Sick in Armed Forces in the Field, 84 (1952). ("It should be possible in States which are parties to the Convention…for the rules of the Convention to be evoked before an appropriate national court by the protected person who has suffered a violation"); GCII Commentary at 92; GCIV Commentary at 79.

3. Because Section 2241 Provides Falesteny an Express Statutory Cause of Action, It Is Irrelevant That the GC3 Does Not Itself Create a Private Right of Action.

The third "test" for determining whether a treaty is self-executing asks whether the treaty creates a private right of action. This view is typically attributed to Judge Bork, who, concurring in *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, stated that "[a]bsent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty is self-executing, *that is, when it expressly; or impliedly; provides a private right of action." Id.* at 808 (emphasis added). (In support of his view, Judge Bork cited a Third Circuit opinion, *Mannington Mills, Inc. v. Congoleum Corp., 595* F.2d 1287, 1299 (3d Cir. 1979), in which that court, without extended analysis, had declined to enforce various treaty provisions after "[f]inding no indication that a private right of action was conferred by the treaties.") Judge Bork's treatment of the enforceability issue has stirred controversy, *see* Rosati, *supra*, at 571 n.160, in part because the

Supreme Court authority on which he based his conclusion – *Head-Money* – does not stand for (or even support) the proposition that a treaty is self-executing only if it creates a private right of action.

To be sure, GC3 does not, in express terms, provide a private right of action to individuals like Falesteny. But that is not dispositive (or even relevant) here. There is a fundamental difference between *Tel-Oren* and *Mannington Mills,* on the one hand, and this case, on the other. The claimants in *Tel-Oren* and *Mannington Mills* had no basis for a cause of action other than the treaties on which they relied. *Tel-Oren,* 726 F.2d at 801-08 (Bork, J.) (concurring) (neither Alien Tort Claim Act nor federal common law created cause of action, leaving claimants to rely solely on treaty); *Mannington Mills,* 595 F.2d at 1298-99 (referring to no other possible source for cause of action). Here, by contrast, Falesteny need not – and does not – rely on GC3 as the source of his cause of action; the federal habeas statute, 28 U.S.C. § 2241, expressly furnishes Falesteny's cause of action. Neither *Tel-Oren* nor *Mannington Mills* remotely stands for the proposition that to be enforceable in court as substantive law a treaty must provide a private right of action even where, as here, the plaintiff *already has a private right of action.*

A rule limiting the enforceability of treaties to those that provide a separate cause of action could not explain the Supreme Court's on-point decision in

Mali. The Court there did not pause to ask whether the treaty at issue furnished a private right of action; instead, the Court permitted enforcement of treaty-based rights through the habeas statute's express cause of action. Nor could such a rule explain the undeniable fact that federal courts routinely adjudicate habeas petitions based on alleged constitutional violations despite the fact that the Constitution does not of its own force create a cause of action.[15] Just as the Constitution's failure to furnish a cause of action does not render its provisions unenforceable where an independent cause of action exists, the failure of a treaty – which is "supreme Law" just like the Constitution – to create an express cause of action does not render its provisions unenforceable where, as here, a claimant has a freestanding private right of action. Nor is the Respondents' belief that GC3 cannot be enforced via habeas compatible with the Supreme Court's on-point decision in *Mali*.

II. The Military Commissions Act Confirms That the Third Geneva Convention is a Part of Domestic Law and Thus Enforceable

Despite its eagerness to eradicate statutory habeas rights for Guantanamo prisoners Congress was very clear that it wanted military officials to observe the protections of the Geneva Conventions. *See* section 6 of the MCA. Such protections were not, however to give rise to a free standing cause of action based on the Conventions themselves. This thought was set forth in section 5(a) of

[15] Hence statutes like 42 U.S.C. §1983 and decisions like *Bivens v. Six Unknown Names Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

the MCA. As we have explained above there is no requirement that a treaty create an explicit cause of action for its terms to be capable of enforcement by a court. Accordingly the cited provisions of the MCA are fully compatible with strict enforcement of the Conventions in the statutory habeas context. And, more important, as explained in Falesteny's opening brief, to the extent that section 5(a) of the MCA is not consistent with enforcement of the supreme law of the United States in this habeas matter, it is both a violation of the principles of *United States v.* Klein and an unauthorized suspension of the privilege of habeas corpus that must be rejected.

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