No. 02-13009-D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ERNEST MOISE, HEDWICHE JEANTY, BRUNOT COLAS, JUNIOR PROSPERE, PETERSON BELIZAIRE, AND LAURENCE ST. PIERRE,

Petitioners/Appellants,

v.

JOHN M. BULGER, Acting Director for District 6, Immigration and Naturalization Service, JAMES W. ZIGLAR, Commissioner, Immigration and Naturalization Service, JOHN D. ASHCROFT, Attorney General of the United States, IMMIGRATION AND NATURALIZATION SERVICE, and UNITED STATES DEPARTMENT OF JUSTICE,

Respondents/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

RESPONDENTS/APPELLEES' BRIEF IN RESPONSE TO BRIEF OF AMICUS CURIAE LAWYERS COMMITTEE FOR HUMAN RIGHTS

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CERTIFICATE OF INTERESTED PERSONS

I hereby certify that the following persons may have an interest in the outcome of this case:

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RESPONDENTS/APPELLEES' BRIEF IN RESPONSE TO BRIEF OF AMICUS CURIAE LAWYERS COMMITTEE FOR HUMAN RIGHTS

On August 6, 2002, pursuant to Rule 29 of the Federal Rules of Appellate Procedure, this Court issued an order granting the Lawyers Committee for Human Rights (hereinafter "LCHR" or "amicus") permission to file an amicus brief in this matter. Respondents John M. Bulger, et al. (collectively "respondents" or "the Government") respectfully submit this response to LCHR's amicus brief.

SUMMARY OF ARGUMENT

Notwithstanding amicus LCHR's contentions, international law has no application to this case. First, there is a controlling legislative act in the form of an affirmative grant of legislative authority to detain inadmissible aliens,

including those who are seeking asylum. Second, the Attorney General, acting through his delegate the Acting Deputy Commissioner for the Immigration and Naturalization Service, has made clear that the executive branch has determined that petitioners should be continued in immigration custody rather than paroled into the community. Finally, there exist long-standing controlling judicial decisions of the Supreme Court and this Court holding that the flexibility of the political branches would be undermined if international law were invoked to limit the authority provided by Congress to the Attorney General to detain or parole excludable aliens. The existence of controlling legislative and executive acts, and judicial decisions, governing the issues in this case, preclude consideration of international law and amicus' arguments are therefore, irrelevant.

In any event, the parole instruction at issue here does not violate international law, as demonstrated by the legislative history of the immigration statute's refugee provisions. Rather, international instruments, including those relied upon by amicus, allow for restrictions to be placed on the movement of asylum-seekers (including detention) while the basis of their asylum claims are determined. That is precisely the case here. These same international instruments further

acknowledge that detention of asylum-seekers may be necessary when faced with a large influx of potential refugees. Because the Government in this case instituted the parole instruction in South Miami to deter a mass migration and to prevent the loss of life resulting from migrants undertaking dangerous maritime voyages from Haiti to the United States, the policy does not violate international law.

Finally, amicus' contentions regarding the alleged effect of detention on asylum-seekers cannot provide a basis for reversing the district court's decision below because petitioners have not asserted that their presentation of their asylum claims have been prejudiced by their detention. Indeed, the district court made no findings of fact regarding the conditions of petitioners' confinement or their ability to present their claims for asylum. Accordingly, those issues are not before the Court in this appeal.

ARGUMENT

I. BECAUSE THERE ARE CONTROLLING EXECUTIVE AND LEGISLATIVE ACTS AND JUDICIAL DECISIONS GOVERNING THE LEGALITY OF PETITIONERS' DETENTION, CONSIDERATION OF INTERNATIONAL LAW IS PRECLUDED

In an effort to buttress petitioners' position, amicus LCHR argues (LCHR Br. at 2-18) that the district court's decision should be reversed because the parole instruction at issue here allegedly violates international law. LCHR's

arguments (LCHR Br. at 18-21) regarding the threshold issue of whether international law even applies to this case, however, are notably brief and are relegated to secondary importance. This is understandable given controlling Supreme Court and Circuit precedents which foreclose petitioners' and LCHR's claim that resort to international law principles is warranted under the facts of this case.

Both the Supreme Court and this Court have held that international law will not bind the Government if a legislative or executive act or a judicial decision governs the situation. The Paquete Habana, 175 U.S. 677, 700 (1900) (international law applies only "where there is no treaty and no controlling executive or legislative act or judicial decision . . . ."); Garcia-Mir v. Meese, 788 F.2d 1446, 1453 (11th Cir.), cert. denied, 479 U.S. 889 (1986) (same, citing The Paquete Habana); see also United States v. Merkt, 794 F.2d 950, 964 n.16 (5th Cir. 1986). First, international law is inapplicable to this case because there is a controlling legislative act, in the form of an affirmative grant of authority by Congress to detain inadmissible aliens who have established a credible fear of persecution, such as petitioners, pending adjudication of their applications for admissibility to the United States. 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 235.3(b)(2)(iii). See Alvarez-

Mendez v. Stock, 941 F.2d 956, 963 (9th Cir. 1991) (federal appellate court "ha[s] no power to invoke international law to require the release of an alien whom a statute expressly requires the Attorney General to detain.").

International law is further rendered inapplicable because the parole instruction at issue is a controlling executive act within the meaning of The Paquete Habana. A "controlling executive act" need not originate from the President himself; rather, and as both the Supreme Court and this Court have recognized, cabinet-level officers, such as the Secretary of the Navy (see The Paquete Habana, 175 U.S. at 713-14) or the Attorney General (see Garcia-Mir, 788 F.2d at 1454-55)[1/], may perform such binding acts. Amicus nonetheless tries to take this case out of the reach of these controlling legal precedents by arguing that "the only executive conduct in this case is that of mid-level INS officials." Amicus Br. at 20 & nn.11, 12. This argument is without merit, however, and fails

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[1/] LCHR also filed a brief as amicus curiae in Garcia-Mir, arguing that a "controlling executive act" under The Paquete Habana test must come directly from the President, not one of his subordinates. 788 F.2d at 1454 & n.10. Rejecting LCHR's argument, this Court determined that The Paquete Habana "does not support the proposition that the acts of cabinet officers cannot constitute controlling legislative acts. At best it suggests that lower level officials cannot by their acts render international law inapplicable. That is not an issue in [Garcia-Mir], where the challenge is to the acts of the Attorney General." 788 F.2d at 1454.

to address specifically the district court's finding (R2-65-26) that because the Attorney General is authorized by statute to delegate the exercise of his parole authority to certain high level Immigration and Naturalization Service ("INS") officials, including the Deputy Commissioner, the parole instruction at issue in this case which was issued by the Acting Deputy Commissioner through the exercise of his properly delegated authority, see 8 C.F.R. §§ 2.1, 212.5, must be analyzed as if the Attorney General had issued the instruction himself. Indeed, LCHR fails to provide citation to any authority which would support either the proposition that the Attorney General cannot delegate his parole authority as provided by the immigration statute, or that the INS Acting Deputy Commissioner's issuance of the parole instruction in this case was not an exercise of this delegated authority. Where, as in this instance, the executive branch has determined that domestic needs require the continued detention of petitioners, consideration of international law is precluded because the parole instruction here is a controlling executive act.

Finally, international law cannot provide a basis for reversing the district court's decision because there exists controlling judicial decisions which override international law. In Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en

banc) ("Jean I"), this Court followed the Supreme Court's decision in Shaughnessy v. United States ex rel Mezei, 345 U.S. 206 (1953), and held that because of the entry doctrine, even an indefinitely detained alien "could not challenge his continued detention without a hearing." 727 F.2d at 974-75. This court subsequently acknowledged that its decision in Jean I "reflects the obligation of the courts to avoid any ruling that would 'inhibit the flexibility of the political branches of government to respond to changing world conditions . . . .'" Garcia-Mir, 788 F.2d at 1455 (quoting Mathews v. Diaz, 426 U.S. 67, 81 (1976)). The Court further held that its decision in Jean I is "sufficient to meet the test of The Paquete Habana," thereby precluding application of international law to Garcia-Mir's claims challenging the continued detention of unadmitted aliens, a class of Mariel Cuban refugees. Garcia-Mir, 788 F.2d at 1455. Because Garcia-Mir stands for the proposition that the flexibility of the political branches would be undermined if international law were invoked to limit the authority provided by Congress to the Attorney General to detain or parole excludable aliens, it is a "controlling judicial decision" which renders consideration of international law unnecessary under the holding of The Paquete Habana. See Gisbert v. United States Attorney General, 988

F.2d 1437, 1447-48 (5th Cir. 1993) (relying upon "immigration statutes, Attorney General actions," and decisions in Mezei, Alvarez-Mendez, and Garcia-Mir to conclude that "international law does not require the release of the petitioners where these legislative, executive or judicial decisions exist to the contrary.").

Because international law does not apply to this case, amicus LCHR's brief, which offers an extensive discussion of why, in their view, the decision to continue petitioners in immigration custody is an alleged violation of international law, has no bearing on the issues decided by the district court and which are before this Court on appeal.

II. IN ANY EVENT, THE PAROLE INSTRUCTION DOES NOT VIOLATE PRINCIPLES OF INTERNATIONAL LAW

Even if this Court should decide that principles of international law apply here, the district court's decision still warrants affirmance. LCHR alleges (LCHR Br. at 5-6) that petitioners' detention violates the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 19 U.S.T. 6259 ("the Convention"); the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 60 U.N.T.S. 267, 19 U.S.T. 6224 ("the Protocol"); and the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 ("ICCPR"). LCHR Br. at 5-18. As

discussed below, however, none of these documents provides a basis for reversing the district court's decision.

First, LCHR's reliance upon Articles 31 and 33 of the Convention, as incorporated by the Protocol, is misplaced because the Protocol is not a self-executing treaty.[2/] It thus does not confer any rights upon aliens beyond those granted by the implementing domestic legislation. See Haitian Refugee Ctr. v. Baker, 953 F.2d 1498, 1504 (11th Cir.) (withholding provision of Convention, Article 33, as incorporated into the Protocol, is not self-executing), cert. denied, 502 U.S. 1122 (1992); Bertrand v. Sava, 684 F.2d 204, 218-19 (2d Cir. 1982) ("[T]he Protocol affords the petitioners no rights beyond those they have under our domestic law.").

[2/] Congress enacted the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (amending the Immigration and Nationality Act ("INA"), codified at 8 U.S.C. § 1101 et seq.), in large part to harmonize United States law with the Protocol, to which the United States acceded in 1968, 19 U.S.T. at 6223-58. See Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 169 & n.19 (1993); Stevic v. INS, 467 U.S. 407, 417-18 & n.20 (1984). The Protocol, in turn, binds its signatories to comply with Articles 2 through 34 of the Convention (to which the United States is not a signatory), and generally adopts the Convention's definition of "refugee" for purposes of identifying who is entitled to the protection of its provisions. Protocol art. I(1) and (2), 19 U.S.T. at 6225; Convention art. I(A)(2), 19 U.S.T. at 6261.. The Protocol does not contain any provisions governing the treatment of refugees independent of those incorporated from the Convention. 19 U.S.T. at 6225-29.

Second, the legislative history of the Refugee Act establishes that when Congress enacted that statute, it did not intend to alter in any manner the Attorney General's parole authority with respect to aliens seeking admission to the United States, including those seeking asylum. Ishtyaq v. Nelson, 627 F. Supp. 13, 18-19 (E.D.N.Y. 1983). Accordingly, the Senate Report discussing the Refugee Act specifies that

> The Attorney General's parole authority under Section 212(d)(5) of the Immigration and Nationality Act [8 U.S.C. § 1182(d)(5)], remains unchanged. Once the bill takes effect, however, the Attorney General does not anticipate using this authority with respect to refugees unless he determines that compelling reasons in the public interest related to individual or groups of refugees require that they be paroled into the United States, rather than be admitted in accordance with proposed Sections 207 or 208.

S. Rep. No. 256, 96th Cong., 1st Sess. 17, reprinted in 1980 U.S.C.C.A.N. 141, 157; see H. Conf. Rep. No. 781, 96th Cong., 2d Sess. 20, reprinted in 1980 U.S.C.C.A.N. 160, 162 ("the Conferees . . . recognize that it does not affect the Attorney General's authority under section 212(d)(5) of the [INA] to parole aliens who are not deemed to be refugees.").

Thus, regardless of amicus' reading of the United States' obligations under the Protocol, the implementing legislation clearly demonstrates that Congress never intended asylum-

seekers to be entitled to automatic parole, but instead intended to reaffirm the principle that parole is to be granted by the Attorney General only in limited circumstances (i.e., compelling reasons in the public interest).[3/] Indeed, the INS's decision to continue petitioners in immigration custody pending adjudication of their applications for admission to the United States is consistent with Article 31 of the Protocol which, by its own terms, contemplates restrictions on the movement of asylum-seekers "until their status in the country is regularized or they obtain admission into another country." See LCHR Br. at 9 (quoting Article 31).

Third, amicus mischaracterizes the parole instruction at issue here as bottomed on a policy of deterring future asylum-seekers. LCHR Br. at 14-18. To the contrary, the record establishes and the district court found (R2-65-12, 24), that the parole instruction is based on policy concerns relating to the potential for a mass migration and the corresponding loss of lives if migrants continued to undertake the dangerous

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[3/] As we have explained in our answering brief (Resp't Br. at 6 n.4), the parole statute was amended in 1996 to institute a higher standard for a grant of parole. Thus, the Attorney General, in his discretion, may grant parole "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A) (2002).

maritime voyage from Haiti to South Florida.[4/] Here, it is undisputed that petitioners are inadmissible for lack of proper entry documents and were subject to the mandatory detention provision of the expedited removal statute. See 8 U.S.C. § 1225(b)(1). Thus, the parole instruction is in conformity with and in furtherance of the INS's obligation to enforce the federal immigration laws so as to deter and prevent unlawful entry by detaining aliens who may not appear to be clearly and beyond a doubt entitled to be admitted to the country.[5/] See generally 8 U.S.C. § 1225; see also GAO Report on Illegal Aliens: Opportunities Exist to Improve the Expedited Removal Process 67 (Sept. 2000) (available at www.gao.gov) (reporting that between April 1, 1997 to September 30, 1999, 1000 of 2351 aliens who had established a credible fear and were paroled from immigration custody failed to appear for their removal hearing and concluding that "many aliens may be using the

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[4/] Indeed, LCHR itself acknowledges that "detention may be justified . . . with regard to . . . a large-scale influx . . . ." LCHR Br. at 15 (construing a document from United Nations High Commissioner for Refugees).

[5/] As we have explained (Resp't Br. at 32 n.16), petitioners' detention is ancillary to their admission: if their asylum claims are denied and a final order of removal is entered, there is no impediment to their return to Haiti. If they are able to demonstrate admissibility (such as eligibility for asylum), they will be in due course admitted.

credible fear process to illegally remain in the United States.").

LCHR relies (LCHR Br. at 9-14) on various United Nations documents, including the United Nations High Commissioner for Refugees ("UNHCR") Detention Guidelines, to support its contention that under the Protocol, the detention of asylum seekers "may only be resorted to 'if necessary'," (id. at 10). However, the documents primarily relied upon by LCHR do not have the force of law and are not binding upon the United States.[6/] While Congress intended to harmonize United States immigration law with the Protocol as a general matter, Congress gave absolutely no indication that it intended to bind itself (or the Attorney General) to the construction of that document

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[6/] LCHR relies primarily on a "conclusion" by the UNHCR's Executive Committee concerning detention of asylum-seekers. LCHR Br. at 10 & n.7. However, the UNHCR has acknowledged elsewhere that such conclusions are not formally binding. See Summary Record of the 431st Meeting at 12 (¶ 63), U.N. Doc. A/AC.96/SR.431 (1988) (statement of Mr. Arnaout, Dir., Division of Refugee Law and Doctrine, UNHCR). Rather, conclusions are essentially normative and have a "relatively low status" as nonlegal instruments. Jerry Sztucki, The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme, 1 Int'l J. Refugee L. 285, 307-311 (1989). In any event, the UNHCR Executive Committee's Conclusion apparently views detention as "necessary . . . to determine the elements on which the claim to refugee status or asylum is based." LCHR Br. at 10 n.7 (quoting UNHCR Conclusion). Here, petitioners are being detained pending a determination on their asylum applications and, even under the UNHCR Executive Committee's Conclusion, their detention is allowable as "necessary."

by the UNHCR. Indeed, because the UNHCR Detention Guidelines (cited on page 10 of LCHR's Brief) was issued in 1999 and postdates the United States' accession to the Protocol by more than three decades, neither Congress nor the President can be presumed to have accepted its interpretation of the Protocol's terms at the time the United States became a signatory. Moreover, there is no basis for giving the United Nations High Commissioner more deference than Congress's designee, the Attorney General, in interpreting an Act of the Congress of the United States, especially where, as here, the Attorney General's interpretation and enforcement comports with the Act's plain language and legislative history. See 8 U.S.C. § 1225(b)(1)(B)(ii) (aliens who have established a credible fear "shall be detained for further consideration of the application for asylum.") (emphasis added); id. at § 1182(d)(5)(A) (grant of parole limited to specified instances only); Resp't Br. at 6 n.4 (discussing the legislative history of the parole statute). Congress's intent to conform the United States' law to the Protocol cannot be equated with an intent to abdicate responsibility for the interpretation and enforcement of federal law to an agency of the United Nations.

Finally, LCHR contends (LCHR Br. at 17-18) that the parole instruction is discriminatory and, therefore, petitioners'

detention is violative of Article 26 of the ICCPR, which prohibits racial and national origin discrimination. Because we have already explained at length (Resp. Br. at 33-37), that the parole instruction at issue in this case does not discriminate on the basis of race or national origin, those arguments will not be repeated here.

Even if this Court were to conclude that the parole instruction makes nationality-based distinctions, however, there is still no violation of the United States' obligations under the ICCPR. When the United States ratified the ICCPR, it entered an understanding that

> distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status -- as those terms are used in Article 2 paragraph 1 and Article 26 -- to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of Article 4 upon discrimination, in time of public emergency, based "solely" on the status of race, colour, sex, language, religion or social origin not to bar distinctions that may have a disproportionate effect upon persons of a particular status.

International Covenant for Civil and Political Rights, 138 Cong. Rec. S4781-01, S4783 (daily ed. April 2, 1992) (emphasis added) (Executive Session; reprinting the administration's

reservations, declarations, and understandings).[7/] Because the ICCPR was ratified subject to the reservations, declarations, and understandings attached by Congress to its advice and consent to the President, the ICCPR is effective in domestic law subject to those conditions. In this case, the parole instruction does not violate the United States' obligations under the ICCPR because it is "at a minimum, rationally related to a legitimate governmental objective": specifically, the INS's goals of preventing the loss of life in the high seas and discouraging illegal immigration by deterring a mass migration.

In sum, it is clear that the decision to continue petitioners in immigration custody does not violate the United States' obligations under international law.

III. AMICUS' CONTENTIONS REGARDING THE EFFECT OF DETENTION ON ASYLUM-SEEKERS DOES NOT PROVIDE A BASIS FOR REVERSING THE DISTRICT COURT'S DECISION

LCHR also argues (LCHR Br. at 21-27) that detention of asylum seekers should be prohibited because, allegedly, it adversely impacts their ability to present their asylum claims. LCHR overlooks, however, that none of the petitioners have made such a claim or an allegation in this lawsuit. Indeed, the

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[7/] "'Understandings' are interpretive statements that clarify or elaborate provisions but do not alter them." Congressional Research Service, 106th Cong., 2d Sess., Treaties and Other International Agreements: The Role of the United States Senate 11 (Comm. Print 2001).

district court made no findings of fact regarding the conditions of petitioners' confinement or their ability to present their claims for asylum. Thus, those issues are not before this Court in this appeal. See Richardson v. Alabama State Bd. of Educ., 935 F.2d 1240, 1247 (11th Cir. 1991) (stating that "amici curiae may not expand the scope of an appeal to implicate issues not presented by the parties to the district court" and declining to consider arguments and defenses raised only by amici and not by parties to the litigation); Bertrand v. Sava, 684 F.2d at 207 n.6; Resp't Br. at 41 n.19.

CONCLUSION

For all the foregoing reasons, as well as the reasons set forth in respondents' answering brief, respondents respectfully request that the district court's decision be affirmed.

Respectfully submitted,

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September 5, 2002

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 29(d) and 32(a)(7)(C), and contains 3712 words.

September 5, 2002

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CERTIFICATE OF SERVICE

I certify that on this 5th day of September 2002, I caused paper and electronic copies of the foregoing **Respondents/Appellees' Brief in Response to Brief for Amicus Curiae Lawyers Committee for Human Rights** to be served upon petitioners by placing them in envelopes which were subsequently sealed and forwarded to a mail room of the U.S. Department of Justice for the addition of the correct amount of first class postage and same-day delivery to a United States Post Office in Washington, D.C.:

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