
UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

)
)
) DEFENSE MOTION TO
) DISMISS FOR VIOLATION OF
) COMMON ARTICLE 3 OF THE
) GENEVA CONVENTIONS
)
)
) 1 October 2004

1. Timeliness. This motion is submitted within the time frame established by the Presiding Officer's order during the initial session of Military Commissions on 24 August 2004.

2. Relief Sought. The Military Commission should find that the protections granted under Common Article 3 of the Geneva Conventions apply to Mr. Hamdan.

3. Overview. Common Article 3 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." GPW, Art. 3(1)(d). In this case, Hamdan's lengthy pretrial confinement has amounted to an arbitrary and illegal sentence. The government cannot now undo this violation by charging Hamdan over two and a half years after it first detained him; nor can it stop its *continued* violation of this same provision by bringing him to trial before a military commission that is manifestly not a "regularly constituted court." As experts on American military law (including former Generals and Admirals), former officials of the International Committee of the Red Cross, 271 Members of the United Kingdom and European Parliaments, and a variety of others have noted, the military commission process violates international law because it does not provide satisfactory procedures.

4. Facts.

a. On 13 November 2001, President Bush issued a military order pursuant to the authority vested in him as President of the United States and Commander in Chief of the Armed Forces of the United States by the Constitution and laws of the United States vesting in the Secretary of Defense the authority to try by military commission those persons that President determined were subject to the order.

b. Subsequent to the President's Military Order of 13 November 2001, Mr. Hamdan was taken XXXX in late November 2001, XXXX and has been detained by the United States government ever since.

c. On or about July 2002, Mr. Hamdan was transferred from Afghanistan to Guantanamo Bay where he was initially held in Camp Delta.

d. Camp Delta consists of cell block units holding XXXX detainees in individual cells, is open to the air, and permits conversations between detainees.

e. On 3 July 2003, the President of the United States determined that Mr. Hamdan was subject to his military order of 13 November 2001.

f. On or about 14 December 2003, Mr. Hamdan was transferred on order of Commander, JTF Guantanamo to Camp Echo into pre-trial segregation, pursuant to preparation for trial by Military Commission.

g. On 15 December 2003, The Chief Prosecutor for Military Commissions requested that the Chief Defense Counsel detail counsel to Mr. Hamdan for the limited purpose of negotiating a pre-trial agreement.

h. On 18 December 2003, the Chief Defense Counsel detailed LCDR Charles D. Swift, JAGC, USN, as Mr. Hamdan's military Defense Counsel.

i. On 31 January 2004, Detailed Defense Counsel met with Mr. Hamdan and explained his rights in conjunction with Military Commission and the governments stipulation that detailed defense counsel's access was conditioned on Mr. Hamdan's willingness to enter into pre-trial negotiations.

j. On 12 February 2004, Detailed Defense Counsel on behalf of Mr. Hamdan submitted a demand for charges and for a speedy trial.

k.

l. On 23 February 2004, the Legal Advisor to the Appointing Authority denied the applicability of Article 10 of the UCMJ, without further explanation or charges.

m. Following Defense demand for speedy trial, CDR XXXX, JAGC, USN, Detailed Prosecutor in the subject case, orally stated to Detailed Defense Counsel that Mr. Hamdan's case was going to be "moved to the back of the stack."

n. 13 July 2004, a charge of conspiracy to commit terrorism against Mr. Hamdan was referred to this Military Commission.

o. The first session of Mr. Hamdan's Military Commission was held on 24 August 2004.

5. Law.

a. The Geneva Conventions Bind this Commission. The GPW has been implemented in the domestic law of the United States through binding regulations promulgated by every department of the U.S. Military:

All persons taken into custody by U.S. forces will be provided with the protections of the GPW *until* some other legal status is determined by competent legal authority. Army Regulation 190-8, *Enemy Prisoners of*

War, Retained Personnel, Civilian Internees and Other Detainees § 1-5(a)(2) (1997), available at http://www.apd.army.mil/pdf/files/r190_8.pdf [hereinafter AR 190-8] (emphasis added).¹

In addition to this general statement implementing the GPW, Article 5 is the subject of specific, detailed sections of AR 190-8, which closely tracks the language of the GPW. AR 190-8 § 1-6 provides:

1-6. Tribunals

a. In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

b. A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

b) Thus, the mere assertion by the detainee of protected status is sufficient to require military authorities to afford the detainee the protections of the GPW pending a determination by a competent tribunal. The provisions that immediately follow, § 1-6 (c)-(g), describe in detail the procedures that should be followed in implementing GPW Article 5. In his concurring opinion in *Hamdi v. Rumsfeld*, Justice Souter, joined by Justice Ginsburg, correctly noted that these regulations were "**adopted to implement the Geneva Convention.**" 124 S.Ct. 2633, 2658 (June 28, 2004) (emphasis added).²

¹ This regulation was jointly promulgated by the Headquarters of the departments of the Army, Navy, Air Force, and Marine Corps in Washington, D.C. on October 1, 1997. The regulation itself explicitly states that its purpose is to implement international law as set forth in the GPW: "This regulation implements international law, both customary and codified, relating to EPW [enemy prisoners of war], RP [retained personnel], CI [civilian internees], and ODs [other detainees], which includes those persons held during military operations other than war. The principal treaties relevant to this regulation are:...(3) The 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW)." AR 190-8 § 1-1(b).

² See, e.g., Dep't of the Army, Field Manual no. 27-10, *The Law of Land Warfare*, ch. 3 § I ¶ 71 (1956) ([Article 5] applies to any person not appearing to be entitled to prisoner-of-war status...who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists") (unchanged by 1976 revision), available at www.adtdl.army.mil/cgi-bin/adtdl.dll/fm/27-10/Ch.3.htm; Dep't of the Navy, *The Commander's Handbook on the Law of Naval Operations* § 11.7 (1995) ("Individuals captured as spies or as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and have the question adjudicated"); The Judge Advocate General's School, *Operational Law Handbook* 22 (William O'Brien, ed., 2003) (instructing judge advocates to "advise commanders that, *regardless of the nature of the conflict*,

c. The legislative history of the GPW also establishes that the provisions at issue here have been implemented. In its Report recommending that the Senate give its advice and consent to ratification of the 1949 Geneva Conventions, the Senate Committee on Foreign Relations stated: "[I]t appears that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four conventions." S. Exec. Rep. No. 84-9 (1955) [hereinafter "Ratifying Report"] at 30. The Committee identified only four areas where additional implementing legislation would be required, none of which are relevant here.³ With respect to the GPW Articles relating to "grave breaches," the Committee noted:

The committee is satisfied that the obligations imposed upon the United States by the "grave breaches" provisions are such as can be met by existing legislation enacted by the Federal Government within its constitutional powers. A review of that legislation reveals that no further measures are needed to provide effective penal sanctions or procedure for those violations of the conventions which have been considered in this portion of the report. Ratifying Report at 27.

Furthermore, "[t]here can, of course, be instances in which the United States Constitution, or previously enacted legislation, will be fully adequate to give effect to an apparently non-self-executing international agreement, thus obviating the need of adopting new legislation to implement it." Id. As noted above, the Ratifying Report expressly stated that this is precisely the situation in this case, as very little new legislation was deemed necessary to implement the GPW in its entirety.⁴

d. The Provisions of the GPW Must be Enforced in this Commission

1. The government is relying on international law as the source of authority for these commissions. Having designed a procedure to enforce international law, they are bound by its procedures and limitations.

2. In any event, even if one were to disregard that, and to disregard also the fact that the military's own regulations implement the Geneva Convention, it would still not help the Government because Common Article 3 of the Geneva Convention are self-executing. The Supremacy Clause of the United States Constitution declares that "This Constitution, and the

all enemy personnel should initially be accorded the protections of the GPW Convention (GPW), at least until their status has been determined") (emphasis added).

³ The implementing legislation deemed necessary was as follows: (1) modification of 18 U.S.C. § 706 relating to the commercial use of the Red Cross emblem, (2) legislation to provide workmen's compensation for civilian internees, (3) legislation to exempt relief shipments from import, customs, and other duties, and (4) appropriate penal measures to enforce provisions that only POW or internment camps be identified by the letters PW, PG, or IC. Ratifying Report at 30-31.

⁴ "In fact, Congress has rarely refused to implement an admittedly valid international agreement." Restatement § 111, Rpt.'s Note 7.

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.” Art. VI.

3. A self-executing treaty is one that operates as law without requiring implementing legislation or Executive action.

Courts in the United States are bound to give effect to...international agreements of the United States, except that a "non-self-executing" agreement will not be given effect as law in the absence of necessary implementation.

An international agreement of the United States is 'non-self-executing' (a) if the agreement manifests an intention that it shall not become effective as domestic law without enactment of implementing legislation, (b) if the Senate in giving advice and consent to a treaty, or Congress by resolution requires implementing legislation, or (c) if implementing legislation is constitutionally required. Restatement § 111 ¶¶ 3-4 (1987).

4. "A treaty may create judicially enforceable rights if the signing parties so desire." *Cardenas v. Smith*, 733 F.2d 909, 918, (D.C. Cir. 1984). "When no right is explicitly stated, courts look to the treaty as a whole to determine whether it evidences an intent to provide a private right of action." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-809 (D.C. Cir. 1984) (Bork, J., concurring) (suggesting that treaties that "speak in terms of individual rights" may be regarded as self-executing).

Since generally the United States is obligated to comply with a treaty as soon as it comes into force for the United States, compliance is facilitated and expedited if the treaty is self-executing. Moreover, when Congressional action is required but delayed, the United States may be in default on its international obligation. Therefore, if the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts. (This is especially so if some time has elapsed since the treaty has come into force.) In that even, a finding that the treaty is not self-executing is a finding that the United States has been and continues to be in default, and should be avoided.

In general, agreements that can readily be given effect by executive or judicial bodies, federal or State, without further legislation, are deemed self-executing, unless a contrary intention is manifest. ***Obligations not to act, or to act only subject to limitations, are generally self-executing.*** Restatement §111, Rpt.'s Note 5 (emphasis added).

5. In an opinion characterized by the Supreme Court as "very able" (see *United States v. Rauscher*, 119 U.S. 407, 427-28 (1886)), the Kentucky Court of Appeals stated:

When it is provided by treaty that certain acts shall *not* be done, or that certain limitations or restrictions shall *not* be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land." *Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697, 702-03 (1978) (emphasis added).

6. The Supreme Court has long recognized that individual rights established by treaty are directly enforceable in federal courts, even in the absence of implementing legislation:

[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.... *A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.* *The Head Money Cases*, 112 U.S. 580, 598 (1884) (emphasis added)⁵; *see also Kolovrat v. Oregon*, 366 U.S. 187 (1961) (recognizing claim under a treaty as a defense against state action in taking of property); *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928) (relying on treaty provisions to uphold issuance of a writ of mandamus against state official); *Asakura v. City of Seattle*, 265 U.S. 332, 339-41 (1924) (recognizing private right of action for injunctive relief against enforcement of municipal ordinance in violation of treaty with Japan); *Chew Hong v. United States*, 112 U.S. 536 (1884) (holding that habeas petitioner could properly claim rights to leave the country and return as established by treaty with China); *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (holding that private rights established by treaty are enforceable).

7. In this case, both the plain language and the history of the GPW demonstrate that the Convention (1) was intended to confer rights on private individuals, and (2) is self-executing in many of its provisions, including those at issue here. First, the language of the GPW clearly creates judicially enforceable rights held by individual detainees. For example, GPW Article 5 expressly secures rights to "persons...having fallen into the hands of the enemy" and provides that "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." 6 U.S.T. at 3324. Article 6 states that no agreement between or among nations "shall adversely affect the situation of prisoners of war, as defined by the present Convention, ***nor restrict the rights that it confers upon them.***" *Id.* (emphasis added). Article 7 provides that POWs "may in no circumstances

⁵ In *The Head Money Cases*, the Supreme Court analyzed different provisions of a treaty separately to determine whether they were self-executing.

renounce in part or in entirety **the rights secured to them** by the present Convention." Id. (emphasis added). Article 78 provides that prisoners "shall have the right to make known to the military authorities" their requests and complaints regarding the conditions of their captivity. Id. at 3566. This article authorizes prisoners acting directly, not through their nation's diplomats, to bring their claims to the attention of the detaining power. Thus, there can be no serious doubt that the GPW confers rights on private individuals, and not just on nations.

8. In revising the Geneva Conventions of 1929, which had failed to provide adequate protection during World War II, the United States sought "to ensure humane treatment of POWs – not to create some amorphous, unenforceable code of honor among the signatory nations." *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992) ("[I]t is inconsistent with both the language and spirit of [the GPW] and with our professed support of its purpose to find that the rights established therein cannot be enforced by individual POWs in a court of law...."). The legislative history of the GPW also bears this out. The authors of the Ratifying Report noted that "[e]xperience acquired during 1939-45 amply demonstrated the necessity of bringing [earlier treaties] up to date, making them susceptible of more uniform application and more definite in interpretation, and further improving them so as to provide greater and more effective protection for the persons whom they were intended to benefit.... The function of the new texts [including the GPW] is to provide better protection...." Ratifying Report at 2. The 1929 Geneva Convention failed because of its reliance on reciprocity and diplomatic protest, principles that the GPW replaced with legally binding injunctions. As the Committee noted, "[t]he practices which [the present Conventions] **bind** nations to follow impose no burden upon us that we would not voluntarily assume in a future conflict without the **injunctions** of a formal treaty obligations." Ratifying Report at 32 (emphasis added). The Committee recommended that consent to ratification be given, despite "the possibility that at some later date a contracting party may invoke specious reasons to evade compliance with the **obligations** of decent treatment which it has freely assumed in these instruments. Id. (emphasis added).

9. Thus, the intent and the acknowledgement of the United States in ratifying the GPW was that it was a binding obligation. This is also apparent from new language in the GPW requiring the contracting parties "to ensure respect for the present Convention in all circumstances." This language, absent from the 1929 Convention, was placed in the very first Article of the GPW. As the official ICRC commentary to the Convention explains:

By undertaking this obligation at the very outset, the Contracting Parties drew attention to the fact that it is not merely an engagement concluded on a basis of reciprocity.... It is rather a series of **unilateral engagements** solemnly contracted before the world as represented by the other Contracting Parties. *Official ICRC Commentary* at 17-18 (emphasis added).

10. This result is further confirmed by analyzing the criteria for self-execution set forth in Restatement § 111. None of the conditions recognized as characteristic of a non-self-executing provision exists with respect to Common Article 3. That is, (1) the GPW does not "manifest an intention that it shall not become effective as domestic law without the enactment of implementing legislation," (2) the Senate, in giving consent to the treaty, did not "require implementing legislation" for those Articles, and (3) implementing legislation is not "constitutionally required." Restatement § 111 ¶ 4.

11. Moreover, the right secured to Hamdan by Common Article 3 is the right not to be punished unless it conforms to established procedures. As such, it falls squarely within that category of treaty provisions described in *Hawes* that "certain acts shall not be done, or certain limitations or restrictions shall not be disregarded or exceeded." *Hawes*, 76 Ky. (13 Bush) at 702-03. Such provisions do not need additional legislative or executive implementation, and are readily enforceable. Article 3 is a provision that a certain act *not* be done.

12. Here again, no implementing legislation is required to give effect to this provision. Rather, because GPW Article 3 "prescribe[s] a rule by which the rights of the private citizen or subject may be determined," federal courts can and must enforce these treaty obligations, even without implementing legislation. *The Head Money Cases*, 112 U.S. at 598; see also *Asakura*, 265 U.S. at 341 ("The rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by municipal ordinance or state laws.... It operates itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.").

e) This Commission Violates Common Article 3

There can be little doubt that the procedures established by this commission violate fundamental norms of fairness as established by international law. This motion incorporates the detailed analysis by three different entities, all of which are attached to this document.

1) *Analysis of General Brahms, Admiral Gunn, Admiral Hutson, and General O'Meara.* This analysis, by the leading members of our American military on such questions, explains why various aspects of the military commissions violate Article 3. In particular, they point to denials of 8 rights: a) the lack of a speedy charge and trial; b) the right to present an adequate defense; c) the right not to have coerced and unreliable testimony introduced; d) the right to an impartial tribunal; e) the right to appeal in a civilian court; f) the right to be free from retroactive punishment; and g) the right to nondiscriminatory treatment.

2) *Analysis of 271 Members of the European and U.K. Parliaments.* This analysis has been signed by the leaders of all of the major British parties, including prominent conservative Tories such as Lord Howe of Aberavon, a Former Deputy Prime Minister and Former Leader of House of Commons and Former Secretary of State for Foreign & Commonwealth Affairs; Lord Hurd of Westwall, the Former Home Secretary and Foreign Secretary and former Leader of the Conservative Party.

The 271 Members of Parliament explain why the military commissions violate five fundamental rights under the Geneva Conventions and International Law: a) the right to fairly determine innocence and guilt; b) the right to an independent appeal; c) the right to a speedy trial; d) the right to not have evidence obtained via torture; and e) the right of nondiscrimination because only aliens are subject to the commissions.

3) *Analysis of Louise Doswald-Bech and others*. This brief, filed on behalf of some of the leading former officials in human rights and international law, further explains why the commissions violate Common Article 3.

6. Files Attached. Three. Briefs of 271 Members of Parliament, General Brahms *et al.*, and Louise Doswald-Bech, et al.

7. Oral Argument. Is required. The Presiding Officer has instructed the Commission members that he will provide the Commission members with his interpretation of the law as he sees it, but that the Commission members are free to arrive at their own conclusions. The Defense asserts its right to be heard following the Presiding Officer's pronouncement via oral argument in order for the remainder of the Commission members to be informed as to the reasons for the Defense's support or opposition to the Presiding Officer's position. Additionally, the Defense intends to call expert witnesses and to incorporate their testimony into this motion via oral argument.

8. List of Legal Authority Cited.

a. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135

b. Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-5(a)(2) (1997), available at http://www.apd.army.mil/pdffiles/r190_8.pdf

c. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2658 (June 28, 2004)

d. Art VI, United States Constitution

e. *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976)

f. *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1107 (D.C. Cir. 2001)

g. *Lidas, Inc. v. United States*, 238 F.3d 1076,1080 (9th Cir. 2001)

h. *United States v. Postal*, 589 F.2d 862, 884 (5th Cir. 1979)

i. *Cardenas v. Smith*, 733 F.2d 909, 918, (D.C. Cir. 1984)

j. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-809 (D.C. Cir. 1984)

k. *United States v. Rauscher*, 119 U.S. 407, 427-28 (1886)

l. *Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697, 702-03 (1978)

m. *The Head Money Cases*, 112 U.S. 580, 598 (1884)

- n. *Kolovrat v. Oregon*, 366 U.S. 187 (1961)
- o. *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928)
- p. *Asakura v. City of Seattle*, 265 U.S. 332, 339-41 (1924)
- q. *Chew Hong v. United States*, 112 U.S. 536 (1884)
- r. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833)
- s. *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992)
- t. *Official ICRC Commentary*

9. Witnesses and/or Evidence Required. The Defense may call one or more of the following witnesses in support of this motion: XXXX, and/or XXXX (some Curriculum Vitae's are attached). All of these individuals are experts in the area of international human rights law including the Geneva Conventions. The expert testimony is probative to a reasonable person under the circumstances presented, specifically based on the individual's skill, knowledge, training, and education. They each possess specialized knowledge of the laws of international human rights and as they are applied in the United States. The application and substance of such laws is a legal finding to be made by members of the Military Commission beyond the training and expertise of lay persons. As such, the expert testimony provided by one or more of the above named individuals will assist the Commission members in understanding and determining whether the President's Military Order of 13 November 2001 violates the Geneva Conventions.

10. Additional Information. The Defense is in the process of identifying which of the above experts are available for a 8 November hearing date and will identify from the above list the expert(s) intended to be called by the Defense at the earliest opportunity.

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

SALIM AHMED HAMDAN, Military Commission
Detainee, Camp Echo, Guantanamo Bay Naval Base,
Guantanamo Bay, Cuba,

Petitioner,

v.

DONALD H. RUMSFELD, United States Secretary
of Defense; JOHN D. ALTENBURG, JR.,
Appointing Authority for Military Commissions,
Department of Defense; Brigadier General THOMAS
L. HEMMINGWAY, Legal Advisor to the
Appointing Authority for Military Commissions;
Brigadier General JAY HOOD, Commander Joint
Task Force, Camp Echo, Guantanamo Bay Naval
Base, Guantanamo Bay, Cuba; GEORGE W. BUSH,
President of the United States,

Respondents.

RECEIPT COPY

Civil Action No. 1:04-cv-1519-JR

Judge James Robertson

**UNOPPOSED MOTION OF 271 UNITED KINGDOM AND EUROPEAN
PARLIMENTARIANS FOR LEAVE TO FILE AS *AMICI CURIAE* IN SUPPORT
OF PETITIONER**

Two-hundred seventy-one (271) Members of the Houses of Parliament of the United Kingdom of Great Britain and Northern Ireland, Members of the European Parliament, and a Vice President of the European Commission (hereafter the "*Amici*") hereby move for leave to participate in this matter as amici curiae and to file the attached Memorandum of Law in support of Petitioner.

Interests of Proposed Amici Group Members

1. *Amici* include no fewer than 186 Members of the Parliament of United Kingdom and Northern Ireland, 85 current or former Members of the European

Parliament, and a Vice President of the European Commission. *Amici* are drawn from all across the Continent, both geographically and politically, and are identified individually in the Appendix to the attached Memorandum of Law. They include five former judges of the highest court in the United Kingdom, and eleven Bishops of the Church of England.

2. “The decision whether to allow a non-party to participate as an *amicus curiae* is solely within the broad discretion of the Court.” *Ellsworth Associates, Inc. v. United States of America*, 917 F.Supp. 841, 846 (D.D.C. 1996). The Court should grant leave to file as an *amici* if the information provided is “timely and useful”. *Id.* (citations omitted). In particular, where the “non-party movants have a special interest” in the litigation and a “familiarity and knowledge of the issues raised therein that could aid in the resolution” of the matter at bar, leave to participate as *amici curiae* should be granted. *Id.*; accord, *Cobell v. Norton*, 246 F.Supp.2d 59, 62 (D.D.C. 2003) (an “amicus brief should normally be allowed . . . when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide”, quoting *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997)).

3. Participation by these *Amici* is particularly appropriate here. *Amici* are leading parliamentarians in states with close legal, historical and political ties to the United States, and with which the United States has frequently cooperated in developing international treaties, principles and institutions that create the framework of international law these nations share and which *Amici* believe should be upheld in times of conflict as in times of peace. This matter raises issues of international law and the views of the *Amici*, who are drawn from the legal systems of many varied European countries and their respective democratic institutions, will be of assistance to the Court.

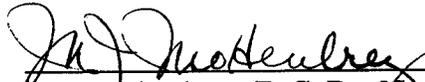
4. This Motion is unopposed. Counsel for *Amici* has contacted counsel for Petitioner and Respondents and all have consented to the *Amici* appearing and filing their Memorandum of Law.

Conclusion

For the foregoing reasons, the United Kingdom and European Parliamentarians respectfully request that the Court grant them leave to participate in this matter as *amici curiae* and to file the attached Memorandum as such.

Dated: September 29, 2004

Respectfully submitted,



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

SALIM AHMED HAMDAN, Military
Commission Detainee, Camp Echo,
Guantanamo Bay Naval Base,
Guantanamo Bay, Cuba,

Petitioner,

v.

DONALD H. RUMSFELD, United
States Secretary of Defense; JOHN D.
ALTENBURG, JR., Appointing
Authority for Military Commissions,
Department of Defense; Brigadier
General THOMAS L. HEMMINGWAY,
Legal Advisor to the Appointing
Authority for Military Commissions;
Brigadier General JAY HOOD,
Commander Joint Task Force, Camp
Echo, Guantanamo Bay Naval Base,
Guantanamo Bay, Cuba; GEORGE W.
BUSH, President of the United States,

Respondents.

Civil Action No. 1:04-cv-1519-JR

Judge James Robertson

**MEMORANDUM OF LAW
ON BEHALF OF 271 UNITED
KINGDOM AND EUROPEAN
PARLIAMENTARIANS AS
AMICI CURIAE IN SUPPORT
OF PETITIONER**

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**MEMORANDUM OF LAW ON BEHALF OF 271
UNITED KINGDOM AND EUROPEAN
PARLIAMENTARIANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

IDENTITY AND INTEREST OF THE *AMICI CURIAE*

The identity of the *amici*

The *amicus* group¹ numbers 271, comprising 186 Members of the Houses of Parliament of the United Kingdom of Great Britain and Northern Ireland (the “UK Parliament”) and 85 current or former Members of the European Parliament and a Vice President of the European Commission. The *amicus* group spans the political spectrum. It includes senior figures from all the major political parties in the United Kingdom, 5 retired Law Lords (judges in the highest court in the UK), including a former Lord Chancellor, other senior lawyers, some of whom have held high judicial office, 11 Bishops of the Church of England and former Cabinet ministers.

Some members of the *amicus* group from the UK Parliament also filed submissions before the Supreme Court of the United States in *Rasul v. Bush*, ___ U.S. ___, 124 S. Ct. 2686 (2004). *Amici* reiterate and adopt in this Memorandum some of those submissions where they deal with similar issues.²

¹ The members are identified individually in an Appendix to this Memorandum. The *amici* file this brief with the consent of Petitioner and Respondents.

² In particular, in that brief it was noted that:

“Members of Parliament have repeatedly articulated these sentiments to Her Majesty’s Government, which has committed diplomatic effort and resources to protect the due process rights of the detainees. Prime Minister Tony Blair assured the House of Commons that ‘[w]e will make active representations to the United States ... to make absolutely sure that any such trial will take place in accordance with proper international law.’ 408 Parl. Deb., H.C. (6th ser.) (2003) 1151-52.... Members of Parliament have employed every potential avenue to voice concern for the British detainees and turn now to this Court as an alternative, independent route to ensure that due process is provided.”

Brief of 175 Members of Both Houses of Parliament of the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Petitioner, at 2 n.5, *Rasul v. Bush*, ___ U.S. ___, 124 S. Ct. 2686 (2004) (Nos. 03-343 and 03-334).

The interest of the *amici*

Amici consider that aspects of the military commission system put the United States in breach of its international law obligations, a situation they consider to be deeply regrettable.

Now, more than ever, the international legal order needs to be strengthened by the world's most powerful nations transparently and effectively demonstrating their adherence to the rule of law and to the legally mandated protection of the due process rights of individuals, including those affected by the war on terror. These principles are fundamental and they can yield to no person and to no circumstances: "there are certain principles on which there can be no compromise. Fair trial is one of those."³

Adherence to these principles inhibits neither the protection of U.S. citizens nor the effective defence of the United States. Rather, ensuring that those accused of terrorist acts receive a transparently fair trial that meets international minimum standards enhances the political capital of the United States: abrogation of those principles imperils its moral authority. Moreover, it risks a tragic descent from the high standards of behaviour to which civilised nations have committed themselves and undermines the hard won progress since World War II devastated the lives of so many citizens of both the United States and the nations of Europe.

Amici express no view on the guilt of any individual detainee generally and none on the position of Salim Ahmed Hamdan specifically. Equally, they do not express any view on the legitimacy of the military action in Afghanistan or Iraq, the politics or tactics of the "war on terror" in general, or against al Qaeda in particular, or on the decisions of any individual member of the U.S. administration. *Amici* hold

³ Attorney General for England and Wales Lord Goldsmith, speech to the French *Cour de Cassation*, 25 June 2004, available at <http://news.bbc.co.uk/2/hi/politics/3839153.stm>.

different individual views on these issues. But *amici* share the view that, however horrific and barbaric the attacks on the United States on 11 September 2001,⁴ and whatever the continuing threat to world security posed by terrorism, these threats can and should be met without breach of the United States' international legal obligations.⁵ The United States must ensure fair processes for the prosecution of those accused of terrorism-related crimes with the safeguard of independent judicial review. *Amici* therefore urge this Court to allow the innocence or guilt of the accused to be determined "after a hearing as dispassionate as the times and horrors we deal with will permit, and upon a record that will leave our reasons and motives clear".⁶

The relevance of the *amici*'s views

Amici respect the independence of the judiciary in a friendly foreign state. Nevertheless, they hope that the views of leading parliamentarians in states with close legal, historical and political ties to the United States may be of assistance to the Court when it is weighing the arguments. They base that hope on the long tradition of shared policies, joint legal progress and mutual learning that have characterised the development of relevant domestic and international law in the United States of America and in other democracies governed by the rule of law. The United States has long been known as a nation "unwilling to witness or permit the slow undoing of those human rights to which this nation has always been committed."⁷ It is right that

⁴ The nations of Europe joined the widespread condemnation of those attacks and support for the United States that followed, most famously, perhaps, in the headline of *Le Monde*, September 13, 2001: "Nous sommes tous americains" (We are all Americans).

⁵ As was famously stated in a leading UK case, *Liversage v. Andersen* 1942 AC 206, "amid the clash of arms, the laws are not silent. They may be changed but they speak the same language in war as in peace".

⁶ Report on the forthcoming Nuremburg Trials by Robert H. Jackson to President Harry S. Truman, June 7, 1945, Dep't St. Bull., June 10, 1945, at 1071, 1073.

⁷ President Kennedy, Inaugural Address, 20 January 1961, available at <http://www.bartleby.com/124/pres56.html>.

the United States should strive to set the highest standards in this respect: the international legal principles upon which *amici* rely find eloquent expression in the Declaration of Independence and the Constitution of the United States, which themselves reflect principles in the Magna Carta and the English Bill of Rights and have in turn influenced the development of constitutional democracies the world over. Moreover, in the modern era, the United States and the nations of Europe, including the United Kingdom, have frequently cooperated in developing the international treaties, principles and institutions that create the public international law framework that nations share today.⁸ *Amici*, concerned that the United States should be seen clearly to respect its international legal obligations, submit their arguments in the light of the shared domestic and international legal experiences and commitments of both the United States and the jurisdictions of Europe, in particular the United Kingdom, which are relevant to those arguments.

SUMMARY OF ARGUMENT

This Court can, and should, have regard to the United States' international legal obligations. Those obligations, which speak directly to the situation of individuals detained at Guantanamo Bay, are embodied in a number of treaties to which the United States is a party, including the 1949 Geneva Convention Relative to the Treatment of Prisoners of War and the 1966 International Covenant on Civil and Political Rights, and are also embodied in customary international law. International

⁸ The Statute of the International Court of Justice, 59 Stat. 1055, T.S. 993, 3 Bevans 1179; Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810 ("Universal Declaration"); International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 ("ICCPR"); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nov. 20, 1984, 1465 U.N.T.S. 85 ("Torture Convention"); and the Geneva Conventions of 1949.

law establishes certain minimum due process standards which the United States has legally bound itself to meet and which should therefore be observed.

The military commission process to which Hamdan and other detainees are subject does not satisfy these international legal standards in a number of respects.

First, the processes for prosecuting detainees for alleged terrorist acts are not sufficiently independent of executive influence to meet fair trial requirements, in particular in so far as: (a) the processes are closely intertwined with the executive power, leading to a decision by the President of the United States (or his appointee) on the conviction and sentence of the accused, when the President has not acted in a judicial capacity in so doing, has already made strong public statements on culpability, and has made the preliminary determination that the detainees are to be incarcerated; and/or (b) there is no independent appeal process from the military commissions.

Second, there has been inordinate delay in bringing detainees to trial with no objective review of the position of the individual or the justification for detention.

Third, the use of evidence obtained by torture is not excluded by the military commission process.

Fourth, in distinguishing between U.S. citizens and aliens accused of terrorist offences, the United States has failed to ensure that the fundamental rights afforded to U.S. citizens are also afforded to alien detainees.

ARGUMENT

I. THE COURT IS CHARGED WITH ENFORCING THE UNITED STATES' INTERNATIONAL LEGAL OBLIGATIONS.

A. International Law Is Part Of The Law Of The United States, And It Is To Be Ascertained And Applied By This Court.

Amici note the well-established principle that international law is part of the law of the United States and that federal courts are to ascertain and apply it. See *Sosa v. Alvarez-Machain*, ___ U.S. ___, 124 S. Ct. 2739, 2764-5 (2004) (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. . . . It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.”) (citations omitted); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”). “Courts in the United States are bound to give effect to international law” Restatement (Third) of the Foreign Relations Law of the United States 1561 (1987).

The Constitution of the United States explicitly provides that “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, cl. 2. It is equally well established that customary international law⁹ also constitutes the law of the land. *Alvarez-Machain*, ___ U.S. at ___, 124 S. Ct. at 2766-7 (quoting *The Paquete Habana*, 175 U.S. at 700).¹⁰ Accordingly the international law that is to be ascertained and administered

⁹ This is defined as “international custom, as evidence of a general practice accepted as law.” Statute of the International Court of Justice, art. 38(1)(b).

¹⁰ Although in *Alvarez-Machain* the Court narrowly defined the category of violations of customary international law that could be the subject of a private right of action by an alien in federal courts

by the federal courts includes both the United States' commitments in treaties and customary international law.

International law falls to be ascertained and applied in the courts of the United States both directly, as in *Alvarez-Machain* (considering customary international law) or when the courts apply a self-executing treaty, and indirectly, when the courts apply the longstanding principle that, so far as is possible, the laws of the United States should be interpreted in accordance with international law, see *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that “an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains”); accord *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004) (describing the *Charming Betsy* rule as outgrowth of comity towards other nations that is underpinned by principles of customary international law). The Supreme Court has also looked to international law as a reflection of the “values that we share with a wider civilization” to inform its evaluation of the demands of due process in constitutional cases with no obvious international dimension. *Lawrence v. Texas*, 539 U.S. 558, 576 (2003). In these cases, the Court has referred to such international legal sources as the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (“ECHR”), not by way of applying the treaty, or indeed international law directly, but out of a recognition that consideration of what international law requires appropriately informs the courts' determinations under federal statutes and even their interpretation of the Constitution of the United States.

under the Alien Tort Statute, __ U.S. at __, 124 S. Ct. at 2761-6 (construing 28 U.S.C. § 1350), the Court did not question, and in fact affirmed both explicitly and by example, that international law is part of the law of the United States and that in ascertaining and administering international law federal courts should consider both treaties and customary international law.

This petition is, in part, based on the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362 (“Third Geneva Convention”), a treaty that has been signed and ratified by the United States and incorporated into U.S. domestic law through military regulations, see, *e.g.*, Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-6(a) (1997) (Exhibit K to Swift Declaration). In addressing Hamdan’s claim under the Third Geneva Convention, this Court is therefore called upon to determine the applicability of the Convention. International law is also, equally importantly, relevant to the Court’s consideration of Hamdan’s claims under the Uniform Code of Military Justice and the United States Constitution in the indirect senses discussed above.

International law is of relevance in this case irrespective of whether or not a particular treaty is self-executing. Such issues affect only direct enforcement of international law by U.S. courts. The status of a treaty as non-self-executing does not reduce its binding force in international law. This is an implication of the well established principle of international law that a state “may not rely on the provisions of its internal law as justification for failure to comply with its obligations,” United Nations International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts, art. 32, G.A. Res. 82, U.N. GAOR, 56th Sess., Supp. No. 10 and Corrigendum, U.N. Doc. A/56/83 (2001) (“Articles on State Responsibility”);¹¹ accord Vienna Convention on the Law of Treaties, art. 27, May

¹¹ As a resolution of the United Nations’ General Assembly, the Articles on State Responsibility are not in themselves binding, but they are authoritative to the extent that they codify international law. As the individual who served as the ILC’s Rapporteur on state responsibility notes, the principle reflected in article 32 “is supported both by State practice and international decisions” and thus reflects customary international law. James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* 207 (2002).

23, 1969, 1155 U.N.T.S. 331 (“VCLOT”).¹² Because of this principle, the status and binding force of a treaty or customary rule as a matter of international law does not depend upon the provision made for domestic enforcement of that rule.¹³

B. Respect For International Law Reflects The United States’ Tradition And Serves The United States’ Interests.

Ascertaining and applying international law in this case is also in keeping with the United States’ leadership in the development of international human rights norms and its longstanding tradition of respect for international law, and it moreover serves the United States’ immediate interests.

The United States’ historical leadership in the field of international human rights law is well established,¹⁴ and it is especially notable in respect of international humanitarian law, a branch of international law specifically applicable to armed conflict. “The first modern attempt to draw up a binding code for the conduct of an armed force in the field was that prepared by Professor Francis Lieber of the United States, promulgated as law by President Lincoln in 1863 during the American Civil War.” Leslie C. Green, *The Contemporary Law of Armed Conflict* 29 (2d ed. 2000).

¹² Although not a party to the VCLOT, the United States “recognizes the Vienna Convention as a codification of customary international law, . . . considers the Vienna Convention ‘in dealing with day-to-day treaty problems’ and acknowledges the Vienna Convention as, in large part, ‘the authoritative guide to current treaty law and practice.’” *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001) (internal citation omitted); see also Restatement (Third) of Foreign Relations Law of the United States 144-5 (1987) (“The Department of State has on various occasions stated that it regards particular articles of the [Vienna] Convention as codifying existing international law; United States courts have also treated particular provisions of the Vienna Convention as authoritative.”).

¹³ Thus was it possible for the International Court of Justice to hold the United States liable for a violation of the Vienna Convention on Consular Relations, see *LaGrand* (Ger. v. U.S.) 2001 I.C.J. 1 (Judgment of 27 June), even though the courts of the United States had determined that the same treaty gave rise to no individual claim for a violation, see *Breard v. Greene*, 523 U.S. 371 (1998).

¹⁴ U.S. leadership on human rights is illustrated by the 1992 ratification of the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (“ICCPR”), which the Senate Committee that recommended ratification viewed as an outgrowth of “the leading role that the United States plays in the international struggle for human rights”, United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, 31 I.L.M. 645 (1992), reproduced from U.S. Senate Executive Report 102-23 (102d Cong., 2d Sess.).

The Lieber Code is widely recognized as having “had significant influence on the international debate regarding the further codification of the laws of war and is viewed as a starting point for subsequent international conventions”. Brief of Human Rights Institute of the International Bar Association as *Amicus Curiae* in Support of Petitioners, at 23 n.16, *Rasul v. Bush*, ___ U.S. ___, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343). Following World War Two, the United States supported the negotiation—and promptly ratified—the Geneva Conventions of 1949, widely regarded as the pillars of contemporary international humanitarian law and binding both as treaties and as a matter of customary international law.¹⁵

When it disregards international law, the United States risks setting precedents that will adversely affect its own citizens abroad. With the “war on terror” now being fought on multiple fronts, the United States has a compelling interest in securing the fullest protection possible for individuals operating in zones of conflict, many of whom are American soldiers and civilians.

II. INTERNATIONAL LAW APPLIES TO THE CONDUCT OF THE UNITED STATES AT GUANTANAMO BAY.

Amici take no view on the application of domestic law, but emphasise that international law applies to the actions of the United States Government in respect of detainees at Guantanamo Bay.

A. International Law, Including International Human Rights Law, Applies To The Conduct Of The United States Anywhere In The World.

It is well established that state responsibility under international human rights treaties turns upon whether the respondent state exercises sufficient authority and

¹⁵ See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 257 (Advisory Opinion of June 24) (holding the terms of the Conventions binding as a matter of customary international law because they protect rights that are so “fundamental” as to be “intransgressible”).

control in the situation that the action can be said to have been taken under the jurisdiction of the state in question. Thus, for example, each State Party to the ICCPR (including the United States) expressly undertakes “to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.” ICCPR, art. 2(1). The International Court of Justice (“ICJ”) has recently reaffirmed that the effect of this provision is “that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.” *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 2004 I.C.J., at ¶ 111 (Advisory Opinion of 9 July 2004), available at <http://www.icj-cij.org/icjwww/idecisions.htm>. In so holding, the ICJ considered the text of the treaty in the light of its object and purpose,¹⁶ “the constant practice of the Human Rights Committee” established under the auspices of the United Nations to monitor compliance with the ICCPR,¹⁷ and the fact that the *travaux préparatoires* (or “legislative history”) of the ICCPR “show[ed] that in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory.” *Id.*, ¶ 109.

Similarly, the fundamental protections recognized in the American Declaration of the Rights and Duties of Man, to which the United States has in past

¹⁶ See VCLT, art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

¹⁷ See *López Burgos v. Uruguay*, No. 52/1979, Views of the H.R.C., CCPR/C/13/D/52/1979 at ¶ 12.3 (29 July 1981); *Casariago v. Uruguay*, No. 56/1979, Views of the H.R.C., CPR/C/13/D/56/1979 at ¶¶ 10.1-10.3 (29 July 1981) (both applying the ICCPR to extraterritorial state actions).

conflicts conceded it was bound,¹⁸ attach not by virtue of the territorial *locus* of state conduct but by virtue of the fact that the state exercises authority and control over individuals claiming the protection. See American Declaration of the Rights and Duties of Man, arts. XXV, XXVI, May 2, 1948, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L. V/II.82 doc. 6 rev. 1 (1992) (“American Declaration”). The Inter-American Commission on Human Rights, authoritatively interpreting the American Declaration, has held that “[g]iven that individual rights inhere simply by virtue of a person’s humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction” and has specifically ruled that jurisdiction “may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state—usually through the acts of the latter’s agents abroad.” *Coard v. United States*, Case 10.951, Inter. Am. C.H.R. Report No. 109/99, OEA/Ser.L/V/II.106, doc.6 rev., at 1283, §§ 37, 39, 41 & 43 (1999).¹⁹

It is therefore well established that the application of international human rights norms “turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.” *Ibid.* Whatever the position in terms of ultimate sovereignty over Guantanamo Bay, the United States

¹⁸ See *Coard v. United States*, Case 10.951, Inter Am. C.H.R. Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999).

¹⁹ The position under the ECHR is similar, with the European Commission and the European Court of Human Rights holding that states are “bound to secure the rights of all persons under their actual authority and responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad.” *Cyprus v. Turkey*, 13 DR 85 (1977); *Loizidou v. Turkey*, 23 E.H.R.R. 513 (1996); *Bankovic v. Belgium and 16 Other Contracting States*, 11 B.H.R.C. 435 (2001); *Ocalan v. Turkey*, 37 E.H.R.R. 10 (2003).

unquestionably exercises authority and control there. See *Rasul*, __ U.S. at __, 124 S. Ct. at 2696. To paraphrase the words of the Human Rights Committee, it would be “unconscionable to so interpret the responsibility” of the United States under international human rights treaties as to allow the U.S. “to perpetrate violations [of human rights norms] on the territory of another State, which violations it could not perpetrate on its own territory.” *López Burgos, supra*, at ¶ 12.3. Accordingly, to comply with international law the treatment of the Guantanamo detainees must protect fundamental human rights and in particular must comply with the ICCPR.

B. International Law Applies In Times Of Armed Conflict And National Emergency.

The United States has never declared war in the aftermath of the September 11 atrocities, however the “war on terror” has resulted at various times in a state of armed conflict. The existence of a state of war or armed conflict does not suspend the application of international law. Indeed, the norms of international humanitarian law, and especially the Geneva Conventions, apply in terms to situations of armed conflict. And whether or not specific instruments of international humanitarian law apply in a particular case, it has been recognized that “civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.” Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), art. 1(2), *adopted* June 8, 1977, 1125 U.N.T.S. 3.²⁰

There is no tension between the application of international humanitarian law in time of war or armed conflict and the residual application of international human

²⁰ Although the United States is not a signatory to Protocol I, aspects of the treaty, including article 1(2), reflect customary international law, which is binding on the United States.

rights law at the same time. As the Inter-American Commission stated when considering the application of international human rights norms in a case arising out of the U.S. military engagement in Grenada:

while international humanitarian law pertains primarily in time of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a “common nucleus of non-derogable rights and a common purpose of protecting human life and dignity,” and there may be a substantial overlap in the application of these bodies of law. Certain core guarantees apply in all circumstances, including situations of conflict, and this is reflected, *inter alia*, in the designation of certain protections pertaining to the person as peremptory norms (*jus cogens*) and obligations *erga omnes*, in a vast body of treaty law, in principles of customary international law, and in the doctrine and practice of international human rights bodies such as this Commission. Both normative systems may thus be applicable to the situation under study.

Coard, supra, ¶ 39 (footnotes omitted). Thus the non-derogable rules of international human rights law continue to operate even in times of war and armed conflict. The ICJ concurs, having repeatedly rejected the assertion that international human rights protections cease to apply at such times. In its opinion on the *Legal Consequences of the Construction of a Wall* the ICJ reaffirmed the determination in a previous Advisory Opinion that “the protection of the International Covenant of Civil and Political Rights does not cease in time of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.” 2004 I.C.J. at ¶ 105 (quoting *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 266, 240 (Advisory Opinion of 8 July)). Similar provisions for temporary derogations from particular human rights obligations in order to confront war or other public emergency are provided in other human rights treaties. See American Convention on Human Rights, art. 27, Nov. 22, 1969, OASTS 36; ECHR, art. 15. These provisions confirm that, absent such a derogation, international human

rights norms are not generally suspended in the face of war. The United States has not entered a derogation from its obligations under the ICCPR in respect of Guantanamo Bay or the military action in Afghanistan.

Moreover, notwithstanding the provision for derogation from certain human rights protection, some obligations are in any event non-derogable. As the United Nations Human Rights Committee has ruled in respect of the ICCPR, these norms include “humanitarian law” and “peremptory norms of international law” such as those prohibiting hostage-taking, the imposition of collective punishments, “arbitrary deprivations of liberty” and “deviating from fundamental principles of fair trial, including the presumption of innocence.” General Comment No. 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶ 11 (2001). Accordingly, this Court must consider the United States’ obligations under both international humanitarian law and international human rights law.

C. International Law Applies In Respect Of Alleged Al Qaeda Members.

The characterization of a particular individual as an “al Qaeda detainee” or otherwise does not eliminate the protections afforded to that individual under international human rights law; those rights pertain to the individual, not to any state or sub-state entity. One of the principal achievements of international law in the decades following World War Two was the widespread recognition of individual rights and obligations under international law, which hitherto had generally addressed only the rights and duties of states. The legacy of the Nuremberg Trials was the imposition of individual responsibility for some violations of the international law governing armed conflict, while the legacy of the United Nations system and the Universal Declaration of Human Rights was the recognition of the inherent dignity of

individuals and their enjoyment of fundamental rights protected by international law. As a result of these developments, international law governing armed conflict and international human rights law operate not exclusively on the plane of inter-state relations, but also, and most importantly, on the plane of relations between states and individuals subject to their authority. Therefore the status of al Qaeda as a non-state actor, or even as a terrorist organization, does not remove individuals alleged to be associated with al Qaeda from the realm of international human rights law. Indeed, that the United States plans to prosecute Hamdan and other detainees for alleged violations of the laws of war—that is to say, for violations of international law governing armed conflict—is an implicit recognition that these individuals, even if they are members or associates of al Qaeda (which Hamdan denies), remain subjects of international law. It is only just and proper that Hamdan and other detainees be subjected to international law equally with respect to its benefits—the protections of international humanitarian and human rights law—as with respect to its burdens.

III. DETAINEES AT GUANTANAMO BAY ARE ENTITLED TO BASIC STANDARDS OF TREATMENT ESTABLISHED AT INTERNATIONAL LAW.

In addition to the Geneva Conventions, several other international legal instruments confer rights on Guantanamo detainees, including treaties to which the United States is a party.

A. The United States Is Bound By The International Covenant On Civil And Political Rights.

The ICCPR is a treaty that embodies the fundamental civil and political rights contained in the Universal Declaration of Human Rights. With over 150 States Parties, the ICCPR is the most widely accepted treaty on human rights in existence. The United States ratified the ICCPR on 8 September 1992 and is therefore bound by

its terms.²¹ As a treaty to which the United States is a party, the ICCPR is the “law of the land” in the United States, see U.S. Const., art. VI, cl. 2, and the United States has pledged to uphold the rights created by it and all international human rights treaties to which it is a party, Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (1998) (“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, the [Torture Convention], and the [Convention on the Elimination of All Forms of Racial Discrimination]. It shall also be the policy and practice of the Government of the United States to promote respect for international human rights . . .”).

When ratifying the ICCPR, the United States appended a “declaration” to the effect that the operative provisions of the Covenant²² are “not self-executing”. 138 CONG. REC. S54781-01 (daily ed. Apr. 2, 1992). The basis for this declaration (the effect of which is that the ICCPR does not, of itself, create private rights directly enforceable in U.S. courts) was that “the fundamental rights and freedoms protected by the Covenant are already guaranteed as a matter of U.S. law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases.” Report submitted by the United States of America under Article 40 of the ICCPR, U.N. Doc. CCPR/C/81/Add 4(1994), at 2.

²¹ Article 4 of the ICCPR entitles States Parties to derogate from certain provisions of the Covenant “in time of public emergency which threatens the life of the nation”. However, as noted above, the U.S. has entered no derogation, and the ICCPR therefore continues to bind it.

²² See ICCPR, arts. 1-27 (imposing obligations on States Parties to uphold rights protected by the Covenant).

This declaration does not relieve the United States of its obligations on the international legal plane. Rather it operates as a representation to the international community that the United States' international legal obligation to confer the fundamental rights and protections enshrined in the ICCPR will be discharged through the medium of U.S. domestic law, including the U.S. Constitution, such that individuals whose rights have been infringed are entitled to effective equivalent remedies under that law. The declaration amounts to an express undertaking to the other States Parties to the Covenant that the United States will secure the protections set forth in the ICCPR through domestic law as applicable to "all individuals within its territory and subject to its jurisdiction", see ICCPR, art. 2(1). The Supreme Court has recently held that the United States exercises effective jurisdiction over the Guantanamo Bay Naval Base. *Rasul*, __ U.S. at __, 124 S. Ct. at 2696.²³

B. The United States Is Bound By The Torture Convention.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 ("Torture Convention"), was ratified by the United States in October 1994 and entered into force for the United States on November 20, 1994. Like the ICCPR, the Torture Convention binds the United States and is the "law of the land".

Under the Convention, the United States is obliged, *inter alia*, to take effective legislative, administrative and judicial measures to prevent acts of torture or cruel, inhuman or degrading treatment or punishment and to criminalize and punish such

²³ *Rasul* concerned habeas corpus, a writ in relation to which an expansive attitude to jurisdiction has been traditional, but the Court's analysis does not confine itself to that context. If it were to be the case, contrary to the Court's holding in *Rasul*, that Hamdan and those held with him at Guantanamo Bay lie outside the protections of the U.S. legal system, and are deprived of the ability to bring an action for infringement of their rights under U.S. statutes and the Constitution, it would be all the more important in such circumstances that the international law obligations of the United States inherent in its declaration to confer equivalent rights and protections on these individuals not be ignored.

acts when they occur. *Id.*, arts. 2, 4 and 16.²⁴ The definition of “torture” in the Convention includes:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Id., art 1(1). Any alleged violation must be examined promptly by the competent authorities, and the victim must be able to obtain effective redress. *Id.*, arts. 13 and 14. In addition, the Convention provides that the United States may not rely on evidence obtained by torture. *Id.*, art. 15. Insofar as the treatment of detainees at Guantanamo may be found to contravene the provisions of the Torture Convention, the treaty obliges the United States to take action to provide redress, as that treatment will have been inflicted by U.S. nationals. *Id.*, art. 5(1)(b).²⁵

As with the ICCPR, the United States has entered a declaration to the effect that Part I of the Torture Convention (which includes the provisions cited above) is not self-executing. Nevertheless, again as with the ICCPR, the Torture Convention remains a valid instrument of international law, to which the United States is a party, to which it has pledged to adhere, see Exec. Order No. 13,107, *supra*, and by which it is bound.

C. The United States Is Bound Not To Defeat The Object And Purpose Of The American Convention on Human Rights.

The American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (“ACHR”), is a regional human rights instrument existing under the aegis of the

²⁴ For the purposes of article 16, the U.S. has entered a reservation, requiring that “cruel, inhuman or degrading treatment or punishment” be understood as cruel, unusual and inhumane treatment and punishment prohibited by the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution.

²⁵ On the authority of *Rasul*, there may also be jurisdiction under article 5(1)(a) as the offences would have been “committed in . . . territory under [U.S.] jurisdiction.”

Organization of American States. It contains protections for civil and political rights (including the right to humane treatment, the right to judicial protection and the right to a fair trial), as well as economic, social and cultural rights. The United States has signed, but not ratified, the ACHR. As a signatory, although it is not strictly bound by the ACHR, the United States has an obligation not to defeat its object and purpose, see VCLOT, art. 18, and must therefore avoid taking any action that is inconsistent with the rights set out therein. The object and purpose of the ACHR extends to guaranteeing the rights contained in the Convention on an individual basis. See ACHR, fourth preambular paragraph. U.S. courts can, and frequently do, have reference to the ACHR in determining the scope and existence of obligations under international law. *E.g., Thompson v. Oklahoma*, 487 U.S. 815 (1988) (referring to the ACHR, ICCPR and Geneva Conventions in support of the decision to vacate a sentence of death imposed on a juvenile).²⁶

D. Customary International Law Obliges The United States To Respect Fundamental Human Rights.

In addition to specific treaty obligations, the United States is bound by the customary international law of human rights. Customary international law is established by authoritative state practice. The relevant norms have been codified in a number of documents. These include the American Declaration of the Rights and Duties of Man, which binds the United States (as a signatory of the Charter of the Organization of American States) as a matter of international law. *Roach and Pinkerton*, Case No. 3/87, ¶¶ 44-8 (Inter-American Commission on Human Rights,

²⁶ Note also that article 2 of the ACHR envisages that, where the rights conferred are not already ensured by legislative or other provisions, States Parties are obliged to supply the deficiency “in accordance with their constitutional processes . . . , such legislative or other measures as may be necessary to give effect to those rights or freedoms.” The relief sought from this Court represents such a “constitutional process”.

Decision of 27 March 1987). Among the fundamental human rights enshrined in the American Declaration (and therefore considered provisions of customary international law) are the right to a fair trial and the right to due process of law, including the right to an impartial and public hearing in courts previously established in accordance with pre-existing laws. American Declaration, arts. XVIII and XXVI.

Customary international law on human rights is also codified in the Universal Declaration, *supra*, which was adopted by the United Nations General Assembly on 10 December 1948. The Universal Declaration is not a treaty, but a series of statements defining the civil, political, economic, social and cultural rights of human beings. It is the primary United Nations document establishing human rights standards and norms, and it forms the basis for many of the human rights instruments enacted since its adoption, including those referred to above. Through time, its various provisions have become so accepted by states that it can now be said to amount to customary international law. See *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001). Like the Geneva Conventions, the ICCPR and the ACHR, the Universal Declaration is frequently considered in judgments of United States courts. *E.g.*, *United States v. Ballesteros*, 71 F.3d 754 (9th Cir. 1995) (referring to the Universal Declaration definition of arbitrary detention); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998) (noting that there is a “clear international prohibition against arbitrary arrest and detention”, and citing Universal Declaration as an example).

Additionally, the ECHR, *supra*, incorporates bedrock human rights which are now recognised as provisions of customary international law, most of which are derived from the Universal Declaration and which the drafters of the ECHR considered to be “the foundation of justice and peace in the world . . .”. ECHR,

Preamble. While the United States, as a non-signatory, is not bound by the ECHR, the treaty enshrines and protects many of the same rights and freedoms as are protected by treaties to which the United States is a party, and, indeed, which are protected by the U.S. Constitution and cherished as the birthright of every U.S. citizen. The States Parties to the ECHR described themselves as “the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law”. *Ibid.* The United States shares the same heritage, and should uphold the same rights and freedoms.

**E. International Humanitarian Law And The Geneva Conventions
Comprehensively Protect Individuals In Armed Conflict.**

Although *amici* have demonstrated above the relevance of a number of other international legal instruments to the Court’s consideration of the issues arising in this case, the instant petition concerns the provisions of the Third Geneva Convention. As was noted above, this is one of four conventions negotiated following World War Two that govern the treatment of individuals in armed conflict and that form the central pillars of modern international humanitarian law. The object and purpose of international humanitarian law, including the Geneva Conventions, was to provide comprehensive protection to individuals caught up in armed conflict. Those who are deemed or alleged to be combatants come within the scope of the Third Geneva Convention, while non-combatants are covered by the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365 (“Fourth Geneva Convention”), to which the United States is also a party. The Geneva Conventions protect “intransgressible” rights; reflect customary international law, see *Legality of Threat or Use of Nuclear Weapons* (Advisory Opinion), *supra*, at 257; and parallel the numerous international legal instruments

discussed above, which, of course, continue to apply regardless of the applicability of the Geneva Conventions in a particular case. Individuals may have slightly different rights and duties depending upon whether they are, e.g., combatants or civilians, but no one lies outside the protection of the law.

A key determinant of which provisions of the Geneva Conventions apply to a particular individual is characterization of the conflict in which he was involved (whether as a combatant or not). The majority of the specific provisions of the Geneva Conventions (including article 103 of the Third Geneva Convention relied upon by Petitioner) apply in cases of *international armed conflict*. Article 3, which is common to all four Geneva Conventions (and hence is known as “common article 3”), applies to “*armed conflict not of an international character*,” and provides baseline protection against, *inter alia*, “cruel treatment and torture,” “humiliating and degrading treatment” and “the passing of sentences . . . without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”. Respondents would characterize some aspects of the conflict in Afghanistan as armed conflict that is neither international because, by assertion, it is not between states, nor armed conflict “not of an international character” because it occurs in the territory of more than one state. As a result of this characterization, according to the Respondents, the individuals detained at Guantanamo Bay, or some category of them that includes Hamdan, fall into an exceptional third category which is entirely outside the protections of the Geneva Conventions.

Not only is it difficult to accept that armed conflict could simultaneously not be international and also not be “armed conflict not of an international character”, but this approach conflicts with recent authority on the scope of application of the Geneva

Conventions. The United States Government has separately acknowledged authority directly undermining the Respondents' arguments: internal government documents (which have been made public) analyzing the application of international legal norms, including the Third Geneva Convention, to the detention of individuals at Guantanamo Bay and elsewhere take note of recent authority, including authority from the International Court of Justice, "that common Article 3 is better read as applying to all forms of non-international armed conflict" and "that all 'armed conflicts' are either international or non-international, and that if they are non-international, they are governed by common Article 3." See Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defence from Office of Legal Counsel, U.S. Department of Justice, dated January 22, 2002, at 8 n.23 (citing Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 ¶4339 n.2 (Yves Sandoz et al. eds., 1987)); *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S.) 1986 I.C.J. 14, 114 (Judgment of June 27); see also *id.* at 8 (citing the decision of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Tadic*, Case No. 160 (ICTY Appeals Chamber, Oct. 2, 1995)).

In *Tadic*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia emphasized the comprehensive scope of international humanitarian law, rejecting an argument that neither the branch of international humanitarian law applicable to non-international armed conflict (common article 3) nor that applicable to international armed conflict (the remaining provisions of the Geneva Conventions)—applied to one phase of the hostilities in the former Yugoslavia. See *Prosecutor v. Tadic*, Case No. 160, ¶¶ 66-70 (Decision on the

Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995) available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>. The Appeals Chamber emphasized that “the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities”, *id.*, ¶ 67, to encompass “the entire territory of the Parties to the conflict”, *id.*, ¶ 68.

Accordingly, the Appeals Chamber concluded:

an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts the whole territory under the control of a party, whether or not actual combat takes place there.

Id., ¶ 70.

Thus international humanitarian law applies from the time of the initiation of hostilities until their conclusion and throughout the territory of the parties to the conflict. The “armed conflict with al Qaeda” began with an invasion of Afghanistan, which constituted “declared war or . . . any other armed conflict . . . between two or more of the High Contracting Parties”; Afghanistan like the United States is a party to the Geneva Conventions. The Geneva Conventions thus began to apply, and they persist in application throughout the territory of Afghanistan (or at the least throughout the “whole territory under the control of a party” to the hostilities) “until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.” *Tadic*, ¶ 70. Individuals detained prior to any such time—military actions in Afghanistan are ongoing and the United States has repeatedly

indicated that the “war on terror” continues—are entitled to the basic protections of the Geneva Conventions.

Given the central importance of the Geneva Conventions to securing all individuals caught up in armed conflict against the barbarism of war, the Court must give full weight to the *Tadic* decision. The Court should evaluate the parties’ arguments on the application of the Third Geneva Convention against the backdrop of the United States’ commitment to international law; its obligations to perform treaties in good faith, see VCLOT, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”); the tradition of respect for the rule of law shared by the United States; and the tradition of leadership by the United States in the field of human rights and international humanitarian law.

IV. THE MILITARY COMMISSION SYSTEM FAILS TO AFFORD DETAINEES THE DUE PROCESS TO WHICH THEY ARE ENTITLED UNDER INTERNATIONAL LAW.

A. The Military Commission System Violates Detainees’ Right To An Impartial Determination Of Their Guilt Or Innocence.

The right to be tried by an independent and impartial tribunal is a cardinal component of international human rights law. It is protected by all major human rights treaties, from the ICCPR, see art. 14(1) (“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”), to the ACHR, see art. 8(1) (“Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law...”), and the ECHR, see art. 6(1) (“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a

reasonable time by an independent and impartial tribunal established by law”). This right is also enshrined in the Geneva Conventions. See common art. 3(1)(d) (prohibiting “at any time and in any place whatsoever with respect to the above-mentioned persons . . . the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”).

The common source of all these instruments is the entitlement to a fair trial by an independent tribunal, enshrined as one of the “equal and inalienable rights of all members of the human family” in the Universal Declaration. Universal Declaration, preamble and art. 19 (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”).

The military commission system, as established and implemented by the United States to try detainees at Guantanamo Bay, does not sufficiently safeguard this most fundamental of rights. The system lacks the necessary degree of independence to be, and to be seen to be, compliant with the requirements of international law.

The military commissions are composed of officers of the U.S. military, appointed by the “Appointing Authority” exercising authority delegated by, and acting under the authority, direction and control of, the Secretary of Defense. Military Commission Order No. 1 of March 12, 2002, ¶ 4(A)(1); Department of Defense Directive 5105.70, ¶ 3.1. They may be removed by the Appointing Authority at any time “for good cause”. Military Commission Order No. 1, ¶ 4(A)(3).²⁷ Once the military commission has heard the case against the accused and reached a decision as

²⁷ The Order contains no definition of “good cause”.

to his guilt or innocence, the case is passed automatically to the Review Panel. The Review Panel examines the trial record, and decides whether the charges against the accused should be dismissed, whether the accused should be found guilty, or whether the case should be returned to the commission that tried it, on the basis that there has been a “material error of law”. *Id.*, ¶ 6(H); Military Commission Instruction No. 9, ¶4(C). Like the members of the military commissions, the members of the Review Panel are selected by the Secretary of Defense. Military Commission Instruction No. 9, ¶ (4)(B). They are appointed for a term not exceeding two years, and they, too, can be removed “for good cause”. *Id.*, ¶ 4(B)(2).²⁸ Except where the case is returned on grounds of an error of law, the Review Panel then sends the case to the President (or Secretary of Defense, exercising authority delegated by the President), who finally determines the verdict and sentence imposed on the accused. Military Commission Order No. 1, ¶ 6(H). He may either accept the Review Panel’s recommendation, or decide that a verdict of guilt as to a lesser charge and/or a reduced sentence is more appropriate.

As the system is currently constructed, therefore, the same official (or his delegate, acting on his authority and under his control) is responsible for the original detention, for laying the charges against a detainee, for selecting the members of the tribunals that will hear the charges (over whom he exercises command authority), and for making the final decision as to the detainee’s guilt or innocence of those same charges. There is no appeal from this process.

Both the Secretary of Defense and the President have already publicly commented on the guilt of the Guantanamo detainees, despite the fact that none of

²⁸ Under the terms of the Instruction, “good cause” includes, without limitation, “physical disability, military exigency, or other circumstances that render the member unable to perform his duties”.

those detainees has yet been tried, and that only very few have even been charged with any crime.²⁹ The President was responsible for designating each of the detainees “enemy combatants” in the first place, thereby occasioning their continued detention at Guantanamo Bay and eligibility for trial by military commission. See Press Briefing of Senior Department of Defense Official and Senior Military Officer, July 3 2004, available at <http://www.defenselink.mil/transcripts/2003/tr20030703-0323.html>. A system of trial in which the Secretary of Defense and/or the President is responsible for managing the process of trial and making the final decision as to the guilt or innocence of detainees upon whose guilt they have previously expressed views cannot be considered independent and impartial. The same statements also undermine the ability of the military commission system to uphold another fundamental plank of international human rights law: a detainee’s right to be presumed innocent until proven guilty. See, e.g., ICCPR, art. 14(2); ACHR, art. 8(2); ECHR, art. 6(2).

The European Court of Human Rights, whose decisions are a useful indicator of the application of international human rights law by Western legal systems and democratic political systems, has considered the right to be tried by an impartial tribunal as it is set out in article 6 of the ECHR on numerous occasions. In *Findlay v. United Kingdom*, the Court held that in order to decide whether a tribunal is independent it is necessary to consider: (i) how the members of the tribunal are appointed; (ii) their term of office; (iii) the existence of guarantees against outside

²⁹ For example, when discussing the Guantanamo detainees in a meeting with the leader of the Afghan interim government, Hamid Karzai, earlier this year, Mr. Bush made the unequivocal and unqualified comment: “these are killers”. Statement of President Bush in a meeting with Hamid Karzai on 28 January 2004, available at <http://www.whitehouse.gov/news/releases/2002/01/20020128-13.html>. Similarly, Mr. Rumsfeld has publicly stated: “[t]hese people are committed terrorists,” and, apparently making no distinction between a charge and a conviction, “. . . the reality is that they have been charged with something. They have been *found to be* engaging in battle on behalf of the al Qaeda or the Taliban . . .”. Department of Defense Briefing, 22 January 2002, available at <http://www.globalsecurity.org/military/library/news/2002/01/mil-020122-usia01.htm> (emphasis added).

pressure; and (iv) whether the tribunal *appears* to be independent. (1997) 24 E.H.R.R. 221, ¶ 73.³⁰ To determine impartiality, one must look at whether the members of the tribunal are free from personal prejudice and bias, both subjectively and objectively. *Ibid.* A tribunal must not only be impartial, it must be seen to be impartial, and the European Court has held that there may be a violation of ECHR Article 6(1) where “the impartiality of the courts in question was capable of appearing to be open to doubt”, *Hauschildt v. Denmark* (1990) 12 E.H.R.R. 266 ¶¶ 52, 53. *Amici* understand that U.S. law contains a similar principle. Cf. *U’Ren v. Bagley*, 245 P. 1074, 1075 (Or. 1926) (“Courts, like Caesar’s wife, must be not only virtuous but above suspicion.”).

Amici submit that the Guantanamo Bay military commissions do not meet these standards: The members of both the commissions themselves and the Review Panel are chosen not by ballot or rotation (the methods by which judges are normally detailed to a case in the U.S., the U.K. and elsewhere), but by the Secretary of Defense. The Secretary of Defense also has the power to remove them, at any time, simply by making a unilateral decision that there is “good cause” for so doing. Since “good cause” is either very broadly defined, or not defined at all, in the relevant Military Instructions, and since there is no provision for review of a decision by the Secretary to remove a member of a commission or Review Panel, this power appears to be essentially unfettered. The members of these tribunals are, therefore, appointed at the discretion of one individual and have no security of tenure, but can be removed or replaced at any time. Given the degree of control exercised by the Secretary of

³⁰ The tribunal under scrutiny in *Findlay* was, in substance, a court martial. See also *Cooper v. United Kingdom* (2004) 39 E.H.R.R. 8 ¶ 104 and *Grievs v. United Kingdom* (2004) 39 E.H.R.R. 2 ¶ 69, considering whether courts martial complied with the right to trial by an independent and impartial tribunal. In both cases, the European Court confirmed the tests it had originally set out in *Findlay*.

Defense (who has already expressed his views on guilt) over both their appointment and their removal, it is not difficult to see how this system might operate as an improper influence on members of the military commissions and the Review Panel, thereby affecting their ability to act independently and impartially.³¹ This does not meet the requirement of the appearance of impartiality.

Moreover, the U.S. has deliberately chosen not to use existing fora, such as the domestic courts, courts martial or the Court of Appeal of the Armed Forces, all of which are known to be independent and impartial, to try Guantanamo detainees or to review their sentences. Rather, it has elected to establish an entirely separate system controlled exclusively by the Executive Branch. In their submissions, Respondents offer no explanation of the rationale behind this decision. The military commission system as currently constituted does not provide adequate guarantees of detainees' fundamental right at international law to trial by an independent and impartial tribunal.

B. Military Commissions Violate International Law Because There Is No Appeal To An Independent Judicial Body.

These failings are not cured by the right to challenge any eventual verdict through an appeal to a sufficiently independent court. The President's November 2001 Military Order gives exclusive jurisdiction over cases like Hamdan's to members of the Executive Branch of government. "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," Military Order of 13 November 2001, § 7(b). The Executive Branch is thus prosecutor, judge, and jury, with the power to impose sentences of life imprisonment, or even death, a situation

³¹ See *Findlay, supra*, ¶ 76 ("Since all the members of the court-martial which decided Mr Findlay's case were subordinate in rank to the convening officer and fell within his chain of command, Mr Findlay's doubts about the tribunal's independence and impartiality could be objectively justified.").

that does not obtain even with respect to courts martial in the United States, where appeal can be had to the Court of Appeal for the Armed Forces.

A meaningful and independent appeal is a central aspect of the due process rights guaranteed by the Geneva Conventions, the ICCPR and other international instruments to which the United States is a party or signatory. Article 106 of the Third Geneva Convention requires states to ensure prisoners the right to appeal convictions for war crimes “in the same manner as the members of the armed forces of the Detaining Power.” The ICCPR likewise recognises the importance of a separate review of any tribunal’s decisions concerning both the guilt of the accused and his punishment: Article 14(5) provides that “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.” As the International Criminal Tribunal for Yugoslavia has emphasized, this language “reflects an imperative norm of international law,” *Prosecutor v. Hazim*, Case No. IT-96-21, (ICTY Appeals Chamber Decision of Nov. 22, 1996), available at <http://www.un.org/icty/celebici/appeal/decision-e/61122PR3.htm>, which compels states to provide the defendant in a criminal case the opportunity to correct error or injustice through an effective and independent superior judicial body. Implementing the Universal Declaration, the HRC has condemned a number of countries for restrictions on the right of appeal that pale in comparison to the limitations that Hamdan will face. Spain, for instance, has been found to be in violation of article 14(5) of the ICCPR for a system that narrowed the grounds for appeal before normal civilian courts for certain types of offences. *Vazquez v. Spain*, H.R.C. Communication N° 701/1996 of 11 August 2000.³²

³² See also *Hill v. Spain*, H.R.C. Communication N° 526/1993 of 23 June 1997. Egypt has also drawn criticism for its “Emergency Law,” which subjects civilians to military tribunals, without

Hamdan's right to an independent appeal is all the more essential in light of the military commission procedures outlined above and the processes for the collection and presentation of evidence discussed in subsection D below. These all increase the likelihood of a mistaken judgement and miscarriage of justice. As detainees convicted of terrorism-related offences could face the death penalty, any errors committed at the military commission level could turn out to be irreversible, further intensifying the United States' international legal obligation to provide effective and independent appeal of military commission decisions.³³

C. International Law Requires That Detainees Be Allowed A Speedy Trial.

It is a fundamental principle of international law that a person detained on suspicion of a criminal offence must be tried without delay and that pre-trial detention should be an exception, and be as short as possible. This right is enshrined in the Geneva Conventions, the ICCPR and numerous other international instruments. Article 9(3) of the ICCPR states that “[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release”.³⁴ The same provision of the ICCPR also stipulates: “[i]t shall not be the

appeal to normal courts of law. Many observers insist that such a system violates article 14(5) of the ICCPR. *E.g.*, International Bar Ass'n, “IBA calls for end to use of (Emergency) Supreme State Security Courts and military courts in Egypt,” February 2000, available at <http://www.ibanet.org/humri/WebHRIDetails.asp?ID=25>.

³³ *Smith v. Jamaica*, H.R.C. Communication N° 282/1988 of 31 March 1993 (“the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that ‘the procedural guarantees therein prescribed must be observed, including . . . the right to review of conviction and sentence by a higher tribunal’.”); see also H.R.C. General Comment No. 6(16), U.N. Doc. CCPR/C/21/Rev.1, at 7, ¶ 7.

³⁴ See also H.R.C. General Comment 8(16), U.N. Doc. HRI/Gen/1/Rev.7 at 132 (“in the view of the Committee, delays must not exceed a few days”).

general rule that persons awaiting trial shall be detained in custody”.³⁵ The Third Geneva Convention, ACHR and ECHR contain similar provisions.³⁶ A long delay between arrest and trial inevitably affects the value of any evidence submitted at trial when it eventually occurs and may therefore prejudice the defence, for example where the judgment is based on statements by witnesses made many years after the relevant events occurred. *Cagas v. The Philippines*, H.R.C. Communication N° 788/1997 of 23 October 2001. Such prejudice is exacerbated where the defendant’s own mental state might be deteriorating as a result of prolonged solitary confinement, thus impairing his ability to assist in his own defence.

Despite its obligations under the ICCPR and the clear provisions of other treaties, the United States has held Hamdan in pre-trial detention for a period of more than thirty months, without bringing him before a judge or “other officer authorized to exercise judicial power” to determine his status, and without affording him a trial. Much of this period has been spent in conditions tantamount to solitary confinement. Hamdan is listed as one of the first detainees whose cases will be heard by a military commission, and it is proposed that his trial will take place during December 2004.³⁷

³⁵ See also *id.*, ¶ 3 (“Pre-trial detention should be an exception and as short as possible”); ICCPR, art. 14(3) (setting out minimum guarantees for individuals charged with a criminal offence, including the right to be tried without undue delay).

³⁶ ACHR, art. 7(5): “Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings”; ECHR, art. 5(3): “everyone arrested or detained...shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial”; Third Geneva Convention, art. 103: trial “shall take place as soon as possible”, and “in no circumstances” shall pre-trial confinement exceed three months.

³⁷ See Dept. of Defense announcement of 14 July 2004 “Yemeni Detainee to Face Military Commission”. According to Respondents’ Brief, at 12, line 27, “both the government and Hamdan have proposed that his Commission trial begin in December [2004]”, although no date has yet been fixed.

The ICCPR does not prohibit military commissions, but the use of such tribunals to try civilians should be very exceptional, and should take place under conditions which genuinely afford the full guarantees stipulated in ICCPR article 14. See H.R.C. General Comment No. 13(21), U.N. Doc.

Detention without trial for almost three years clearly contravenes international law. Much shorter periods of pre-trial detention have been found to violate international law. The H.R.C. held that, in the absence of a satisfactory explanation by the detaining State Party, a pre-trial detention of twenty-three months breached articles 9(3) and 14(3) of the ICCPR. *Brown v. Jamaica*, H.R.C. Communication N° 775/1997 of 23 March 1999. A period of twenty-two months' pre-trial detention was held to breach the same articles. *Sextus v. Trinidad and Tobago*, H.R.C. Communication N° 818/1998 of 16 July 2001. The H.R.C. considers that "in cases involving serious charges such as homicide or murder, and where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible." *Francis v. Trinidad and Tobago*, H.R.C. Communication N° 899/1999 of 25 July 2002 (citing H.R.C. Communication N° 473/1991 (*Barroso v. Panama*)). U.S. courts also recognise the right to a speedy trial, as protected by international law. In *Martinez v. City of Los Angeles*, citing the Restatement (Third) of the Foreign Relations Law of the United States and various international instruments, including the ICCPR and the Universal Declaration, the Court held that "there is a clear international prohibition against arbitrary arrest and detention", and that "[d]etention is arbitrary 'if ...the person detained . . . is not brought to trial within a reasonable time'." 141 F.3d at 1384; accord *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995).

D. Military Commissions Violate The Right To A Fair Trial Because They Admit Evidence Obtained Through Torture.

Standard rules on the admission of evidence applied in U.S. courts do not apply to the military commission process. It is therefore possible that confessions and other evidence procured through questionable interrogation methods, including

HRI/Gen/1/Rev.7, at 135. These include the right to be informed of the charges against one promptly and in detail, the right to examine witnesses and the right to trial without undue delay.

torture, would be admissible against Hamdan and other detainees. See Military Commission Order No. 1, art. 6 D(1). The acceptance of evidence without regard to the means by which it was procured is contrary to international practice and, more importantly, violates the United States' obligations under the ICCPR and other treaty instruments, which it has publicly pledged to uphold. In a letter to Senator Patrick J. Leahy, the Legal Counsel of the U.S. Defense Department made the following unequivocal statement:

it is the policy of the United States to comply with all of its legal obligations in its treatment of detainees, and in particular with legal obligations prohibiting torture. Its obligations include conducting interrogations in a manner that is consistent with the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment . . . as ratified by the United States in 1994.

Letter from William J. Haynes II, Legal Counsel of the U.S. Department of Defense, to the Honorable Patrick J. Leahy, dated June 25, 2003, available at <http://www.hrw.org/press/2003/06/letter-to-leahy.pdf>.

The international law prohibition on torture is widely recognized. The Universal Declaration, for example, provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Article 5; see also ECHR, art. 3. So fundamental is this principle that it has entered into customary international law, having acquired the status of *jus cogens* (a peremptory norm of customary international law from which no derogation is permitted). *Prosecutor v. Furundjiza*, Case No. IT-95-17/1 (ICTY Decision of 10 December 1998), at §§ 137 and 153 *et seq.*, available at <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>. The ICCPR is unequivocal in its condemnation of torture and inhuman and degrading treatment. ICCPR, art. 7. In particular, it provides that prisoners must be treated with humanity, and that their dignity must be respected. *Id.*, art. 10. In all

of these international law instruments, the right to be free from torture is absolute: it is not subject to any waiver or exception.³⁸

A direct corollary of the prohibition on torture and inhuman treatment of prisoners is that evidence obtained using such practices must be inadmissible in the adjudication of guilt or sentencing. The H.R.C. explained that the exclusion of such evidence is essential to the struggle against improper interrogation techniques. Human Rights Committee, General Comment No. 20, U.N. Doc. HRI/Gen/1/Rev.7, at §12. The H.R.C. reiterated this principle in *Paul v. Guyana*: “It is important for the prevention of violations under Article 7 that the law must exclude the admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.” H.R.C. Communication N° 728/1996 of 21 December 2001, at §9.3.³⁹ The Supreme Court of the United States has also recognized that to admit improperly-acquired evidence will encourage detaining authorities to employ such tactics, undermining the integrity of the judicial system and the United States’ ideals of due process. *Haynes v. State of Washington*, 373 U.S. 503, 515 (1963).⁴⁰

³⁸ See H.R.C. General Comment No. 20, U.N. Doc. HRI/Gen/1/Rev.7, at 150 § 3; Torture Convention, art. 2.2; *Vezenardoglu v. Turkey*, Eur. Court of H.R., Application No. 32357/96 (Decision of 11 April 2000) at § 28, available at <http://www.echr.coe.int/Eng/judgments.htm> (“Even in the most difficult of circumstances, such as the fight against terrorism or crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment”).

³⁹ One consequence of the absolute nature of the prohibition on torture is that the bar on tainted evidence must apply in “any proceedings,” not merely regular court trials. *G.K. v. Switzerland*, Committee Against Torture Communication N° 219/2001 of 12 May 2003, at § 6.10. The Committee Against Torture (“C.A.T.”) is the body established under the Torture Convention to assess alleged violations of the Convention by signatory states.

⁴⁰ U.S. jurisprudence goes still further in deterring improper interrogation of prisoners, excluding from evidence even subsequent confessions that could be regarded as “fruit of the poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471 (1963). *Amici* note that the English Court of Appeal has recently held that, as long as the UK neither supports nor participates in torture, evidence obtained by torture may be admitted in certain circumstances. However, this decision has attracted widespread criticism, and leave to appeal has been sought (*A, B, C, D, E, F, G, H, Mahmoud Abu Rideh Jamal Ajouaou and Secretary of State for the Home Department* [2004] EWCA 1123).

In the case of Guantanamo detainees, these fundamental rules of international law are far from theoretical. Recent press reports and eyewitness accounts have raised serious doubts about the nature, extent and intensity of interrogation techniques employed in connection with the war on terror. Former prisoners allege physical abuse such as beatings, immersion in water, withholding medicine and subjection to pepper spray, and mental abuse including sexual humiliation, death threats and solitary confinement.⁴¹ These reports underline the seriousness of the due process lacunae in the military commissions' rules of evidence. By not formally and clearly excluding from the military commission process evidence—including possible confessions—obtained by torture, these procedures violate the United States' obligations under the ICCPR and other international instruments.

E. Military Commissions Are Discriminatory Because They Subject Foreign Citizens To Human Rights Violations That United States Citizens Do Not Suffer.

While Hamdan and the other foreign detainees are brought before military commissions, American prisoners captured in Afghanistan under similar conditions are allowed to seek adjudication of their cases in the U.S. courts martial or civilian court system. This discrimination by nationality constitutes a separate violation of international law.

The principle that governments must guarantee the rights of individuals within their jurisdiction equally, regardless of their national origin, lies at the very foundation of civilised concepts of justice. Equality before the law finds direct codification in the international instruments the United States has signed and ratified, such as the ICCPR,

⁴¹ See, e.g., Andrew Buncombe, "Shocking Guantanamo abuses revealed," *The Independent*, 4 August 2004; Paul Waugh, "Tarek's Story," *The Evening Standard*, 3 Aug. 2004; Vikram Dodd and Tania Branigan, "Questioned at gunpoint, shackled, forced to pose naked, British detainees tell their stories of Guantanamo Bay," *The Guardian*, 4 August 2004.

which obliges States Parties to ensure the rights recognized in the Covenant “to all individuals within its territory and subject to its jurisdiction . . . , without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (article 2(1)).⁴² In effect, this rule arises directly out of the international law obligation that “all persons shall be equal before the courts and tribunals.” ACHR, art. 1. Article 1 of the ACHR likewise obliges the United States to “ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms [recognized in the Convention], without any discrimination for reasons of . . . national or social origin.” Nor is this general requirement of equal treatment for individuals hailing from different countries relaxed in times of war and armed conflict. Article 16 of the Third Geneva Convention is clear that prisoners of war “shall be treated alike by the Detaining Power, without any adverse distinction based on . . . nationality . . . or any other distinction founded on similar criteria.”

In practice, international law requires that governments provide an objective and reasonable justification for differential treatment of individuals based on nationality. Decision of the Human Rights Committee under the Optional Protocol to the ICCPR , U.N. Doc. No. CCPR/C/59/D/601/1994, ¶ 8.5; *Palau-Martinez v. France*, European Court of Human Rights, Application No. 64927/01 (Judgment of 16 March 2004) at ¶ 31, available at <http://www.echr.coe.int/Eng/judgments.htm> (“different treatment is discriminatory . . . if it ‘has no objective and reasonable justification,’ that is if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aim

⁴² See also H.R.C. General Comment No. 15(27), U.N. Doc. HRI/Gen/1/Rev.7, at 140 (“[T]he general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”).

sought to be realised”); see also *Barcelona Traction Light and Power* (Belg. v. Spain), 1966 I.C.J. Rep. 6, 302-16 (Tanaka, J. dissenting) (differential treatment must have an objective justification). Because the equality principle is so deeply rooted in international law, the state seeking to derogate from it bears the burden of proving that it has discriminated in a way that is reasonable and proportionally related to a legitimate public goal. See Ian Brownlie, *Principles of Public International Law* 547 (6th ed. 2003). Contrary to its obligations under the ICCPR and other treaties, the United States has provided no coherent justification for subjecting foreign detainees to inferior treatment.

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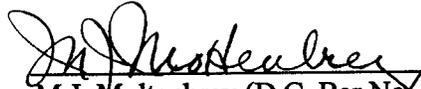
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CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court rule that, because the conditions of Hamdan's confinement and the process to which he is subject violate international law, his petition should be granted.

Dated: September 29, 2004

Respectfully submitted,



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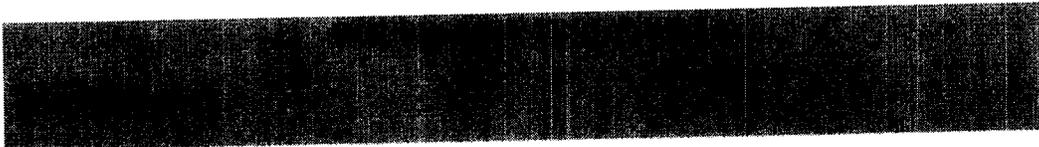
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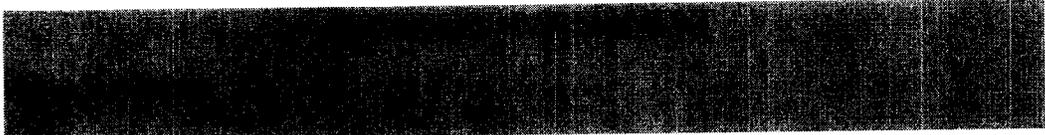
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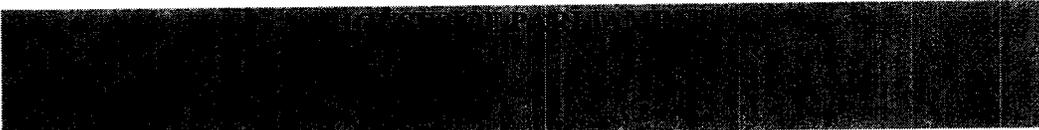
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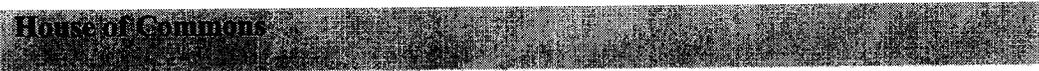
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Rt Hon Neil Kinnock, Vice-President

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD,
Secretary of Defense, *et al.*,

Respondents.

Civil Action No. 1:04-CV-01519-(JR)

AMICUS BRIEF OF

GENERAL DAVID M. BRAHMS (ret.)
ADMIRAL LEE F. GUNN (ret.)
ADMIRAL JOHN D. HUTSON (ret.)
GENERAL RICHARD O'MEARA (ret.)

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INTEREST OF AMICI

Amici are retired senior military officials with extensive experience in issues relating to legal policy, the laws of war, and armed conflict. Amici have spent their careers commanding troops at home and overseas and protecting the nation from attack. Amici believe that the United States, for the sake of its own soldiers, must afford the protections of the Geneva Conventions to all individuals seized in armed conflicts and held in its custody.

Brigadier General David M. Brahms served in the United States Marine Corps from 1963 through 1988, with a tour of duty in Vietnam. He served as principal legal advisor for POW matters at Marine Corps Headquarters in the 1970s and was directly involved in issues relating to the return of American POWs from Vietnam. From 1985 through 1988, he was the senior legal adviser for the Marine Corps. General Brahms is a member of the Board of Directors of the Judge Advocates Association.

Vice Admiral Lee F. Gunn served in the United States Navy for 35 years. From 1997 to 2000, he served as the Department of the Navy Inspector General. Admiral Gunn commanded the USS Barbey, Destroyer Squadron Thirty-One, and Amphibious Group Three, comprised of the 21 ships, 12 shore commands, and 15,000 Sailors and Marines of the Pacific Amphibious Forces. He served under General Anthony Zinni as Deputy Combined Forces Commander and Naval Forces Commander for Operation United Shield, the final withdrawal of United Nations peacekeeping forces from Somalia in 1995.

Rear Admiral John D. Hutson served in the Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson is now President and Dean of the Franklin Pierce Law Center in New Hampshire.

Brigadier General Richard O'Meara retired from the United States Army after 36 years of service in the active and reserve components. He is a combat veteran and former Assistant to the Judge Advocate General for Operations (IMA). He currently is a professor of International Relations at Monmouth University and serves as adjunct faculty in the Defense Institute for International Legal Studies. General O'Meara has lectured on human rights and rule

of law subjects in locations as diverse as Cambodia, Rwanda, Vietnam, and the Ukraine, and serves as a defense expert before the Special Court in Sierra Leone.

INTRODUCTION

Amici ask the Court to declare that the military commissions established by the President in his Military Order of November 13, 2001, by which Respondents propose to try Petitioner Salim Ahmed Hamdan as an “enemy combatant,” unlawfully denies Hamdan the protections of the Geneva Conventions. Amici ask the Court to order Respondents to provide Hamdan those protections.

Amici’s concern is more than theoretical: Respondents’ denial of Hamdan’s rights under the Geneva Conventions directly endangers American soldiers. As the Legal Adviser to the Department of State has observed:

Any small benefit from reducing further [the application of the Geneva Conventions] will be purchased at the expense of the men and women in our armed forces that we send into combat. A decision that the Conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged deprives our troops there of any claim to the protection of the Convention in the event they are captured and weakens the protections afforded by the Conventions to our troops in future conflicts.

Memorandum from William H. Taft IV, Legal Adviser, Dep’t of State, to Counsel to the President (Feb. 2, 2002), *available at* <http://www.fas.org/sgp/othergov/taft.pdf> (“Taft Memo”). Senator Biden has made the same point more bluntly: “There’s a reason why we sign these treaties: to protect my son in the military. That’s why we have these treaties. So when Americans are captured, they are not tortured.” *See* <http://biden.senate.gov/pressapp/record.cfm?id=222640> (June 13, 2004) (last visited Sept. 29, 2004).

The Geneva Conventions establish rules for the treatment of citizens of signatory nations captured during war. The United States became a party to the Conventions to protect the safety and welfare of its own citizens. As Secretary of State Dulles stated during Senate consideration of the Conventions, America’s “participation [in the Conventions] is needed to . . .

enable us to invoke them for the protection of our nationals.” *Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations*, 84th Cong., 1st Sess. 3-4 (1955). Senator Mansfield similarly urged that “it is to the interest of the United States that the principles of these conventions be accepted universally by all nations,” for “[t]he conventions point the way to other governments.” He stated:

Without any real cost to us, acceptance of the standards provided for prisoners of war, civilians, and wounded and sick will insure improvement of the condition of our own people as compared with what had been their previous treatment.

101 Cong. Rec. 9960 (1955). Senator Alexander Smith voiced the same view: “I cannot emphasize too strongly that the one nation which stands to benefit the most from these four conventions is the United States To the extent that we can obtain a worldwide acceptance of the high standards in the conventions, to that extent will we have assured our own people of greater protection and more civilized treatment.” *Id.* at 9962.

The United States has been steadfast in applying the Conventions – even as to soldiers of governments that insisted the Conventions did not bind them, and even where the Conventions technically did not apply. Time and again the United States’ adherence to the Conventions and its precursors has saved American lives.

In World War II, for example, it has been noted that “[t]he American Red Cross attributed the fact of the survival of 99 percent of the American prisoners of war held by Germany . . . to compliance with the [1929] Convention.” Howard S. Levie, *Prisoners of War in International Armed Conflict* 10 n.44 (1977). And the fact that millions of POWs from all camps returned home was “due exclusively to the observance of the Geneva Prisoners of War Convention.” Josef L. Kunz, *The Chaotic Status of the Laws of War and the Urgent Need for Their Revision*, 45 Am. J. Int’l L. 37, 45 (1951). The significantly higher mortality rate suffered by Soviet soldiers held by Germany can be explained by the fact that the 1929 Convention was not “technically applicable” and was not applied to those prisoners. Levie, *Prisoners of War in International Armed Conflict* at 10 n.44.

Thousands of American soldiers taken prisoner during the Vietnam War also benefited from the United States' commitment to the Geneva Conventions. Although North Vietnam insisted that the Geneva Conventions did not apply to American prisoners, whom it labeled "war criminals," the United States afforded all enemy POWs the protections of the Conventions to secure "reciprocal benefits for American captives." Maj. Gen. George S. Prugh, *Vietnam Studies, Law at War: Vietnam 1964-73*, at 63 (1975). The United States afforded those protections not only to North Vietnamese soldiers but also to the Viet-Cong, who did not follow the "laws of war." *Id.*; see also Dep't of State Bull. 10 (Jan. 4, 1971) (White House statement announcing President Nixon's demand that the North Vietnamese apply the Geneva Conventions to ease "the plight of American prisoners of war in North Viet-Nam").

These efforts paid off. Former American POWs and commentators have recognized that the United States' application of the Conventions to North Vietnamese soldiers and Viet-Cong saved American soldiers from abuses when they were imprisoned in Vietnam. Speaking on the fiftieth anniversary of the Geneva Conventions, Senator McCain stated:

The Geneva Conventions and the Red Cross were created in response to the stark recognition of the true horrors of unbounded war. And I thank God for that. I am thankful for those of us whose dignity, health and lives have been protected by the Conventions I am certain we all would have been a lot worse off if there had not been the Geneva Conventions around which an international consensus formed about some very basic standards of decency that should apply even amid the cruel excesses of war.

Senator John McCain, Speech to the American Red Cross Promise of Humanity Conference (May 6, 1999), available at http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=820 (last visited Sept. 29, 2004).

Senator McCain stated that he and other POWs are grateful to have been "spare[d] . . . the indignity of [being] put on trial in violation of the conventions." *Id.*

Since the Vietnam War, the United States has continued to insist on broad adherence to the Geneva Conventions. The emergent features of modern conflict – including

peacekeeping operations and police actions against warlords and terrorist networks – have not diminished the importance to the United States of adhering to the Geneva Conventions.

For example, following the capture of U.S. Warrant Officer Michael Durant in 1993 by forces loyal to Somali warlord Mohamed Farah Aideed, the United States demanded assurances that Durant’s treatment would be consistent with the protections afforded by the Conventions. The United States made this demand even though, “[u]nder a strict interpretation of the Third Geneva Convention’s applicability, Durant’s captors would not be bound to follow the convention because they were not a ‘state.’” Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the “War on Terror”*, 44 Harv. Int’l L.J. 301, 310 (2003).

As part of its negotiations on behalf of Durant, the United States stressed that Somali fighters captured by the United States would be treated as prisoners of war under the Geneva Conventions, even though Somalia had no functioning government and thus was not a “state” within the meaning of the Geneva Conventions. See Paul Lewis, *U.N., Urged by U.S., Refuses to Exchange Somalis*, N.Y. Times, Oct. 8, 1993, at A16. This approach bore fruit: “Following these declarations by the United States, heavy-handed interrogations of Durant appeared to cease, the Red Cross was allowed to visit him and observe his treatment, and he was subsequently released.” *McDonald & Sullivan*, 44 Harv. Int’l L.J. at 310.

Denying Guantanamo detainees the protections of the Geneva Conventions weakens the United States’ ability to demand that the Conventions be applied to Americans captured during armed conflicts abroad. That Respondents believe they can justify denying the detainees those protections is cold comfort:

Interpolating unrecognized exceptions into the contours of prisoner of war status . . . undermines the Geneva Conventions as a whole, [and could easily] boomerang to haunt U.S. or allied forces: enemy forces that might detain U.S. or allied troops would undoubtedly follow the U.S. lead and devise equally creative reasons for denying prisoner of war status. By [flouting] international law at home, the United States risks undermining its own authority to demand implementation of international law abroad.

Manooher Mofidi & Amy E. Eckert, “*Unlawful Combatants*” or “*Prisoners of War*”: *The Law and Politics of Labels*, 36 Cornell Int’l L.J. 59, 90 (2003).¹

Just such erosion, however, is already occurring. Alarmingly but predictably, other governments have begun citing United States policy to justify their repressive policies:

- **Egypt.** President Mubarak stated that Sept. 11 “created a new concept of democracy . . . especially in regard to the freedom of the individual.”
- **Liberia.** President Taylor imprisoned and tortured a respected journalist, labeling him an “unlawful combatant.”
- **Zimbabwe.** A spokesman for President Mugabe called for full investigation and prosecution of “media terrorism.”
- **Eritrea.** The government suspended independent newspapers and jailed 21 journalists and opposition politicians, citing links with Osama Bin Laden.
- **China.** The government applied a new terrorism charge against a U.S. permanent resident and democracy activist.
- **Russia.** The government linked its brutal tactics in Chechnya to Sept. 11.

Lawyer’s Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post-September 11 United States*, at 77-79 (Fiona Doherty & Deborah Pearlstein eds., 2003).

¹ See also Steven W. Becker, “*Mirror, Mirror on the Wall. . .*”: *Assessing the Aftermath of September 11th*, 37 Val. U. L. Rev. 563, 572 (2003) (arguing that American failure to grant POW status under the Geneva Convention “is placing U.S. military personnel abroad in danger, as we have troops in many parts of the world, and it is reasonable to assume that at some time some of them may be captured. If the same treatment is applied to them, we would be hard put to argue otherwise.”); Harold Hongju Koh, *The Case Against Military Commissions*, 96 Am. J. Int’l L. 337, 340 (2002) (arguing that it “seriously disserves the long-term interests of the United States--whose nonuniformed intelligence and military personnel will conduct extensive armed activities abroad in the months ahead” to fail to follow the Geneva Conventions); John Cloud, *What’s Fair in War?*, Time, Apr. 7, 2003, at 66 (arguing that the United States should apply the Geneva Conventions because “it is that very document that could help those young American captives get home safe.”).

By recognizing the rights that the Geneva Conventions afford captives like Hamdan, the United States can protect Americans captured in armed conflicts and avoid lasting damage to the rule of law abroad.

SUMMARY OF ARGUMENT

The military commission system established by the President's Military Order of November 13, 2001 violates Hamdan's rights under the Geneva Conventions, as do the particular conditions of Hamdan's internment. Among the three Branches, the federal courts have the final say as to the meaning of the Conventions, and they also have the power and the duty to enforce the Conventions as judicially construed. This Court can and should declare that the military commission system violates Hamdan's rights under the Geneva Conventions and compel Respondents to adhere to the Conventions in their treatment of him.

ARGUMENT

I. THE COURT CAN AND SHOULD REQUIRE RESPONDENTS TO AFFORD HAMDAN THE PROTECTIONS OF THE GENEVA CONVENTIONS.

Hamdan properly seeks judicial enforcement of the Geneva Conventions because the federal courts are the ultimate expositors of the meaning of treaties and may compel the Executive Branch to conform its actions to treaty requirements as judicially construed. The relevant portions of the Geneva Conventions obligate the Executive Branch without further action by Congress and therefore can be directly enforced by the courts.

A. Federal Courts Are Empowered and Obligated to Interpret Treaties.

Since the dawn of the Republic, it has been "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). It similarly has long been the province and duty of Article III courts to interpret and apply treaties to which the United States is a party. The power to do so is conferred by Article III, cl. 2, ¶ 1, which provides that "the judicial Power" extends to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." This power is also embedded in the Supremacy Clause, which

specifies 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, cl. 2. As Alexander Hamilton explained in *The Federalist* No. 22:

A circumstance which crowns the defects of the Confederation remains yet to be mentioned – the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations.

The Federalist Papers, at 150 (Clinton Rossiter ed., 1961).

The Supreme Court recognized the power of Article III courts to interpret treaties in *Owings v. Norwood’s Lessee*, 9 U.S. 344 (1809). In that case the Court held that a 1794 peace treaty with Britain did not protect a Briton’s claim to land from confiscation. Writing for the Court, Chief Justice Marshall stated: “The reason for inserting that clause [Art. VI, cl. 2] in the constitution was, that all persons who have real claims under a treaty should have their causes decided by the national tribunals.” *Id.* at 348. Although Hamilton and Marshall were focused on the need to reserve treaty interpretation to federal rather than state courts, case law has since made clear that this reservation also applies against the other Branches.

In *Jones v. Meehan*, 175 U.S. 1 (1899), the Court held – in the teeth of a contrary interpretation by Congress and the Executive Branch – that a treaty between the United States and a Chippewa tribe had granted a tribal chief fee simple title to certain land. The Court broadly affirmed that “[t]he construction of treaties is the peculiar province of the judiciary.” *Id.* at 3. Since then, the Court has often confirmed the ultimate role of the Judicial Branch in treaty interpretation. *See, e.g., Perkins v. Elg*, 307 U.S. 325 (1939) (overruling a State Department interpretation of a citizenship treaty); *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (“the courts have the authority to construe treaties and executive agreements”).

B. The Court May Compel the Executive Branch to Conform Its Actions to the Requirements of the Geneva Conventions as Judicially Construed.

A core function of the Judicial Branch is to define not only the limits of its own powers, *see Marbury*, but also the limits of powers granted by the Constitution to the Political Branches. As the Supreme Court explained in *Baker v. Carr*, 369 U.S. 186 (1962):

Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Id. at 211. Although the construction of a treaty by the Executive Branch is “of weight,” it is “not conclusive upon courts called upon to construe” the treaty. *Factor v. Laubheimer*, 290 U.S. 276, 295 (1933).

Accordingly, federal courts – including the D.C. Circuit and this Court – have frequently overruled Executive Branch treaty interpretations and ordered the Executive Branch to conform its actions to those treaties as judicially construed. In *British Caledonian Airways Ltd. v. Bond*, 665 F.2d 1153 (D.C. Cir. 1981), the Circuit invalidated an FAA regulation as contrary to the Convention on International Civil Aviation, and in *Rainbow Navigation, Inc. v. Dep’t of the Navy*, 686 F. Supp. 354 (D.D.C. 1988), this Court overruled the Navy’s interpretation of an agreement between United States and Iceland regulating bidding for military shipping contracts.

Judicial willingness to overturn Executive Branch interpretations of treaties is especially marked when individual liberty is implicated. *See, e.g., United States v. Decker*, 600 F.2d 733, 738 (9th Cir. 1979) (liberty interest of accused weighed against holding dispute over a fishing treaty non-justiciable). And courts have been prepared to overturn Executive Branch interpretations of treaties in areas where deference is traditionally due. In *Perkins*, for example, the Supreme Court overturned the Secretary of State’s interpretation of a naturalization treaty with Sweden. Under the Secretary’s interpretation, an American-born woman whose father had taken her to Sweden as a child lost her U.S. citizenship while abroad. The Court declared the

woman a citizen, barred the government from deporting her, and ordered the Secretary to issue her a passport. 307 U.S. 325.

C. Judicial Enforcement of the Geneva Conventions Does Not Depend on Further Action by Congress.

Further action by Congress is unnecessary to ensure Hamdan the protections of the Geneva Conventions. The relevant provisions of the Geneva Conventions are “self-executing,” and in any event only military commissions that conform to the Geneva Conventions are authorized by existing statutory law.

1. The Geneva Conventions are “self-executing”.

Courts may enforce duly ratified treaties that are “self-executing” without action by Congress. A self-executing treaty is one that “operates of itself without the aid of any legislative provision.” *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled in part on other grounds*, *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). Such a treaty “expressly or impliedly” permits private actions by individuals to enforce its provisions. *Head Money Cases*, 112 U.S. 580, 598-99 (1884); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976); *Z & F Assets Realization Corp. v. Hull*, 114 F.2d 464, 470-71 (D.C. Cir. 1940). A treaty may “contain both self-executing and non-self-executing provisions.” *Lidas, Inc. v. United States*, 238 F.3d 1076, 1080 (9th Cir. 2001).

To determine whether a treaty is self-executing, a court typically looks to “the intent of the signatory parties as manifested by the language of the instrument, and, if the language is uncertain, it must then look to the circumstances surrounding its execution.” *Diggs*, 555 F.2d at 851. The “critical” factor is “the purposes of the treaty and the objectives of its creators.” *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1283 (9th Cir. 1985).

The relevant provisions of the Geneva Conventions do not state whether they require implementing legislation. Thus, a court must look to the intent of the drafters, the intent of the Senate in ratifying the Conventions, and the purposes and objectives of the Conventions.

Evidence that the drafters intended the Conventions to be self-executing is provided by article 129 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (“Geneva III” or “Third Convention”). Article 129 is the only provision that speaks to domestic legislation, *United States v. Noriega*, 808 F. Supp. 791, 798 n.8 (S.D. Fla. 1992). It states that signatories should enact any legislation necessary to provide any *additional* penal sanctions for persons guilty of specified “grave breaches” of the Convention. The Convention, however, does not require legislation implementing the underlying prohibitions or sanctions. It would be anomalous to require legislation to implement *additional* sanctions but not the underlying prohibitions or sanctions.

Consistent with the requirement of article 129, Congress enacted the War Crimes Act, 18 U.S.C. § 2441, imposing criminal liability on any U.S. national committing a “grave breach” of the Conventions. Like the drafters, Congress saw no need to enact legislation providing for enforcement of the underlying prohibitions or sanctions.

The ratification history establishes that the Senate understood the Conventions to be enforceable in domestic courts without implementing legislation. The Foreign Relations Committee stated that the four Conventions are almost entirely self-executing:

15. Extent of Implementing Legislation Required: From information furnished to the committee it appears that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four conventions.

Geneva Conventions for the Protection of War Victims: Report of the Senate Comm. on Foreign Relations, S. Rep. No. 9, 84th Cong. 1st Sess. 30 (1955). The Committee identified only four provisions that required implementing legislation, none pertaining to the protections of individuals at issue here. *Id.* at 30-31.²

² The four provisions concerned (1) a restriction on commercial use of the Red Cross emblem; (2) the provision of workers’ compensation rights to injured civilian detainees; (3) exemption of relief shipments from customs; and (4) a requirement that POW camps be identified with the letters PW, PG, or IC.

For 50 years, the Executive Branch has implemented the Geneva Conventions without questioning the lack of Congressional execution. Regulations jointly promulgated by the Army, Navy, Air Force, and Marine Corps have consistently treated the Conventions as binding. See Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-5 (a)(2) (1997) (“AR 190-8”); Dep’t of the Army, Field Manual No. 27-10, The Law of Land Warfare, ch. 3, § I ¶ 71 (1956) (“FM27-10”) (adopting article 5 verbatim).

Finally, the Conventions were written “first and foremost to protect individuals, and not to serve state interests.” Oscar M. Uhler *et. al.*, *Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 20 (Jean S. Pictet ed., 1958). For example, in Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (“Geneva IV” or “Fourth Convention”). –

- Article 5 affords “individual . . . rights and privileges under the present Convention,” “rights of communication,” and “rights of fair and regular trial.”
- Article 72 affords the “right to present evidence,” the “right to be assisted by a qualified advocate or counsel of their own choice,” and the “right at any time to object.”
- Article 73 provides that “[a] convicted person shall have the right of appeal.”
- Article 78 provides that persons interned for security reasons shall have “the right of appeal.”
- Article 80 refers to “rights” of internees.
- Article 147 provides “rights of fair and regular trial.”

Likewise, in Geneva III –

- Article 5 provides that “persons shall enjoy the protection of [the Third Convention]” whenever their status as a POW is in doubt.
- Article 7 provides that “[p]risoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention.”

- Article 106 provides that “[e]very prisoner of war shall have . . . the right of appeal.”
- Article 129 provides that “[i]n all circumstances, the accused persons shall benefit by safeguards of proper trial and defense”).

As one district court has stated in reference to Geneva III:

[I]t is inconsistent with both the language and spirit of the treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs – not to create some amorphous, unenforceable code of honor among the signatory nations. ‘It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.’ [citing 3 International Committee of the Red Cross, *Commentary on the Geneva Conventions* (J. Pictet, ed., 1960)].

Noriega, 808 F. Supp. at 799; *see also United States v. Lindh*, 212 F. Supp. 2d 541, 553-54 (E.D. Va. 2002); *Restatement (Third) of the Foreign Relations Law of the United States*. § 111, Rpt.’s Note 5 (“obligations not to act, or to act only subject to limitations . . . generally self executing”).

Respondents do not acknowledge this authority. Instead, they argue that because the Foreign Relations Committee did not specifically state that violations of the 1949 treaty *could* be enforced through private actions, the legislative intent was to preclude such private actions. (Mot. 32.) As noted, however, the Committee specifically found the Conventions almost entirely self-executing.

Respondents also argue that the drafters must have intended to preclude private enforcement in domestic courts because the Conventions include provisions allowing nations to resolve their differences in interpreting the Conventions by diplomatic means. *Id.* at 31 n.20. One does not – and cannot – follow from the other. Under Respondents’ logic, individuals from nations with scant bargaining power (such as Yemen), individuals captured fighting on behalf of a regime that no longer exists (such as the former government of Afghanistan), and citizens of the detaining nation (*see, e.g., Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004)) would be left without

a remedy. Indeed, Respondents' interpretation would render certain provisions nonsensical. For example, Geneva III, art. 7 states that "[p]risoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention." It is unclear why the Conventions would allow individuals to waive rights they cannot enforce.

Several courts have recognized that the provisions of the Conventions relating to individual rights are self-executing and provide a private right of action. As one district court has stated, "[Geneva III,] insofar as it is pertinent here, is a self-executing treaty to which the United States is a signatory. It follows from this that the [Geneva III] provisions in issue here are a part of American law and thus binding in federal courts under the Supremacy Clause." *Lindh*, 212 F. Supp. 2d at 553-54 (footnotes omitted); *see also Noriega*, 808 F. Supp. at 797. Another district court has held that the Geneva Conventions "under the Supremacy Clause ha[ve] the force of domestic law." *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002), *remanded on other grounds*, 356 F.3d 695 (2d Cir. 2003), *rev'd on other grounds*, 124 S. Ct. 2711 (2004).

Although the Fourth Circuit in *Hamdi v. Rumsfeld* stated the view that the Conventions are not self-executing, 316 F.3d 450, 468-69 (4th Cir. 2003), its decision was vacated, 124 S. Ct. 2633 (as was the decision of this Circuit in *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *see Rasul v. Bush*, 124 S. Ct. 2686 (2004)). Moreover, contrary to the law of this Circuit, the Fourth Circuit declined to consider legislative intent or acknowledge that a treaty can provide an implied private right of action. *See Diggs*, 555 F.2d at 851.³ The

³ Judge Bork expressed a view similar to the Fourth Circuit's in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring). Like the Fourth Circuit, Judge Bork failed to consider the pertinent legislative history or recognize that treaties can contain both self-executing and non-self-executing provisions. The Supreme Court rejected his reasoning in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), in holding that the law of nations could be enforced under Alien Tort Claims Act.

Fourth Circuit’s conclusion that the Geneva Conventions are not self-executing has been much criticized.⁴

2. The federal statute governing military commissions requires compliance with the Geneva Conventions.

“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.); accord *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10, 21-22 (1963). “This rule of construction reflects principles of customary international law – law that [a court must assume] Congress ordinarily seeks to follow.” *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004). Thus, the federal statutes providing for military commissions, and allowing the President to set their procedures, must be interpreted to authorize only commissions that conform to the Geneva Conventions.

The Uniform Code of Military Justice (“UCMJ”) authorizes the President to write procedures for military commissions and states that, if practical, these procedures “shall . . . apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district court.” 10 U.S.C. § 836. The statute permits the President to suspend certain district court procedures, but does not authorize him to waive the fundamental guarantees of the Geneva Conventions. Therefore, under the *Charming Betsy* canon, a court must construe the authority granted by this statute to preclude any violation of customary international law, including the Geneva Conventions.

⁴ See, e.g., Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained without Trial*, 44 Harv. Int’l L.J. 503, 515 (2003) (*Hamdi* “incorrect”); Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 Cornell L. Rev. 892, 917 (2004) (*Hamdi* “erroneous”).

II. THE MILITARY COMMISSION SYSTEM VIOLATES HAMDAN'S RIGHTS UNDER THE GENEVA CONVENTIONS.

A. The Geneva Conventions Apply to Hamdan.

Hamdan is entitled to the protections of the Geneva Conventions because he was captured during an armed conflict between the United States and Afghanistan.⁵ Under the Conventions, the United States is required to treat Hamdan as a POW until a “competent tribunal” determines that he is not entitled to that designation. *See* Geneva III, art. 5. If a “competent tribunal” determined that Hamdan is not a POW, the United States would be required to provide him the protections of Article 3 (“Common Article 3”), common to all of the 1949 Geneva Conventions, which sets minimum standards for the protection of detainees.

1. The Geneva Conventions apply to Hamdan because he was captured during an international armed conflict.

The Geneva Conventions were intended to be applied broadly to provide human rights protections to all involved in international armed conflicts. The Conventions were “drawn up first and foremost to protect individuals, and not to serve state interests.” *Commentary IV*, at 20. They use expansive language in order to “deprive belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations.” *Id.*

Article 2 (“Common Article 2”), common to the Third and Fourth Conventions, provides that the Conventions are applicable in “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Geneva III, art. 2. Afghanistan is a party to the Conventions. *See* International Committee of the Red Cross, *States Party to the Geneva Conventions and their Additional Protocols*, Feb. 6, 2004. Because Hamdan was captured in the course of the conflict between the United States and Afghanistan (*see* Hamdan Aff. at 10, Ex. B to Schmitz Decl. filed with Hamdan’s petition), the Geneva Conventions apply to Hamdan.

⁵ The factual assertions in this brief either appear in Hamdan’s petition or have been reported to amici by Hamdan’s counsel. For the purpose of deciding Respondents’ motion to dismiss, these factual assertions must be taken as true. *Warren v. District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004).

Respondents argue that Hamdan was captured not during the United States' armed conflict with Afghanistan but during a "separate" conflict with al Qaeda – a conflict that the United States happened to be fighting at the same time, on the same soil, using the same troops, and with the same objectives.⁶ The conflict between the United States and al Qaeda can no more be separated from the conflict between the United States and Afghanistan than the conflict between Germany and the French Resistance in World War II can be separated from the conflict between Germany and France. Moreover, even if one could digest the fiction that there were two parallel conflicts in Afghanistan, Hamdan was captured by Afghan paramilitary forces allied with the United States and fighting the Taliban. *See Hamdan Aff.* at 10.

Secretary of State Powell was therefore correct when he stated, soon after the United States invaded Afghanistan, that the Geneva Conventions apply to both al Qaeda and Taliban fighters. Rowan Scarborough, *Powell Wants Detainees to the Declared POWs*, Wash. Times, Jan. 26, 2002. As his Legal Adviser stated (Taft Mem. at ¶ 3):

[The suggestion that there is a] . . . distinction between our conflict with al Qaeda and our conflict with the Taliban does not conform to the structure of the Conventions. The Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions are applicable to all persons involved in the conflict – al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc. If the Conventions do not apply to the conflict, no one involved in it will enjoy the benefit of their protections as a matter of law.⁷

⁶ *See* Presidential Mem. and Order to the Vice President, *et al.*, dated Feb. 7, 2002, at ¶ 2, available at http://www.library.law.pace.edu/research/020207_bushmemo.pdf (last visited Sept. 29, 2004) (accepting conclusion of DOJ and determining that provisions of Geneva do not apply to conflict with al-Qaeda in Afghanistan or elsewhere because, among other reasons, al-Qaeda is not a High Contracting Party to Geneva; also accepting legal conclusion of the Attorney General and DOJ that Constitution authorizes President to suspend Geneva Conventions as between the United States and Afghanistan, but declining to exercise that authority and determining instead that Geneva Conventions will apply to present conflict with the Taliban).

⁷ *See also* Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 Conn. J. Int'l L. 127, 153-54 (2003) (arguing that the Third Convention should be applied to the conflict with al Qaeda because al Qaeda was an "enemy" of the U.S. in an armed conflict and its forces were so intertwined with the Taliban as to make them indistinguishable); Joan Fitzpatrick, *Agora: Military Commissions: Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 Am. J. Int'l L. 345, 349 (2002) (noting that the conflict in
(continued...)

Respondents' interpretation of Common Article 2 bears a disturbing resemblance to the interpretation of predecessor conventions adopted by Nazi Germany in World War II. Exploiting "technicalities" and "ambiguities" in the 1929 Conventions, the Nazis refused to afford POW status to members of the armed forces of countries the Nazis occupied because those prisoners were no longer soldiers of any government or state in existence. *See* Levie, *Prisoners of War in International Armed Conflict*, at 12. Responding to this brazen evasion of the conventions, Common Article 2 was written "as a catchall, to include every type of hostility which might occur without being 'declared war,'" *Commentary IV*, at 14-15, thus ensuring that "nobody in enemy hands can be outside the law," *id.* at 51.⁸

As one scholar has commented, Respondents' position "repudiates the very concept of a 'law' of war," substituting "a new form of international armed conflict that is subject to no identifiable norms of international humanitarian law" and "an international armed conflict in which all of the 'combatants' as defined by the Third Geneva Convention are on one side – that of the United States and its allies." Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 *Hastings Int'l & Comp. L. Rev.* 303, 317-18 (2002).

2. Hamdan is entitled to be treated as a POW until a competent tribunal determines otherwise.

Geneva III has been interpreted to create a presumption that a prisoner who is captured in a war zone is a POW. *See* Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 847 *Int'l Rev. Red Cross* 571, 571 (2002). Moreover, article 5 of Geneva III and United States military regulations require prisoners to be afforded full POW status as long as there is any doubt about their status. Article 5 provides:

Afghanistan was an international armed conflict in which the Taliban and Al Qaeda joined forces against the U.S. and its Afghan allies).

⁸ *See also* Norman G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 *UCLA J. Int'l L. & For. Aff.* 331, 371 (2003) (arguing that "the U.S. treatment of individual al-Qaeda members must comport with the strictures of the conventions because the conventions apply in all instances of international conflict.").

Should *any doubt* arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

(Emphasis added.) *See also* AR 190-8; FM27-10.⁹ To overcome the presumption and deny Hamdan POW status, therefore, Respondents must establish either that it is beyond doubt that Hamdan is not entitled to POW status, or that a competent tribunal has determined that he is not. Respondents cannot make either showing.

Doubt as to Hamdan's status starts with his capture by bounty-hunting Afghan paramilitary forces who had every incentive to manufacture information to justify their reward. Hamdan Aff. at 10. "Pakistani intelligence sources said Northern Alliance commanders could receive \$5,000 for each Taliban prisoner and \$20,000 for a Qaeda fighter. As a result, bounty hunters rounded up any men who came near the battlegrounds and forced them to confess." Jan McGirk, *Pakistani Writes of His US Ordeal*, Boston Globe, Nov. 17, 2002, at A30.

In addition, Army regulations provide that a detainee's status is "in doubt" under Article 5 whenever the detainee *claims* that he is entitled to POW status, as Hamdan has done. *See* Hamdan Pet. ¶¶ 36-42. Military regulations provide:

A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and *who asserts that he or she is entitled to treatment as a prisoner of war*, or concerning whom any doubt of a like nature exists.

See AR 190-8, § 1-6(b) (emphasis added). Navy regulations provide that even "individuals captured as spies or illegal combatants have the right to assert their claim of entitlement to

⁹ The military regulations cited in this brief express the interpretation of the Geneva Conventions by the United States. *See* FM 27-10, ch. 3, § I ¶ 71(b) (explaining that AR 190-8 is the military's interpretation of Article 5).

prisoner-of-war status before a judicial tribunal and to have the question adjudicated.” NWP 1-14M: The Commander’s Handbook on the Law of Naval Operations § 11-7 (1995).¹⁰

Because Hamdan claims POW status, he is entitled under Article V and military regulations to POW protections until a competent tribunal determines otherwise. *See also, e.g., Gherebi v. Bush*, 352 F.3d 1278, 1283 n.7 (9th Cir. 2003) (suggesting that the failure to make status determinations by tribunals violates Article 5 and the military regulations that codify it), *as amended by* 374 F.3d 727 (9th Cir. 2004); *Hamdi*, 124 S. Ct. at 2658 (Souter, J., concurring in part, dissenting in part, and concurring in judgment); *European Commission for Democracy Through Law (Venice Commission), Council of Europe, Opinion on the Possible Need for Further Development of the Geneva Conventions*, at 9-10 (2003), available at [http://venice.coe.int/docs/2003/CDL-AD\(2003\)018-e.asp](http://venice.coe.int/docs/2003/CDL-AD(2003)018-e.asp) (“Venice Commission Opinion”) (last visited Sept. 29, 2004).¹¹

¹⁰ *See also* George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 Am. J. Int’l L. 891, 893 (2003) (the military regulation’s “interpretation [of Article 5] clearly indicates that doubt arises and a tribunal is required whenever a captive who has participated in hostilities asserts the right to be a POW”). The United States has regularly conducted adjudications in the midst of conflicts to determine if detainees asserting the right to POW status are entitled to such protections. *See, e.g.,* Judge Advocate General’s School, *Operational Law Handbook* 22 n.2 (O’Brien ed., 2003) (discussing hearings to determine whether detainees were entitled to POW status conducted during the first Gulf War); *Contemporary Practice of the United States Relating to International Law*, 62 Am. J. Int’l L. 754, 768-75 (1968) (discussing hearings conducted during the Vietnam War); Note, *Safeguarding the Enemy Within*, 71 Fordham L. Rev. 2565, 2574 (2003) (noting U.S. Army’s establishment of widespread Article 5 tribunals in Vietnam to adjudicate POW status of enemy detainees).

¹¹ Article 45(1) of the first Protocol Additional to the Geneva Conventions provides that “[a] person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war . . . until such time as his status has been determined by a competent tribunal.” *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, June 8, 1977, 1125 U.N.T.S. 3. Although the United States is not a party to Protocol I, commentators have suggested that the rule established in Article 45(1) is now customary international law and that the United States regards Article 45(1) as customary international law. *See* Naqvi, *supra* at 591-93 (U.S. regards this rule as customary international law); Aldrich, 96 Am. J. Int’l L. at 892 (Article 45(1) is “now a part of customary international law”). By violating Article 45(1), the
(continued...)

Respondents assert that no doubt exists as to his status because the President has “determined” that Hamdan is a member of al Qaeda and is subject to the Military Order. (Mot. 35-36). But the President cannot decide Hamdan’s status because “the president is not a tribunal and cannot substitute for a tribunal under Article 5.” Aldrich, 96 Am. J. Int’l L. at 897. Nor can the President justify departing from the requirements of Article 5 on the ground that the President has labeled Hamdan an “enemy combatant.” Such a justification assumes its conclusion. Neither Article 5 nor the military regulations purport to withhold from so-called “enemy combatants” the right to have their status determined by a tribunal.

The President’s categorical refusal to provide POW protections to any of the detainees also violates Article 5’s requirement that the prisoners receive individualized status determinations. This requirement is implicit in the rule that doubt as to a prisoner’s status exists when the prisoner claims POW status. *See* Naqvi, *supra*, at 585-87.

The individualized assessment required by Article 5 is a recognition of the realities of war: when large numbers of people are rounded up, civilians, soldiers, and even “enemy combatants” are easily mistaken. After the Gulf War, the United States, as it had done following every conflict since the ratification of the Geneva Conventions, convened tribunals for detainees with unclear status. Of 1,196 tribunals convened, almost three quarters (886) resulted in a finding that the detainee was not a combatant at all, but a displaced civilian. Dep’t of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* (1992), available at www.ndu.edu/library/epubs/cpgw.pdf (last visited Sept. 29, 2004). Respondent Rumsfeld has acknowledged that some of the detainees at Guantanamo may be unlawfully detained: “Sometimes when you capture a big, large group there will be someone who just happened to be in there that didn’t belong in there.” Dep’t of Defense, Secretary Rumsfeld Media Availability en route to Camp X-Ray (Jan. 27, 2002), available at www.defenselink.mil/news/Jan2002/t01282002_t0127sd2.html (last visited Sept. 29, 2004).

United States therefore also violates Common Article 3. *See* *Kadic v. Karadzic*, 70 F.3d 232, 242-43 (2d Cir. 1995); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1351 (N.D. Ga. 2002).

If Article 5 were construed to allow the President to “determine” categorically that a designated class of prisoners is not entitled to POW status – especially a group as large and diverse as the Guantanamo detainees – the protections of Article 5 would be illusory. Such a construction “would give the detaining power an easy means to circumvent its obligation under Article 5 by simply declaring that it has no doubts that the conditions of Article 5 . . . are not satisfied.” Venice Comm’n Opinion at 9.

3. Hamdan is protected by Common Article 3 whether or not he is deemed a POW.

“If any person detained during an armed conflict is not a POW, such person nevertheless benefits from protections under Common Article 3 of the Geneva Conventions, which applies today in all armed conflicts and which incorporates customary human rights to due process into the conventions.” Paust, *supra* at 514 & n.37. Common Article 3 requires humane treatment of prisoners and forbids “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Geneva III, art. 3.

Common Article 3 is applicable in the case of “armed conflict not of an international character,” but it is not limited to non-international conflicts: Because international armed conflicts trigger “protections equal to, and in most areas greater than, those accorded by Common Article 3,” Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int’l L. 1, 41 (2003), “[the] minimum requirement [of Common Article III] in the case of a non-international conflict is *a fortiori* applicable in international conflicts,” *Commentary IV*, at 14.

Thus, the International Court of Justice has stated that “[t]here is no doubt that, in the event of international armed conflicts . . . [the rules articulated in Common Article 3] . . . constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity.’” *Nicaragua v. United States*, 1986 I.C.J. 14, 113-14 (citation omitted). The ICJ stated that “[b]ecause the minimum rules applicable to

international and non-international conflicts are identical, there is no need to address the question whether . . . [the actions alleged to be violative of Common Article 3] must be looked at in the context of the rules which operate for one or for the other category of conflict.” *Id.*

Similarly the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia found that Common Article 3 was applicable to the conflict in the former Yugoslavia whether or not that conflict was characterized as international or internal. *Prosecutor v. Tadic*, Case No. IT-94-1-A, ICTY, Trial Chamber, Decision on Defense Motion on Jurisdiction, Aug. 10, 1995, ¶¶ 65-74, available at <http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm> (last visited Sept. 29, 2004); see also *Kadic*, 70 F.3d at 242-43 (stating in its discussion of customary international law that Common Article 3 sets forth the “most fundamental requirements of the law of war”); *Mehinovic*, 198 F. Supp. 2d at 1351 (recognizing “the customary international humanitarian norms embodied in [Common Article 3]”).¹²

B. Respondents’ Treatment of Hamdan Violates the Geneva Conventions.

Whether Hamdan is deemed protected under the Third Convention as a POW or only under the basic protections of Common Article 3, Respondents have failed to provide him with the judicial process and humane treatment which he is due.

¹² Hamdan should also be understood to qualify for the protections due civilians under the Geneva IV. Although Article 4 of Geneva IV states that these protections are not available to “[n]ationals of a neutral state who find themselves in the territory of a belligerent state” (on the theory that those individuals are to be protected through diplomatic means) some commentary suggests that the protections of Geneva IV are to be provided to anyone who finds himself “in the hands of a Party to the [armed] conflict.” Art. 4. See, e.g., *Commentary IV* at 51 (“Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.”); accord FM 27-10, ch. 3 § II ¶ 73 (Army Field Manual, taking a similar position). Such a reading of Geneva IV is particularly appropriate in Hamdan’s case because the Yemeni government’s diplomatic efforts on Hamdan’s behalf have so far been unavailing.

1. The military commissions violate the Third Geneva Convention and Common Article 3.

Military commissions *per se* do not violate the Geneva Conventions. Indeed, some of the amici have advocated the use of commissions – constituted with appropriate protections for defendants – in the current war against Al Qaeda. Such commissions, however, must provide at least the protections afforded by the Geneva Conventions unless Congress unmistakably provides otherwise. See *Charming Betsy*, 6 U.S. (2 Cranch) 64, and discussion at page 15, *supra*. Congress has not provided otherwise.

The military commissions established by Respondents violate the Geneva Conventions because they fail to provide Hamdan (a) the right to a speedy investigation and trial, (b) the right to present an adequate defense, (c) the right not to have coerced confessions admitted as evidence, (d) the right to have his case heard before an independent tribunal, (e) the right to appellate review of his sentence, (f) the right to be free from retroactive punishments, and (g) the right to be free from discrimination in his sentencing and punishment.

a) Right to a speedy judicial investigation and trial

Article 103 of Geneva III requires that “[j]udicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. . . . In no circumstances shall this confinement [prior to trial] exceed three months.” Hamdan has been in detention for nearly three years. Since being declared subject to military commission proceedings, he has been in detention for fifteen months, the last six of which he has spent in solitary confinement. See Hamdan Pet. 11; Charge Sheet for *United States v. Hamdan*, Hamdan Pet. 11.

Respondents’ actions also violate Common Article 3, which requires at least those minimum judicial protections “recognized as indispensable by civilized peoples.” The content of these protections is defined through customary international law, which has found expression in

Article 75 of Protocol I,¹³ and in the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. (“ICCPR”).¹⁴

Respondents’ treatment of Hamdan violates Common Article 3 and customary international law because, by any measure, the proceedings against him have been “unduly delayed.” See Protocol I, art. 75(4)(a) (requiring “an accused to be informed without delay of the particulars of the offence alleged against him”); ICCPR, art. 14(3)(c) (requiring detainees to be “tried without undue delay”). Hamdan was held prisoner for more than two-and-one-half years before Respondents issued their charges against him; the offenses of which he is accused allegedly occurred before the end of 2001. Approval of Charge and Referral, *United States v. Hamdan*. This delay has inevitably impaired his ability to mount an adequate defense, inasmuch as the trail of evidence has become cold and witnesses have become unavailable.

¹³ Although the United States has not ratified Protocol I (*see supra* note 11), its stated reasons for not ratifying Protocol I did not include objections to article 75, and the President specifically recognized that some provisions of Protocol I reflect customary international law. See *Message from the President Transmitting Protocol II Additional to the 1949 Geneva Conventions*, 26 I.L.M. 561, 564 (1987). According to a JAG deskbook:

Although the U.S. has never ratified either of these Protocols, [their] relevance continues to grow based on several factors: a. The US has stated it considers many provisions of Protocol I . . . to be binding customary international law. b. The argument that the entire body of Protocol I has attained the status of customary international law continues to gain in strength . . . d. U.S. policy is to comply with Protocol I and Protocol II whenever feasible.

Judge Advocate General’s School, U.S. Army, *Legal Framework of the Law of War*, in Law of War Workshop Deskbook 25, 32 (Brian J. Bill ed., 2000), available at [www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/fc6fd99c6c0745e185256a1d00467742/\\$FILE/LOW%20Deskbook%202000.pdf](http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/fc6fd99c6c0745e185256a1d00467742/$FILE/LOW%20Deskbook%202000.pdf) (last visited Sept. 27, 2004). See also Douglass Cassel, Center for International Human Rights, *Violations of International Human Rights and Humanitarian Law Arising from Proposed Trials Before United States Military Commissions*, June 17, 2004, available at www.law.northwestern.edu/depts/clinic/ihr/docs/MilComms061704.pdf at n. 85 (last visited Sept. 27, 2004).

¹⁴ “All the rights . . . protected by the principal International Covenants [including the ICCPR] . . . are internationally recognized human rights . . .” *Restatement* § 701 Reporter’s Note no. 6, § 702, cmt. m (1987).

b) Right to present an adequate defense

The military commissions are a tilted playing field, a fateful contest with one-sided rules. The commissions severely handicap prisoners in conducting their defense.

Under article 84 of Geneva III, “[i]n no circumstances whatever shall a prisoner of war be tried by a court of any kind . . . the procedure of which does not afford the accused the rights and means of defense provided for in Article 105.” Article 105 mandates respect for various rights, including the right “to assistance by one of his prisoner comrades” in mounting a defense, and the right to have legal counsel able to “confer with any witnesses for the defense, including prisoners of war.” Similarly, Common Article 3, Protocol I, and the ICCPR all set out required elements for an adequate legal defense under customary international law, providing that a detainee must “have all necessary rights and means of defense,” Protocol I Art. 75(4)(a), and “adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing,” ICCPR at Art. 14(3).

Contrary to these requirements, Hamdan is being held in solitary confinement, *see* Hamdan Pet. at 11, and thus may not confer with others interned at the Guantanamo Bay facility. Moreover, the Secretary of Defense has issued an order that authorizes the officer presiding over a military commission to restrict the access of the defense to witnesses significantly. Restrictions can “include, but are not limited to: testimony by telephone . . . or other electronic means; [and the] introduction of prepared declassified summaries of evidence.” Dep’t of Def. Military Comm’n Order No. 1 at § 6(D)(2)(d) (Mar. 21, 2002) (“MCO No. 1”). This order violates Hamdan’s unconditional right to an adequate defense, which permits such limitations in “no circumstances whatever” and permits his counsel free access to “any witnesses.” Geneva III, arts. 84, 105; *see also* Protocol I, art. 75(4)(g) (allowing defendants to “obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”); ICCPR art. 14(3)(e) (requiring that defendants be afforded access to witnesses “under the same conditions” as the prosecution).

Because Hamdan is a citizen of Yemen, Hamdan's counsel sought to be allowed to have Yemeni officials meet with him. That request was denied. Hamdan's ability to assist in his own defense has also been hampered by poor translation. *See, e.g.,* Neil A. Lewis, *Terror Tribunal Defendant Demands to Be Own Lawyer*, N.Y. Times, Aug. 27, 2004, at www.nytimes.com/2004/08/27/politics/27gitmo.html ("The day's proceedings were marred by translation difficulties, which have been a chronic problem throughout the week. Translators hired by defense lawyers in the audience provided alternate translations and criticized the choppy versions offered by the tribunal's interpreters."). Translation problems have plagued operations at Guantanamo for years. *See* 148 Cong. Rec. S5,843 (daily ed. June 20, 2002) (letter from Senators Leahy and Grassley to the Inspector General of the Department of Justice questioning incidents of faulty translation by FBI translators at Guantanamo).

The military resources available to Hamdan's defense also are insufficient:

There is a stark and critical imbalance in the resources of the prosecution and defense attorneys. The prosecutors have an entire floor and a real staff – including researchers, clerks and paralegals. The defense attorneys – all six of them – work from one office. In the office there are just four computers and a copy machine that only periodically works. They have no administrative staff. They are, to my eye, under water. It appears difficult, if not impossible, to practice law in this type of environment. The contrast with the prosecution's resources is stark.

Deborah Pearlstein, *Military Commission Trial Observation*, Aug. 25, 2004, at http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary.htm (last visited Sept. 29, 2004). There are not enough computers and telephones to allow several defense teams to work simultaneously, even though the commissions are proceeding simultaneously. The conference table in the defense teams' offices was removed prior to the start of the commissions, forcing defense counsel to work on the floor. *See* Kenneth Roth, Letter to Defense Secretary Rumsfeld on the Military Commissions at Guantanamo Bay, Sept. 16, 2004, *available at* www.hrw.org/english/docs/2004/09/15/usdom9350.htm (last visited Sept. 26, 2004).

c) Right to exclude coerced and unreliable confessions as evidence

Hamdan suffered physical abuse in Afghanistan when he was unable to provide answers that satisfied U.S. troops, *see* Hamdan Aff. 10, and then was subjected to almost three years of constant mental and moral coercion at Guantanamo. For example, Hamdan was told that he would be offered U.S. citizenship if he would act as a witness against others. *Id.* at 11. He has been in solitary confinement so long that he has considered pleading guilty to unspecified charges simply to be released back into the general Guantanamo population. *Id.* at 12.

The admission of confessions or tortured testimony – from or against Hamdan – would clearly violate domestic law, the UCMJ, 10 U.S.C. § 831, and judicial protections “recognized as indispensable by civilized peoples.” Under Respondents’ system, however, such evidence is *required* to be admitted before the military commission “if, in the opinion of the Presiding Officer [or a majority of the commission] . . . the evidence would have probative value to a reasonable person.” *See* MCO No. 1 at § 6(D)(1). Moreover, Hamdan is hindered in rebutting such evidence by the fact that he is likely to have access to it only in the form of summaries or “statements of the relevant facts that the [tortured testimony or other classified information] would tend to prove.” *Id.* § 6(D)(5)(b). These summaries, although hearsay and thus difficult to contest, *must* be admitted if “probative . . . to a reasonable person,” even if the prejudicial value of the evidence outweighs its probative value. *Id.* at 6(D)(1).

d) Right to an independent and impartial tribunal

“In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized.” Geneva III, art. 84; *see also Hamdi*, 124 S. Ct. at 2648 (detainees are entitled to “a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker”). The same guarantee of an independent and impartial tribunal is implicit in Common Article 3, via customary international law, Protocol I art. 75(4), and the ICCPR art. 14(1).

The tribunal established by Respondents to judge Hamdan is not impartial. The military commission, named by an Appointing Authority who was in turn named by the

Secretary of Defense, is composed of a presiding officer and five other members (including one alternate). The presiding officer is a retired military judge; the other five members of the commission are active military officers who “continue to report to their parent commands,” Dep’t of Def. Military Comm’n Instruction No. 6 (Apr. 30, 2003), § 3(A)(8). Although the Military Commission Instruction promises that “the consideration or evaluation of duty as a member of a military commission is prohibited in preparing effectiveness, fitness, or evaluation reports of a commission member,” it is difficult to believe that such considerations would not occur to any member of the commission with ambitions for higher military position.

That this is not an impartial tribunal is apparent not only in the structure of the commission but also in its particular composition. The presiding officer has admitted stating that he did not believe there was any “speedy trial” issue at stake for the Guantanamo detainees.¹⁵ During preliminary proceedings, he also purported to predict the ruling of the Appointing Authority, based upon his close friendship with the Authority. *See* Roth, Letter to Defense Secretary Rumsfeld. Other commission members were involved in the capture and interrogation of enemy forces in Afghanistan, led efforts to transport captives from Afghanistan to Guantanamo, or were otherwise involved in military operations in Afghanistan.¹⁶ One member has admitted calling the Guantanamo detainees “terrorists.”¹⁷

The structure of the commission also casts doubt on its competence and independence. The presiding officer is the only member of the commission with legal experience. The lack of legal experience on the part of the other members of the commission became clear during *voir dire* questioning, when the alternate member admitted to not knowing

¹⁵ *See* John Hendren, *Trials and Errors at Guantanamo*, L.A. Times, Aug. 29, 2004, at A1.

¹⁶ *See* Vanessa Blum, *Defense Lawyer Challenges Impartiality of Guantanamo Commission Members*, Legal Times, Aug. 26, 2004, available at www.law.com/jsp/article.jsp?id=1090180421066 (last visited Sept. 12, 2004).

¹⁷ *See* Toni Locy, *U.S. Tribunal Could Lose Members*, USA Today, Sept. 14, 2004, at 5A, available at www.usatoday.com/printedition/news/20040915/a_tribunals15.art.htm (last visited Sept. 29, 2004).

what the Geneva Conventions are. Hendren, *supra* (“Do you know what the Geneva Convention is, sir?” Swift asked. ‘Not specifically. No, sir,’ Lt. Col. Curt S. Cooper answered. ‘And that’s being honest.’”). But it is the full commission, not just the presiding officer, that has the authority to “provide a full and fair trial” and to “proceed impartially and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence, and preventing any unnecessary interference or delay.” MCO No. 1 at § 6(B)(1)-(2). For Hamdan, it is a no win situation: The members of the commission either may disregard the presiding officer on matters that require legal experience, for example, the admissibility of evidence¹⁸; or they may defer to him indiscriminately *because* of his legal experience.

In addition, the tribunal process facing Hamdan ends with a decision by the President or by the Secretary of Defense. MCO No. 1 at § 6(H)(2), (5)-(6). The President and Secretary are not impartial: their political reputations are at stake in these highly visible commission hearings. The members of the military commission, and the Appointing Authority and the review panel, *id.* at § 6(H)(3)-(4), who have intermediate appellate authority, similarly cannot be impartial because they are members of an organization whose reputation is at stake. And they are not independent because they report indirectly to the President and the Secretary of Defense – as do the prosecution and defense staff.

It is difficult indeed to believe that the commission members could remain impartial following the President’s public statement, “I know for certain that these are bad people”, Guy Dinmore & Cathy Newman, *Iraq Controversies Mar Ovations for Blair*, *Fin. Times*, July 18, 2003, at 3, and the statement of Secretary Rumsfeld that the Guantanamo detainees are “among the most dangerous, best-trained, vicious killers on the face of the Earth,” Jess Bravin, Jackie Calmes & Carla Anne Robbins, *Status of Guantanamo Bay Detainees Is Focus of Bush Security Team’s Meeting*, *Wall St. J.*, Jan. 28, 2002, at A16.

¹⁸ Interlocutory questions, “the disposition of which would effect a termination of proceedings with respect to a charge,” are to be referred to the Appointing Authority. MCO No. 1 at § 4(A)(5)(d).

e) Right to appeal to a civilian court

Under article 106 of the Third Convention, “[e]very prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial.” For U.S. military personnel, referral to a Court of Criminal Appeals of court-martial cases is mandatory for any member of the U.S. military who receives a sentence of confinement for one year unless this appeal has been waived. 10 U.S.C. § 866(b). Thereupon, discretionary review by the Court of Appeals for the Armed Forces and the Supreme Court of the United States is available. *Id.* § 867(a)-a(a). The Court of Appeals for the Armed Forces is composed of five civilian judges, appointed by the president with the advice and consent of the senate for a term of 15 years, and removable only for cause. 10 U.S.C. § 942.

Hamdan, however, is due only an administrative review by the Appointing Authority, further review of the trial record by a panel of military officers, and final review by the Secretary of Defense or the President. MCO No. 1 at § 6(H). There is no provision for review by a true judicial body:

[M]ilitary tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and . . . the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

The White House, President Issues Military Order (Nov. 13, 2001), § 7(b), *available at* <http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html> (last visited September 29, 2004).

f) Right to be free from retroactive punishments

Common Article 3 incorporates the customary international due process rights of Protocol I, art. 75(4)(c), which states that “[n]o one shall be accused or convicted of a criminal

offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed”

Among other acts, Hamdan has been accused of conspiracy to commit two offences: (i) destruction of property by an unprivileged belligerent, and (ii) terrorism. According to the International Committee of the Red Cross, as to each offense, “[i]t is doubtful that this crime, as defined [within Dep’t of Def. Military Comm’n Instruction No. 2 (Apr. 30, 2003), § 6(B)], exists under the law of armed conflict Violation of the prohibition against retroactivity is of concern.” International Committee of the Red Cross, *Analysis of Proposed Military Commissions*, Nov. 24, 2003, on file with the authors.

g) Right to nondiscriminatory treatment

Under Common Article 3, persons not taking active part in the conflict “shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.” However, the government has agreed to stronger procedural protections for military commission defendants from Australia and Great Britain: These defendants are permitted the involvement of foreign lawyers as consultants, confidential communications with their lawyers, and increased family contacts. David Hicks, a detainee from Australia, will be permitted to serve any sentence in an Australian prison.¹⁹ Despite requests from the government of Yemen, Hamdan has received no such assurances.

The very fact that Hamdan is subject to the military commissions violates the nondiscrimination protections of Common Article 3 because U.S. citizens are beyond their jurisdiction. Military Order of Nov. 13, 2001, at § 2 (“The term ‘individual subject to this order’ shall mean any individual who is not a United States citizen . . .”).

¹⁹ See B. Graham & T. Branigan, *Two Britons at Guantanamo Will Not Face the Death Penalty*, Washington Post, July 23, 2003, at A18; Dep’t of Def. News Release No. 892-03, *U.S. and Australia Announce Agreements on Guantanamo Detainees* (Nov. 25, 2003).

2. Hamdan's conditions of internment violate the Geneva Conventions.

For over two-and-a-half years, Hamdan has been subject to (a) arbitrary detention, (b) questioning under unlawful coercion, (c) solitary confinement with limited access to sunlight and exercise, (d) infrequent medical treatment, and (e) barriers to the free exercise of his religion. This treatment violates the Geneva Conventions.

a) Prolonged arbitrary detention

The Supreme Court has recently recognized a customary international legal prohibition against prolonged arbitrary detention. *See Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2768 (2004). The Court cited the Restatement (Third) of Foreign Relations Law, which declares that a state violates customary international law “if, as a matter of state policy, it practices, encourages, or condones . . . (e) prolonged arbitrary detention” Restatement § 702. “Detention is arbitrary if it is supported only by a general warrant, or is not accompanied by notice of charges; if the person detained is not given early opportunity to communicate with family or to consult counsel, or is not brought to trial within a reasonable time.” Restatement § 702, cmt. h. The Court also noted that the International Court of Justice, in addressing the hostage crisis in Iran, might properly have labeled the hostage situation as “arbitrary detention” in part because the crisis “lasted ‘many months.’” *Sosa*, 124 S. Ct. at 2768 n.27 (citing *United States v. Iran*, 1980 I.C.J. 3, 42).

Hamdan did not receive notice of the charges against him for eighteen months – assuming that he was indeed informed that he is subject to the military commission when the President made that determination in July 2003. Charge Sheet for *United States v. Hamdan*. Hamdan has been detained for almost three years, during which time he had very limited contact with family and counsel. Hamdan's detention exceeded the roughly fourteen months of the hostages' confinement in Iran.²⁰ That Hamdan's detention has been prolonged and arbitrary by any reasonable standard is obvious.

²⁰ See BBC, *1981: Tehran frees US hostages after 444 days* (n.d.), available at <http://news.bbc.co.uk/onthisday/hi/dates/stories/january/21/newsid2506000/2506807.stm>.

b) Questioning under coercion

Hamdan was told that he would “remain in custody until such time as he wishe[d] to plead guilty to some unspecified crime against the United States . . . and that his appointed defense counsel [was] . . . available only to assist Hamdan in pleading guilty to some unspecified offense.” Hamdan Pet. 13. Because he has refused to plead guilty, he has been kept from his family and home for nearly three years. *See id.* at 11, 13. This treatment violates article 99 of the Third Convention, which states that “[n]o moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.” “[P]risoners of war must at all times be protected, particularly against acts of . . . intimidation.” *Id.* art. 13. “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.” *Id.* art. 17. Finally, this treatment violates Article 75 of Protocol I, which forbids “torture of all kinds, whether physical or mental.”

c) Solitary confinement without access to sunlight

Article 21 of the Third Convention requires that, except for confinement resulting from disciplinary sanctions, POWs “may not be held in close confinement except where necessary to safeguard their health” In fact, “[p]risoners of war shall be quartered under conditions as favorable as those for the forces of the Detaining Power who are billeted in the same area” – conditions that “shall in no case be prejudicial to their health.” Art. 25. Moreover, POWs “shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent.” Art. 22. Article 75(1) of Protocol I, incorporated in Common Article 3, requires detainees “to be treated humanely in all circumstances”.

The years of confinement away from his family – and now his solitary confinement without access to sunlight or fellow internees – have endangered Hamdan’s

psychological well-being, and put him, in the words of an examining psychiatrist, at risk of “serious mental injury.” Hamdan Pet. 11, 13.

d) Inadequate medical treatment

The Third Convention provides that POWs are to receive without charge “the medical attention required by their state of health,” Art. 15, and that “[m]edical inspections of prisoners of war shall be held at least once a month,” Art. 31. Such medical care is also implicit in article 75(1) of Protocol I, incorporated in Common Article 3, which requires detainees “to be treated humanely in all circumstances.” Hamdan, however, receives medical care infrequently – he is seen by a physician once every four to five months. Hamdan’s health is such that more critical, timely intervention is regularly required. The years of confinement away from his family – and now his solitary confinement at Camp Echo at Guantanamo – have put him at risk of “serious mental injury.” He has lost 50 pounds and is on a hunger strike against his condition. Respondents have thus violated their legal duty under the Geneva Conventions to provide Hamdan the basic medical assistance he requires.

e) Restrictions on free exercise of religion

Hamdan has been denied access to important religious texts other than the Koran, and he has not had access to a Muslim chaplain, except for a brief period, in the time he has been interned at Guantanamo. The Third Convention mandates that detainees “shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities.” Geneva III, art. 34.

The seriousness of these treaty violations is magnified by the religious context of the armed conflict in which Hamdan was sold to the United States. The United States effectively is at war with radical Islam. Violating the religious liberties of Muslim captives in that war can only heighten the likelihood of grisly retribution against Americans.

III. The Court Should Order Respondents to Treat Hamdan in Accordance with the Geneva Conventions.

Hamdan has languished in Respondents' custody for nearly three years. He has spent much of that time in solitary confinement – deprived of sunlight, exercise, medical care and other basic human needs. His mental and physical health have deteriorated dangerously.

Respondents, however, assert that the Court is *required* to ignore Hamdan's plight and must abstain from adjudicating his claims until some later time after the military commission completes its work. Respondents misstate the requirements of the abstention doctrine and disregards the harm Hamdan will suffer if he is required to endure even longer delays.

A. Abstention Is Not Appropriate Because Hamdan Challenges Executive Branch Authority.

Hamdan asserts that Respondents are unlawfully denying him protections to which he is entitled under the Geneva Conventions by proposing to try him before a military commission that, by its design, violates the Conventions. The commissions cannot determine their own lawfulness, especially when their existence reflects Respondents' determination not to follow the Conventions' requirements. Abstention is not appropriate.

The core function of the Judicial Branch – ensuring that neither it nor the Political Branches transgress the limits of their constitutional authority – cannot be assumed by the other Branches. As the plurality stated in *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, “[t]he judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III.” 458 U.S. 50, 59 (1982). The courts have consistently granted litigants access to a judicial tribunal despite government appeals for deference to military tribunals.

In *Reid v. Covert*, 354 U.S. 1 (1957), the Supreme Court affirmed the power of a district court to grant relief to the spouses of military personnel whom they claimed were being unconstitutionally subjected to prosecution under the UCMJ. In *McElroy v. Guarliardo*, 361 U.S. 281 (1960), the Court held that a civilian employee of the armed forces serving with the armed forces in a foreign country could not constitutionally be subjected to a court-martial in time of peace. And in *Toth v. Quarles*, 350 U.S. 11 (1955), the Court held that a former Air

Force serviceman could not constitutionally be subjected to trial by court-martial for crimes alleged to have been committed while he was in the military.

In each of these cases, the Court determined that adjudication of the petitioner's claim should proceed immediately in the Article III court and not await further proceedings by the military tribunal. As in *Reid*, *McElroy* and *Toth*, this Court may vindicate Hamdan's claims "without requiring exhaustion of military remedies" because "the expertise of military courts [do not extend] to the consideration of constitutional claims of the type presented." *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969).

B. Abstention Is Not Appropriate Because Hamdan Raises Substantial Arguments Challenging the Jurisdiction of the Military Commissions.

A person need not submit to a trial before a military tribunal "if the military court has no jurisdiction over him." *New v. Cohen*, 129 F.3d 639, 644 (D.C. Cir. 1997). For this reason, a federal court need not abstain in deference to military commissions (and a petitioner need not exhaust his claims before the military tribunal) where the petitioner "rais[es] substantial arguments denying the right of the military to try [him] at all." *Id.* (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)).

Respondents' amicus, relying on *New*, asserts that this Court is required to abstain unless it is "undisputed that the persons subject to the court-martials never ha[ve] been or no longer [are], in the military." Washington Legal Foundat. Amicus Br. 11. In *New*, however, the D.C. Circuit held that the Article III courts have the authority to consider all "substantial" arguments challenging the jurisdiction of military tribunals. *New*, 129 F.3d at 644. The Court in *New* rejected the petitioner's jurisdictional challenge to the military tribunal only *after* considering the merits of the challenge. *Id.* at 646.

Abstention is not required or appropriate here because Hamdan's claim is that the military commissions have no right to adjudicate Respondents' charges against him. His petition raises "substantial" arguments that the military tribunals lack both personal and subject matter

jurisdiction over him. *See* Hamdan Pet. 69-72. Accordingly, Hamdan’s challenges to the jurisdiction of the military tribunals can and must be resolved by an Article III court.²¹

C. Councilman Does Not Require This Court To Abstain.

In *Councilman*, 420 U.S. 738, the Supreme Court held that an Article III court should not enjoin a pending court-martial proceeding against a service member who was charged with committing a criminal offense while on active duty. *Id.* at 746. The Court gave three reasons why considerations of comity can preclude a federal court from enjoining such a pending proceeding. None of those reasons applies here.

First, the Court recognized that the military justice system must remain free from undue interference in disciplining its own officers because “[t]he military is a ‘specialized society separate from civilian society’ with ‘laws and traditions of its own developed during its long history.’” *Id.* at 757 (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)). The military’s “primary business” is to “fight or be ready to fight wars should the occasion arise,” and the military must “insist upon a respect for duty and a discipline without counterpart in civilian life” and must have a mechanism for enforcing this discipline that is separate from civilian courts. *Id.* (internal citations and quotations omitted).

Second, the Court noted that Congress, in enacting the UCMJ, had established “an integrated system of military courts and review procedures” to balance the interest in military preparedness and with the interest in fairness to service members charged with military offenses.” *Id.*; *see also Parisi v. Davidson*, 405 U.S. 34, 40 (1972). The Court has noted that “[f]ree countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.” *Toth*, 350 U.S. at 22.

²¹ Hamdan has moved that the military commission hold its proceedings in abeyance, pending this Court’s decision, *inter alia*, on the applicability of the Geneva Conventions to the commission. *See, e.g.*, Defense Notice of Motion (Violation of Common Article 3 of the Geneva Conventions), Aug. 19, 2004 at ¶ 6.

Third, the Court noted that the issues raised in *Councilman* were “matters as to which the expertise of military courts is singularly relevant.” 420 U.S. at 760 (*e.g.*, whether offense was “service-related”). As the Court explained in *Toth*, “military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offense charged against a soldier is purely military, such as disobedience of an order, leaving a post, etc.” 350 U.S. at 18.

These rationales do not apply to Hamdan. Hamdan is not a member of the United States military. His alleged offenses have no bearing on the military’s ability to maintain order and discipline. *Councilman*, 420 U.S. at 760. Whether he is tried before a military commission has no relevance to the “military discipline, morale and fitness” of our armed services. And Hamdan’s claims go to the very legitimacy of the military commissions, which is a matter that Respondents must defend in an Article III court.

Anticipating these objections, Respondents assert that the Court should nevertheless abstain because the Executive Branch “is in the best position to determine appropriate procedures for trying enemy combatants charged with violations of the laws of war.” (Motion, at 16). This is simply a variation on Respondents’ argument that the Executive Branch knows best and has the last word on whether and how its actions are constrained by the treaty obligations of the United States. As demonstrated earlier, however, “[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.” *Sterling v. Constantin*, 287 U.S. 378, 400-01 (1932). It is the province of Article III courts to decide “the allowable limits of military discretion.” *Id.*

D. Hamdan Will Suffer Irreparable Harm Unless The Court Intervenes.

Hamdan has already spent nearly three years imprisoned at Guantanamo. He is currently held in solitary confinement with limited access to sunlight and limited opportunities for physical exercise. He is on a hunger strike and has lost 50 pounds. Even spiritual succor has been largely denied. Without court intervention, Hamdan will be kept in solitary confinement and his psychological and physical health will continue to deteriorate.

Hamdan can draw no solace from Respondents' bland assurance that he will be free to petition an Article III court for relief *after* the military commission proceedings are complete. Hamdan should not be forced to endure unlawful conditions, which are taking a toll on his physical and mental health, or to submit to proceedings before an unlawful tribunal. He has a right to conditions of confinement and trial that satisfy the Geneva Conventions. Once tried before the military commissions, his right to the protections of the Geneva Conventions and international law will have been irretrievably lost.

CONCLUSION

Two centuries ago, Justice Story wrote that, whatever the President's discretion, "he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims." *Brown v. United States*, 12 U.S. (8 Cranch) 110, 153 (1814). Hamdan is entitled to the protections of the Geneva Conventions, and the Court should order Respondents to begin providing him with those protections forthwith.

Respectfully submitted,

DATED: September 30, 2004

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO

I am a resident of the United States. My business address is One Front Street, 34th Floor, San Francisco, California 94111. I am employed in the City and County of San Francisco where this service takes place. I am over the age of 18 years, and not a party to the within cause. I am readily familiar with my employer's normal business practice for collection and processing of correspondence for mailing with the U.S. Postal Service. On the date set forth below, I served the foregoing document(s) described as:

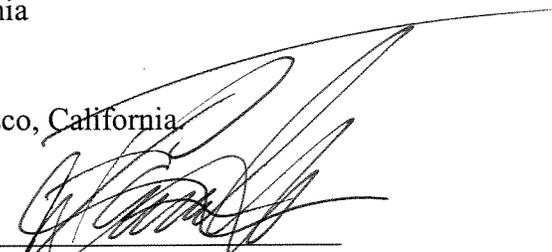
AMICUS BRIEF OF GENERAL DAVID M. BRAHMS (ret.), ADMIRAL LEE F. GUNN (ret.), ADMIRAL JOHN D. HUTSON (ret.), GENERAL RICHARD O'MEARA (ret.) IN SUPPORT OF PETITIONER

on the following person(s) in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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before a judge or judicial officer “must not exceed a few days;”¹⁰⁵ delays as short as four or five days have been found to violate ICCPR Article 9.3¹⁰⁶ Similarly, the HRC has found violations of ICCPR article 9.4 in cases where the accused was prevented for a period of as little as one week from bringing judicial proceedings to challenge his detention.¹⁰⁷ In addition to the GC III rule (art. 103) that pretrial detention of POW’s not exceed three months, the ICCPR rule for other prisoners is that any pretrial detention must be “as short as possible.”¹⁰⁸

The delays in Mr. Hamdan’s case, and in the case of Guantanamo detainees generally, vastly exceed the delays that have been deemed unacceptable by the HRC. Even taking into account the difficulty of prosecuting cases against alleged members of a secretive and clandestine international terrorist organization, the delays far exceed the time periods allowed under the ICCPR and Geneva Conventions. Nor can the delay be excused on the ground that Mr. Hamdan was initially being held for intelligence and security reasons, rather than for criminal prosecution. Even were one to accept the premise that the clock does not start to run until it is determined that a person is being held for criminal prosecution, the relevant time period in Mr. Hamdan’s case would begin on July 3, 2003, when the President issued his determination that Mr. Hamdan was subject to trial by military commission¹⁰⁹ – a full year before Mr. Hamdan was charged. These delays violate international law.

2. Coercive Conditions at Guantanamo Violate the Right Not to Be Compelled to Testify Against Oneself or to Confess Guilt.

¹⁰⁵ General Comment 8, *Right to Liberty and Security of Persons*, 30 June 1982, para. 2, [hereinafter Gen. Cmt. 8].

¹⁰⁶ *Freemantle v. Jamaica*, U.N. Doc. CCPR/C/68/D/625/1995, U.N. H.R. Comm. (Apr. 28, 2000), paras. 7.4 and 7.5; *Terán Jijón v. Ecuador*, U.N. Doc. CCPR/C/44/D/277/1988, U.N. H.R. Comm. (Apr. 8, 1992), para. 5.3.

¹⁰⁷ *Torres v. Finland*, U.N. Doc. CCPR/C/38/D/291/1988, H.R. Comm. (Apr. 5, 1990), para. 5.3.

¹⁰⁸ Gen. Cmt. 8, *supra* note 105, para. 3.

¹⁰⁹ *See supra* note 99.

Where prisoners make statements to interrogators under the coercive conditions at Guantanamo, three kinds of violations of international humanitarian and human rights law may result.

First is a violation of the U.S. obligation not to admit statements made under torture as evidence. Military commissions are not only authorized, but required, to admit statements made by prisoners at Guantanamo – even statements that may have been made under torture. The applicable Military Commission Order provides that evidence “shall” be admitted if the presiding officer or a majority of the commission considers that it “would have probative value to a reasonable person.”¹¹⁰ Thus, if a statement made under torture nonetheless is deemed to have some “probative value,” it “shall” be admitted as evidence. This violates article 15 of the Torture Convention, which requires each State Party “to ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence” against the victim of torture in any proceeding whatsoever.

Second, even in the absence of torture, where statements were made in coercive conditions such as those reportedly pervasive at Guantanamo, their admission in evidence violates the right under international humanitarian and human rights law “[n]ot to be compelled to testify against [one]self or to confess guilt.”¹¹¹ The HRC advises that where statements result from cruel, inhuman or degrading treatment, or where prisoners are not treated humanely and with respect for their dignity, “[t]he law should require that evidence provided by means of such

¹¹⁰ MCO No. 1, *supra* note 71, section 6(D)(1).

¹¹¹ ICCPR, *supra* note 7, art. 14.3(g). Humanitarian law similarly provides: “No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.” GC III, *supra* note 4, art. 99. For all other persons the “fundamental guarantees” of Protocol I provide, “No one shall be compelled to testify against himself or to confess guilt.” *supra* note 6, art. 75.4(f).

methods or any other form of compulsion is wholly unacceptable.”¹¹² Yet the military commission procedures provide that the right of the accused not to testify at trial “shall not preclude admission of evidence of prior statements ... of the Accused.”¹¹³ Thus, prior statements made during imprisonment in the coercive conditions at Guantanamo, and before the accused had assistance of counsel, “shall” be admitted into evidence, whenever the commission believes they have probative value.¹¹⁴

Third, conditions at Guantanamo may coerce prisoners into plea bargain agreements, by which they plead guilty in return for a specified term of imprisonment.¹¹⁵ The pressure to enter into such agreements is made especially strong by the U.S. claim that even if a prisoner wins his case before a military commission, and is found not guilty on all charges, the military can continue to imprison him as an “unlawful enemy combatant” until the end of the “war” on terrorism.¹¹⁶ An agreement to plead guilty may thus be the only way a prisoner can be assured of release from Guantanamo by a definite date. The acceptance of plea bargains under these circumstances would violate international human rights and humanitarian law.¹¹⁷

¹¹² Gen. Cmt. 13, *supra* note 55, 13 para. 14.

¹¹³ MCO No. 1, *supra* note 71, section 5.F.

¹¹⁴ *Id.* para. 5.D(1).

¹¹⁵ Prospective plea bargains at Guantanamo have been reported in the press. E.g., J. Mintz, *Deals Reported Afoot for Detainees; But Lawyers Question Pacts for Clients Without Access to Counsel*, THE WASHINGTON POST, Dec. 6, 2003, p. A6; M. Dunn, *Hicks considers pleading guilty*, HERALD SUN (Melbourne, Australia), 27 May 2004.

¹¹⁶ U.S. Dept. of Defense News Briefing, Note 116, March. 21, 2002, Transcript published by M2, Presswire, Mar. 22, 2002 (accessible at www.lexis.com, news library).

¹¹⁷ See *supra* note 111.

3. Restrictions on Legal Assistance Violate the Right to Counsel.

U.S. military commission procedures authorize assignment of military defense counsel to the accused only “sufficiently in advance of trial to prepare a defense.”¹¹⁸ As a result, the accused may be – and they in fact have been -- imprisoned at length with no legal assistance. Petitioner Hamden was in U.S. custody for approximately twenty five months, and was detained at Guantanamo for nineteen months, before he was first allowed to meet with his military defense counsel.¹¹⁹ The vast majority of Guantanamo detainees have still not been allowed access to counsel. Meanwhile, throughout this entire period of extended detention, the government interrogates the prisoners. Military commissions are then authorized to admit into evidence the statements taken from prisoners, without advice of counsel, during these interrogations.¹²⁰ This prolonged denial of access to counsel, while taking statements that may be used in evidence, violates the right to counsel.¹²¹

Even after counsel was assigned to petitioner Hamdan, his right to counsel was again denied in connection with the Combatant Status Review Tribunals, which purport to determine whether detainees are properly categorized as “enemy combatants.”¹²² According to press reports, detainees -- including those like Mr. Hamdan who face trials by military commission -- are not allowed to be represented by counsel at or in connection with these tribunal hearings.¹²³

¹¹⁸ MCO No. 1, *supra* note 71, section 5(D).

¹¹⁹ Hamdan Aff., *supra* note 96, at pp. 10 and 11 of Schmitz Decl. (second and third page of Hamdan Aff.) (Hamdan was captured in November 2001, flown to Guantanamo in June 2002, and first met his military defense counsel on January 30, 2004).

¹²⁰ MCO No. 1, *supra* note 71, sections 5(F) and 6(D)(1).

¹²¹ The UN Human Rights Committee has found violations of the right to counsel where access was denied for as few as five days after a person was taken into custody. *Kelly v. Jamaica*, Comm. No. 537/1993, Views of 29 July 1996, para. 9.2. See also, *Imbrioscia v. Austria*, App. No. 00013972/88, Judgment of 24 Nov. 1993, Eur.Ct.H.Rts., para. 33-34, 36.

¹²² Secretary of the Navy Gordon England, Special Department of Defense Briefing with Navy Secretary Gordon England (Sept. 8, 2004), available at <http://www.defenselink.mil/transcripts/2004/tr20040908-1284.html>.

¹²³ Associated Press, *Bin Laden - Linked Suspect Boycotts Hearing* (Sept. 24, 2004), available at http://abcnews.go.com/wire/World/ap20040924_1062.html. See also *Two Detainees Brought Before Military Panel*, Seattle Times, Sept. 16, 2004, at A12.

This violation is exacerbated by the government's pronouncements that statements made by a detainee at such hearings can later be used as evidence against the detainee.¹²⁴

In addition, the exclusion of civilian defense counsel from secret hearings (part 5 below) and denial of access of civilian (and in some cases military) defense counsel to secret documents (part 6 below) further violate the right to effective assistance of counsel.

4. Monitoring Attorney-Client Communications Violates the Right to Communicate With Counsel in Private.

U.S. military commission procedures expressly authorize the military to engage in “monitoring of communications”¹²⁵ between the accused and defense counsel (both military and civilian) “for security or intelligence purposes.”¹²⁶ Monitoring may be conducted whenever a designated military officer determines, for example, that it is “likely to produce information for security or intelligence purposes.”¹²⁷ This violates the right of an accused to communicate with defense counsel in confidence, which is intrinsic to the ICCPR rights to “communicate with counsel”¹²⁸ and to “legal assistance.”¹²⁹ Prisoners of war are also expressly entitled to be interviewed by their defense counsel or advocate “in private.”¹³⁰

¹²⁴ Secretary of the Navy Gordon England, SecNav Briefs on Review Tribunals (July 16, 2004), available at <http://www.defenselink.mil/transcripts/2004/tr20040716-1006.html>.

¹²⁵“Communications” is broadly construed to include communications by “oral, electronic, written, or any other means.” U.S. Dept. of Defense Military Commission Order No. 3, para. 3, Feb. 5, 2004, at <http://www.dod.mil/news/commissions.html>.

¹²⁶ *Id.* para. 3. Although para. 4(F) provides that information obtained from monitoring will not be used against the accused or shared with persons responsible for the prosecution, these limitations do not remedy the breach of confidentiality. Neither the accused nor his counsel are likely to speak with the candor essential to an effective defense if they know their communications are being monitored by the military, for whatever purpose.

¹²⁷ *Id.* para. 4 (A).

¹²⁸ Article 14.3 (b) of the ICCPR, *supra* note 7, guarantees the right of the accused to “communicate with counsel.” The HRC comments that this “requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications.” Gen. Cmt. 13, para. 9, *supra* note 55. Even in States which, unlike the U.S., are not Parties to the ICCPR, widely-endorsed UN guidelines have repeatedly required confidentiality of attorney-client communications. *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First UN Cong. on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955, and approved by Economic and Social Council resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, para. 93: (“Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.”); *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, U.N. G.A. Res. 43/173 of 9 Dec. 1988, Principle 18.4 (“Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.”); *Basic Principles on the Role of Lawyers*, adopted by the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27

The right of confidential attorney-client communications in criminal cases, widely recognized by international law,¹³¹ must be respected even in cases of accused who are “extraordinarily dangerous” and whose “methods had features in common with terrorists.”¹³² As the European Court has explained, “If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the [European] Convention is intended to guarantee rights that are practical and effective.”¹³³ This rationale applies equally to the ICCPR, which requires States Parties to ensure “effective protection of [ICCPR] rights,”¹³⁴ and to GC III, under which privacy of communications between an accused prisoner of war and his defense counsel or advocate is an “essential prerogative.”¹³⁵ The rules governing the military commission procedures expressly authorize the violation of this right.

August to 7 Sept. 1990, Principle 22 (“Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.”)

¹²⁹ Art. 14.3 (d) guarantees the right to “legal assistance.” Interpreting the identical right in the European Convention, the European Court of Human Rights concluded “that an accused’s right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 para. 3 (c) ... of the [European] Convention.” *S. v. Switzerland*, App. Nos. 00012629/87 and 00013965/88, Judgment of 28 Nov. 1991, para. 48.

¹³⁰ Counsel for a POW may “freely visit the accused and interview him in private.” GC III, *supra* note 4, Art. 105.

¹³¹ *E.g.*, American Convention on Human Rights, O.A.S. Treaty Series No. 36, entered into force, July 18, 1978, art. 8.2 (d) (right of accused “to communicate freely and privately with his counsel . . .”); Council of Europe Standard Minimum Rules for the Treatment of Prisoners, art. 93 (“Interviews between the prisoner and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official.”); and European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights, ETS No. 161, entered into force, Jan. 1, 1999, art. 3(2) (c) (Detainees “shall have the right to correspond, and consult out of hearing of other persons, with a lawyer . . .”).

¹³² *S. v. Switzerland*, *supra* note 129, paras. 9 and 47.

¹³³ *Id.* para. 48.

¹³⁴ Gen. Cmt. 31, *supra* note 36, para. 6.

¹³⁵ JEAN DE PREUX, COMMENTARY TO GENEVA CONVENTION III OF AUGUST 1949 RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, Art. 105, para 3(b).

5. Exclusion from Secret Hearings Violates the Rights of the Accused to be Tried in His Presence and to Assistance of Counsel.

Prisoners tried by military commission may be excluded from portions of their own trials.

While generally the accused may be present at every stage of the trial, his presence must be “consistent with Section 6(B)(3).”¹³⁶ That section authorizes the commission’s presiding officer -- or the Appointing Authority -- to close proceedings. Closure may be for such purposes as protecting classified information or intelligence sources, methods or activities, or “other national security interests.” And it “may include a decision to exclude the Accused, [and] Civilian Defense Counsel...”

This violates the right of an accused under international humanitarian and human rights law “[t]o be tried in his presence, ...”¹³⁷ The ICRC Commentary explains that “the important thing is that the defendant is present at the sessions where the prosecution puts its case, when oral arguments are heard, etc. In addition, the defendant must be able to hear the witnesses and experts, to ask questions himself and to make his objections or propose corrections.”¹³⁸

By allowing prosecutors to present and argue secret evidence in the absence of the accused and civilian defense counsel, the military commission procedures breach not only this “important” element of the right to be tried in one’s presence, but also the right to assistance of counsel. Even though military defense counsel may be present at all sessions of the trial, this fails to cure the violation, because military defense counsel “may not disclose any information presented during a closed session to individuals [such as the accused and civilian defense counsel] excluded from such proceeding.”¹³⁹

¹³⁶ MCO No. 1, *supra* note 71, section 5.K.

¹³⁷ ICCPR, *supra* note 7, art. 14.3 (d). Accord, Protocol I, *supra* note 6, art. 75.4 (e): “Anyone charged with an offense shall have the right to be tried in his presence.” This includes, at minimum, all hearings in which the prosecutor participates. *E.g.*, Eur.Ct.H.Rts., *Belziuk v. Poland*, App. No. 00023103/93, Judgment of 25 March 1998, para. 39.

¹³⁸ ICRC Commentary to Protocol I, *supra* note 23, art. 75, para. 3110.

¹³⁹ MCO No. 1, *supra* note 71, section 6(B)(3).

6. Denials of Secret Documents Violate the Rights to Adequate Facilities for the Defense and to Equality of Arms.

The presiding officer may also deny documents or portions thereof to the defense if they contain broadly defined “protected information.”¹⁴⁰ The officer may substitute instead a portion or a summary, or a statement of the relevant facts the withheld documents would prove.¹⁴¹ But this does not cure the problem, for three reasons.

First, there is no requirement to make any substitution; even though protected information is admitted into evidence, it may simply be withheld from the accused and defense counsel.¹⁴² Second, neither the accused nor his counsel has any way to know whether the substitute, if any, fairly and adequately compensates for their denial of access to the original. Since that original is known to the prosecution, the result is a denial of “equality of arms”¹⁴³ — *i.e.*, it puts the defense at an unfair disadvantage vis a vis the prosecution.

And third, if the prosecution chooses not to offer protected information into evidence, it may be withheld from the accused and defense counsel, both civilian and military.¹⁴⁴ This is especially troubling in regard to information that may tend to exculpate the accused. Generally the prosecution must turn over such exculpatory information to the defense.¹⁴⁵ However, if the exculpatory information is “protected,” the prosecution is not required and, indeed, not permitted to disclose it. The defense thus may never learn of the existence of critical exculpatory information.

¹⁴⁰ This includes information which is “classified or classifiable”; or which is protected from disclosure by “law or rule”; or whose disclosure “may” endanger witnesses or participants in commission trials; or which concerns “intelligence and law enforcement sources, methods, or activities”; or which concerns “other national security interests. *Id.* section 6(D)(5)(a). See also *id.* section 9 (no unauthorized disclosure of “state secrets”).

¹⁴¹ *Id.* section 6(D)(5)(b).

¹⁴² The presiding officer is authorized to direct the deletion of protected information “or” a substitution. *Id.*

¹⁴³ *E.g.*, Human Rights Committee views in *Aarela and Nakkalajarvi v. Finland*, Comm. No. 779/1997, Views of 7 Nov. 2001, para. 7.4; *Jansen-Gielen v. Netherlands*, Comm. No. 846/1999, Views of 14 May 2001, para. 8.2; *Robinson v. Jamaica*, Comm.No. 223/1987, Views of 4 April 1989, para. 10.4; *Fei v. Colombia*, Comm. No. 514/1992, Views of 26 April 1995, para. 8.4.

¹⁴⁴ MCO No. 1, *supra* note 71, section 6(D)(5)(b).

¹⁴⁵ *Id.* section 5.E.

For all three reasons, permitting the denial of “protected” information to the defense violates the right of the accused under both international human rights and humanitarian law to “adequate ... facilities for the preparation of his defense”¹⁴⁶ and to equality of arms.

7. Denial of Judicial Appeal Violates the Right to Review By a Higher Tribunal.

No judicial appeal is permitted from the decisions of military commissions.¹⁴⁷ Instead, commission decisions are subject to review only by a “review panel”¹⁴⁸ whose members are appointed by the Secretary of Defense and must be either military officers or civilians temporarily commissioned as military officers.¹⁴⁹ Both their manner of designation and their military identity thus contrast unfavorably with those of the judges of the Court of Appeals for the Armed Forces, who review judgments of courts-martial; those judges must be nominated by the President and confirmed by the Senate, and are civilians.¹⁵⁰ In addition, judges of the Court of Appeals for the Armed Forces may be removed only by the President, upon notice and hearing, and only for neglect of duty, misconduct or disability.¹⁵¹ In contrast, review panel members may be removed by the Secretary of Defense, without notice or hearing, for “military exigency.”¹⁵² The review panel thus lacks the structural independence essential to judicial review.¹⁵³

This lack of judicial appeal violates the ICCPR right of “everyone” convicted of a crime to have his conviction and sentence “reviewed by a higher tribunal according to law.”¹⁵⁴ In the

¹⁴⁶ ICCPR, *supra* note 7, art. 14.3(b). The Human Rights Committee explains that the “facilities must include access to documents and other evidence which the accused requires to prepare his case, ...” Gen. Cmt. 13, para. 9. See also GC III art. 105 (right to “necessary facilities to prepare the defence”); GC IV art. 72 (right to “the necessary facilities for preparing the defence”); and Protocol I art. 75.4(a) (right to “all necessary rights and means of defence”).

¹⁴⁷ President’s Military Order, section 7(b)(2).

¹⁴⁸ MCO No. 1, *supra* note 71, section 6(H)(4).

¹⁴⁹ *Id.* section 6(H)(4).

¹⁵⁰ See note 160.

¹⁵¹ 10 U.S.C. 942 (c) (2004).

¹⁵² MCI 9, section 4(B)(2), Dec. 26, 2003, at http://www.dod.mil/news/Aug2004/commissions_instructions.html (Secretary may remove a panel member for “good cause,” which includes “military exigency”).

¹⁵³ See *supra* part II.A.2.

¹⁵⁴ ICCPR, *supra* note 7, Art. 14.5.

case of persons entitled to treatment as prisoners of war, it also violates their right to appeal “in the same manner as members of the armed forces of the Detaining Power.”¹⁵⁵

8. The Military Commission Procedures as a Whole Deprive Petitioner Hamdan of His Right to a Fair and Regular Trial and Fail to Respect Generally Recognized Principles of Regular Judicial Procedure.

The cumulative impact of the multiple violations of international fair trial norms set forth above is a denial of petitioner Hamdan’s right to a “fair” hearing,¹⁵⁶ to “judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples,”¹⁵⁷ and to a trial meeting “generally recognized principles of regular judicial procedure.”¹⁵⁸

C. U.S. Military Commissions Impermissibly Discriminate Against Non-U.S. Nationals.

Petitioner Hamdan is a citizen of Yemen. The President’s Military Order authorizes trial by military commission of members of al Qaeda and other alleged international terrorists only if they are non-citizens of the U.S.¹⁵⁹ Thus, if a foreign national and an American both join al Qaeda, and both commit the same terrorist bombing, the foreign national can be tried by military commission, but the American cannot. The American would be entitled to trial either by a civil court with full judicial guarantees, or by court-martial presided over by a certified military judge and subject to judicial review by independent civil courts of appeal, including the U.S. Supreme Court.¹⁶⁰

¹⁵⁵ GC III, *supra* note 4, Art. 106. U.S. military personnel convicted in courts-martial have the right to appeal to courts. *See intranote* 162.

¹⁵⁶ ICCPR *supra* note 7, art. 14.1.

¹⁵⁷ Common Article 3(1)(d). The “fundamental guarantees” of Protocol I, *supra* note 6, Art. 75 give “valuable indications to help explain the terms of [Common] Article 3 on guarantees.” ICRC Commentary to Protocol I, *supra* note 23, art. 75.4, para. 3084.

¹⁵⁸ Protocol I, *supra* note 6, Art. 75.4.

¹⁵⁹ President’s Military Order, *supra* note 58, section 2(a). The title of the Order is “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism.”

¹⁶⁰ The U.S. Congress has established a Court of Appeals for the Armed Forces, consisting of five judges “appointed from civilian life” by the President, subject to advice and consent of the Senate, for 15 year terms, who can be removed only for neglect of duty, misconduct or mental or physical disability. 10 U.S.C. 941, 942 (a), (b) and (c) (2004). All courts-martial death sentences are subject to mandatory review by that Court, and all persons whose court-martial convictions have been upheld by a military appeals court are entitled to petition for review by that Court. 10 U.S.C. 867 (a)(1) and (3) (2004). Discretionary review

This discrimination contravenes both international human rights and humanitarian law. ICCPR Art. 2.1 requires States Parties to recognize ICCPR rights “without distinction of any kind.” Article 26 adds, “All person are equal before the law and are entitled without any discrimination to the equal protection of the law.” Although a few ICCPR rights may be denied to non-citizens,¹⁶¹ “[t]he general rule is that each one of the rights of the [ICCPR] must be guaranteed without discrimination between citizens and aliens.”¹⁶² GC III as well as Protocol I are in accord.¹⁶³

Not all differences in treatment are discriminatory. Distinctions may be upheld “if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”¹⁶⁴ The President’s Military Order, however, articulates no justification, let alone a “reasonable and objective” basis, to discriminate against foreign nationals. It justifies trial by military commission in order to “protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks,” and because of the “danger to the safety of the United States and the nature of international terrorism.”¹⁶⁵ But it makes no effort to explain why these rationales apply to foreign but not to American international terrorists, and none is apparent. On the contrary, where the subject matter jurisdiction of special courts for alleged terrorists “is not based on objective

of its decisions is available from the U.S. Supreme Court. 10 U.S.C. 867a (a). In addition, court-martial convictions may be reviewed by *habeas corpus*. E.g., *Parker v. Levy*, 417 U.S. 733 (1974).

¹⁶¹ Non-citizens may be denied the rights to freedom of movement and residence within a country, art. 12.1; the rights to enter and not to be expelled from a country, arts. 12.4 and 13; and the rights to vote and take part in public affairs and public service, art. 25.

¹⁶² General Comment No. 15, *The position of aliens under the Covenant*, 11 April 1986, para. 2 [hereinafter Gen. Cmt. 15].

¹⁶³ “[A]ll prisoners of war shall be treated alike ..., without any adverse distinction based on ... nationality ...” GC III, *supra* note 4, art. 16. Protocol I, *supra* note 6, “fundamental guarantees” must be provided “without any adverse distinction based upon ... national ... origin ...” Art. 75.1.

¹⁶⁴ General Comment No. 18, *Non-discrimination*, 10 Nov. 1989, para. 13 [hereinafter Gen. Cmt. 18]. The United States interprets articles 2.1 and 26 to permit distinctions “when such distinctions are, at minimum, rationally related to a legitimate governmental objective.” 138 CONG.REC. S4781-01 (daily ed., April 2, 1992), Understanding II(1). It is not clear that this test differs from the “reasonable and objective” language used by the Committee. In any event neither the President’s Military Order nor logic explains why trying foreign but not American members of al Qaeda by military commission is “rationally related” to the legitimate objective of countering international terrorism.

¹⁶⁵ President’s military order, *supra* note 58, Sections 1 (e) and (f).

criteria but on the nationality of the suspected terrorists,” the result is “discrimination based on nationality.”¹⁶⁶

Trials before civil courts with full judicial safeguards are not among those few ICCPR rights afforded only to citizens. Under article 14.1, “All persons shall be equal before the courts and tribunals.” The minimum guarantees of article 14.3 must be provided “in full equality.” The HRC elaborates: “Aliens shall be equal before the courts and tribunals, . . . Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights.”¹⁶⁷

Far from justifying discrimination in trials of non-citizens, international humanitarian law guarantees equal or better treatment of foreign citizens. GC III grants foreign prisoners of war the right to trial before the “same courts” using the “same procedures” as apply to soldiers of the Detaining Power,¹⁶⁸ and Protocol I provides “fundamental guarantees” for persons not already protected by GC III or IV, “without any adverse distinction” based upon, among other grounds, “other status, or on any other similar criteria.”¹⁶⁹ The prohibition of discrimination based on “other status” includes discrimination based on nationality.¹⁷⁰

The U.S. military commissions, then, discriminate against foreign nationals such as petitioner Hamdan in violation of international humanitarian and human rights law.

¹⁶⁶ Report of the Working Group on Arbitrary Detention, E/CN.4/2004/3, 15 Dec. 2003, para. 67.

¹⁶⁷ Gen. Cmt. 15, *supra* note 162, para. 7.

¹⁶⁸ *Supra* Note 4, Art. 102.

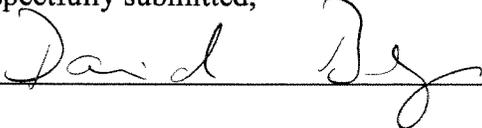
¹⁶⁹ *Id.* Art. 75.1.

¹⁷⁰ See Views of the Human Rights Committee in *Gueye v. France*, Communication no. 196/1985, Decision of the Human Rights Committee, 6 April 1989, CCPR/C/35/D/196/1985, para. 9.4 (nationality discrimination constitutes discrimination based on “other status” under art. 26 of the ICCPR). See also Int.-Am.Ct.H.Rts, Adv.Op. OC-18, *Legal Status and Rights of Undocumented Migrants* (2003), paras. 110 (principle of non-discrimination is *jus cogens*) and 121 (due process must be guaranteed to all without discrimination based on migratory status).

CONCLUSION

For all the foregoing reasons, going forward with the military commission proceedings against petitioner Hamdan would violate fundamental norms of international humanitarian and human rights law. Thus, under the *Charming Betsy* canon, a trial utilizing this commission and these procedures is not within the President's statutory authority under 10 USC 836, and would be unlawful. The military commission is not established by law nor is it independent and impartial. As structured, the commission proceedings violate fundamental fair trial norms in numerous critical respects. Further, the use of military commissions only for non-U.S. citizens impermissibly discriminates against petitioner. For all of these reasons, *amici* urge this Court to grant to petitioner Hamdan relief from trial by military commission.

Respectfully submitted,



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INTEREST OF AMICI

Amici submit this brief because of their long-standing commitment to respect for international humanitarian and human rights law, and their conviction that the military commission procedures established for the trial of certain Guantanamo detainees, including petitioner Salim Ahmed Hamdan, violate those norms.

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The Center for International Human Rights of Northwestern University School of Law fosters the use of international law to promote human rights, democracy and the rule of law. The Center engages in education, research, technical assistance and advocacy in support of international human rights and humanitarian law.

Petitioner Hamdan seeks relief from trial by military commission and from the conditions of pretrial detention imposed on detainees designated for military commission trial. Amici file this brief in support of his petition to urge that the military commission procedures violate international humanitarian and human rights law.

ARGUMENT

This Court now has before it a question – the lawfulness of improvised, shortcut procedures for criminal prosecutions – fundamental to the rule of law. The military commissions proposed by the executive purport to bypass both the regular courts established by Article III of the Constitution, and the special courts martial established by statute. They propose to employ newly devised procedures that abandon or undermine significant procedural safeguards of the rights of defendants in both ordinary criminal courts and courts martial. These made-to-order commissions and procedures were established, not by Congress, but by presidential military order, together with subsequent orders and instructions issued by the Secretary of Defense and his designees. This Court is now called upon to determine the legality of these improvised procedures, at least as applied to petitioner Hamdan.

In doing so, this Court should give due weight to international humanitarian and human rights law. From the founding of the Republic, international law has been part of United States law. Under the Supremacy Clause of the Constitution, “all Treaties made” share with the Constitution and federal statutes the status of “supreme Law of the Land.” U.S. Const. Art. VI, §2. As the Supreme Court has recognized, “A treaty . . . is a law of the land as an act of congress is.” *Edye v. Edye*, 112 U.S. 580, 598-99 (1884). *See also El Al Israel Airlines, Ltd. Tseng*, 525 U.S. 155, 167 (1999), *quoting Zicherman v Korean Airlines*, 516 U.S. 217, 226 (1996) (“a treaty ratified by the United States is . . . the law of this land”).

Humanitarian and human rights treaties matter to the domestic legal validity of the military commission procedures for two main reasons. First, certain treaty provisions – such as the fair trial provisions of the Geneva Conventions, discussed below – are “self-executing.” *U.S. v. Noriega*, 808 F.Supp. 791, 799 (S.D.Fla. 1992); *U.S. v. Lindh*, 212 F.Supp. 2d 541, 553-54 and n. 20 (E.D.Va. 2002).¹ As the Supreme Law of the Land, they prevail over inconsistent executive procedures.

Second, even treaties which are not self-executing must be considered in the interpretation of United States statutes. The Presidential Order establishing military commissions, and on which the subsequent military orders and instructions are based, purports to exercise authority conferred by a statute, namely 10 U.S.C. §836 (2004), which authorizes the President to prescribe procedures for military commissions. Like all statutes, however, this one must be interpreted, if possible, in a manner consistent with international law. As Chief Justice John Marshall declared in *Murray v. Schooner Charming Betsy* two centuries ago, “[A]n Act of

¹ The Fourth Circuit concluded in *Hamdi v. Rumsfeld*, 316 F. 3d 450, 468-69 (4th Cir. 2003), *vacated*, 124 S.Ct. 2686 (2004) that the Geneva Conventions are not self-executing. Whatever the merit of that conclusion with respect to the provision addressed in that case – the right to a POW status hearing – the Fourth Circuit’s analysis, which relied heavily on diplomatic avenues of relief, has no application to the procedural safeguards for the benefit of individuals in criminal trials, at issue in this case.

Congress ought never to be construed to violate the law of nations, if any other possible construction remains ...” 6 U.S. (2 Cranch) 64, 118 (1804). The *Charming Betsy* principle has been consistently reaffirmed by the Supreme Court. *E.g.*, *F.Hoffman-La Roche Ltd. v. Empagran S.A.*, ___ U.S. ___, 124 S.Ct. 2359, 2366 (2004); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *McCulloch v. Sociedad Nacional de Marineros*, 370 U.S. 10, 20-21 (1963).

The *Charming Betsy* canon requires construction of Acts of Congress, wherever possible, in a manner consistent with United States international obligations under both treaties, *Sale v. Haitian Centers Council*, 509 U.S. 155, 178 and n. 35 (1993), and customary international law, *Hoffman-La Roche, supra*, 124 S.Ct. at 2366 (statutory construction reflecting “principles of customary international law--law that (we must assume) Congress ordinarily seeks to follow”). (Customary international law consists of norms reflecting general practices of nations, accepted by them as binding norms.² Specific examples are discussed below.)

Nothing in 10 U.S.C. §836 purports to authorize or require military commission procedures in conflict with international law. Thus the statute may -- and accordingly must -- be interpreted to authorize only procedures consistent with United States commitments under international law.

Section I of this brief sets forth certain international humanitarian and human rights treaty and customary norms applicable to military commission procedures. Section II demonstrates that the military commission procedures proposed for use in Mr. Hamdan’s criminal trial violate these norms.

I. APPLICABLE INTERNATIONAL NORMS

International humanitarian and human rights law are bodies of law that address, *inter alia*, the obligations of governments to individuals subject to their jurisdiction. While

² Restatement (Third) of the Foreign Relations Law of the United States § 102 (2) (1987).

international humanitarian law addresses rights specifically applicable in the context of armed conflict, international human rights law is of more general application.³ Both international bodies of law impose requirements for the fair treatment of persons accused of crimes, and both are applicable to the military commission trials of Guantanamo detainees.

International humanitarian and human rights law are embodied primarily in treaties and customary international law. Potentially applicable humanitarian law treaties to which the United States is a party include the 1949 Geneva Conventions on prisoners of war (“GC III”)⁴ and on civilians (“GC IV”).⁵ Other pertinent international humanitarian law obligations reflect customary international law, especially Common Article 3 of the 1949 Geneva Conventions and the “fundamental guarantees” (art. 75) of the 1977 Geneva Protocol I (“Protocol I”).⁶ Human rights treaties to which the United States has agreed to be bound include the International Covenant on Civil and Political Rights (“ICCPR”)⁷ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”).⁸ We address each in turn.

The 1949 Geneva Conventions III (prisoners of war) (“GC III”) and IV (civilians and other protected persons) (“GC IV”), to which the United States has long been a party,⁹ include provisions that address fair trial rights. Under GC III, prisoners of war charged with crimes are

³ See *infra* at p. 11-13.

⁴ Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, entered into force, Oct. 21, 1950, entered into force for the U.S., Feb. 2, 1956, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

⁵ Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, entered into force, Oct. 21, 1950, entered into force for the U.S., Feb. 2, 1956, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

⁶ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, entered into force, Dec. 7, 1978, reprinted in 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

⁷ G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force, Jan. 3, 1976 [hereinafter ICCPR].

⁸ G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force, June 26, 1987 [hereinafter Torture Convention].

⁹ The United States ratified GC III and GC IV in 1956. See *supra* notes 4 and 5.

expressly guaranteed a series of fair trial rights.¹⁰ In addition, GC III guarantees POW's the right to be tried only by the same courts, under the same procedures, as in cases against military personnel of the detaining power.¹¹ Overall, fair trial guarantees are considered so essential that "willfully depriving a prisoner of war of the rights of a fair and regular trial prescribed in this Convention" is deemed a "grave breach" of the Geneva Convention, which makes the persons responsible subject to criminal punishment.¹²

Amici are not in possession of sufficient, verified facts to express an opinion on whether Mr. Handan would, upon proper adjudication, be determined to be a POW. However, where there is "any doubt," he is entitled to be treated as a POW under GC III "until such time as [his] status has been determined by a competent tribunal."¹³

GC IV guarantees similar fair trial protections to "protected persons," who may be sentenced only by "competent courts" after a "regular trial."¹⁴ Again, willful deprivation is deemed a "grave breach."¹⁵ "Protected persons" under GC IV include all those "in the hands of a Party to the conflict" who are not prisoners of war or wounded or sick.¹⁶ This includes not only civilian bystanders to the conflict, but even those individuals who may be "definitely suspected of or engaged in activities hostile to the security of the State."¹⁷

¹⁰ GC III, *supra* note 4, arts. 99 and 103-07, guarantee the rights not to be tried or sentenced for acts not forbidden by law at the time; not to give coerced confessions; the right to defense and to assistance of a qualified advocate or counsel; speedy trial; limits on pretrial confinement; timely notice of charges; the right to call witnesses; the right to an interpreter if necessary; the right to private communications between the advocate or counsel and the accused; the right of appeal in the same manner as for members of the armed forces of the detaining power; and to announcement of judgment and sentence. GC III does not expressly provide for the rights to a fair and public hearing before an independent and impartial tribunal established by law, equality before the courts, or the presumption of innocence. These latter rights are, however, sought to be assured by GC III's additional provision giving POW's the right to trial before the same courts with the same procedures as would hear cases against military personnel of the detaining power. *Id.*, art. 102.

¹¹ *Id.*, art. 102.

¹² *Id.*, art. 130.

¹³ *Id.* art. 5.

¹⁴ GC IV, *supra* note 5, arts. 4, 71-76 & 126.

¹⁵ *Id.*, art. 147.

¹⁶ *Id.*, art. 4.

¹⁷ *Id.*, art. 5.

However, it does not include nationals of neutral States who find themselves in the territory of a belligerent State, so long as their State has normal diplomatic representation in the detaining State.¹⁸ It thus appears that Mr. Hamdan, a citizen of Yemen, may not be a protected person under GC IV for purposes of the conflict between the United States and Afghanistan. As discussed below, however, this does not diminish the procedural safeguards to which he is entitled under international law.¹⁹

Customary International Law as reflected in the Minimum Rules of Common Article 3 of the 1949 Geneva Conventions and in the “Fundamental Guarantees” of Article 75 of the 1977 Geneva Protocol I (“Protocol I”). Common Article 3 of the 1949 Geneva Conventions reflects obligations imposed as a matter of customary international law. By its terms, Common Article 3 applies only in conflicts of a non-international character. However, the International Court of Justice long ago ruled that there is “no doubt” that its norms “also constitute a minimum yardstick” and “minimum rules” that are applicable as well in international armed conflicts.²⁰ These essential norms have been recognized as a part of customary international law.²¹

Common Article 3’s minimum rules include a prohibition on passing sentences and carrying out executions “without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”²² In view of the subsequent inclusion of fundamental fair trial guarantees in widely

¹⁸ *Id.*, art. 4.

¹⁹ Common Article 3 of the 1949 Geneva Conventions and Article 75 of Protocol I are discussed below, and their protections extend to Mr. Hamdan. Additionally, although it does not appear that Mr. Hamdan has been charged with grave breaches of the Geneva Conventions, in the event any charges against him were to be so characterized, then article 146 of GC IV would entitle him to “safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105” *et seq.* of GC III.

²⁰ *Military and Paramilitary Activities in and Against Nicaragua*, Merits, Judgment, I.C.J. REPORTS 1986, p. 14, para. 218, 219, 220. This principle is also reflected in U.S. domestic law, which makes violations of Common Article 3 subject to criminal prosecution. 18 U.S.C. § 2441 (c)(3) (2004).

²¹ George Aldrich, *Symposium: The Hague Peace Conferences: The Laws of War on Land*, 94 AM. J. INT’L L. 42, 60 (2000).

²² GC III, *supra* note 4, art. 3 (1)(d); GC IV, *supra* note 5, art. 3(1)(d).

ratified humanitarian and human rights law treaties, these “indispensable” judicial guarantees of Common Article 3 should now be understood to include the “fundamental guarantees” for fair trials of Protocol I and the fair trial safeguards of the ICCPR, both discussed below.²³

The “fundamental guarantees” set out in Article 75 of Protocol I are even more protective of fair trials than the 1949 Geneva Conventions. These fundamental guarantees largely parallel the fair trial safeguards of ICCPR Article 14.²⁴ The fundamental guarantees of Article 75 apply to all persons who are within the power of a state participant in an armed conflict and who do not benefit from more favorable treatment under the Geneva Conventions or Protocol I.²⁵ This would include a person, such as Mr. Hamdan, who is not a national of a party to the conflict and whose State has normal diplomatic representation in the detaining power.²⁶

The fundamental guarantees of Article 75 of Protocol I have attained the stature of customary international law and thus bind the United States even though it has not ratified Protocol I. More than 160 states are parties to Protocol I. Although the United States has not ratified Protocol I, it has signed the treaty, and its stated reasons for not ratifying did not include objections to the fair trial guarantees of Article 75.²⁷ On the contrary, U.S. government legal experts and military manuals have identified Article 75 as among those provisions of Protocol I

²³ The “fundamental guarantees” of Protocol I, *supra* note 6, art. 75, give “valuable indications to help explain the terms of [Common] Article 3 on guarantees.” CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, art. 75.4, para. 3084 (Yves Sandoz et al. eds., International Committee of the Red Cross, 1987) [hereinafter ICRC Commentary to Protocol I].

²⁴ Whereas ICCPR Article 14, *supra* note 7, guarantees the right to a “fair and public hearing by a competent, independent and impartial tribunal established by law,” Article 75.4 of Protocol I, *supra* note 6, assures the right to trial before an “impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure . . .” It then lists essentially the same safeguards as in ICCPR Article 14.2 and 14.3. Right to counsel, though not expressly delineated, is deemed implicit in the “necessary rights and means of defence.” ICRC Commentary to Protocol I, *supra* note 23, art. 75.4(a), para. 3096.

²⁵ Protocol I, *supra* note 6, art. 75.1.

²⁶ GC IV, *supra* note 5, art. 4; ICRC Commentary to Protocol I, *supra* note 23, art. 75, para. 3022 (2).

²⁷ See *Message from the President Transmitting Protocol II Additional to the 1949 Geneva Conventions*, 26 I.L.M. 561, 562, 564 (1987) (stating objections to Protocol I while “recogniz[ing] that certain provisions of Protocol I reflect customary international law”).

that reflect customary international law.²⁸ Article 75 is consistent with the fair trial standards of widely ratified treaties on both human rights (e.g., ICCPR Article 14) and humanitarian law (GC III and GC IV). Leading commentators as well as the American Bar Association agree that it reflects customary international law.²⁹

The International Covenant on Civil and Political Rights (“ICCPR”) is a multilateral treaty to which 153³⁰ countries are States Parties. Following signature by the President and consent to ratification by the Senate, the United States in 1992 became party to, and thus bound by, the ICCPR.³¹ Among the rights guaranteed by this treaty are the right to judicial review of the lawfulness of detentions (art. 9.4), to a catalogue of fair trial safeguards for “everyone” charged with a criminal offense (art. 14), to the treatment of prisoners with humanity and respect for their inherent dignity (art. 10.1), and to non-discrimination and equality before the law (arts. 2.1, 14.1, and 26).

Important guidance in interpreting the ICCPR is provided by the Human Rights Committee (“HRC”), “established in 1977 in accordance with Article 28 of the ICCPR” and

²⁸ T. Meron, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 64-65 (1989), citing Panel, *Customary Law and Additional Protocol I to the Geneva Conventions for the Protection of War Victims: Future Directions in Light of the U.S. Decision Not to Ratify*, 81 ASIL PROC. 26, 37 (1987) (Lt. Col. B. Carnahan of the Joint Chiefs of Staff in personal capacity only); *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law*, 2 AM. U.J. INT’L L. & POL’Y 415, 427 (1987) (M. Matheson, Deputy Legal Adviser, U.S. Dept. of State); D. Scheffer, *Remarks*, 96 ASIL PROC. 404, 406 (2002) (Ambassador Scheffer stated that “we need to understand fully that Article 75 of Protocol I is a very vibrant article that the United States government has actually said represents customary international law (even though we have not ratified Protocol I).”) Additionally, the 1997 edition of the U.S. Army, Judge Advocate General’s School, International & Operational Law Department, OPERATIONAL LAW HANDBOOK (p. 18-2) stated expressly that the U.S. views article 75 of Protocol I as “customary international law.” (Accessible at at, <http://www.cdmha.org/toolkit/cdmha-rltk/PUBLICATIONS/oplaw-ja97.pdf>, visited June 4, 2004.) Although more recent editions do not repeat this statement, neither do they qualify or retract it.

²⁹ E.g., George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 891, 893 (2002); Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP. & INT’L L. 185, 190 (1996); David L. Herman, *A Dish Best Not Served at All: How Foreign Military War Crimes Suspects Lack Protection Under United States and International Law*, 172 MILITARY L. REV. 40, 81-82 (2002); American Bar Association Recommendation 10-B, adopted by the ABA House of Delegates Aug. 9, 2004 (“customary international law, including Article 75 of the 1977 Protocol I to the Geneva Conventions”).

³⁰ See Ratification Table, Office of the U.N. High Commissioner for Human Rights (visited Sept. 28, 2004) <http://www.ohchr.org/english/countries/ratification/index.htm>.

³¹ 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992). See also S. Rep. No. 103-35, at 6-10 (1993).

“charged with implementing and interpreting the ICCPR” *United States v. Duarte-Acero*, 208 F.3d 1282, 1285 n.12 (11th Cir. 2000). The HRC interprets the ICCPR by issuing “General Comments” on particular provisions, and by rendering decisions in individual cases; both “are recognized as a major source for interpretation of the ICCPR.” *Maria v. McElroy*, 68 F.Supp. 2d 206, 232 (E.D.N.Y. 1999), *abrogated on other grounds*, *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004).

Although ICCPR Article 4 permits “derogations” from certain rights in times of national emergency, ICCPR fair trial norms are non-derogable. As the HRC has made clear, no derogation may be made which would violate “humanitarian law or peremptory norms of international law, for instance . . . by deviating from fundamental principles of fair trial,”³² The United States has not attempted to invoke the derogation clause with respect to the proposed trials by military commission.³³

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”) was adopted by the UN General Assembly in 1989, and has 138³⁴ States Parties, including, since 1994, the United States. Among its provisions, the Torture Convention requires States Parties to ensure “that any statement which is established to have been made as a result of torture shall not be invoked as evidence” against an accused. Although the United States attached reservations and understandings to its ratification of the Torture Convention, none sought to limit the applicability of this exclusionary rule.³⁵

* * *

³² *General Comment No. 29 on Article 4 of the Covenant: States of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 11. See also *id.* at para. 15-16.

³³ To protect ICCPR rights from too-facile after-the-fact invocations of the derogation clause, Article 4.3 of the ICCPR requires a State Party to “immediately inform the other States Parties” to the ICCPR of any derogation, *supra* note 7.

³⁴ See Ratification Table, *supra* n. 30.

³⁵ 136 Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990). Reservations and understandings are made by states at the time of ratification in order to put on record any qualifications they may have to their agreement to a treaty.

Each of these sources of international humanitarian and human rights law -- GC III, Common Article 3 of the 1949 Conventions and article 75 of Protocol I as customary international law, and the ICCPR and Torture Convention -- has applicability to the military commission proceedings against petitioner Hamdan. Under the *Charming Betsy* canon, each must be applied to the interpretation of the statute, 10 U.S.C. 836, authorizing the President to establish procedures for military commissions. To the extent the current commission procedures conflict with these international norms, they exceed the President's statutory authority and are unlawful.

Further, in applying international and human rights law, three preliminary principles must be emphasized. First is the principle of complementarity, under which both human rights and humanitarian law apply in situations of armed conflict. Second is the principle of most favorable protection, guaranteeing a person who may fall under more than one category of detainee the most favorable protection provided by international law for any category into which he may fall. The final principle speaks to territorial scope, and makes clear that the obligations imposed on states do not stop at their borders, but extend to wherever a state exercises jurisdiction.

A. Complementarity

International humanitarian and human rights law are complementary in wartime, not mutually exclusive. As confirmed by the Human Rights Committee, the ICCPR continues to apply

“in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain [ICCPR] rights, more specific rules of international humanitarian law may be specially relevant for the purposes of interpretation of [ICCPR] rights, both spheres of law are complementary, not mutually exclusive.”³⁶

³⁶ *General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13 (General Comments), para. 11 [hereinafter Gen. Cmt. 31].

The International Court of Justice has likewise affirmed that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the [ICCPR].”³⁷ As noted above, the United States has not purported to derogate from its ICCPR obligations with respect to the military commissions, nor could it, since fair trial rights are non-derogable.³⁸ The Torture Convention also explicitly applies in war as in peace: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, . . . or any other public emergency, may be invoked as a justification of torture.”³⁹

The complementary nature of international human rights and humanitarian law is especially clear in regard to fair trial rights of persons detained in connection with armed conflict. As stated in Article 72 of Protocol I, Articles 72-79 of that protocol provide rules “additional to . . . other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.”⁴⁰ The International Committee of the Red Cross (“ICRC”) Commentary to Protocol I specifies that these “other applicable rules” include ICCPR norms.⁴¹

Among the “additional” rules set out in Protocol I is the Article 75 rule on “fundamental guarantees” for the trial of prisoners who may not qualify for more favorable treatment under the 1949 Geneva Conventions.⁴² In addition to specifying procedural guarantees, Article 75.7(a)

³⁷ I.C.J. Advisory Op. of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. - - -, para. 106, available at http://www.icj-cij.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_20040709.pdf. See also, *id.* at para. 105, (quoting I.C.J. Advisory Op. of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, para. 25).

³⁸ See *supra* at p. 5.

³⁹ Torture Convention, *supra* note 8, art. 2.2.

⁴⁰ Protocol I, *supra*, note 6, Art. 72.

⁴¹ ICRC Commentary to Protocol I, *supra* note 23, art. 72, para. 2927-28.

⁴² *Id.* art. 75, para. 3031.

provides more generally that trials of such prisoners for war crimes or crimes against humanity should be “in accordance with the applicable rules of international law.” The fair trial norms of the ICCPR and the Torture Convention must be considered among these “applicable rules,” and hence available to all persons tried for war crimes while in the power of a party to the conflict.⁴³

This principle of complementary protection applies specifically at Guantanamo. The United Nations High Commissioner for Human Rights has stated that all prisoners at Guantanamo “are entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the [ICCPR] and the Geneva Conventions of 1949. . . . Any possible trials should be governed by the principles of fair trial . . . provided for in the ICCPR and the Third Geneva Convention.”⁴⁴

B. Most Favorable Protection

A second principle is that of most favorable protection. Article 75.8 of Protocol I provides that Article 75 may not be construed to limit “any other more favorable provision granting greater protection, under any applicable rules of international law.” This includes greater protection resulting from “another Convention [e.g., the ICCPR and the Convention Against Torture] or from customary law.”⁴⁵ This principle of the “most favourable protection” applies as well where there is doubt about whether a prisoner qualifies as a prisoner of war, and hence benefits from the fair trial guarantees for POWs. “In case of doubt, the defendant can always invoke the most favourable provision.”⁴⁶ As a consequence, whatever their status,

⁴³ Protocol I, *supra* note 6, Art. 75.1. This conclusion is reinforced by the broad language of Article 75, which aims to avoid “questionable trials,” *id.*, at art. 75, para. 3143, and by the express reference to “fundamental human rights” within the “field of application” section of Article 72. Protocol I, art. 72.

⁴⁴ Statement of the High Commissioner for Human Rights on the Detention of Taliban and Al Qaeda Prisoners at U.S. Base in Guantanamo Bay, 16 Jan. 2002, available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/C537C6D4657C7928C1256B43003E7D0B?opendocument> (last visited Aug. 9, 2004).

⁴⁵ Protocol I, *supra* note 6, para. 3146.

⁴⁶ *Id.*, para. 3142.

prisoners tried for war crimes or related crimes are entitled to the most favourable protection afforded by applicable international humanitarian or human rights law, be it the GC III, Protocol I, the ICCPR or the Torture Convention.

C. Territorial Scope

International humanitarian and human rights law obligations reach beyond the borders of a state's own territory. As the HRC has reaffirmed, States Parties are bound to respect and ensure ICCPR rights "to all persons subject to their jurisdiction" and "to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."⁴⁷ This is consistent with the HRC's longstanding jurisprudence, first articulated a decade before the U.S. ratified the ICCPR,⁴⁸ and has recently been confirmed by the International Court of Justice.⁴⁹ The Geneva Conventions and customary international humanitarian law likewise govern a state's conduct beyond its own borders, wherever the state exercises jurisdiction or effective control.⁵⁰ Any contrary claim would be at odds not only with the object and purpose of the governing norms, but also with the consistent case law of other human rights bodies on the territorial application of international human rights instruments.⁵¹

⁴⁷ Gen. Cmt. 31, *supra* note 36, para. 10.

⁴⁸ *Lopez Burgos*, Communication No. R.12/52, Views of 29 July 1981, para. 12.1; *Celiberti*, Communication No. R.13/56, Views of 29 July 1981, para. 10.1.

⁴⁹ I.C.J. Advisory Op. of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. - - -, paras. 107-11, available at http://www.icj.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_20040709.pdf.

⁵⁰ Extraterritorial application of the Geneva Conventions is reflected in State practice, including by the U.S. as a member of the Security Council. *E.g.*, Article 7 of the Statute of the International Criminal Tribunal for Rwanda, which has subject matter jurisdiction *inter alia* over violations of Common Article 3 of the Geneva Conventions, provides in relevant part that its "territorial jurisdiction . . . shall extend to the territory of Rwanda . . . as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens." Available at <http://www.ictt.org/ENGLISH/basicdocs/statute.html> (last visited Aug. 9, 2004).

⁵¹ *E.g.*, *Bankovic et al. v. Belgium et al.*, Eur.Ct.H.Rts. App. No. 00052207/99, Decision of 12 Dec. 2001 (Grand Chamber), para. 71; *Loizidou v. Turkey*, App. No. 000015318/98, Judgment of 23 March 1995 (preliminary objections), para. 62 (State Party responsible under European Convention when it "exercises effective control of an area outside its national territory"); *Coard et al. v. U.S.*, Int.-Am.Comm.H.Rts., Case No. 10.951, Report No. 109/99, 29 Sept. 1999, para. 37.

* * *

In sum, both international humanitarian and human rights law obligations govern the proper interpretation of the President's authority under 10 USC 836 to establish procedures for military commissions, and require that prisoners at Guantanamo, including petitioner Hamdan, be given the benefit of the most favorable applicable norms. There can be no doubt that United States' obligations extend to Guantanamo, occupied under a century-old lease from Cuba that grants the U.S. "complete jurisdiction and control" for as long as the U.S. chooses to remain.⁵² In the next section we demonstrate that the military commission procedures proposed for the criminal trial of petitioner Hamdan would violate these obligations in critical respects.

II. THE MILITARY COMMISSION PROCEEDINGS AGAINST PETITIONER HAMDAN VIOLATE INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW

International human rights and humanitarian law require – even in wartime – that governments guarantee every person accused of crime certain fundamental rights essential to a minimum standard of fair treatment. These obligations fall into three categories: (1) every accused must be afforded the right to trial before independent and impartial tribunals that are duly established by law; (2) certain minimum fundamental guarantees must be scrupulously observed with respect to the conduct of pre-trial and trial proceedings; and (3) throughout the entire process there must be full adherence to the principle of non-discrimination and equality before the law. Going forward with the military commission proceedings against petitioner Hamdan would violate each of these sets of obligations.

A. The Military Commissions Fail to Satisfy Minimum Requirements of Institutional Legitimacy

⁵² *Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004).

The institutional legitimacy of a tribunal lies at the heart of any inquiry into the essential fairness of a criminal process. Unless the tribunals themselves meet certain necessary standards, no judgment they issue can be deemed legitimate. Under international law, this institutional legitimacy requires that tribunals be “established by law” and that they be both independent and impartial. For the following reasons, the proposed military commissions lack the required institutional legitimacy.

1. The Military Commissions Are Not Established By Law

Article 14.1 of the ICCPR requires that every tribunal hearing criminal (or civil) cases must be “established by law.” The central purpose of this requirement is to guard against excessive executive discretion by requiring that tribunals be established not by executive fiat but via laws duly promulgated by a nation’s legislative body.⁵³ While the legislation establishing a tribunal need not “regulate each and every detail” of the tribunal’s operation, it must be comprehensive in scope, setting forth at a minimum “the matters coming within the jurisdiction of [the] certain category of courts,” and “establish[ing] at least the organizational framework for the judicial organization.”⁵⁴ Accordingly, to demonstrate compliance with Article 14, States Parties to the ICCPR are directed by the HRC to “specify the relevant constitutional and legislative texts which provide for the establishment of the courts”⁵⁵ This obligation applies not only with respect to ordinary national courts, but equally with regard to any military or other special courts that might be established.⁵⁶

The proposed military commissions do not meet this standard of institutional legitimacy: they are at their core a creature of executive directive. No statute duly enacted by Congress establishes these military commissions. While the President’s Military Order references as the basis of its authority three acts of Congress – the authorization for use of military force following the attacks of September 11, 2001,⁵⁷ and sections 821 and 836 of title 10 of the U.S. Code⁵⁸ – none of these provides the necessary basis for military commissions to be “established by law.”

⁵³ Cf. *Coeme and Others v. Belgium*, App. Nos. 00032492/96 et al., Eur.Ct.H.Rts., Judgment of 22 June 2000, para. 98, quoting *Zand v. Austria*, app. no. 7360/76, Eur. Comm’n H.Rts., Commission Report of 12 October 1978, DECISIONS AND REPORTS (DR) 15, pp. 70 and 80 (interpreting identical provision of the European Convention on Human Rights).

⁵⁴ *Zand*, 15 DR paras. 66, 68, 69.

⁵⁵ Human Rights Committee, General Comment No. 13, *Equality before the courts and the right to a fair and public hearing by an independent court established by law*, 13 April 1984, para. 3 [hereinafter Gen. Cmt. 13].

⁵⁶ *Id.* para. 4

⁵⁷ Authorization for the Use of Military Force Joint Resolution, Public Law 107-40, 115 Stat. 224 (2001).

⁵⁸ President’s Military Order, preambular paragraph. The Order also references, without any specification, “the Constitution and laws of the United States.” This general reference is insufficient to satisfy the “established by law” requirement.

The use of force resolution makes no mention whatsoever of military commissions. Section 821 is merely negative, providing that the jurisdiction of courts-martial does not deprive military commissions of jurisdiction over offenders or offenses that they, “by statute or by the law of war,” may otherwise have.⁵⁹ And section 836, rather than establishing requirements for the appointment, composition, jurisdiction or procedure of military commissions, instead delegates to the President wide discretion to define procedures for military commissions.⁶⁰

Nor does any other U.S. statute “establish by law” the military commissions envisioned in the President’s Military Order. Statutes do provide that two particular offenses – aiding the enemy and spying – may be tried by “court martial or military commission.”⁶¹ But these statutes fall far short of “establishing by law” the military commissions contemplated by the President’s Military Order for trial of some 26 specified principal offenses, plus others unspecified.⁶²

Significantly for the present case, Mr. Hamdan is not charged with either of the two offenses addressed in these statutes.

Even as to the offenses of aiding the enemy and spying, these statutes are insufficient. At most, they confer limited jurisdiction on military tribunals that have yet to be “established by

⁵⁹ 10 U.S.C. section 821 (2004) reads in its entirety: “The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.”

⁶⁰ 10 U.S.C. section 836 (2004) reads in its entirety: “(a) Pretrial, trial and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter. (b) All rules and regulations made under this article shall be uniform so far as practicable.”

⁶¹ 10 U.S.C. §§ 904 and 906 (2004).

⁶² U.S. Dept. of Defense Military Commission Instruction (“MCI”) No. 2, para. 6, Apr. 30, 2003, at http://www.dod.mil/news/Aug2004/commissions_instructions.html, lists the following 26 principal offenses as triable by military commission: willful killing of protected persons, attacking civilians, attacking civilian objects, attacking protected property, pillaging, denying quarter, taking hostages, employing poison or analogous weapons, using protected persons as shields, using protected property as shields, torture, causing serious injury, mutilation or maiming, use of treachery or perfidy, improper use of flag or truce, improper use of protective emblems, degrading treatment of a dead body, rape, hijacking or hazarding a vessel or aircraft, terrorism, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, aiding the enemy, spying, perjury or false testimony, and obstruction of justice related to military commissions. Moreover, this list is “illustrative,” not “comprehensive” or “exclusive,” and the absence of a particular offense from the list “does not preclude trial for that offense.” *Id.* para. 3.C.

law.”⁶³ But no statute purports to establish such commissions. None defines their appointment or composition. And with exceedingly limited exceptions,⁶⁴ none establishes their procedures. Hence, no statute meets the minimum international law requirement of “establish[ing] at least the organizational framework for the judicial organization.”⁶⁵

The U.S. military commissions accordingly are not established by law and hence lack competence under international law to try any offense.

2. The Military Commissions Are Not Independent and Impartial

Article 14.1 of the ICCPR guarantees an accused the right to be tried by a tribunal that is “independent and impartial.” This is “an absolute right that may suffer no exception.”⁶⁶ It is, accordingly, one of the fair trial safeguards deemed to be an “indispensable” judicial guarantee required by Common Article 3 of the Geneva Conventions.⁶⁷

“Independence” refers to the freedom of the members of the tribunal from external interference with their judicial functions, and to the “objectively justified” appearance of such independence.⁶⁸ “Impartiality” refers to the absence of subjective bias on the part of the members of the tribunal, and to the objectively justified appearance of the absence of bias.⁶⁹ In assessing independence and impartiality the HRC looks “in particular ... to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the

⁶³ While neither of these statutory provisions uses the term “jurisdiction,” they could be read to confer such jurisdiction, by implication, on any military commissions that may be established.

⁶⁴ U.S. statutory provisions on military commissions authorize convening authorities to assign them court reporters and interpreters; require witnesses to appear and prohibit contemptuous acts; permit commissions to receive certain sworn testimony given before courts of inquiry; and direct military lawyers to revise and record their proceedings. 10 U.S.C. 828, 847, 848, 850, 3037, 8037 (2004). Other statutes exclude military commissions from general laws on judicial review of agency action (5 U.S.C. sections 551(1)(F) and 701 (b)(1)(F)) and on pretrial release and speedy trials (18 U.S.C. 3156 and 3172), and provide that extraterritorial jurisdiction of U.S. courts over members or employees of the U.S. armed forces or persons who accompany them outside the U.S. do not deprive military commissions of any jurisdiction they may have “by statute or by the law of war.” 18 U.S.C. 3261(c)(2004).

⁶⁵ *Zand*, 15 DR para. 69.

⁶⁶ *González del Río v Peru*, UN Doc. CCPR/C/46/D/263/1987, H.R. Comm. (Oct. 28, 1992), para. 5.2.

⁶⁷ *See supra* at p. 7.

⁶⁸ *E.g.*, *Cooper v. U.K.* App. No. 00048843/99, Eur. Ct. H.R. (Dec. 16, 2003), para. 104.

⁶⁹ *Id.*

condition[s] governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch ...”⁷⁰

By any of these measures, the lack of independence of the U.S. military commissions is patent. Broad powers over the military commissions are exercised by the “Appointing Authority,” a newly-created executive office whose incumbent is appointed by, and serves at the pleasure of, the Secretary of Defense.⁷¹ This Appointing Authority selects the members of each military commission and chooses which one of them will be the presiding officer.⁷² The only criteria provided for selection are that commission members must be U.S. military officers and “competent to perform the duties involved,”⁷³ and at least one must be a U.S. military lawyer.⁷⁴ The lack both of criteria for selection and of transparency in the selection process raises troublesome questions of potential, unseen interference in the independence of the commissions. Nothing precludes the Appointing Authority from selecting members with a view to favoring the prosecution over the defense. This risk is aggravated by the entirely *ad hoc* nature of the appointments. A military officer may be appointed to sit on one commission, and then never be appointed to another, or the officer may be appointed repeatedly. The Appointing Authority’s discretion to control the composition of commissions is wide and unchecked.

The same Appointing Authority has sole power to decide many critical questions normally ruled on by courts, thereby further undermining any military commission claim to independence. The commissions are not allowed to decide any interlocutory question whose outcome might result in the termination of the proceedings; instead, the presiding officer is

⁷⁰ Gen. Cmt 13, *supra*, note 55, para. 3; *see also Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Milan, 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, paras. 1-6.

⁷¹ U.S. Dept. of Defense Military Commission Order No. 1, section 2, Mar. 21, 2002 [hereinafter MCO No. 1]; *see also* U.S. Dept. of Defense Military Commission Order No. 5, Mar. 15, 2004 (revoking designation of initial Appointing Authority and designating new Appointing Authority). Both at http://www.dod.mil/news/Aug2004/commissions_orders.html.

⁷² *Id.* MCO No. 1, sections 4(A)(1)-(4).

⁷³ *Id.* 4(A)(3).

⁷⁴ *Id.* 4(A)(4).

required to refer all such questions for decision by the Appointing Authority.⁷⁵ Likewise, a plea agreement between the defense and prosecution is subject to approval, not by the commission, but by the Appointing Authority.⁷⁶

The Authority is similarly empowered to decide many other questions of trial procedure normally ruled on by courts, including any and all interlocutory questions the presiding officer may choose to refer.⁷⁷ The Appointing Authority may close the proceedings to the public and may even exclude the accused and his civilian defense counsel.⁷⁸ The Authority directs the time and place of each commission session,⁷⁹ conducts an “administrative review” of the record of trial and may return the case for further proceedings if necessary,⁸⁰ approves or disapproves any communications regarding military commissions by prosecutors or defense counsel to the news media,⁸¹ and may limit the time between the trial on the merits and the sentencing hearing.⁸² Exercise of these normally judicial powers by an executive officer constitutes direct interference with the independence of the commissions.

In addition, all members of the military commissions are serving military officers,⁸³ a factor justifying doubt as to their independence and impartiality.⁸⁴ They are subject to military

⁷⁵ *Id.* 4(A)(5)(d).

⁷⁶ *Id.* 6(A)(4).

⁷⁷ *Id.* 4(A)(5)(d).

⁷⁸ *Id.* 6(B)(3).

⁷⁹ *Id.* 6(B)(4).

⁸⁰ *Id.* 6(B)(4).

⁸¹ MCI No. 3, April 15, 2004, *Responsibilities of the Chief Prosecutor, Prosecutors, and Assistant Prosecutors*, section 5(c); MCI No. 4, April 15, 2004, *Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel*, April 30, 2003, section 5 (c). Both at http://www.dod.mil/news/Aug2004/commissions_instructions.html.

⁸² MCI No. 7, April 30, 2003, *Sentencing*, section 4(A).

⁸³ MCO No. 1, *supra* note 71, section 4(A)(3).

⁸⁴ *Cooper*, App. No. 00048843/99, Eur. Ct. H.R., para. 117 (participation of civilians in key positions on British air force courts-martial found to be “one of the most significant guarantees of the independence of the court-martial proceedings”); *Incal v. Turkey*, App. No. 00022678/93, Eur. Ct. H.R. (June 9, 1998), para. 68 (independence and impartiality of Turkish National Security Courts were negated by fact that one of three members of these courts was a military judge, and such officers are “servicemen who still belong to the army, which in turn takes its orders from the executive.” In addition, security courts’ impartiality was open to doubt because they empowered members of one armed force to sit in judgment on their presumed enemies.); *Ocalan v. Turkey*, App. No. 00046221/99, Eur. Ct. H.R. (March 12, 2003), paras. 111-21 (even a single military judge on a three-judge tribunal, even for only a portion of the proceedings, tainted its impartiality and independence; among other

performance evaluations,⁸⁵ and most have career aspirations within the military.⁸⁶ While the commissions are instructed to act “impartially,”⁸⁷ and officers’ performance as commission members is not to be taken into account in their evaluations,⁸⁸ these formal undertakings cannot suffice to assure impartiality in fact or in appearance.⁸⁹

These pervasive structural defects are aggravated by the public statements by the Commander in Chief, characterizing the prisoners at Guantanamo as “bad men,”⁹⁰ and by the Secretary of Defense, asserting that “the people in U.S. custody are . . . enemy combatants and terrorists who are being detained for acts of war against our country.”⁹¹ To counter these widely publicized statements would require strong structural guarantees of independence and impartiality. Yet the commissions are burdened by the opposite: strong structural interferences with their independence and impartiality.

Although the particular composition of a military commission cannot cure these structural defects, the composition of the commission appointed for petitioner Hamdan (and three other charged detainees) illustrates, based on press reports, the impact of these structural

factors, doubts were objectively justified by “the exceptional nature of the trial itself concerning a high-profile accused who had been engaged in a lengthy armed conflict with the Turkish military authorities . . .”).

⁸⁵ MCI No. 6, section 3(A)(8). Commission members “continue to report to their parent commands.” *Id.* 3(B)(10).

⁸⁶ MCO No. 1, *supra* note 71, section 4(A)(3) requires that commission members be military officers, although they may include retired officers recalled to active duty.

⁸⁷ MCO No. 1, *supra* note 71, section 6(B)(2).

⁸⁸ MCI No. 6, section 3(B)(10), Apr. 15, 2004, at http://www.dod.mil/news/Aug2004/commissions_instructions.html.

⁸⁹ *Findlay v. U.K.*, App. No. 00022107/93, Eur. Ct. H.R. (Feb. 25, 1997), para. 35, 75, 80 (Court expressed doubts as to whether impartiality was objectively justified even though British court-martial members were sworn to act “without partiality”); *Incal*, App. No. 00022678/93, Eur. Ct. H.R., paras. 27, 67, 73 (Court expressed doubts about impartiality even though Turkish military judges on National Security Courts were constitutionally guaranteed to be independent and to judge “according to their personal conviction, in accordance” with the law); *Grievies v. U.K.*, App. No. 00057067/00, Eur. Ct. H.R. (Dec. 16, 2003), paras. 84, 85, 88, 91 (career aspirations of British navy court-martial members were among the factors objectively justifying doubts about their independence and impartiality; although British government argued that naval Judge Advocate was “not reported on as regards his performance” in courts-martial, the European Court of Human Rights was unimpressed); *Ocalan v. Turkey*, App. No. 00046221/99, Eur. Ct. H.R., paras. 111-21 (even a single military judge on a three-judge tribunal, even for only a portion of the proceedings, tainted its impartiality and independence; among other factors, doubts were objectively justified by “the exceptional nature of the trial itself concerning a high-profile accused who had been engaged in a lengthy armed conflict with the Turkish military authorities . . .”); *Polay Campos v. Peru*, U.N. Doc. CCPR/C/61/D/577/1994, U.N. H.R. Comm. (Jan. 9, 1998), para. 8.8 (Peruvian anti-terrorism tribunals violated a “cardinal aspect of a fair trial. . . that the tribunal must be, and be seen to be, independent and impartial,” because they could include “serving members of the armed forces”).

⁹⁰ *E.g.*, N. Watt, *Bush Aids Blair By Halting Trial of Britons in Guantanamo Bay*, THE GUARDIAN (London), July 19, 2003, p. 8.

⁹¹ Remarks by Secretary of Defense Donald Rumsfeld to Greater Miami Chamber of Commerce re: Prisoners being held at Guantanamo Bay, Miami, Fla., Feb. 13, 2004 (*available at www.defenselink.gov*) (last visited June 14, 2004).

infirmities.⁹² The presiding officer, who came out of retirement to serve on the military commission, has acknowledged being a close personal friend of the appointing authority.⁹³ He was chosen as the one required lawyer on the commission despite the fact that, in retirement, he has allowed his law license to lapse.⁹⁴ Among the remaining four members and one alternate:

Air Force Lt. Col. Timothy Toomey served as an intelligence officer in Afghanistan and Iraq. Marine Col. R. Thomas Bright supervised an operation that sent suspected terrorists and Taliban fighters to Guantanamo Bay. Marine Col. Jack Sparks Jr. lost one of his Marine reservists, a firefighter, in the attack on the World Trade Center. Army Lt. Col. Curt Cooper said he did not know precisely what the Geneva Conventions were and noted in a commission questionnaire that he was deeply affected by a visit to Ground Zero at the World Trade Center site.

The Washington Post, Aug. 29, 2004, at A12.

Additionally, the four non-lawyer members are alleged to lack any legal expertise,⁹⁵ notwithstanding that they will be called upon to make complicated legal determinations, as well as factual ones. If true, this makes it all too likely that they will unduly defer to the legal expertise of the presiding officer – that is, to the person acknowledged to be a close personal friend of the Appointing Authority. While it is possible that some or all of these particular commission members will be replaced as a result of defense challenges, the structural defects that undermine the independence and impartiality of the military commissions will remain.

⁹² See, e.g., John Hendren, *Detainee Pleads Not Guilty as He Challenges His Judges*, LOS ANGELES TIMES, Aug. 26, 2004, at A14; Scott Higham, *Hearings Open With Challenge to Tribunals*, THE WASHINGTON POST, Aug. 29, 2004, at A12; and Peter Spiegel, *At Guantanamo Bay the hunters sit in judgment on their prey: Defence lawyers are protesting at the recent careers of the five men on the tribunal trying al-Qaeda suspects*, FINANCIAL TIMES (London, England), Aug. 26, 2004, at 8. These articles refer to challenges by counsel for detainee David Hicks as well as by counsel for Mr. Hamdan; the same presiding judge and commission members have been appointed as the military commission for both of these men, as well as for the other two detainees currently facing military commission proceedings.

⁹³ John Hendren, *Detainee Pleads Not Guilty as He Challenges His Judges*, LOS ANGELES TIMES, Aug. 26, 2004, at A14.

⁹⁴ *Id.*

⁹⁵ *Id.*

For all of these reasons, doubts about the independence and impartiality of the military commissions are objectively justified, and the military commissions thus fail the international requirements of independence and impartiality.

B. The Military Commission Pre-Trial and Trial Procedures Fail to Satisfy Fundamental Fair Trial Requirements

International human rights and humanitarian law guarantee a catalogue of fair trial safeguards for everyone accused of a crime. These safeguards create minimum requirements for pre-trial and trial procedures that must be met in any criminal process. For the reasons that follow, the military commission procedures fail to meet these essential standards.

1. Prolonged Pretrial Detention Without Charge Violates the Rights to Prompt Notice, Appearance Before a Judge, Judicial Recourse, Judicial Investigation and Trial, and to Limited Pretrial Detention of Prisoners of War.

Mr. Hamdan was held at Guantanamo for over two years before being charged with a crime.⁹⁶ He was brought to Guantanamo in June 2002,⁹⁷ and was not charged until July 13, 2004,⁹⁸ even though he had been determined by the President to be subject to the Presidential Military Order providing for military commission trials a full year earlier.⁹⁹ His first appearance before a military commission did not occur until August 24, 2004,¹⁰⁰ and his actual trial is not set

⁹⁶ The period of Mr. Hamdan's detention at Guantanamo is in addition to his prior detention by U.S. forces overseas. Mr. Hamdan's affidavit states that he was captured by Afghan forces and turned over to United States forces for a bounty the following day, but does not give dates for those events. See Translated Affidavit of Salim Ahmed Salim Hamdan, Feb. 9, 2004, attached as Exh. B to Declaration of Charles P. Schmitz, Ph.D., filed Apr. 6, 2004, and unsealed in pertinent part by Order of Aug. 5, 2004 [hereinafter Hamdan Aff.], at p. 10 of Declaration (second pg. of Hamdan Aff.). According to the charge against Mr. Hamdan, he was captured in November 2001. *U.S. v. Hamdan*, Conspiracy Charge, Jul. 14, 2004, available at <http://www.dod.mil/news/Jul2004/d20040714hcc.pdf>. This would add an additional six months to his total detention by the United States.

⁹⁷ Hamdan Aff, *supra* note 96, at p. 10 of Decl. (second pg. of Hamdan Aff.).

⁹⁸ Approval of Charge and Referral, signed by John D. Altenburg, Jr., Appointing Authority, July 13, 2004 (avail. at <http://www.dod.mil/news/Jul2004/d20040714HAC.pdf>) (last visited Sept. 28, 2004).

⁹⁹ See U.S. Dept. of Defense News Release, July 3, 2003, *President Determines Enemy Combatants Subject to His Military Order* (avail. at <http://www.dod.mil/releases/2003/nr20030703-0173.html>) (last visited Sept. 28, 2004), indicating that on July 3, 2004, six unnamed Guantanamo detainees had been determined by the President to be eligible for trial by military commission, and, U.S. Dept. of Defense News Release, Dec. 18, 2003, *Defense Counsel Assigned to Salim Ahmed Hamdan* (avail. at <http://www.dod.mil/releases/2003/nr20031218-0792.html>) (last visited Sept. 28, 2004), indicating that petitioner Hamdan was one of these six detainees.

¹⁰⁰ U.S. DOD News Release, Aug. 24, 2004, *Firsi Military Commission Convened at Guantanamo Bay, Cuba*, (Aug. 24, 2004), available at <http://www.dod.mil/releases/2004/nr20040824-1164.html>.

to begin until later this year. This prolonged detention without notice of charge, appearance before a judge, judicial recourse or trial constitutes a clear violation of international humanitarian and human rights law.

The ICCPR requires promptness at all procedural stages leading to criminal convictions. Persons arrested must be informed “promptly” of any charges. Arts. 9.2 and 14.3(a). They must be brought “promptly” before a judge or judicial officer. Art. 9.3. Everyone deprived of liberty – not only those arrested on criminal charges – is entitled to bring proceedings before a court, so that the court may decide “without delay” on the lawfulness of the detention. Art. 9.4. Everyone charged with crimes is entitled to trial “within a reasonable time,” art. 9.3, and “without undue delay,” art. 14.3(c).

The Geneva Conventions also require prompt processing. In the case of prisoners of war charged with crimes, judicial investigations must be conducted “as rapidly as circumstances permit” and the trial “as soon as possible,” and pretrial confinement of POW’s cannot lawfully exceed three months.¹⁰¹ For prisoners who do not qualify as POW’s or as protected persons under GC IV, the “fundamental guarantees” of Protocol I require that the accused be “informed without delay” of the particulars of charges,¹⁰² and incorporate the other ICCPR temporal guarantees set forth above.

The HRC interprets these temporal guarantees strictly. It has found violations of ICCPR article 9.2 where the accused was not informed of the charges at the time of arrest,¹⁰³ or when the accused was held for ten days before being so informed.¹⁰⁴ Delays in bringing an arrested person

¹⁰¹ GC III, *supra* note 4, art. 103. Although POW’s may be held in normal POW quarters until the conflict is over, they may be held only 3 months in pretrial confinement.

¹⁰² Protocol I, *supra* note 6, art. 75.4(a).

¹⁰³ *Drescher Caldas v. Uruguay*, U.N. Doc. CCPR/C/19/D/43/1979, U.N. H.R. Comm. (July 21, 1983), para. 14; *Bithashwiwa v. Zaire*, U.N. Doc. CCPR/C/37/D/241/1987 (Nov. 29, 1989), para. 13 (b).

¹⁰⁴ *Fillastre and Bizouarn v. Bolivia*, U.N. Doc. CCPR/C/43/D/336/1988, U.N. H.R. Comm. (Nov. 6, 1991), para. 6.4.