RECORD OF TRIAL

COVER SHEET

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES
V.
SALIM AHMED HAMDAN

ALSO KNOWN AS:

SALIM AHMAD HAMDAN
SALIM AHMED HAMDAN
SALEM AHMED SALEM HAMDAN
SAQR AL JADAWY
SAQR AL JADDAWI
KHALID BIN ABDALLAH
KHALID WL'D ABDALLAH

NO. 040004

VOLUME ___ OF ___ TOTAL VOLUMES

5TH VOLUME OF REVIEW EXHIBITS (RE)—RE 30-33
FOR NOVEMBER 8, 2004 SESSION
(REDACTED VERSION)

United States v. Salim Ahmed Hamdan, NO. 040004

INDEX OF VOLUMES

A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at http://www.defenselink.mil/news/commissions.html.

The volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to this administrative certification.

VOLUME NUMBER	SUBSTANCE OF CONTENTS
I*	Military Commission Primary References (President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda)—includes rescinded publications
II*	Supreme Court Decisions: *Rasul v. Bush*, 542 U.S. 466 (2004); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); *Ex Parte Quirin*, 317 U.S. 1 (1942); *Ex Parte Milligan*, 71 U.S. 2 (1866)
III*	DoD Decisions on Commissions including Appointing Authority orders and decisions
IV*	Federal Litigation in *Hamdan v. Rumsfeld*, at U.S. Supreme Court and D.C. Circuit
V*	Federal Litigation at U.S. District Courts
VI*	Transcript (August 24 and November 8, 2004 sessions)
VII*	Review Exhibits 1-15 (August 24, 2004 session)
VIII*	Review Exhibits 21-29 (November 8, 2004 session)

* Interim volume numbers. Final numbers to be added when trial is completed.

United States v. Salim Ahmed Hamdan, NO. 040004

INDEX OF VOLUMES

VOLUME NUMBER	SUBSTANCE OF CONTENTS
IX**	Review Exhibit 22-A-1 (November 8, 2004 session) (SEALED)
X**	Review Exhibit 22-A-1 (November 8, 2004 session) (SEALED)
XI**	Review Exhibits 30-33 (November 8, 2004 session)
XII**	Review Exhibits 34-58 (November 8, 2004 session)

** Interim volume numbers. Final numbers to be added when trial is completed.

UNITED STATES V. SALIM AHMED HAMDAN NO. 040004--REVIEW EXHIBITS

Description of Exhibit **PAGE No.**

1ST VOLUME OF REVIEW EXHIBITS: RES 1-15 (329 PAGES)
SESSION OF AUG. 24, 2004

RE 1	Convening Order and Appointment of Military Commission Members, 13 Jul 04 (2 pages)	1
RE 2	Presidential Reason to Believe Determination, 3 Jul 03 (1 page)	3
RE 3	List of Interpreters (1 page)	4
RE 4	Protective Order for Interpreters (1 page)	5
RE 5	Detail of Prosecutors, 28 Jul 04 (1 page)	6
RE 6	Chief Defense Counsel details military defense counsel, 23 Jul 04 (1 page)	7
RE 7	Charges that were referred to trial (3 pages)	8
RE 8	Presiding Officer's Biographical Summary (13 pages)	11
RE 9	Questionnaires of Commission Members	24
RE 9A	COL S_____ (13 pages)	24
RE 9B	COL B_____ (13 pages)	37
RE 9C	COL B_____ (14 pages)	50
RE 9D	LtCol T_____ (13 pages)	64
RE 9E	LtCol C_____ (13 pages)	77
RE 10	Presiding Officer's Preliminary Instructions to Commission Members (7 pages)	90
RE 11	Defense Motion to Dismiss for Unlawful Command Influence (68 pages)	97
	Draft Trial Guide for Commission Members (13 pages)	119

Description of Exhibit	PAGE No.
Memorandum by BG Hemingway concerning requirement for presence of Commission Members at sessions, 11 Aug 04 (2 pages)	132
MCM, 2002, pages A2-10 and A2-11 (2 pages)	134
U.S. v. Stoneman, 57 MJ 35 (CAAF 2002) (17 pages)	136
U.S. v. Dugan, 58 M.J. 253 (CAAF 2002) (12 pages)	153
RE 12 Prosecution Reply Motion regarding Unlawful Command Influence (eEmail from Office of Appointing Authority, 17 Aug 04, directing start of hearing (15 pages)	165
E-Mails exchanged between Chief Defense Counsel and Presiding Officer on role of Presiding Officer and Commission Members (4 pages)	171
Memo from defense counsel to appointing authority on role of Presiding Officer, dated 10 Aug 04 (3 pages)	175
Memorandum by BG Hemingway concerning requirement for presence of Commission Members at sessions, 11 Aug 04 (2 pages)	178
RE 13 Defense motion to dismiss because of a lack of combatant status review tribunal (44 pages)	180
DoD News Release on Combatant Status Review Tribunal, 7 Jul 2004 (1 page)	184
Defense counsel requests delay in service of charges upon accused, dated 13 Jul 04 (1 page)	185
Government Brief in Hamdan filed in U.S. District Court (pages 12 and 13) (2 pages)	186
Notice to Detainees about Combatant Status Review Tribunal, delivered 12-14 Jul 04 (1 page)	188

UNITED STATES V. SALIM AHMED HAMDAN NO. 040004--REVIEW EXHIBITS

	Description of Exhibit	PAGE No.
	Service v. Dulles, 354 U.S. 363 (1957) (17 pages)	189
	Vitarelli v. Season, 359 U.S. 535 (1959) (10 pages)	206
	Accardi v. Shaughnessy, 347 U.S. 260 (1954) (7 pages)	216
	Office Hours (1 page)	223
RE 14	Government response to defense motion to dismiss because of a lack of combatant status review tribunal (96 pages)	224
	Affidavit of Mr. Harrison about notice provided to accused of pending CSRT hearing (1 page)	228
	Government Brief filed in U.S. District Court on 6 Aug 04 (58 pages)	229
	Order establishing CSRT, dated 7 Jul 04 (4 pages)	287
	Secretary of the Navy implementation of DoD Order with attachments for CSRTs, dated 29 Jul o4 (29 pages)	291
RE 15	Protective Orders (9 pages)	321
	Protective Order No. 1, requiring redaction of names of investigators, interrogators, and photos of law enforcement personnel (2 pages) MARKED FOUO	321
	Protective Order No. 2, requiring protection of For Official Use Only (FOUO), other classified information and law enforcement records, as well as pre-clearance of books or other publications (3 pages)	324
	Protective Order No. 3, requiring protection of For Official Use Only (FOUO), other classified information and law enforcement records (3 pages)	327

UNITED STATES V. SALIM AHMED HAMDAN NO. 040004--REVIEW EXHIBITS

Description of Exhibit **PAGE No.**

2ND VOLUME OF REVIEW EXHIBITS: RES 21-29 (362 PAGES) SESSION OF NOV. 8, 2004

RE 21	Prosecution motion to compel defense discovery	1
	Prosecution filing, Oct. 1, 2004 (3 pages)	1
	Attachment 1—Prosecution motion to compel defense discovery, July 30, 2004 (2 pages)	4
	Attachment 2—Defense counsel's request to act as personal representative or as a witness at Combatant Status Review Tribunal, Sept 21, 2004 (2 pages)	6
	Attachment 3—Email concerning discovery, Oct 22, 2004 (3 pages)	8
	Defense response to prosecution motion to compel discovery Oct 22, 2004 (3 pages)	11
	Attachment 1—Defense response to prosecution motion to compel discovery, Oct 15, 2004 (1 page)	14
	Prosecution reply, Oct 19, 2004 (2 pages)	15
RE 22	Prosecution motion to pre-admit evidence	17
	Prosecution filing, Oct. 1, 2004 (4 pages)	17
	Prosecution reply, Oct. 20, 2004 (7 pages)	21
	RE 22-A-1 Consists of three sets of materials: The Unsealed documents follow from 29 to 133. The other two volumes are SEALED LAW ENFORCEMENT RECORDS. THOSE TWO VOLUMES FOLLOW THIS VOLUME.	29
	Attachment 1—Discovery provided to defense counsel Dec. 18, 2003 (3 pages)	134

UNITED STATES V. SALIM AHMED HAMDAN NO. 040004--REVIEW EXHIBITS

Description of Exhibit		PAGE No.
RE 23	Prosecution motion to preclude attorney-expert and legal-commentator testimony about the law	137
	Prosecution filing, Oct. 8, 2004 (5 pages)	137
	Defense response to prosecution motion to compel discovery Oct 14, 2004 (16 pages)	142
	Attachment 1—Decision by ICTY regarding expert witness July 3, 2002 (5 pages)	153
	Prosecution reply, Oct. 19, 2004 (6 pages)	158
RE 24	Prosecution motion to request a hearing Aug. 24, 2004 (2 pages)	164
RE 25	Defense motion to dismiss for violation of Article 103 of the 3rd Geneva Convention Oct. 1, 2004 (11 pages)	166
	Prosecution response, Oct. 15, 2004 (6 pages)	177
	Attachment 1—Target Letter, Dec. 15, 2003 (2 pages)	183
	Attachment 2—Memorandum from BG Hemingway stating that Article 10, UCMJ, does not apply to the Accused's detention, Feb. 23, 2004 (1 page)	185
	Defense reply, Oct. 27, 2004 (9 pages)	186
RE 26	Defense motion to dismiss for failure to state an offense because international law does not recognize conspiracy, conspiracy cannot be charged against low level individuals, conspiracy charges cannot incorporate prewar conduct, and the DoD definition of conspiracy is too broad	195
	Defense filing, Oct. 1, 2004 (10 pages)	195
	Prosecution reply, Oct. 15, 2004 (21 pages)	205
	Attachment 1-Law Enforcement Record describing interview of Accused, May 1, 2003 (10 pages) MARKED FOUO	226

	Description of Exhibit	PAGE No.
	Attachment 2-Law Enforcment Record describing interview of Accused from June 26, 2002 until July 9, 2002 (21 pages) MARKED FOUO	236
	Attachment 3-Law Enforcment Record describing interview of Accused from June 8, 2002 (10 pages) MARKED FOUO	257
	Defense reply, Oct. 26, 2004 (13 pages)	267
RE 27	Defense motion to dismiss because the President's Military Order violates 42 U.S.C. 1981 because it targets only non-citizens of the United States	280
	Defense filing, Oct. 1, 2004 (17 pages) (two different pages, both numbered "11")	280
	Includes CV of Professor Bruce Ackerman (12 pages)	284
	Prosecution response, Oct. 15, 2004 (3 pages)	296
	Defense reply, Oct. 22, 2004 (4 pages)	299
RE 28	Defense motion to dismiss for violation of the Constitution's Equal Protection Clause, as the President's Military Order targets only non-citizens of the United States	303
	Defense filing, Oct. 1, 2004 (7 pages)	303
	Prosecution response, Oct. 15, 2004 (9 pages)	310
	Defense reply, Oct. 27, 2004 (14 pages)	319
RE 29	Defense motion to dismiss for lack of legislative authority to conduct military commissions	333
	Defense filing, Oct. 1, 2004 (17 pages)	333
	Prosecution filing, Oct. 15, 2004 (13 pages)	350

Description of Exhibit **PAGE No.**

3RD AND 4TH VOLUMES OF REVIEW EXHIBITS: RE 22-A-1 SESSION OF NOV. 8, 2004

REVIEW EXHIBIT 22-A-1

Review Exhibit (RE) 22-A-1 has two parts—a sealed portion and an unsealed portion.

In RE 15, the Presiding Officer ordered that most of RE 22-A-1 be sealed. The sealed portion of RE 22-A-1 has been marked with the following page numbers in the bottom right corner:

3RD VOLUME OF REVIEW EXHIBITS: REPORT OF INVESTIGATION (336 PAGES)

1	-	86
88	-	101
104	-	119
171	-	243
321	-	366
370	-	470

4TH VOLUME OF REVIEW EXHIBITS: REPORT OF INVESTIGATION (275 PAGES)

471	-	526
533	-	539
545	-	560
577	-	620
633	-	635
639	-	640
880	-	932
1451	-	1465
1472	-	1485
1552	-	1615

UNITED STATES V. SALIM AHMED HAMDAN NO. 040004--REVIEW EXHIBITS

Description of Exhibit		PAGE No.
5TH VOLUME OF REVIEW EXHIBITS: RES 30-33 (306 PAGES) SESSION OF NOV. 8, 2004		
RE 30	Defense motion to dismiss the charges for lack of speedy trial, in violation of Article 10, UCMJ	1
	Defense filing, Oct. 1, 2004 (6 pages)	1
	Prosecution response, Oct. 15, 2004 (8 pages)	7
	Attachment 1—Target Letter, Dec. 15, 2003 (2 pages)	15
	Attachment 2—Memorandum from BG Hemingway, Feb. 23, 2004 (1 page)	17
	Attachment 3—Combat Status Review Tribunal result (1 page)	18
	Defense response, Oct. 27, 2004 (8 pages)	19
RE 31	Defense motion to dismiss the charges for lack of jurisdiction because there has been no declaration of war	27
	Defense filing, Oct. 1, 2004 (14 pages)	27
	Affidavit of Accused in Arabic (3 pages)	33
	Affidavit of Accused in English (4 pages)	37
	Prosecution response, Oct. 15, 2004 (9 pages)	41
	Attachment 1-Law Enforcment Record describing interview of Accused from June 26, 2002 until July 9, 2002 (21 pages) MARKED FOUO	50
	Attachment 2-Law Enforcement Record describing interview of Accused, Aug. 6, 2002 (10 pages) MARKED FOUO	71
	Attachment 3-Law Enforcment Record describing	81

	Description of Exhibit	PAGE No.
	interview of Accused from May 17, 2003 (10 pages) MARKED FOUO	
	Defense reply, Oct. 26, 2004 (4 pages)	91
	Affidavit of Accused in Arabic (3 pages)	95
	Cover page	98
	Affidavit of Accused in English (4 pages)	99
RE 32	Defense motion to dismiss for violation of common Article 3 of the Geneva Conventions	103
	Defense filing, Oct. 1, 2004 (10 pages)	103
	RE 32-A-1: Amicus Brief, Sept. 30, 2004 (159 pages)	113
	Prosecution response, Oct. 15, 2004 (9 pages)	272
	Attachment 1-Memorandum from BG Hemingway Feb. 23, 2004 (1 page)	281
	Defense reply, Oct. 27, 2004 (18 pages)	282
RE 33	Defense reply to prosecution response to defense request for witness Umat al Subur Ali Qassim Al-Qal'a	300
	Defense filing, Oct. 23, 2004 (3 pages)	300
	Witness request, Oct. 12, 2004 (1 page)	302
	Prosecution response, Oct. 25, 2004 (2 pages)	303
	Defense reply, Oct. 28, 2004 (2 pages)	305

Description of Exhibit **PAGE No.**

6TH VOLUME OF REVIEW EXHIBITS: RES 34-58 (269 PAGES) SESSION OF NOV. 8, 2004

RE 34	Defense motion to compel attendance of a witness--Muhammed Ali Qassim al Qal'a	1
	Defense filing, Oct. 26, 2004 (3 pages)	1
	Prosecution response, Oct. 25, 2004 (2 pages)	4
	Defense reply, Oct. 28, 2004 (2 pages)	6
RE 35	Defense motion to compel attendance of a witness--Taql'a Muhsin al Ansi	8
	Defense filing, Oct. 26, 2004 (2 pages)	8
	Prosecution response, Oct. 25, 2004 (2 pages)	10
	Defense reply, Oct. 28, 2004 (2 pages)	12
RE 36	Defense request for relief: Bill of Particulars and Duplicity	14
	Defense filing, Oct. 29, 2004 (2 pages)	14
	Prosecution response, Nov. 5, 2004 (6 pages)	16
	Defense reply, Nov. 7, 2004 (6 pages)	22
RE 37	Defense request for witness—Professor Slaughter	28
	Defense filing, Oct. 29, 2004 (1 page)	28
	Defense filing, Oct. 18, 2004 (2 pages)	30
	CV of witness	34
	Defense supplement to synopsis	42
	Prosecution response, Oct. 25, 2004 (3 pages)	45
	Defense reply, Oct. 27, 2004 (4 pages)	48

	Description of Exhibit	PAGE No.
	Presiding Officer denies request for witness, Oct. 29, 2004 (1 page)	52
RE 38	Defense request for witness—Professor Ackerman	53
	Defense filing, Oct. 29, 2004 (1 page)	53
	Defense filing, Oct. 18, 2004 (4 pages)	54
	CV of witness	60
	Defense supplement to synopsis	71
	Prosecution response, Oct. 25, 2004 (3 pages)	73
	Defense reply, Oct. 27, 2004 (4 pages)	76
	Presiding Officer denies request for witness, Oct. 29, 2004 (1 page)	80
RE 39	Defense request for witness—Professor Fletcher	81
	Defense filing, Oct. 29, 2004 (1 page)	81
	Defense request for witness, Oct. 18, 2004 (2 pages)	82
	Defense filing, Oct. 11, 2004 (2 pages)	84
	Defense supplement to synopsis	87
	Prosecution response, Oct. 25, 2004 (3 pages)	89
	Defense reply, Oct. 27, 2004 (4 pages)	92
	Presiding Officer denies request for witness, Oct. 29, 2004 (1 page)	96
RE 40	Defense request for witness—Professor Danner	97
	Defense filing, Oct. 29, 2004 (1 page)	97
	Defense request for witness, Oct. 18, 2004 (2 pages)	98

	Description of Exhibit	PAGE No.
	Defense filing, Oct. 11, 2004 (2 pages)	100
	Defense supplement to synopsis	103
	Prosecution response, Oct. 25, 2004 (3 pages)	105
	Defense reply, Oct. 27, 2004 (4 pages)	108
	Presiding Officer denies request for witness, Oct. 29, 2004 (1 page)	112
RE 41	Defense request for witness—Professor Paust	113
	Defense filing, Oct. 29, 2004 (1 page)	113
	Defense request for witness, Oct. 18, 2004 (2 pages)	114
	Defense filing, Oct. 11, 2004 (2 pages)	116
	Defense supplement to synopsis	119
	CV of witness	121
	Prosecution response, Oct. 25, 2004 (3 pages)	146
	Defense reply, Oct. 27, 2004 (4 pages)	149
	Presiding Officer denies request for witness, Oct. 29, 2004 (1 page)	153
RE 42	Defense request for abatement, Nov. 4, 2004 (1page)	154
RE 43	Defense request for abatement based on improperly constituted panel, Nov. 2, 2004 (4 pages)	155
RE 44	Chief Defense Counsel's memorandum indicating Mr. Katyal is authorized to represent the accused (1 page)	159
RE 45	Information concerning translator services (7 pages)	160
RE 46	Detailing of assistant defense counsel, CPT Autorino Sept 21, 2004 (1 page)	167

UNITED STATES V. SALIM AHMED HAMDAN NO. 040004--REVIEW EXHIBITS

Description of Exhibit		PAGE No.
RE 47	Appointing Authority's approval of some challenges for Cause, October 19, 2004 (28 pages)	168
RE 48	Filings Inventory, Nov. 7, 2004 (11 pages)	196
RE 49	Official copies of Presiding Officer Memoranda, as of Oct. 24, 2004 (40 pages)	208
1-1	Presiding Officers Memoranda	209
2-1	Appointment and Role of the Assistant to the Presiding Officers	210
3	Communications, Contact, and Problem Solving	213
4-2	Motions Practice	215
5	Spectators to Military Commissions	223
6-1	Requesting Conclusive Notice to be Taken	226
7	Access to Evidence and Notice Provisions	229
8	Trial Exhibits	232
9	Obtaining Protective Orders and Requests for Limited Disclosure	238
10	Witness Requests, Requests to Depose a Witness, and Alternatives to Live Testimony	240
11	In development: Qualifications of Translators/Interpreters and Detecting Possible Errors of Incorrect Translation and Interpretation during Commission Trials	242
12	Filings Inventory	243
RE 50	Interlocutory Question No. 1-Presiding Officer submits suggestion that closed sessions be held without accused being present—this would also permit sessions outside Guantanamo. Request	247

Description of Exhibit **PAGE No.**

and Appointing Authority decision are each one page in length.

RE 51 Interlocutory Question No. 2—Presiding Officer submits suggestion that some sessions be held outside Guantanamo and by conference call. Request and Appointing Authority decision are each one page in length. 249

RE 52 Presiding Officer submits Interlocutory Question No. 3--Seeks clarification of the process for deciding motions and the procedure for forwarding interlocutory questions. Request is two pages in length and Appointing Authority decision is one page in length. 251

RE 53 Presiding Officer submits Interlocutory Question No. 4--Seeks clarification of when the Presiding Officer should provide instruction(s) to the commission members. Request is four pages in length and Appointing Authority decision is one page in length. 254

RE 54 Presiding Officer submits Interlocutory Question No. 5--Seeks clarification of when alternate member(s) are replaced. Request is four pages in length and Appointing Authority decision is one page in length. 259

RE 55 Instructions by the Presiding Officer (1 page) 264

RE 56 Defense supplement to previous motions concerning expert witnesses, Nov. 7, 2004 (3 pages) 265

RE 57 Memorandum detailing prosecutors, Oct. 27, 2004 (1 page) 268

RE 58 Memorandum detailing prosecutors, Nov. 5, 2004 (1 page) 269

UNITED STATES OF AMERICA	)
	)
	) DEFENSE MOTION TO
v.	) DISMISS UNDER
	) ART 10, UCMJ
	)
SALIM AHMED HAMDAN	) 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. That the Military Commission dismiss the charge against Mr. Hamdan because the United States Government did not comply with its own rules regarding speedy trial.

3. Overview. The Supreme Court of the United States has warned that the "guarantee of a speedy trial 'is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.'" *United States v. Loud Hawk,* 106 S. Ct. 648, 654 (1986). American military law, and in particular the Uniform Code of Military Justice (UCMJ), is even more stringent than its civilian counterpart in guaranteeing rights of speedy charge and trial.

Unfortunately, the government has held Mr. Hamdan in custody for almost three years without bringing his case to trial before a military commission or informing him of the reasons for delay. These actions violate Mr. Hamdan's right to a speedy trial under the Uniform Code of Military Justice. A proceeding like this would never pass muster in the American military justice system. The fact that these proceedings are occurring at Guantanamo, a place that the Congress of the United States has labeled subject to the Uniform Code of Military Justice, requires this Commission to dismiss the charges.

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 prisoner by indigenous Afghanistan forces in late November 2001, where upon he was subsequently turned over to U.S. personnel for a bounty 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 20 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. 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.

l. Following Defense demand for speedy trial, CDR[redacted]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."

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

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

5. Law.

a. The UCMJ Applies to Mr. Hamdan.

1. The Uniform Code of Military Justice took effect on May 31, 1951, nearly one year after the Supreme Court's *Eisentrager* decision of June 1950. *See* 10 U.S.C. 801-940 (1952 ed. Supp. V). The Code is the result of painstaking study and reflects an effort to reform the system from top to bottom. *Burns v. Wilson,* 346 U.S. 137, 141 (1953) (plurality op.). With this complete revision of the Articles of War came the expansion of Article 2, in 10 U.S.C. 802(12), which identifies additional persons who are subject to the Code:

> Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

2. The expansion of the UCMJ in the above quoted paragraph 12 thus represents a clear break from the World War II military commission cases like *Yamashita*, where the Court held that the Articles of War did not apply to General Yamashita of the Japanese Imperial Army. *Yamashita*, 327 U.S. at 20. Unlike the old Article 2, which only covered "members of our own Army and of the personnel accompanying the Army," (*id.*) the new ¶12 extends jurisdiction to "persons within" leased areas without limitation.

3. As proposed and ultimately adopted, ¶12 was understood to be much more expansive than its predecessor, 34 U.S.C. § 1201. In fact, our own military officers warned that this paragraph 12 expansion of the UCMJ would create major international difficulties. For example, in his Senate testimony, Maj. Gen. Thomas Green, the Army Judge Advocate General, argued "Article 2 (12) is not limited to time of war or national emergency, nor does it exclude purely military offenses. Its effect would be to make subject to military law, without limitation or qualification, any person residing in or visiting a base area at any time. The enactment of a statute conferring such sweeping jurisdiction over foreign nationals whose only connection with the armed forces might be that they are native or residents of an area leased to the United States, will inevitably lead to international complications." Statement of Major General Thomas H. Green, U.S. Senate, Cmte. on Armed Services, May 9, 1949, at 266.

4. The Government now finds itself in the very situation that General Green contemplated when the UCMJ was drafted. Under ¶12, Mr. Hamdan is subject to the UCMJ, for the Naval Base is leased by the United States and under the control of Secretary Rumsfeld.. Therefore, Mr. Hamdan is entitled to the protections provided by the UCMJ, including potential review by civilian courts (*See Schlesinger v. Councilman, supra*; *Brosious v. Warden,* 125 F. Supp. 2d 681 (M.D. Pa. 2000) (reviewing, on habeas, various challenges made under the UCMJ

to a military conviction)) and the right to a speedy trial pursuant to 10 U.S.C. § 810, discussed below.

5. It is undoubtedly clear that the UCMJ applies to Mr. Hamdan for one other reason. Indeed, President Bush, when promulgating the Military Order that established the commissions, expressly relied on the UCMJ as support for his authority to do so. See Military Order Para. 1 (relying on the authority of "Sections 821 and 836 of title 10, United States Code"). If the UCMJ did not apply to Mr. Hamdan, therefore, additional constitutional problems about the authority of the Executive to promulgate the Order would arise.

b. Mr. Hamdan's Detention Violates the UCMJ.

1. Article 10 of the UCMJ provides that when the government places a defendant "in arrest or confinement prior to trial," the government must take "immediate steps" to "try him or to dismiss the charges and release him." 10 U.S.C. § 810. This statute "imposes a more stringent speedy-trial standard than that of the Sixth Amendment." *United States v. Kossman*, 38 M.J. 258, 259 (CMA 1993). The government violates Article 10 when it "could readily have gone to trial much sooner than some arbitrarily selected time demarcation but negligently or spitefully chose not to." *Id.* At 261. Thus, in assessing whether a military defendant's speedy trial rights have been violated, the court will apply a standard of "reasonable diligence." *United States v. Tibbs*, 35 C.M.R. 322, 325 (CMA 1965); *see Kossman*, 38 M.J. at 262 (reaffirming *Tibbs* standard).

2. In assessing "reasonable diligence," the military courts look to the four factors outlined by the Supreme Court in the Speedy Trial Clause case of *Barker v. Wingo*, 407 U.S. 514 (1972) as "good guidance." *Kossman*, 38 M.J. at 261 n.3; *United States v. Birge*, 52 M.J. 209, 212 (CAAF 1999) ("It is appropriate . . . to consider the *Barker v. Wingo* factors . . . in determining whether a particular set of circumstances violates a service member's speedy trial rights under Article 10."). The *Barker* factors are "length of delay," "the reason for the delay," "the defendant's assertion of his right," and "prejudice to the defendant."

3. In light of the *Barker* factors, the Government's actions in this case constitute an egregious violation of Article 10. Petitioner has been confined without trial far, far longer than any reported case assessing a speedy trial claim in the court-martial context. *Cf. United States v. Hatfield*, 44 M.J. 22, 23 (CAAF 1996) (observing that "3 months is a long time to languish in a brig awaiting an opportunity to confront one's accusers, and "[f]our months is even longer" in the course of affirming a speedy trial dismissal based on 106 days of confinement). As for reason for delay, the government simply did not need over two years to gather evidence against petitioner. The government has not been "reasonabl[y] diligen[t]" in taking "immediate steps to try" petitioner. *Kossman*, 38 M.J. at 262. Article 10 was intended to prohibit precisely this kind of "foot-dragging" in the military justice system. *Id.* Therefore, petitioner is entitled to speedy trial relief under the UCMJ.

4. The unreasonable and lengthy delay, moreover, has obviously prejudiced petitioner's defense, which will be based on eyewitness and other testimony that grows more stale with each passing day. *See United States v. Beamon*, 992 F.2d 1009, 1014 (interpreting the

Barker prejudice factors to include "oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the accused's defense will be impaired"). Furthermore, the solitary confinement in which Mr. Hamdan is being held certainly qualifies as "oppressive pretrial incarceration" and creates a genuine risk of psychological injury, which will impair Mr. Hamdan's ability to assist in his own defense. (*See* Declaration of Dr. Matthews.) Without prompt relief by this Court, the continued solitary confinement of Mr. Hamdan may eviscerate his ability to put on a vibrant defense before a military commission and be in tension with fundamental rights of the accused.

c. Dismissal is the Appropriate Remedy.

1. The remedy for a violation of speedy trial rights is dismissal of the charges. *See Strunk v. United States*, 412 U.S. 434 (1973) (dismissal is only proper remedy for Speedy Trial Clause violation); *United States v. Hatfield*, 44 M.J. 22 (CAAF 1996) (dismissing charges for UCMJ Article 10 violation).

2. This Commission should dismiss the charges, recognizing that this long period of delay is fundamentally inexcusable. That is what any American military court would do, and what this Commission is obligated to do.

6. Files Attached.

a. Declaration of Dr. Matthews

Notably assertant: these attachments were never produced despite numerous requests. HB

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 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. *United States v. Loud Hawk,* 106 S. Ct. 648 (1986)

b. *Johnson v. Eisentrager*, 339 U.S. 763 (1950)

c. Uniform Code of Military Justice, 10 U.S.C. 801-940 (1952 ed. Supp. V)

d. *Burns v. Wilson,* 346 U.S. 137 (1953)

e. *In re Yamashita,* 327 U.S. 1 (1946)

f. 34 U.S.C. § 1201

g. Statement of Major General Thomas H. Green, U.S. Senate, Cmte. on Armed Services, May 9, 1949

h. *Schlesinger v. Councilman*, 420 U.S. 738 (1975)

i. *Brosious v. Warden,* 125 F. Supp. 2d 681 (M.D. Pa. 2000)

j. 10 U.S.C. § 810

k. *United States v. Kossman*, 38 M.J. 258 (CMA 1993)

l. *United States v. Tibbs*, 35 C.M.R. 322 (CMA 1965)

m. *Barker v. Wingo*, 407 U.S. 514 (1972)

n. *United States v. Birge*, 52 M.J. 209, 212 (CAAF 1999)

o. *Cf. United States v. Hatfield*, 44 M.J. 22 (CAAF 1996)

p. *United States v. Beamon*, 992 F.2d 1009 (9th Cir. Or. 1993)

q. *Strunk v. United States*, 412 U.S. 434 (1973)

9. Witnesses and/or Evidence Required. The Defense intends to call Professor Jordan Paust (Curriculum Vitae will be forwarded) as an expert witness in the area of constitutional and statutory law, specifically discussing the speedy trial doctrine, in support of this motion. The expert testimony is probative to a reasonable person under the circumstances presented based on the Professor's skill, knowledge, training and education. He possesses specialized knowledge of the laws of the United States relating to speedy trial. 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 Professor's specialized knowledge will assist the Commission Members in understanding and determining whether the preferral and referral of the charge in this case violates the speedy trial rules.

10. Additional Information. None.

CHARLES D. SWIFT
Lieutenant Commander, JAGC, US Navy
Detailed Military Defense Counsel
Office of Military Commissions

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	)	PROSECUTION RESPONSE TO DEFENSE MOTION FOR DISMISSAL FOR DENIAL OF A SPEEDY TRIAL IN VIOLATION OF ARTICLE 10 UCMJ 15 October 2004

1. Timeliness: This Motion is filed in a timely manner as required by POM 4.

2. Position on Motion: The Prosecution submits that the Defense's Motion should be denied in total.

3. Facts Agreed upon by the Prosecution: The Prosecution admits the facts alleged by the Defense in subparagraphs 4(j) and 4(n) for the purposes of this motion.

4. Facts:

a. The Chief Prosecutor did not ask that counsel be appointed to the Accused for the limited purpose of negotiating a pre-trial agreement, but ". . . to advise Mr. Hamdan on how he might engage in pretrial discussions with a view towards resolving the allegations against him." See Memorandum dated 15 December 2003, Subject: Target Letter Re: Military Commission of Mr. Salem Ahmed Salem Hamdan, attached.

b. On 23 February, the Legal Advisor to the Appointing Authority did send a reply to the Defense but, contrary to the Defense's misrepresentation, it did contain an explanation. See Memorandum date 23 February 2003, Subject: In the Case of Salem Hamdan: Questions Regarding Application of Article 10, UCMJ, attached. It explained that the Accused was being held based on his status as an unlawful combatant (a basis unrelated to military commissions).

c. The "back of the stack" allegation is an absolute misrepresentation. CDR [redacted] never said what LCDR Swift has quoted him as saying. CDR [redacted] merely told LCDR Swift that he did not control the order of cases and that he did not know when the Accused would be tried if a plea agreement were not reached.

d. On 13 July 2004, a charge of conspiracy to commit the following offenses was referred to this Military Commission: attacking civilians; attacking civilian objects;

murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

5. Legal Authority Cited:

a. Article 10 UCMJ

b. Article 2(a)(12) UCMJ

c. In re Yamashita, 327 U.S. 1 (1946)

d. Article 21 UCMJ

e. Madsen v. Kinsella, 343 U.S. 341 (1952)

f. Reid v. Covert, 354 U.S. 1 (1957)

g. Article 36 UCMJ

h. Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004)

i. United States v. Cooper, 58 M.J. 54 (C.A.A.F. 2003)

j. United States v. Goode, 54 M.J. 836 (N-M. Ct. Crim. App. 2001)

k. United States v. Kossman, 38 M.J. 258 (C.M.A. 1993)

l. Barker v. Wingo, 407 U.S. 514 (1972)

m. United States v. Manning, 56 F.3d 1188 (9th Cir. 1995)

n. United States v. Verdugo Urquidez, 494 U.S. 259 (1990)

o. United States v. Reed, 41 M.J. 449 (C.A.A.F. 1995)

p. United States v. Hatfield, 44 M.J. 22 (C.A.A.F. 1996)

q. United States v. Reeves, 34 M.J. 1261 (N-M. Ct. Crim. App. 1992)

6. Discussion:

The Defense moves to dismiss the charge against the Accused pursuant to Article 10, UCMJ. The Defense's claim lacks merit for three reasons. First, the President has designated the Accused for trial by a military commission for violation of the laws of war or other crimes triable by military commission, so provisions of the UCMJ governing courts-martial do not apply to him. Second, as a combatant who is subject to detention

for the duration of the ongoing armed conflict, the Accused has no legal basis on which to raise a speedy trial claim related to the nature or length of his detention. Third, even if Article 10 were applicable to the Accused, he would not be entitled to any relief because he has failed to show that the military did not act with "reasonable diligence" in bringing and approving charges against him, much less that he has been prejudiced by the alleged delay.

a. Supreme Court case law establishes that Article 10 does not apply to military commissions.

The Defense argues that because the UCMJ extends personal jurisdiction in courts-martial to "persons within an area leased by or otherwise reserved or acquired for the use of the United States," it follows that all of the substantive and procedural rules set out in the UCMJ, including Article 10, are automatically applicable to him. This argument is simply incorrect. The rules set out in the UCMJ apply to courts-martial, not military commissions. While the UCMJ recognizes the jurisdiction of military commissions to try violations of the laws of war[1] or other statute, it does not purport to subject such commissions to its comprehensive set of rules governing courts-martial. Indeed, the Supreme Court has repeatedly recognized that while Congress has prescribed the jurisdiction and procedures governing courts-martial, it properly has allowed the President, as Commander-in-Chief, to set the procedures for wartime military commissions, by recognizing and approving their use but not regulating their procedures.

In In reYamashita, 327 U.S. 1 (1946), the Supreme Court expressly rejected the contention that a military commission convened to try General Yamashita was subject to the procedures in the Articles of War (the precursor to the UCMJ) governing courts-martial. The Court explained that, by Article 15 of the Articles of War (now Article 21, UCMJ[2]), Congress "recognized military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles," and "gave sanction . . . to any use of the military commission contemplated by the common law of

---

[1] Article 21 UCMJ

[2] Article 15 of the Articles of war reads:

> The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

Id. The text of UCMJ Article 21 reads:

> The provisions of this chapter conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

Id.

war." Id. at 19. Although the Court relied in part on the fact that General Yamashita did not fall within the categories of persons made subject to the jurisdiction of the courts-martial by the Articles of War, the Court also based its holding on the fact that "the military commission before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, *was not convened by virtue of the Articles of War, but pursuant to the common law of war*." Id. (emphasis added). Moreover, the Court in Madsen v. Kinsella, 343 U.S. 341 (1952), subsequently rejected any suggestion that the Articles of War would apply to the trial by commission of a person subject to court-martial, upholding the trial by military commission of a U.S. citizen subject to the jurisdiction of courts-martial, notwithstanding that the commission trial was not conducted in strict accordance with the specific Articles of War governing courts-martial.[3]

The Madsen Court characterized the unique nature and purpose of military commissions:

> Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common law war courts. They have taken many forms and borne many names. *Neither their procedure nor their jurisdiction has been prescribed by statute.* It has been adapted in each instance to the need that called it forth.

Id. at 346-348 (footnotes omitted)(emphasis added). The Court went on to hold that, "in the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions . . ." Id. at 348. The Court explained that, in contrast to Congress' active regulation of "the jurisdiction and procedure of the United States courts-martial," Congress had shown "evident restraint" with respect to making rules for military commissions. Id. at 349. The Court further explained that Article 15 (now Article 21 UCMJ) reflected Congress' intent to allow the Executive Branch to exercise its discretion as to what form of tribunal to employ during wartime. Id. at 353.

When the President established military commissions to try members of al Qaida and set out the procedures that will govern them, he exercised the very discretion that the Madsen Court held was implicit in his powers as Commander-in-Chief and was left unrestricted by Congress. Because, as Madsen explained, Congress did not purport to apply the numerous UCMJ provisions regulating courts-martial to the common law

---

[3] In Reid v. Covert, 354 U.S. 1 (1957), a plurality of the Supreme Court ruled that a U.S. citizen civilian spouse of a serviceman could not be subjected to the jurisdiction of a court-martial during peacetime. The Reid plurality concluded that Madsen was not controlling because Madsen involved a trial in occupied enemy territory, where "the Army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area."· Reid at 35, note 63. Madsen remains good law today, and the Supreme Court has limited Reid to its facts. See United States v. Verdugo Urquidez, 494 U.S. 259, 270 (1990).

military commissions, Article 10 of the UCMJ, which sets out a speedy trial standard for courts-martial, is inapplicable to the military commission of the Accused.

b. The Defense misunderstands the President's use of Article 21.

The Defense contends nevertheless that because the President expressly invoked the UCMJ in establishing the military commissions, he must afford the Accused all of the procedural protection set forth in the UCMJ. The latter proposition does not follow from the former. The President invoked the provisions of the UCMJ that recognize his authority to use military commissions to try violations of the laws of war, Article 21, and to create a set of procedures to govern them, Article 36. Reliance on that authority, which the Supreme Court has construed to set military commissions apart from courts-martial and the UCMJ rules that govern them, could not logically trigger application of the entire UCMJ. Indeed, that is essentially the argument the Court rejected in Yamashita and Madsen.[4] In any event, that those subject to military commission do not receive the protection of Article 10 is not "contrary to or inconsistent with" the UCMJ because, as Congress recognized in taking a hands-off approach, military commissions convened during wartime to try violations of the laws of war must deal with military exigencies in administering justice. Because of the unique context in which the commissions operate, and the need for flexibility that context presents, it is not "contrary to or inconsistent with" the UCMJ for the commissions to try persons subject to its jurisdiction for violations of the laws of war without adhering to the speedy trial rules that apply to courts-martial.

c. The Accused is not in pretrial confinement.

Even if Article 10 did apply to the military commissions, the Accused cannot claim its protection, at least insofar as he seeks release from his present confinement. That is because the Accused is an enemy combatant. This status was confirmed at his Combat Status Review Tribunal on 3 October 2004. As such, he may be detained for the duration of hostilities. See Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2641 (2004) (plurality opinion). In light of his combatant status, the Accused has no legal right to seek release from a particular form of confinement based on the length of time he has been held without a trial, even assuming that the speedy trial standards applied and that the military was not complying with them. "The Department of Defense is detaining Mr. Hamdan as an unlawful enemy combatant. Article 10, UCMJ does not apply to Mr. Hamdan's detention." See Memorandum February 23, 2004, subject: In the Case of Salem Ahmed Hamdan, Question Regarding the Application of Article 10, UCMJ.

---

[4] It should be noted that Article 38 of the Articles of War during the Yamashita and Madsen cases was the forerunner of the current Article 36, UCMJ. Like Article 36 UCMJ, Article 38 of the Articles of War prohibited commission procedures contrary to or inconsistent with the Articles of War. Yet Yamashita and Madsen still allowed substantial differences between courts-martial and military commission procedure. As such, no argument can be made that Article 36 requires the application of Article 10 UCMJ to current military commissions.

d. Assuming Article 10 applicability, there is not violation.

Moreover, assuming Article 10 did apply to the military commissions, the Accused's claim for dismissal would also fail because the Defense cannot establish any violation. In order to prevail on an Article 10 claim, the Accused must establish that the government has failed to proceed against him with "reasonable diligence." United States v. Cooper, 58 M.J. 54, 58 (2003). All that petitioner states on this score is that "the Government simply did not need over two years to gather evidence." That conclusive statement is patently insufficient. To begin with, to the extent that there is any relevant time period for an individual lawfully detained as a combatant, the Article 10 clock would not begin to run until the detainee is "ordered into arrest or confinement" pursuant to a charge. Article 10, UCMJ. To date the Accused has not been so ordered. While lacking merit, the best position the Defense can assert is that any speedy trial clock would not have begun to run until December 2003, when the Accused was placed in Camp Echo to facilitate his ability to meet with counsel in connection with the impending charges[5] and to ensure the intelligence gathering function was not tainted.

Additionally, the amount of time that has elapsed, standing alone, does not suggest, much less establish, the absence of reasonable diligence. As the military courts have made clear, "there is no 'magic number' of days in pretrial confinement which would give rise to a presumption of an Article 10, UCMJ, speedy trial violation." United States v. Goode, 54 M.J. 836 (N-M Ct. Crim. App. 2001); United States v. Kossman, 38 M.J. 258 (C.M.A. 1993). In the Goode case, the court held that a defendant who spent 337 days in pretrial confinement failed to make out an Article 10 or constitutional speedy trial violation. Id. at 838-840. Here, the government has charged the Accused with participating in a foreign-based, far-reaching conspiracy spanning five and a half years. The breadth and complexity of the charge as well as the fact that it was brought during the ongoing war against terror refutes petitioner's unsupported assertion that the government is engaged in any delay tactics. See Barker v. Wingo, 407 U.S. 514, 531 (1972) ("The delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.").

Indeed, a far longer period would be justified in the current instance. The United States has undertaken painstaking intelligence-gathering and interrogation with respect to hundreds of enemy combatants and suspected members of al Qaida, a highly disciplined

[5] It is the Prosecution's position that there is no relevant time period for consideration regarding an Article 10 UCMJ claim. The simple fact is that the Accused is not being detained because he is awaiting trial, but because he is an unlawful combatant. As mentioned above, that means that the Accused could be held until the end of hostilities under the existing laws of war. Whether or not the Accused was facing a military commission at this time and place, he would still be detained by U.S. forces. The fact that the Accused was moved after the President found him eligible for trial by military commission does not change the underlying reason for his confinement. In United States v. Reed, 41 M.J. 449 (C.A.A.F. 1995), the Court of Appeals for the Armed Forces made clear that Article 10 is triggered either by "*pretrial* restraint or preferral of charges." Id. at 451. Because, according to Reed the Prosecution is not required to file charges as soon as probable cause exists and because the Accused is not in *pretrial* restraint there is no Article 10 violation.

organization whose agents span the globe and operate in total secrecy. See generally Al Qaida Training Manual ("Manchester Manual"), available at www.usdoj.gov/ag/trainingmanual.htm. It should, therefore, come as no surprise that more time has been required in this case than in courts-martial involving forcible sodomy, Goode, adultery, United States v. Hatfield, 44 M.J. 22, 23 (C.A.A.F. 1996), rape, Reed, or molestation, United States v. Reeves, 34 M.J. 1261 (N-M. Ct. Crim. App. 1992) (462-day delay).

The Defense's claim also founders on his failure to show prejudice from the alleged delay. See Barker at 533-534. The Defense's contention that his defense will be based on testimony "that grows more stale with each passing day" falls well short of the mark. Such "generalized assertions of the loss of memory, witnesses, or evidence are insufficient to establish actual prejudice." United States v. Manning, 56 F.3d 1188, 1194 (9th Cir. 1995). Likewise, Defense's assertion that the Accused's present confinement creates any risk of psychological injury that could impair his ability to assist in his own defense is precisely the kind of speculative claim that cannot form the basis for a finding of prejudice. Id.

For the above-stated reasons, the Accused's motion to dismiss due to violation of Article 10, UCMJ should be dismissed.

7. Attachments:

a. Memorandum dated 15 December 2003, Subject: Target Letter Re: Military Commission of Mr. Salem Ahmed Salem Hamdan

b. Memorandum date 23 February 2003, Subject: In the Case of Salem Hamdan: Questions Regarding Application of Article 10, UCMJ

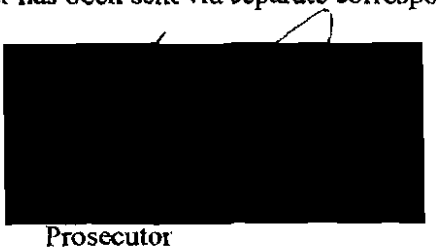
c. Combatant Status Review Tribunal Decision Report Cover Sheet

8. Oral Argument: Although the Prosecution does not specifically request oral argument, we are prepared to engage in oral argument if so required.

9. Witnesses:

a. Major Quentin Crank
b. Captain Jason Orlich
c. Special Agent Lisa Schmidt (already Protected Information pursuant to Presiding Officer Order of August 27 2004).

We ask that the names contained in (a) and (b) above also be considered Protected Information. A proposed Protective Order has been sent via separate correspondence.



Prosecutor

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

December 15, 2003

MEMORANDUM FOR ACTING CHIEF DEFENSE COUNSEL

SUBJECT: Target Letter re Military Commission Investigation of Mr. Salem Ahmed Salem Hamdan

On July 3, 2003, the President determined that Mr. Salem Ahmed Salem Hamdan is subject to the Military Order of November 13, 2001. As a result, pursuant to Section 4(a) of the President's Military Order, Mr. Hamdan "shall, when tried, be tried by military commission for any and all offenses triable by military commission that [he] is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death."

The Office of the Chief Prosecutor is considering whether to prepare charges against Mr. Hamdan and present them to the Appointing Authority for approval and referral in accordance with Section 4(B)(2) of Military Commission Order No. 1, dated March 21, 2002. The charges currently under consideration include, but are not limited to: attacking civilians and civilian objects; terrorism; and conspiracy to commit the above mentioned offenses. Theories of liability in proving these offenses may include conspirator liability for the substantive offense, liability based upon being a member of an enterprise of persons who shared a common criminal purpose, aider and abettor liability, or some combination thereof.

Under my interpretation of Section 3(B)(8) of Military Commission Instruction No. 4, you are authorized to detail a military defense counsel to advise Mr. Hamdan on how he might engage in pretrial discussions with a view toward resolving the allegations against him. My office will make the arrangements with the Commander, Joint Task Force Guantanamo, for such detailed military defense counsel to have access to Mr. Hamdan. Such access shall continue so long as we are engaged in pretrial negotiations. Please advise me as soon as possible what arrangements, if any, you desire to facilitate this representation.

Attachment 1 to this memorandum is provided: 1) to assist Mr. Hamdan's detailed defense counsel in evaluating the potential charges against him; and 2) to advise Mr. Hamdan regarding his options. Additional discovery will be provided to detailed defense counsel when identified.

The final decisions regarding charges against Mr. Hamdan and the terms of any plea agreement that might be entered are within the sole discretion of the Appointing Authority. Nothing in this memorandum, or in any subsequent discussions between the

Office of the Chief Prosecutor and the defense counsel detailed to represent Mr. Hamdan pursuant to this memorandum, should be considered as binding on the Appointing Authority.

Please advise the Office of the Chief Prosecutor no later than January 9, 2004 whether or not Mr. Hamdan is interested in discussing a plea agreement.

Commander [redacted] is my point of contact for matters related to this memorandum.

Disclosure or other public release of the contents of this memorandum is prohibited by Military Commission Instruction No. 4, Section 3(B)(4) and Military Commission Instruction No. 5, Annex B, Section II(E)(1).

[redacted]

Colonel, U.S. Army
Chief Prosecutor (Acting)
Office of Military Commissions

Attachment:
1. Salem Ahmed Salem Hamdan FBI 302, dated July 10, 2002

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

February 23, 2004

MEMORANDUM FOR Lieutenant Commander C.D. Swift, USN, Detailed Defense Counsel for Salem Ahmed Hamdan

SUBJECT: In the Case of Salem Ahmed Hamdan: Question Regarding the Application of Article 10, UCMJ

I am in receipt of your February 12, 2004 memorandum requesting a determination that Article 10, UCMJ, applies to the Department of Defense detention of Salem Ahmed Hamdan. The Department of Defense is detaining Mr. Hamdan as an unlawful enemy combatant. Article 10, UCMJ, does not apply to Mr. Hamdan's detention.

Thomas L. Hemingway
Brig Gen, USAF
Legal Advisor to the Appointing Authority
Office of Military Commissions

cc: Chief Defense Counsel

Attachment 2 to RE 30B

SECRET//NOFORN//X1

(U) Combatant Status Review Tribunal Decision Report Cover Sheet

(U) This Document is UNCLASSIFIED Upon Removal of Enclosures (2) and (4).

(U) TRIBUNAL PANEL: #7

(U) ISN#: 149

Ref: (a) (U) Convening Order for Tribunal #7 of 13 September 2004 (U)
(b) (U) CSRT Implementation Directive of 29 July 2004 (U)
(c) (U) DEPSECDEF Memo of 7 July 2004 (U)

Encl: (1) (U) Unclassified Summary of Basis For Tribunal Decision (U)
(2) (U) Classified Summary of Basis for Tribunal Decision (S/NF)
(3) (U) Summary of Detainee Testimony (U/FOUO)
(4) (U) Copies of Documentary Evidence Presented (S/NF)
(5) (U) Copies of e-mails between Personal Representative and LCDR Swift (U)
(6) (U) Colonel I.E. Wilson-Burke memo of 30 September 2004 (U)
(7) (U) Response to detainee request for information (U)
(8) (U) Personal Representative's Record Review (U)

1. (U) This Tribunal was convened by references (a) and (b) to make a determination as to whether the detainee meets the criteria to be designated as an enemy combatant as defined in reference (c).

2. (U) On 3 October 2004, the Tribunal determined, by a preponderance of the evidence, that Detainee #149 is properly designated as an enemy combatant as defined in reference (c).

3. (U) In particular, the Tribunal finds that this detainee is a member of, or affiliated with, Al Qaida forces, as more fully discussed in the enclosures.

4. (U) Enclosure (1) provides an unclassified account of the basis for the Tribunal's decision. A detailed account of the evidence considered by the Tribunal and its findings of fact are contained in enclosures (1) and (2).

I. E. WILSON-BURKE
Colonel, U.S. Army
Tribunal President

DERV FM: Multiple Sources
DECLASS: X1

SECRET//NOFORN//X1

Unclassified when separated from classified enclosures Attachment 3 to RE 30-B

UNITED STATES OF AMERICA	)	DEFENSE REPLY TO
	)	PROSECUTION RESPONSE TO **D21**
v.	)	(ARTICLE 10 UCMJ)
	)	
SALIM AHMED HAMDAN	)	27 October 2004

1. Timeliness. This reply is filed within the time frame established by the Presiding Officer's order during the initial session of Military Commissions on 24 August 2004, and the grant of relief by the Presiding Officer on 22 October 2004 to submit on 27 October 2004.

2. Relief Sought. That the original Defense Motion, D21, be granted.

3. Facts:

a. The Chief Prosecutor in his Memorandum dated 15 December 2003, Subject: Target Letter Re: Military Commission of Mr. Salem Ahmed Salem Hamdan, (attached) and cited by the Prosecution conditioned Defense Counsel access to Mr.Hamdan to "so long as we are engaged in pretrial negations." By so limiting Defense Counsel's access to Mr. Hamdan, the Chief Prosecutor clearly envisioned representation for the limited purpose of negotiating a pre-trial agreement.

b. The Prosecution states in b) that the February Legal Advisor Letter denying the applicability of Article 10 of the UCMJ gave a reason: Mr. Hamdan is being held as "an unlawful combatant (a basis unrelated to military commissions)". The claim that Mr. Hamdan's status is "unrelated" to commissions is flat out wrong, as the prosecutor's own memoranda make clear. See, e.g., Prosecution's Response to D20, Lack of Legislative Authority, at 4 (stating that commissions may punish "unlawful belligerents"); id. (quoting *Hamdi*'s language that punishment of "unlawful combatants" is appropriate); id. At 7 (discussing the "power to bring unlawful enemy combatants to justice"); and numerous other places in its Prosecution motions.

c. The Defense does not disagree that CDR[redacted] indicated that the order of cases was not up to him. The Defense, however, clearly remembers CDR[redacted] stating that Mr. Hamdan was going to go to the back of the pack. CDR[redacted] words proved prophetic, as although Mr. Hamdan received the second Target letter and was the only detainee to demand a speedy trial, he was in fact the last detainee charged.

4. Law and Discussion.

1. a. The UCMJ Applies to Hamdan.

The Prosecution argues that the UCMJ does not apply in this case. Yet the cases they cite, *In re Yamashita*, 327 U.S. 1 (1946), and *Madsen v. Kinsella*, 343 U.S. 341 (1952), simply do not speak to the applicability of current UCMJ procedures to the trial by military commission

of an individual in Mr. Hamdan's situation. They try to shore up this faulty argument with a misleading and selective parsing of the UCMJ itself.

The Prosecution's reliance on *Yamashita* is misplaced. In that decision, the Court found the Articles of War inapplicable to General Yamashita's military commission trial because it found that Congress "did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons." 327 U.S. 20. General Yamashita, the Court held, is "not a person made subject to the Articles of War by Article 2," id., – which, at the time, included "[i]n general . . . members of our own Army and of the personnel accompanying the Army." Id. at 19. Yet five years after this decision, a new version of the UCMJ took effect. This version changed the military law applied in *Yamashita* by adding paragraph 12 to Article 2, thereby expanding the list of persons "subject to this chapter" to include "persons within an area leased by" the United States. The Prosecution does not dispute that this language applies to Guantanamo.[1] Not only is *Yamashita* irrelevant to question of whether Mr. Hamdan falls within the coverage of the current UCMJ, the Court's argument in that decision actually dictates that the UCMJ's procedural floor should apply to Hamdan. The Court did *not* find that Article 38 (precursor to the current §836) did not impose procedural restraints, as the government now urges, but rather that those restraints did not apply to General Yamashita because he was not covered by the Articles – implying that anyone subject to the articles (like Hamdan) *would* deserve those protections. (Incidentally, *Yamashita* is distinguishable on several other grounds that are explained in the Defense Reply in D20, *Lack of Legislative Authority*, such as the fact that General Yamashita was undoubtedly within the jurisdiction of the commission, that the commission was set up in the field by military authorities, and that the procedural alterations were not substantial.)

Madsen v. Kinsella, 343 U.S. 341 (1952), is also inapplicable. *Madsen* was a case occurring in a zone of war in occupied territory and was explicitly limited to such circumstances. Indeed, the sentence the prosecution cites which says "he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions," Madsen 343 U.S. at 348, is not complete, since that sentence finishes with "*in territory occupied by Armed Forces of the United States*." But Guantanamo is <u>not</u> occupied territory, it is leased territory subject to a different set of rules under Paragraph 12. Nothing in *Madsen* changes that reality.

Furthermore, *Madsen* was a case about the concurrent jurisdiction of courts-martial and commissions, *not* about commission procedure – and the dicta the Prosecution cites cannot change that fact.[2] The Court did not confront the procedural question at all – likely because the procedural situation in *Madsen* was entirely different than that facing Mr. Hamdan here: in *Madsen*, the military commissions of occupation provided extensive procedural protections consistent with the German legal system – to which most of the people they were trying were accustomed. In other words, to the extent that the Court did not hold them strictly to the (then) Articles of War, it did not leave the commissions in the procedural vacuum the government now claims for itself. Id. at 356 ("The occupation courts in Germany are designed especially to meet

---

[1] Yamashita is distinguishable from the present case for other reasons as well. Whereas General Yamashita was unquestionably an enemy combatant, captured during a time of war in an occupied territory, Mr. Hamdan contests his designation as an enemy combatant and is not even a national of a country with which we are at war. "We are not here concerned with the power of military commissions to try civilians." Yamashita, 327 U.S. at 9.

[2] Even the dicta the Prosecution cites ("Neither their procedure nor their jurisdiction has been prescribed by statute," Madsen, 343 U.S. at 347) does not say what they contend it does. The Defense is not saying that all procedures for military commissions are set forth by statute, but rather that the UCMJ, by its express declaration, sets a floor of procedural guarantees below which commission procedures may not sink.

the needs of law enforcement in that occupied territory in relation to civilians and to nonmilitary offenses. Those courts have been directed to apply the German Criminal Code largely as it was theretofore in force."); id. at 358-59 (The military courts were presided over by "civilian judges with substantial legal experience. The rights of individuals were safeguarded by a code of criminal procedure dealing with warrants, summons, preliminary hearings, trials, evidence, witnesses, findings, sentences, contempt, review of cases and appeals."). And while the Supreme Court decided the case in 1952, it was applying pre-UCMJ law, since the trial took place before the UCMJ went into effect.

The Prosecution also relies on a selective reading of § 836 – which it would like to divide in two, accepting only that part which grants authority, and leaving that part which limits it. Section § 836 gives the President the ability to adopt "pretrial, trial and post-trial procedures...for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals...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*." (emphasis added). In other words, though the President has flexibility with regard to conforming the commissions to criminal procedure in civilian courts, he is *not* at liberty to deviate from the statutory baseline of the UCMJ's requirements. 10 U.S.C. § 836; *see also United States v. Johnson*, 19 U.S.C.M.A. 464, 466 (C.M.A. 1970) ("Rules prescribed under this authority [§836] have the force of law unless they conflict with other provisions of the Code or Manual or another recognized principle of military law.") If, as the Government purports, this section were intended solely to *separate* military commissions entirely from court-martial proceedings, the "not be contrary to or inconsistent with this chapter" language would be mere surplusage – an improbable interpretation. The Prosecution cannot pick the parts of § 836 which it favors and argue that the others have no effect. Under the prosecution's reading, the President would be free to depart from the UCMJ for courts-martial as well, and thereby eliminate the crowning achievement in military justice, the UCMJ itself.

Instead, it is far more sensible to read the UCMJ as applying to military commissions, even if they are not located at Guantanamo. Had Congress wanted to carve commissions out of the reach of the UCMJ, it knew how to do so. Congress had already done it in 18 U.S.C. 3172, stating that "an offense triable by . . . military commission" is not subject to the Speedy Trial Act. Yet Congress did no such thing in insulating commissions from the UCMJ. This tracks the "general rule, that military commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial." Winthrop, at 835 n. 81 (citations omitted); Act of July 2, 1864, 13 Stat. 356 (extending court-martial provisions to commissions).

The Prosecution's argument that the Court's decision in Hamdi obviates Article 10 protection is tremendously weak. We have separately discussed why *Hamdi* so dramatically supports the Defense and offers no support to the majority in our Reply Brief in D20, Motion to Dismiss for Lack of Legislative Authority, and that Reply is herein incorporated. A few points are worth highlighting. First, Hamdi did not concern an individual slated to be tried by military tribunal, and so its holding cannot plausibly speak to the applicability of protections triggered uniquely by the tribunal process. Second, the holding of Hamdi was precisely that the government may *not* do whatever it pleases, and hold indefinitely, someone it asserts is an "enemy combatant" without giving that individual a meaningful opportunity to contest that designation. Mr. Hamdan's so-called "Combatant Status Review Tribunal" of October 3 certainly provided no such process – it offered Mr. Hamdan neither the "notice of the factual

basis of his classification," nor "a fair process to rebut the Government's factual assertions," nor a "neutral decisionmaker," nor his "unquestionabl[e] . . . right to access to counsel" mandated by *Hamdi*. 124 S. Ct. at 2648, 2652. The CSRT was too little, too late, and the Prosecution cannot now rely on it to evade the process it must grant Hamdan.

Third, the Court's affirmation in *Hamdi* of the "authority to detain for the duration of the relevant conflict" was "based on longstanding law-of-war principles" which either are not present in the case of Mr. Hamdan, or which the Prosecution has elsewhere tried to ignore. The Court only found Hamdi's detention authorized because of the traditional nature of the U.S. hostilities in Afghanistan, as distinguished from the War on Terror generally, in the pursuit of which Mr. Hamdan was captured (in such circumstances, the Court noted, its "understanding may unravel"). *Hamdi*, 124 S. Ct. at 2641. Moreover, the authority to detain during hostilities applies to those treated as Prisoners of War – a status which the Prosecution has steadfastly refused to grant Mr. Hamdan. In fact, it is that very denial of this status which they claim gives them the authority to hold him without any protections traditionally afforded to POWs.

For all of these reasons, it is not surprising that the Nixon Pentagon, in the midst of thousands of casualties, came to exactly the opposite conclusion of the self-serving prosecution view here:

> [T]he specific protections of the Bill of Rights, unless made inapplicable to military trials by the Constitution itself, have been held applicable to courts-martial. Both logic and precedent indicate that a lesser standard for military commissions would not be constitutionally permissible. In this regard, Winthrop stated: "Military commissions . . . are commonly conducted according to the rule and forms governing courts-martial" . . . Article 21, Uniform Code of Military Justice . . . can be considered as a congressional approval of the long-established practice of tailoring commissions to fit the procedures used in courts-martial. This position is buttressed by the fact that Congress directed the President to establish procedures for courts-martial or other military tribunals which follow, to the extent practicable, the principles of law and the rules of evidence generally followed in United States district courts. Article 36, UCMJ. It did not indicate that separate procedures for military commissions were either needed or desired.[3]

The Prosecution is departing from a long tradition of military justice that applies military rules enacted by the Congress to military commissions. In the rare instance when departures have been permitted, they have been in areas not subject to the Uniform Code of Military Justice. Mr. Hamdan, however, is so subject, by dint of paragraph 12 of the UCMJ. As we explained in our opening Motion, the Army JAG in 1950 when the UCMJ was being debated urged Congress not to adopt paragraph 12 for that reason, but he lost that fight.

---

[3]Nixon Pentagon Report at 19-20 (citations omitted). *Id.* at 7, 9, 17, 21 (similar); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1361 (2004) (stating that commissions are not "regularly constituted" due to failure to observe UCMJ). Professor Paust quotes the Nixon Report in his Article.

b. Hamdan's Treatment violated the UCMJ

Article 10 of the Uniform Code of Military Justice provides that when the Government places a defendant "in arrest or confinement prior to trial," the Government must take "immediate steps" to "try him or to dismiss the charges and release him." 10 U.S.C. § 810. The extraordinarily lengthy pretrial delay to which Hamdan has been subjected unquestionably violates Article 10, which "imposes a more stringent speedy-trial standard than that of the Sixth Amendment." *United States v. Kossman*, 38 M.J. 258, 259 (C.M.A. 1993). The Government violates Article 10 when it "could readily have gone to trial much sooner than some arbitrarily selected time demarcation but negligently or spitefully chose not to." *Id.* at 261.

Despite the Prosecution's claims to the contrary, the speedy trial clock begins to run the moment a defendant is placed in confinement. 10 U.S.C. § 810; *United States v. Reed*, 41 M.J. 449, 451 (C.A.A.F. 1995) ("Article 10...[is] triggered either by pretrial restraint or preferral of charges."); RCM 707(a) ("The accused shall be brought to trial within 120 days after the earlier of: (1) Preferral of charges; [or] (2) The imposition of restraint").[4]

Hamdan's confinement has exceeded all proper boundaries and has significantly prejudiced him in his ability to prepare his defense.[5] In assessing whether a military defendant's speedy trial rights have been violated, the court will apply a standard of "reasonable diligence." *United States v. Tibbs*, 15 C.M.A. 350, 353, 35 C.M.R. 322, 325 (1965); *see Kossman*, 38 M.J. at 262 (reaffirming *Tibbs* standard). The four factors courts look to in analyzing reasonable diligence are "[l]ength of delay," "the reason for the delay," "the defendant's assertion of his right," and "prejudice to the defendant." *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999). In light of these factors, the Government's actions in this case constitute an egregious violation of Article 10.

Although it is true that a long delay, on its own, does not automatically create a speedy trial violation, *United States v. Goode*, 54 M.J. 836 (2001), there must be a showing of good faith by the Government to prevent a dismissal of charges.[6] The Prosecution has made no such showing here. When an accused asserts that he has been denied a speedy trial, the burden is on

---

[4] *United States v. Cooper*, which the government has cited elsewhere as support for its overly limited conception of the speedy trial clock, in fact stands for the opposite proposition – that Article 10 should be applied expansively to "the entire period up to trying the accused." 58 M.J. 54, 60 (C.A.A.F. 2003) (rejecting "a restrictive reading of Article 10"). In addition, *Cooper* identified the Sixth Amendment standard embodied in the Speedy Trial Act, which requires filing charges within *thirty days* after arrest, as a relevant "baseline" for its inquiry. *Id*; Speedy Trial Act, 18 U.S.C. §3161(b). *See also United States v. Earls*, 2003 CCA LEXIS 92 (A.F. C.C.A. Mar. 24, 2003) (all time after confinement counts for speedy trial purposes under Article 10, and should be examined for due diligence under the *Barker* factors); *United States v. Wilkinson*, 27 M.J. 645 (A.C.M.R. 1988) (same).

[5] *United States v. Tibbs*, 15 C.M.A. 350, 353, 35 C.M.R. 322, 325 (1965); *see also Kossman*, 38 M.J. at 262.; *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999) (looking to the four factors outlined by the Supreme Court in the Speedy Trial case of *Barker v. Wingo*, 407 U.S. 514 (1972)); United States v. Mizgala, 2004 C.C.A. LEXIS 24 at *8 (A.F.C.C.A. Jan. 23, 2004). As Justices Scalia and Stevens said in unchallenged words, under the habeas corpus Act in England, "a second magna charta, and a stable bulwark of our liberties," "imprisonment without indictment or trial for felony or high treason . . . would not exceed approximately three to six months." *Hamdi*, at 2662 (Scalia, J, dissenting).

[6] In *Goode*, not only was the delay in trial due to a defense request, but it actually *helped* the defendant, rather than hurt him. 54 M.J. at 840 ("We further find that any delay inured to the benefit of the appellant who used the time to prepare his case and resolve issues related to his counsel."). The charges had been preferred in that case within 15 days of the alleged crimes. *Id.* at 839. Moreover, the court in *Goode* found that the prosecution demonstrated its good faith by trying to reduce the delay and to sever a charge so that trial on the rest of the case could begin more quickly. *Id.* at 839-40.

the Government to establish that it has taken the "immediate steps" that 10 U.S.C. § 810 requires. *United States v. Laminman*, 41 M.J. 518, 520-21 (C.G. Ct. Crim. App. 1994); *United States v. Brown*, 520 F.2d 1106, 1110 (D.C. Cir. 1975) ("The longer the time between arrest and trial, the heavier the burden of the Government in arguing that the right to a speedy trial has not been abridged.").

The unreasonable and lengthy delay, moreover, has prejudiced Hamdan. A speedy trial guarantee is designed to protect three interests of the defendant: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the accused's defense will be impaired. *Barker*, 407 U.S. at 532; *United States v. Plants*, 57 M.J. 664, 667 (A. F. Ct. Crim. App. 2002) (same).

Of these harms, the impact on an accused's ability to mount a defense is the most grave. *Barker*, 407 U.S. at 532 (noting that "the inability of a defendant adequately to prepare his case skews the fairness of the entire system"). It is also the most difficult form of prejudice to prove, "because time's erosion of exculpatory evidence and testimony can rarely be shown." *Doggett v. United States*, 505 U.S. 647, 655 (1992) (citing *Barker*, 407 U.S. at 532); *id.* at 655-56 (also noting that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify"). While the Government has been free, throughout this time, to conduct an investigation, contact witnesses, and preserve evidence, Hamdan has been in solitary confinement, "powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time." *Smith v. Hooey*, 393 U.S. 374, 380 (1969). These prejudicial effects have been aggravated by Hamdan's limited access to counsel.[7]

Furthermore, Hamdan's solitary confinement certainly qualifies as "oppressive pretrial incarceration." *Barker*, 407 U.S. at 532; *United States v. West*, 504 F.2d 253, 256 (D.C. Cir. 1974). His extended confinement has engendered "anxiety and concern" rising to the level of psychological injury. Such anxiety is one of the evils against which the speedy trial guarantee is designed to protect. *United States v. Marion*, 404 U.S. 307, 320, (1971); *see United States v. Calloway*, 505 F.2d 311, 319 (D.C. Cir. 1974) (finding "numbness to the needs" of psychologically damaged defendant languishing in pretrial detention "intolerable").

Finally, the Prosecution advances the bizarre claim that the Defense is seeking to have Mr. Hamdan released to freedom. That is not the Defense position. Rather, it is that he cannot be held as an unlawful combatant in pre-commission segregation. Whether there are other, alternative reasons to hold him as an enemy combatant is an entirely separate matter, as the Pentagon has itself said on several occasions. That is why there is absolutely no national security issue at stake here. All that the commission need decide is whether the rules of justice apply when their literal meaning and their intended purpose in Congress was to do exactly that. Now that the Prosecution has admitted that national security is not at issue, there is very little legal or practical reasoning on which they may stand. The Charge should be dismissed, just as it would in any court martial proceeding.

5. Files Attached.

---

[7]The amorphous claim that conspiracy charges take years to investigate lacks credulity, since any number of complex conspiracies in the American criminal and military courts do not require nearly three years of incarceration before charges are brought. As a result of its failure to explain the delay, the government's actions constitute the kind of "deliberate attempt to delay the trial" that *Barker* identified as weighing most heavily against the government. 407 U.S. at 531. Article 10 was intended to prohibit precisely this kind of "foot-dragging" in the military justice system. *Kossman*, 38 M.J. at 262.

6. Oral Argument. See D21, Defense position remains the same.

7. Legal Authority Cited.

a. Manual for Courts-Martial, Uniform Code Military Justice, 10 U.S.C. § 810

b. *In re Yamashita*, 327 U.S. 1 (1946)

c. *Madsen v. Kinsella*, 343 U.S. 341 (1952)

d. 10 U.S.C. § 836

e. *United States v. Johnson*, 19 U.S.C.M.A. 464 (C.M.A. 1970)

f. 18 U.S.C. § 3172

g. Winthrop: Military Law and Precedents (1896)

h. Act of July 2, 1864, 13 Stat. 356

i. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004)

j. Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1361 (2004)

k. *United States v. Kossman*, 38 M.J. 258, 259 (C.M.A. 1993)

l. *United States v. Reed*, 41 M.J. 449, 451 (C.A.A.F. 1995)

m. *United States v. Tibbs*, 15 C.M.A. 350, 35 C.M.R. 322 (1965)

n. *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999)

o. *United States v. Goode*, 54 M.J. 836 (2001)

p. *United States v. Laminman*, 41 M.J. 518 (C.G. Ct. Crim. App. 1994)

q. *United States v. Brown*, 520 F.2d 1106 (D.C. Cir. 1975)

r. *United States v. Plants*, 57 M.J. 664 (A. F. Ct. Crim. App. 2002

s. *Doggett v. United States*, 505 U.S. 647 (1992)

t. *Smith v. Hooey*, 393 U.S. 374 (1969)

u. *United States v. West*, 504 F.2d 253, 256 (D.C. Cir. 1974

v. *United States v. Marion*, 404 U.S. 307 (1971)

w. *United States v. Calloway*, 505 F.2d 311, 319 (D.C. Cir. 1974)

8. Witnesses/Evidence Required. See D21, Defense position remains the same. However, the Defense notes that the Prosecution's answer of 15 October 2004 indicates that the Prosecution intends to call three witnesses but that the Prosecution has not filed a Notice of Witness in accordance with POM 10. The Defense does not read POM 10 to apply exclusively to the Defense. Accordingly, the Defense objects to the calling of any witness for which a notice has not been filed. The Defense understands that because of the novel issues presented that the failure to file may simply be an oversight on the Prosecutions part and the Defense is willing to withdraw its objection upon The Prosecution's submission of a Witness Notice on or before 1 November 2004 (5 working days before the hearing).

NEAL KATYAL
Civilian Defense Counsel

LCDR CHARLES SWIFT
Detailed Defense Counsel

UNITED STATES OF AMERICA	)
	)
	) DEFENSE MOTION TO
v.	) DISMISS FOR LACK OF
	) PERSONAL JURISDICTION
	)
SALIM AHMED HAMDAN	) 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. That the Military Commission find that the President's Military Order authorizing trial by Military Commission is in violation of the rules of personal jurisdiction and dismiss the charge against Mr. Hamdan.

3. Overview. The Military Commission does not have any personal jurisdiction over Mr. Hamdan and should therefore dismiss the charge against him.

4. Facts.

a. From 1996 until approximately October 2001 Salim Ahmed Hamdan worked in Afghanistan in a private capacity as a agricultural and as a personal driver for Usama Bin Laden.

b. At no relevant time did he join either Al Qaeda or the Taliban, participate in a belligerent act towards the United States or its allies, or have foreknowledge of any belligerent or criminal act directed by either of the above organizations against the United States or its allies.

c. On September 11, 2001, Mohammed Atta, Abdul Alomari, Wail al-Shehri, Waleed al-Shehri, and Satam al-Suqami hijacked American Airlines Flight 11, bound from Boston to Los Angeles, and crashed it into the North Tower of the World Trade Center in New York. Mohammed Atta piloted the plane after it was hijacked. Near-simultaneously, Marwan al-Shehhi, Fayez Ahmed, a/k/a Banihammad Fayez, Ahmed al-Ghamdi, Hamza al-Ghamdi, and Mohald al-Shehri hijacked United Airlines Flight 175, bound from Boston to Los Angeles, and crashed it into the South Tower of the World Trade Center in New York. Marwan al-Shehhi piloted the plane after it was hijacked. As a result of the crashes, the towers of the World Trade Center collapsed. Approximately 2,752 people, almost all of them civilians, were killed. At the time of the hijackings and attacks, the tenants of the World Trade Center were civilian in nature. The occupants consisted of approximately 430 tenants for business and commerce purposes only. Each of the named individuals are alleged to be members of Al Qaeda.

d. On September 11, 2001, Khalid al-Midhar, Nawaf al-Hazmi, Hani Hanjour, Salem al-Hamzi, and Majed Moqed hijacked American Airlines Flight 77, bound from

Washington D.C. to Los Angeles, and crashed it into the Pentagon in Arlington, Virginia. Hani Hanjour piloted the plane after it was hijacked. As a result of the crash, approximately 184 people including many civilians were killed in and around the Pentagon. Each of the named individuals are alleged to be members of Al Qaeda.

e. On September 11, 2002, Ziad Jarrah, Ahmed al-Haznawi, Saaed al-Ghamdi, and Ahmed al-Nami hijacked United Airlines Flight 93, bound from Newark to San Francisco, and crashed it into a field near Shanksville, Pennsylvania. Ziad Jarrah piloted the plane after it was hijacked. 44 civilians died in the crash. Each of the named individuals are alleged to be members of Al Qaeda.

f. The organization known as al Qaida, or "The Base," was founded in or around 1989 by Usama bin Laden, and others. Al Qaida is composed of private individuals and did not constitute the armed force of any recognized state.

g. In response to the events of September 11, 2001, on September 18, 2001, Congress passed a joint resolution authorizing the President to use all necessary and appropriate force . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Sept. 18, 2001 Joint Res.

h. On 7 October 2001, pursuant to Presidential Order the United States commenced armed hostilities in Afghanistan in support of the Northern Alliance.

i. At the time that the United States commenced armed hostilities the Northern Alliance consisted of ethnic Tajiks that opposed the Taliban regime by military force. The Northern Alliance controlled approximately 10% of Afghanistan. The remainder of Afghanistan was controlled by military force/government, commonly referred to as the Taliban.

j. The Taliban exercised political and military control over that portion of Afghanistan that it controlled. The Taliban had been recognized as the government of Afghanistan by Pakistan and Saudi Arabia. The United States, however, did not recognize the Taliban as government of Afghanistan.

k. The United States, however, prior to the commencement of the use of military force negotiated with the Taliban seeking that they capture and turn over Usama Bin Laden and other members of al Qaeda to the United States.

l. 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 the President determined were subject to the order.

m. Subsequent to the President's Military Order of 13 November 2001, Mr. Hamdan was taken prisoner by indigenous Afghanistan forces in late November 2001, where upon he was subsequently turned over to U.S. personnel for a bounty and has been detained by

the United States government ever since.

n. At the time of his capture, Mr. Hamdan was traveling alone, was not part of a belligerent force, and was seeking to flee hostilities in Afghanistan.

o. Mr. Hamdan is not and has never been a member of Al Qaeda..

p. Mr. Hamdan has never taken up arms against the United States government or its nationals.

q. Mr. Hamdan had no advance knowledge of the September 11 attacks on the Pentagon and World Trade Center.

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

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

5. Law.

a. The Military Commission Has No Personal Jurisdiction over Mr. Hamdan.

1. "Jurisdiction" refers to the power of a legal body to try an offense. If that body lacks jurisdiction, everything it does in proceeding with a trial is illegal and unlawful.

2. The Supreme Court of the United States has explained what jurisdiction is and what this body's duties are: "The requirement that jurisdiction be established as a **threshold** matter ... is **inflexible** and without exception . . . for [j]urisdiction is **power** to declare the law,, and **[w]ithout jurisdiction the court cannot proceed at all** in any cause." *Ruhrgas AG v. Marathon Oil Co.*, 119 S. Ct. 1563, 1567 (1999) (internal punctuation and citations omitted). That is why judges across our land, in both the military and civil systems, have said that before proceeding with trial, they must first satisfy themselves that jurisdiction exists. *See In re Grimley,* 137 U.S. 147, 150 (1890); *Carter v. McClaughry*, 183 U.S. 365, 401 (1902); *Hiatt v. Brown,* 339 U.S. 103, 111 (1950).

3. Jurisdiction has always been broken down into two separate concepts. *First*, is the offense something that can be tried by the legal body? This inquiry turns on the history and language of authorizing legislation for that legal body. *Second*, is the person being tried someone that is properly before the reach of the legal body? That question asks whether the Government has alleged facts sufficient to place the specified individual before the military commission. This motion concerns the second of these inquiries.

4. The Government introduces no evidence justifying this commission's personal jurisdiction over Mr. Hamdan. The slender reed they have is a cursory statement by the President from July 2003. In that statement, the President asserts that his authority for such a

finding is in accordance with the Constitution and consistent with the laws of the United States, including the Authorization for the Use of Force passed by Congress on September 18, 2001. This statement is not supported in either fact or law.

5. The President's statement claims that 1) Mr. Hamdan is or was a member of the organization known as al Qaida; 2) that he has engaged in, aided, abetted, or conspired to commit, acts international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or 3) that he has knowingly harbored one or more individuals described in the statements above.

6. These factual assertions are wrong. Mr. Hamdan has specifically denied that he is presently or was at any time a member of al Qaida. He performed the service of driver for monetary compensation and at no time joined or supported the political or alleged criminal activity attributed to Usama Bin Laden and his followers. *See* Hamdan Affidavit, attached. Hamdan denies having any foreknowledge of the activities of any specific criminal enterprise attributed to Bin Laden or his followers, and denies any knowing or willing participation in such activity. Finally, as an employee of Bin Laden, Hamdan can not be said to have "harbored" him within the meaning of the term under established law.

b. <u>The Military Commission Has No Authority Because There Has Been No Declaration of War by Congress.</u>

1. Even if Mr. Hamdan conceded every fact set out in the Government's allegations against him, it would *still* not establish jurisdiction of the military commission in this case. It is well settled that a commission's jurisdiction is limited to a time of war. *See Reid v. Covert*, 354 U.S. 1, 21 (1957) (plurality). As explained above, the President's factual assertions fail to allege that Hamdan committed criminal conduct during a time of war. Conspicuously absent is any statement of when the supposed violation occurred. For a commission to have jurisdiction, it is not enough to say that a crime has been committed. Rather it must first be established that the crime was committed in conjunction with a war. Nor can the President rely on Congress's September 18, 2001 Resolution. That Resolution is limited to "force," and it looks only to the future: "That the President is authorized to use all necessary and appropriate force . . . **in order to prevent any future acts** of international terrorism against the United States by such nations, organizations or persons." Sept. 18, 2001 Joint Res. (emphasis added). Unlike detentions, which "prevent" "future acts" of terrorism, commissions are fully retrospective. Even if it might be thought that the AUMF gives the President the full war power to fight prospectively to keep the peace, Congress circumscribed the President's *retrospective* power to *punish*.

2. The President's sole allegation of a crime committed by Mr. Hamdan is international terrorism. But that is not a violation of the laws of war. Rather, it is a label of convenience, affixed to various acts. As the nation's second-highest court said 20 years ago, terrorism is a term as loosely deployed as it is powerfully charged. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). More recently, a federal appeals court decided that piracy, war crimes and crimes against humanity fall within universal principles of jurisdiction,

but refused to accord terrorism the same status. *See U.S. v. Yousef*, 327 F.3d 56 (2nd Cir. 2003). Implicit in this finding was that terrorism was not a war crime. Nor can it be said that mere membership in a group by itself confers jurisdiction. As such the President's findings of jurisdiction are without support in either fact or law in Hamdan's case.

3. At bottom, the prosecution is under a duty to prove that Mr. Hamdan committed an offense that makes him triable by this commission. They have not even come close to doing so. Neither the Presidential determination in July 2003 nor the charge preferred against Mr. Hamdan on 13 July 2004 accomplish this. Rather, they state the most vague and unsupported allegations. To give the government the power to haul someone before a military tribunal on the basis of literally no concrete evidence that states a violation of the laws of war is dangerous and wrong. If the government finds defendants who acted in ways that violated the laws of war, such as the Nazi Saboteurs, it would be one thing. But this case, alleging vague facts to support a vague offense, is as far from the Nazi saboteurs as one can possibly be. This commission is under a duty to exercise its power to dismiss the prosecution for want of personal jurisdiction.

6. Files Attached.

a. CV, Witness/Expert

b. Hamdan Affidavit

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 Defenses 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. *Carter v. McClaughry*, 183 U.S. 365 (1902)

b. *Hiatt v. Brown*, 339 U.S. 103 (1950)

c. *In re Grimley*, 137 U.S. 147 (1890)

d. *Reid v. Covert*, 354 U.S. 1 (1957)

e. *Ruhrgas AG v. Marathon Oil Co.*, 119 S. Ct. 1563 (1999)

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

g. *United States v. Yousef*, 327 F.3d 56 (2nd Cir. 2003).

h. Authorization for the Use of Force, U.S. Congress, Sept. 18, 2001

9. Witnesses and/or Evidence Required. In the event that the government disputes the facts contained in Mr. Hamdan's affidavit, the Defense reserves the right to call Mr. Hamdan to testify solely for the limited purpose of Commission jurisdiction.

10. Additional Information. None.

CHARLES D. SWIFT
Lieutenant Commander, JAGC, US Navy
Detailed Military Defense Counsel
Office of Military Commissions

UNITED STATES NAVAL STATION:
GUANTANAMO BAY, CUBA:

AFFIDAVIT

I, Salim Ahmed Salim Hamdan, having been duly sworn, states and deposes as follows:

اسمي سالم احمد سالم حمدان وانا مواطن يمني وانا ايضا معروف باسم صقر. ولدت في قرية الخريبة في محافظة حضرموت في سنة 1969 تقريبا وفي سنة 1980 تقريبا انتقلت الى مدينة مكلا حيث سكنت مع ناس اقارب وشغلت في عمل موقت حتى سنة 1990. انتقلت الى العاصمة صنعاء وعمري 20 سنة تقريبا حيث استمريت في البحث عن عمل او وظيفة واشتغلت في اعمال مختلفة ولم انجح في البحث عن وظيفة وبقيت في اعمال مختلفة حتى سنة 1996. والتقيت شخص اسموه علي اليافعي الذي يدور عن ناس ليساعد المسلمين الذين يقاومون الشيوعيين في تاجيكيستان وبعد عدة لقاءات وافقت معه وافقت على الذهاب الى تاجيكيستان ليساعد في المسلمين هناك في المقاومة. سافرت الى باكستان بالطائرة وبعدها الى افغانستان بالسيارة حيث التقيت مع مسلمين اخرين وهم في طريقتهم الى تاخيكيستان الا ان وصلنا الى بدخشان وبعدها كان برجل. ولكن قوات الشيوعيين الموجودة هناك منعونا من الاقتراب للحدود وايضا الطقس كان غير جيد. وبعدها رجعت الى جلال اباد والتقيت مع مهند وقلت له اسافر الى اليمن وهو سالني لماذة؟ وهو قال لي لا توجد لك وظيفة او عمل في اليمن ولكن تبقى هنا يوجد عمل هنا وهي ان تعمل سائق وهو ذهب بي الى عند اسامة بن لادن و هو اعطى لي العمل كسائق في مزرعة اخذ العمال من القرية الى المزرعة ثم الى القرية وبعد 8 اشهور طلب مني اسامة ان اعمل عنده كسائق اخذه الى اماكن الذي يريده. خلال فترة عملي مع بن لادن رجعت الى اليمن مرتين. المرة الاولى كانت في سنة 1998 بهدف الزواج والثانية سافرت الى اليمن للحضور زواج اخو زوجتي وللهدف ذهابي الى الحج. في شهر فبراير 2001 رجعت الى افغانستان لعملي الوظيفة كسائق واستمريت في العمل الى ان بدء هجوم الحلف الشمالي على المدينة التى اسكن فيها. واخر مرة كنت مع بن لادن في كابل. سمعت ان التحالف الشمالي سوف يهجم على مدينة قندهار التى فيها زوجتي بنتي وبيتي فحفت على زوجتي وهي حامل وقررت ان ارجع اليهم وطلبت منه الذهاب الى قندهار ومهما كان جاوبه لي بالموافقة او الرفض ساذهب الى زوجتي. كنت قلق جدا على سلامتهم وقررت ان اوصلهم الى باكستان وقررت استئجار سيارة لاخذ عائلتي الى باكستان وبعد ان وصلت عائلتي الى باكستان حاولت الرجوع الى افغانستان بهدف عودة السيارة الى صاحبها واكي ابيع اشياء و اغراض البيت الشخصية وبعد ذلك ارجع الى زوجتي ونسافر الى اليمن. ولكن في طريقة عودتي مسكوني جنود من الملك السابق ظاهر شاه للافغانستان باحثين عن العرب ليبيعوهم الى الامريكان. عندما مسكوني قد مسكوا عرب اخر قبلي واطلقوا النار عليه وقتلوه. حاولت ان اهرب من المكان ولكن لم انجح في الهرب ومسكوني ثانية وربطوا يديي ورجلي من خلف مثل حيوان بسلك كهرباي وشدوه علي بقوة حتى قطع جسمي واخذوني الى بيت عندهم. وفي اليوم الثاني اخذوني الى بيت اخر لفترة مدتها 7 ايام تقريبا, حيث حقق معي رجل بملابس عسكري وقال لي انه امريكي. الجنود الافغان قالوا لي ان الامريكان دفعوا لهم مبلغ 5000 دولار مقابلني لكي ياخذوني انا. واحد من الجنود الافغان اراد ان يرى الدولارات وفي هذه اللحظة انا رايت الدولارات.

من خلال حبسي عند الامريكان انا ساعدتهم وتعاونت معهم بكل شيء وبرغم من ان تعاونت مه الامريكان اذاوني نفسيا وجسديا. وظهري في حالة سيئة بسبب العمل البنائي في اليمن. انا اخبرت للمحققين الامريكان عن حالي ولكن انتقلوني في وضع سبب لي الم شديد على ظهري ورجلي وكانت ملابسي خفيفة وكان الجو برد جدا, كان جليد. اجبروني الجلوس بدون التحرك للايام كاملة. وفي التحقيقات عندما ليس لي علم بالموضوع التحقيق, ضربوني مع الرجل ومع ايديهم بعدما خرج المحقق واخذوني الى مكاني مع المسجونين الاخرين. واذا لم اخذهم الى مكان بن لادن هددوني بتعذيب وبقتل وبسجن عندما ليس لي علم عن موضوع الاسالة. وكان من اساليب التهديد وضع السلاح المسدس على الطاولة امامي ويرفع المسدس امامي ويقول لي انظر اليه المسدس ما رايك؟ وذهبت معهم الى الاماكن التي سكن فها اسامة بن لادن والتي سافر اليها كذلك. وفي شهر مايو 2002 وصلوني الى جانتانامو وسجنوني في سجن كبير مع مسجونين اخرين كثيرين. حبسوني في زنزانة منفصلة من مجموع من 48 زنزانة. هذه الزنزانات كانت مفتوح للهواء وكنت اقدر اتكلم مع الناس هناك. واعطوني 15 دقيقة مرتين في الاسبوع لاعمل تمرين جسدي في خُوش حجمه 8 امتار في 7 امتار تقريبا وكان ياتي الامام المسلم ويتكلم مع الناس الاخرين ومع اي شخص يريد ان يتكلم معه وكلمت انا معه ايضا وكان في قدري ان اسمع الى المؤذن للصلاة. وفي معسكر دلتا الذي اخبروني عنه المحققين كذلك حققوا معي مسؤلين كثيرين من المكتب التحقيقات الامريكية ومن الامن السياسي التابع للدول كثيرة وعرضوا علي صور كثيرة وسالوني عن هويتها. وقد سمحوني مرتين بان اتكلم مع زوجتي لكي اطمن عليها وانا لا اعرف اي شيء عنها بعد ان وصلتها الى باكستان ومسكوني بعدها وانا دائما في قلق وخوف عليهم. وجئني رجال من المكتب التحقيقات الامريكية و من المعسكر وكلهم قالوا لي انت لست مذنب ولم ترتكب اي جريمة. ولكن قالوا لي انهم يريدون مني ان اعطي الشهادة في محكمات ضد ناس اخرين. المحقق قال لي في حال انا موافق على ان اصبح شاهد في قدري الخروج من السجن وان اصبح مواطن امريكي. وكان مع المحقق اتفاق مكتوب وكان يريد مني ان اوقع عليه. وقررت ان لا اتفق على هذا الاتفاق لانه ليس عندي محامي يضمن لي هذا الاتفاق، وبعد ذلك حقق معي ناس كثير ومرات كثيرة جدا من جانب المكتب التحقيقات الامريكية وناس اخرين ومن ديسمبر 2003 اخذوني من معسكر دلتا انتقلوني الى معسكر ثاني في زنزانة صغيرة داخل بيت صغيرة ومن هذا الوقت لم يسمح لي فرصة لكي ارى الشمس او سماع ناس اخرين خارج البيت او اتحدث مع اشخاص اخرين. وانا الان منفصل لوحدي منذو مدة في البيت الصغير الا الحارس الموجود دائما في الغرفة. ومنحوني فرصة لاعمل تمرين جسديا 3 مرات في الاسبوع ولكن ذلك في الليل وليس في النهار واعطوني القران الكريم فقط ولم يعطوا لي الكتب الاخرة. وعندما سالت عن سبب انتقالي الى هذا المكان لم يخبروني احد الا بعد ان طلبت مترجم يتكلم اللغة العربية حيث لا اعرف اتكلم اللغة الانجليزية والحارس امامي لا يتكلم اللغة العربية. المترجم الذي ياتي في اسبوع مرتين ولكن لا يحضر الا بعد طلب شديد والحاح مني. وقال لي تذهب الى المحكمة العسكرية وسوف يوافر لي محامي وكنت اشتكي في امراض عندي في جسدي واطلب الطبيب لكي ياتي ويفحصني ولكن لا ياتي الطبيب. وعندي في جسدي الم في ظهري وفي رجلي وحكة في جسدي انتشرت بسبب عدم تعرضي الشمس. وقال لي العسكري اخبر المحامي اذا جائك بانك طلبت الطبيب ولم يحضر. وقد طلبت بعض الكتب من المكتبة وقالوا لي ان المكتبة مغلقة وانا وحيد لا اتكلم مع اي اشخاص عندي من الزنزانة ولا يوجد سجين اخر اتكلم معه.

في يوم 30 يناير التقيت بالمحامي Charles Swift الذي قال لي انه عينوه للدفاع عني في محكمة عسكرية. سالت المحامي عن التهم الموجه ضدي وهو قال لي ان ليس هناك تهم موجه ضدي لكن قال لي ان الحكومة الامريكية تفكر في ان توجه تهم مؤامرة لارتكاب هجوم ارهابية. سالت المحامي عن سبب عدم توجيه الحكومة تهم ضدي ومتى يكون تاريخ الجلسة الاولى للمحكمة. المحامي قال لي ان الحكومة تطلب مني قرار عن اتفاق يكون بيني وبينهم على ان اعترف بتهم ضدي مقابل اعقاب وحكم وقال لي المحامي كذلك انه باضافة ذلك من الاتفاق يكون لا بد ان اشهد على ناس واشخاص اخرين في محكمات اخرى ولا اعتقد اني اوافق على هذا الاتفاق لاني لم اقوم بارتكاب اي جريمة.

ان وضعي وحبسي في هذه الزنزانة الصغيرة وحيدا وطول المدة هذه لهو صعبا شديدا على نفسي واعصابي وهو اصعب من ظروف معسكر دلتا. هنا شهر واحد مثل سنة واحد. فكرت في الموافقة على الاتفاق ليخرج من هذه الزنزانة. ولكني مدني ولست عسكري ولست عضو في منظمة القاعدة وانا لست ارهابي وفي اعتقادي عن في حقي المحكمة المدنية بدلا من محكمة عسكري ولكن اي محكمة كان احسن من حالتي الان. طلبت من المحامي Charles Swift ان يطلب محكمة في اسرع الوقت واعطي صلحيات له ليمثل لي كصديق في المحكمة المدنية لاني ليس لي عائلة في الولايات المتحدة وافهم ان المحامي Neal Katyal ايضا سيمثل لي امام المحكمة.

هذا التقرير مكتوب بيدي وطبعه بالغة العربية المترجم تابع لفرقة الدفاع عني وهو Charles Schmitz وقد راجعت النسخة المطبوعة ووافق على صحتها .

Further your affiant sayeth not.

ضابط ٩-٢-٢٠٠٤

Salim Ahmed Salim Hamdan

Subscribed and sworn before
Me this 9th day of February 2004

JASON E. KREINHOP
Legalman First Class, United States Navy
Notary Public and counsel for the United States
10 U.S.C. 10 44a

Exhibit B

UNITED STATES NAVAL STATION:
GUANTANAMO BAY, CUBA:

AFFIDAVIT

I, Salim Ahmed Salim Hamdan, having been duly sworn, states and deposes as follows:

My name is Salem Ahmed Salem Hamdan and I am a Yemeni citizen. I have been known by the name Saqr. I was born in the village of Khoreiba in the governate of Hadhramout in approximately 1969. In 1980, I moved to Makula, where I lived with relatives and worked odd jobs in the city from age 10 until the age of about 20. From the age of 20 I moved to the capital of Yemen, Sa'ana, where I continued to work and seek better employment opportunities, I was unable to find permanent employment, but continued to work odd jobs. In 1996, I was approached by Ali Al-Yafi who was seeking men to aid Muslims struggling against the communists in Tajikistan. After several meetings I agreed to go with him to Tajikistan to aid my fellow Muslims in their struggle. I traveled to Pakistan and then to Afghanistan where I met with other Muslims who were going to Tajikistan. We traveled by plane then by car and then by foot until we got to Badashaw, the forces at Tajikistan wouldn't allow us to go further, and the weather in the mountains was bad, we turned around and left for Kabul. In Kabul, I told Muhannad, that I wanted to return to Yemen. He asked me why. He said there was no work in Yemen and I should stay here, because he has a job for me. He told me he knew of a job as a driver for me. He took me to a farm in Jalalabad, where I met Osama Bin Laden. Osama Bin Laden offered me a job as a driver on a farm he owned, bringing Afghanis workers from the local village to work and back again. After about seven (7) months Osama Bin Laden began to have me drive him to various places. During the period that I worked for Osama Bin Laden, I traveled back to Yemen twice, the first time in 1998 was to get married, then in August 2000, I went back to Yemen to attend my brother-in-laws wedding and to attend the pilgrimage to the Hajj. In February 2001, I returned to Afghanistan with my wife to continue work as a driver. I was still working as a driver in October 2001, when the Northern Alliance with American support began its offensive. The last time I was with Bin Laden was in Kabul. I heard that the Northern Alliance was attacking Kandahar where my wife and daughter were living and I feared for my wife. I decided to return to them and

I asked him [Bin Laden] if I could go to Kandahar but regardless of his response, affirmative or negative, I was going to my wife. I was worried about their safety and I decided to take them to Pakistan. I decided to borrow a car to drive my family to Pakistan. After I had taken my family to Pakistan, I tried to return to Afghanistan to return the car to its owner and to return to my house to sell my belongings to get money in order to return with my family to Yemen. But while trying to return, I was stopped by soldiers loyal to the former king Zahir Shah of Afghanistan, who were looking for Arabs to sell to American forces. When they stopped me they had already taken another Arab who they shot and killed. I tried to flee, but I failed and they captured me again. They tied my hands and feet behind me like an animal with electrical wire and they tied me so tight that the wire cut me. They took me to a house. After a day, I was taken to another house for seven (7) days where I was questioned by a man in a military uniform, who spoke Arabic and said he was an American. The Afghan soldiers told me they had gotten $5,000.00 from the Americans for me, one of the guards who was at the house wanted to see dollars. When the guard showed the money, I saw it too.

While in Afghanistan, I helped and cooperated with the Americans in every way. Despite the fact that I cooperated with the Americans, I was physically abused. I have a bad back from work in Yemen. I told my investigators of this condition but was transported in positions that caused me physical agony in my back. I was dressed in only bright blue overalls in sub-freezing temperatures and was very cold. I was made to sit motionless on benches with other prisoners for days. When I did not know the answers to the investigators questions, the soldiers would strike me with their fists and kick me with their feet, after the investigator left, before they took me back with the other prisoners. When I took them places I had driven Osama Bin Laden, they would threaten me with death, torture or prison when I did not know the answers to their questions. One of their methods to threaten was to put a pistol on the table in front of me and show me the gun and asked, "What do you think?" I went with them to places that Bin Laden lived and where he traveled.

In June 2002, I was flown to Guantanamo Bay, Cuba. In Guantanamo Bay, Cuba, I was put in a large prison with many other men. I was held in a single cell in a cellblock of

48 men. These cells were open to the air and I could talk to the other men. I was given 15 minutes a week of exercise in a 8 meter by 7 meter fenced in area. A Muslim cleric would come and talk to people and I talked with and I could hear the calls to prayer. At Camp Delta, I was questioned by many people from the FBI and Arab police forces. They showed me pictures and asked me to identify the people. On two (2) occasions they allowed me to call my wife on a portable telephone and speak with her and to calm her. I had not heard from her since I left her in Pakistan and I was worried about her. Men from the FBI and investigators from the camp told me that he did not think I had committed any crime and that I am not guilty, but that he wanted me to be a witness against others. He said that if I was willing to be a witness, I could leave Guantanamo Bay and become an American citizen. He let me call my wife again to discuss it. The FBI agent had a written agreement he wanted me to sign. I decided not to because I did not have a lawyer to guarantee that the agreement would be honored. After that I was questioned many times by the FBI and other people.

In December 2003, I was moved from Camp Delta, and put in a new cell, this cell was enclosed in a house, and from that time I have not been permitted to see the sun or hear other people outside the house or talk with other people. I am alone except for the guard in the house. They allow me to exercise three times per week but only at night and not in the day. They gave me the Quran only but not other books. When I asked why I had been moved to this place no one told me anything until I asked for a translator because I do not speak English and the guard does not speak Arabic. The translator is supposed to come twice a week but the translator did not come except when I demanded urgently. He told me that I will have a military trial and will be given a lawyer and I complained that I have medical problems and I asked for a doctor to come check me but he did not come. I have pains in my back and leg and I itch from lack of sunshine. The soldier told me to inform my lawyer when he comes that you asked for a doctor and he did not come. I asked for books from the library, but was told it was closed. I am alone and I do not talk with anyone in my cell because there is no one else to talk to.

On January 30th, I met LCDR Charles Swift, who told me that he had been assigned to defend me before a military commission. I asked my lawyer what the charges against me

were. LCDR Swift told me that no charges against me, but the government sent him a letter that the charges contemplated were conspiracy to commit terrorism. I asked my lawyer why the government had not prepared the charges and when my trial would be.

LCDR Swift told me that the government letter demanded to know whether I would plead guilty to unspecified charges in exchange for a guaranteed sentence. LCDR Swift also told me that in addition to pleading guilty, that I would have to be a witness for the United States as part of the agreement. I do not believe I should plea guilty, because I do not believe I have committed any crime.

Being held in the cell where I am now is very hard, much harder than Camp Delta. One month is like a year here, and I have considered pleading guilty in order to get out of here. I believe that I am a civilian, I have never been a member of Al-Qaeda and I am not a terrorist and I believe I should have a civilian trial, but any trial is better than what I have now. I have asked LCDR Swift to seek a trial as fast as possible and authorized him to act as my next friend in the civilian court, because I have no relatives in the United States. I understand that Professor Neal Kytal will also represent me. My translator, Mr. Charles Schmitz, prepared this statement in Arabic, which I have read and understand to be the truth. My translator, Mr. Schmitz has prepared an English version of my Arabic hand-written statement and based on his review, I have signed and swear to its authenticity.

Further your affiant sayeth not.

Salim Ahmed Salim Hamdan

Subscribed and sworn before
Me this 9th day of February 2004

JASON E. KREINHOP
Legalman First Class, United States Navy
Notary Public and counsel for the United States
10 U.S.C. 10 44a

UNITED STATES OF AMERICA	)	
v.	)	PROSECUTION RESPONSE TO DEFENSE MOTION FOR DISMISSAL (LACK OF PERSONAL JURISDICTION)
SALIM AHMED HAMDAN	)	15 October 2004

1. Timeliness. This Prosecution response is being filed within the time frames and guidance established by Presiding Officer Memorandum (POM) 4-2.

2. Relief Sought. The Defense motion should be denied because the Military Commission has personal jurisdiction over the Accused, and has authority to try the Accused without a formal declaration of war by Congress.

3. Facts in Agreement. The Prosecution does not agree with or stipulate to any of the Defense's facts as alleged. The Prosecution will continue to work with the Defense to obtain a stipulation of fact.

4. Statement of Facts. The Prosecution alleges the following additional facts:

a. That on September 18, 2001, Congress passed a resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." (Authorization for Use of Military Force, 115 Stat. 224; hereinafter "the AUMF")
b. The Accused was born in Yemen. In 1996 he left Yemen utilizing a fraudulent passport and attempted to travel to Tajikistan to engage in *jihad*. (Accused's FBI 302 from July 02 (Attached)
c. Unable to join up with the Tajikistan *jihad*, the Accused eventually went to a Jalalabad guesthouse where he agreed to have a personal meeting with Usama bin Laden. His goal in meeting with bin Laden was to join in *jihad* with bin Laden(Accused's FBI 302 from July 02 and CITF Form 40 of May 03 (Attached)
d. Prior to meeting with Usama bin Laden, the Accused was aware of bin Laden's goal to "expel the infidels from the Arabian Peninsula." (Accused's CITF Form 40 from May 03)
e. After brief stops at the Jihad Wal and Khaldan terrorist training camps, the Accused met personally with Usama bin Laden at bin Laden's compound in Qandahar, Afghanistan (AF). (Accused's FBI 302 from July 02)
f. The Accused agreed to live at the bin Laden compound and serve as a driver. (Accused's FBI 302 from July 02)

g. After an eight-month observation period conducted by Saif al Adel, the head of al Qaida security, the Accused was picked to serve as bin Laden's personal driver and bodyguard. (Accused's Form 40 from May 03). The Accused continued to serve in this capacity (absent a few leaves of absence) until his capture in November of 2001. (Accused's Form 40 of May 03)
h. While serving as bin Laden's personal driver and bodyguard, the Accused pledged "conditional bayat" to bin Laden agreeing to provide full support of the "*jihad* against the Crusaders and Jews." (Accused's Form 40 of May 03)
i. While serving the al Qaida organization, the Accused transported weapons and ammunition provided by the Taliban to al Qaida compounds in Qandahar. (Accused's Form 40 of May 03)
j. While serving as Usama bin Laden's driver and bodyguard, the Accused trained on several occasions at the al Farouq terrorist training camp on the use of various weapons. (Accused's Form 40 of May 03)
k. The Accused was with Usama bin Laden and was one of the people responsible for his safe transport and overall safety during the time periods of the U.S. Embassy bombings in 1998 and the attacks of September 11th. (Accused's FBI 302 of July 02 and Form 40 of May 03)
l. The Accused attended may speeches and press conferences given by Usama bin Laden where bin Laden described the "war against America" and the duty of Muslims to fight Americans. (Accused's Form 40 of May 03)
m. The Accused had knowledge of Usama bin Laden's 1996 Declaration of War and the 1998 fatwa against America. With this knowledge, he continued to serve as Usama bin Laden's driver and bodyguard. (Accused's Form 40 of May 03)
n. The accused observed Mullah Bilal experimenting with explosives in Qandahar, AF in the months prior to the USS COLE attack. Bilal was an al Qaida member who worked for bin Laden. Bilal admitted to Hamdan that he was directly involved in the USS COLE attack. (Accused's FBI 302 of 6 August 02 (Attached))
o. The Accused viewed portions of the USS COLE al Qaida recruiting video and believed this video was produced by al Qaida to spread throughout the world enthusiasm for the cause. (Accused's Form 40 of May 03)
p. The Accused was an al Qaida member and he experienced "uncontrollable enthusiasm" as a result of being with bin Laden. (Accused's Form 40 of May 03).
q. The Accused was present shortly after the attacks of September 11th when Usama bin Laden discussed these attacks with Khalid Sheikh Muhammad (Mukhtar). Bin Laden thanked God for the success of the operation and asked God to reward Mukhtar for his work and role in the September 11th operation. (Accused's Form 40 of May 03)

5. Legal Authority

a. President's Military Order (PMO) of November 13, 2001
b. Authorization for Use of Military Force, 115 Stat. 224
c. Ex parte Quirin, 317 U.S. 1 (1942)
d. In re Yamashita, 327 U.S. 1 (1946)
e. 18 U.S.C. §821
f. Ex parte Vallandigham, 68 U.S. (1 Wall.) 243 (1864)
g. Johnson v. Eisentrager, 339 U.S. 763 (1950)

h. Hirota v. MacArthur, 338 U.S. 197 (1948)
i. Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956); *cert denied,* 352 U.S. 1014 (1957)
j. Reid v. Covert, 354 U.S. 1 (1957)
k. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004)(plurality opinion)
l. United States v Curtiss-Wright Export Corp., 299 U.S. 304 (1936)
m. Cumulative Digest of United States Practice in International Law 1981-1988 (1995)
m. Verano v DeAngelis Coal Co. 41 F.Supp 954, (M.D.Pa.1941).
n. United States v. Hirabayashi, 46 F. Supp. 657, (D. Wash. 1942)
o. The Prize Cases, 67 U.S. 635 (1862)
p. United States v. Rockwood, 48 M.J. 501 (Army Ct. Crim. App. 1998)

6. Legal Analysis

a. The President has the Authority to Convene Military Commissions and Designate Those Available for Commission Trial

Since the founding of this Nation, military commissions have been employed by the Commander in Chief during wartime to try violations of the laws of war. More than 50 years ago, the Supreme Court rejected a slew of challenges to that historic practice, establishing beyond cavil its constitutional validity. Ex parte Quirin, 317 U.S. 1 (1942), In re Yamashita, 327 U.S. 1 (1946); Johnson v. Eisentrager, 339 U.S. 763 (1950).

On September 11, 2001, the al Qaida terrorist network launched a coordinated attack on the United States, killing approximately 3000 persons. Congress responded by passing a resolution authorizing the President:

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Authorization for Use of Military Force, Pub. L. 107-40 section 1-2, 115 Stat. 224 (2001) ("AUMF").

Consistent with historical practice, on 13 November 2001, the President issued a Military Order establishing military commissions to try detainees such as the Accused for violations of the laws of war and other applicable laws. In doing so, the President expressly relied on "the authority vested in me . . . as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] and sections 821 and 836 of title 10, United States Code."[1] Detention, Treatment, and Trial of Certain Non-

[1] Sections 821 and 836 are, respectively , Article 21 and 36 of the Uniform Code of Military Justice (UCMJ).

Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) (hereinafter "Military Order").

Article 21 of the UCMJ specifically provides for the trial of "offenders or offenses that by statute or by the law of war may be tried by military commissions." The procedures to be utilized during these commission proceedings rest within the sole control of the President. UCMJ Article 36. Exercising this authority, the President made a determination that it was not practicable to utilize rules and procedures generally recognized in United States federal district courts and he provided that the Secretary of Defense would issue the implementing rules of procedure to be used at military commissions. Acting upon this delegation, the Department of Defense has issued several implementing Orders, Instructions and Regulations.

The Defense's assertion that the President's Determination of July 3, 2003 (directing the Accused by subject to trial by military commission; hereinafter "Presidential Determination") is clearly wrong. The President has the authority to conduct military commissions to try offenders and offenses of the law of war. Ex parte Quirin, 317 U.S. 1, 28 (1942). Under the Constitution, the President has inherent authority as Commander in Chief to conduct military commissions, presumably without additional authority to wage war being conferred upon him by Congress. Id. at 28-29 (finding that addressing not directly required because Congress had supported the creation of military commissions). With respect to these presently created commissions a plurality of the Supreme Court just months ago held, "The capture and detention of lawful combatants and the capture, detention, *and trial* of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" and such actions fall within the congressional authorization delineated in the AUMF. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (2004) (plurality opinion), citing Ex parte Quirin, 317 U.S., at 28 (emphasis added).

Since Ex parte Quirin, "there can be no doubt of the constitutional and legislative power of the president, as Commander in Chief of the armed forces, to invoke the law of war by appropriate proclamation; to define within constitutional limitations the various offenses against the law of war, and to establish military commissions with jurisdiction to try all persons charged with defined violations." Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956).

b. The Presidential Act of Determining Who is Subject to Trial by Military Commission is an Executive Act Not Subject to Review

The Defense argues that the charge should be dismissed because the Accused is not "properly before the reach" of this Military Commission. Defense Motion at 3. The Defense's justification for this argument is that the President's determination "in not supported in either fact or law." Id. at 4. The Defense cites no legal authority in support of this argument. Instead he relies primarily on his client's denial of the facts in an attached affidavit as the ground for dismissal.

A trial by military commission ordered by the President in the declared exercise of his powers as Commander in Chief under Article II of the Constitution, is not to be set aside by the courts without clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted. Quirin, 317 U.S. at 25; Yamashita, 327 U.S. at 8 (by Congress' codification of the Articles of War, military commissions "are not courts whose ruling and judgments are made subject to review by this Court," citing Ex parte Valandingham, 68 U.S. (1 Wall.). Military Commissions are tribunals whose determinations are reviewable by military authorities either as provided in military orders constituting such tribunals or as provided in the Articles of War. Yamashita at 8. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. Id. If military tribunals have lawful authority to hear, decide, and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities that are alone authorized to review their decisions. Id.

c. The Presidential Determination that this Accused should be subject to Trial by Military Commission is Factually Supported

Even if the Presidential determination is subject to review by this Commission or some other judicial body, the President's decision that the Accused be tried by a military commission is amply supported by the facts. See Factual Assertions in Section 4 and Attached supporting investigative summaries of statements of the Accused. These summarized statements of the Accused, as well as other supporting evidence, were presented to the President in the form of an Evidence Summary prepared by the Criminal Investigation Task Force (Attached). Based on reviewing this summary, the President made his determination that the Accused should be subject to his Military Order and be triable by military commission. While we concede that the Defense should be provided an opportunity to contest these facts, the appropriate forum for this is a full and fair military commission trial on the merits where both sides are provided the opportunity to present probative evidence.

d. Military Commissions Do Not Require a Formal Declaration of War by Congress

Citing Reid v. Covert, 354 U.S. 1 (1957), the Defense asserts that it is "well settled that a commission's jurisdiction is limited to a time of war." Defense Motion at 4. The Reid case is distinguishable as:

(1) it is uncontested that the Accused were two civilian wives of service members, not an unlawful enemy combatant seized in response to an attack on the United States;
(2) the civilian wives were tried at courts-martial, not military commissions; and

(3) the civilian wives were United States citizens who enjoyed constitutional rights that this Accused is not entitled to (see Prosecution Motion Response on Equal Protection)

The analysis in Reid was based upon the Constitution applying in its entirety to the traditional murder trials of these two United States citizens. Id at 19. The holding was very specific that a UCMJ statute "cannot be framed by which a *civilian* can lawfully be made amenable to the military jurisdiction in time of peace." Id at 34 quoting Winthrop, Military Law and Precedents (2d ed., Reprint 1920), 107. Hamdan is neither a civilian nor is this a time of peace.

The President of the United States has expressly declared, in his Military Order of November 13, 2001-Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, that "International terrorists, including members of the al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States *on a scale that has created a state of Armed Conflict that requires the use of the United States Armed Forces*." The President also determined that the individuals subject to his order were to be tried for violations of the laws of war and other applicable laws by military tribunals. See President's Military Order of November 13, 2001, section 1(a) & 1 (e).

The President, in his constitutional role as Commander-in-Chief, and through his broad authority in the realm of foreign affairs, has the full authority to determine when the Nation has been thrust into a conflict that must be recognized as a war and treated under the laws of war. See United States v Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). The President's decision to recognize that an armed conflict exists is a political question. "The Courts have also treated the fundamental issue of whether an armed conflict is taking place for purposes of international or domestic law as a question to be decided by the political branches." See Cumulative Digest of United States Practice in International Law 1981-1988 at 3444 (1995). "It is the well-settled law that the existence of a condition of war must be determined by the political department of the government; that the courts take judicial notice of such determination and are bound thereby." Verano v DeAngelis Coal Co. 41 F.Supp 954, 954 (M.D.Pa.1941).

The President, in his order of 13 November 2001, declared that he was acting pursuant to both his authority as Commander-in-Chief of the Armed Forces under the Constitution and under the "Authorization for Use of Military Force" given him by Congress. Congress, in its Joint Resolution to "authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States" also found that the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States, and expressly authorized the President to use "all necessary and appropriate force *against those nations, organizations, or persons* he determines planned, authorized, committed or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." See AUMF (emphasis added). It has therefore been clearly established that both the President and Congress recognize the President's inherent authority as Commander-in-Chief to prosecute an armed conflict against not only nations, but organizations and persons as well.

"War powers are to be construed broadly..." and "the power to wage war is the power to wage war successfully." See United States v. Hirabayashi, 46 F. Supp. 657, 661 (D. Wash. 1942) *citing* Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U.S. 146 (1919). Under his war powers as Commander-in-Chief, the President has the constitutional authority to determine that an armed conflict exists.

The Prize Cases, 67 U.S. 635 (1862), recognize that the President's declaration of a blockade - of the Confederate ports - is an act of war which is conclusive of the question of whether a state of war exists, whether or not war is formally declared by Congress. *Id.* at 668. The court saw no difference between the nature of that war - between nations, or between a nation and insurgents. Similarly, we are not bound by formality here. See United States v. Rockwood, 48 M.J. 501, 508 n.14 (Army Ct. Crim. App. 1998) ("when courts have decided whether 'time of war' exists for various purposes, they have generally looked to both the fact of actual hostilities and the recognition of such a state, not necessarily through a declaration of war, by the executive and legislative branches.")

Most recently, a Plurality of the Supreme Court held in Hamdi v. Rumsfeld that the detention of combatants captured during combat in Afghanistan "is so fundamental and accepted an incident of war" as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use by issuing the AUMF. 124 S. Ct. 2633. In the very next sentence, the Court also recognized that the "capture, detention, and *trial* of unlawful combatants, by 'universal agreement and practice' are 'important incident[s] of war.'" Id. (citing Quirin, 317 U.S. at 28) (emphasis added). Considering that Congress's AUMF constituted "explicit congressional authorization for the detention of individuals", and that "it is of no moment that the AUMF does no use specific language of detention", it is clear that the Court considers the AUMF to be the functional equivalent of a declaration of war. See id. Accordingly, the Court also presumes the President has congressional authorization to conduct military commissions as another "incident of war" and in accordance with 10 U.S.C. section 821. Therefore, it is apparent that the Congress need not issue a formal declaration of war in order for the President to lawfully direct the Accused be tried by a military commission.

e. The President is not Limited to Solely Fight Prospectively

The Defense contends that "Congress circumscribed the President's retrospective power power to punish" by its "prospective" language in the AUMF. Other than relying on the wording of the AUMF, the Defense cites no authority in support of their position. Disturbingly, the Defense left out of its brief some of the "retrospective" language of the AUMF that authorizes the President to " use all necessary and appropriate force against those nations, organizations, or persons he determines *planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons*, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." (emphasis added). Common sense, logic, and legal precedent all suggest that if Congress used the past tense in describing the enemy they authorized the President to use force against, then undoubtedly he has the authority to hold this enemy accountable for their conduct by directing that they be tried before a military commission. See Yamashita, 327 U.S. at 11-13.

f. A Military Commission has Jurisdiction over Offenders and Offenses That By Statute or the Law of War May be Tried by Military Commission

Buried as almost the last in a series of arguments that lack merit is the Defense assertion that the Accused is charged with committing an act of International Terrorism and that is not a war crime. Defense Motion at 4. First, the charge sheet clearly demonstrates that the Accused is charged with committing a number of war crimes with terrorism being only on of the several war crimes the Accused conspired to commit. These charges were referred by the Appointing Authority, consistent with Military Commission Order No. 1, section 3. The Presidential Determination merely adds qualifying criteria for those he feels based on the current conflict should be subject to the military commission process.

The starting and ending point for this analysis remains Article 21 of the UCMJ which states "[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commission, provost courts, or other military tribunals of concurrent jurisdiction with respect to *offenders* and offenses that by statute or the law of war may be tried by military commissions . . . ." The ability to try such offenders rests on the UCMJ provision in and of itself. The Defense cites no authority for the assertion that the Presidential determination --- a manifestation of the President's executive act to direct a military commission to try the Accused – must itself allege a violation of the law of war. To the contrary, there is substantial legal precedent that the Presidential determination asserting the law of war applies to the Accused is properly a political question, and therefore demands great deference upon judicial review. Yamashita, 327 U.S. at 12-13.

g. The Defense is Correct – The Prosecution has *not yet* proven that the Accused Committed an Offense

The Defense asserts that the "prosecution is under a duty to prove that Mr. Hamdan committed an offense that makes him triable by this commission." Defense Motion at 5. They state that there are "unsupported allegations" and "no concrete evidence." Id. This is the classic "putting the cart before the horse." While the Prosecution is under the obligation to prove the accused's guilt once before a commission at a trial on the merits, we know of no authority that says we must prove our case before the trial starts to show that he is triable by military commission. In the response to a separate Defense motion, the Prosecution provides the supporting authority that the offense charged does in fact state an offense triable by military commission. The Prosecution is confident that when given the opportunity to present evidence to the Commission during a full and fair trial on the merits, the Defense concerns will be alleviated.

7. Defense Proposed Evidence

The Defense has stated that they reserve the right to call the Accused to the stand on this motion and that his testimony would be "solely for the limited purpose of Commission jurisdiction." Defense Motion at 6. First, this proposal will lead to a trial within a trial if we intend to litigate whether the Accused is in fact guilty or not. Second, the Prosecution is not aware of any Commission law that would permit the Accused to testify for the limited purpose of the motion.

8. Evidence

a. FBI 302 documenting interview of Accused July 2002
b. FBI 302 documenting interview of Accused 6 August 2002
c. CITF Form 40 documenting interview of Accused May 2003

Note that this information is FOUO and Law Enforcement Sensitive and is therefore Protected information pursuant to the Presiding Officer's August 27, 2004 Order.

9. Oral Argument. Oral will be provided if desired.

Prosecutor

REVIEW EXHIBITS 26-B AND 31-B

Review Exhibit (RE) 26-B and RE 31-B each have the same 3 attachments that are marked "FOUO / LAW ENFORCEMENT SENSITIVE." FOUO means "for official use only."

In RE 15, the Presiding Officer ordered that records designated in this manner be sealed. Pages 2 and 3 of RE 15 (pertaining to the release of information about investigators and interrogators) were separately classified "For Official Use Only."

Attachments 1-3 of RE 26-B and RE 31-B were therefore redacted from the record that will be posted on the Department of Defense Public Affairs website and sealed.

Attachments 1-3 of RE 26-B and RE 31-B will be included as part of the record for consideration of reviewing authorities.

The sealed records, Attachments 1-3 of RE 26-B, are described as follows:

Attachment 1 consists of a 10-page, CITF Form 40, summary of an interview of the Accused. It is dated May 17, 2003.

Attachment 2 consists of a 21-page, Federal Bureau of Investigation (FBI) form FD-302, summary of an interview of the Accused and other investigative activity from June 26, 2002 to July 9, 2002.

Attachment 3 consists of a 10-page, Federal Bureau of Investigation (FBI) form FD-302, summary of an interview of the Accused. It is dated August 6, 2002.

As indicated above, RE 31-B has the same 3 attachments as RE 26-B. They are, however, in a different order:

Attachment 1 consists of a 21-page, FBI form FD-302, summary of an interview of the Accused and other investigative activity from June 26, 2002 to July 9, 2002.

Attachment 2 consists of a 10-page, FBI form FD-302, summary of an interview of the Accused. It is dated August 6, 2002.

Attachment 3 consists of a 10-page, CITF Form 40, summary of an interview of the Accused. It is dated May 17, 2003.

I certify that this is an accurate summary of sealed Attachments 1-3 of RE 26-B and RE 31-B.

//signed//

M. Harvey
Chief Clerk of Commissions

UNITED STATES OF AMERICA	)	
	)	DEFENSE REPLY TO
	)	PROSECUTION'S RESPONSE TO D22
v.	)	(LACK OF PERSONAL JURISDICTION)
	)	
SALIM AHMED HAMDAN	)	26 October 2004
	)	

1. Timeliness. This reply is filed in a timely manner as required by the Presiding Officer's schedule set 24 August 2004 as amended by continuance granted by the Presiding Officer on 20 October 2004.

2. Relief Sought. As set out in Defense motion D22.

3. Facts. The Defense objects to Prosecution facts "f - v" for the reasons set out in Defense response to P7.

a. The accused is not nor has he ever been a member of Al Qaeda or the Taliban. See attached Accused affidavit of 9 February 2004.

b. The accused did not engage in any belligerent act associated with the United State's armed conflict in Afghanistan commencing on 7 October 2001. Accused affidavit of 9 February 2004.

c. The United States has neither occupied nor held by right of conquest territory within Afghanistan.

d. Afghanistan is not a place or district under martial law.

e. The accused is not an officer of our own army.

4. Law and Discussion.

The Prosecution's Response repeats several items from its earlier Response to the Motion Dismissing for Lack of Legislative Authority, D20. To economize on resources, we are simply incorporating our Reply to D20 here. Our Reply in D20 makes clear that:

a. As a matter of constitutional structure, history, and precedent, military Commissions must be authorized by Congress;

b. There is no such authorization in this case. The Authorization for the Use of Force is not retrospective and does not come even close to a Declaration of War. While no Declaration of War is needed when Congress has authorized military commissions by statute, it is certainly needed here;

c. This military commission breaks from all previous ones in American history because it is not in a zone of war;

d. The Prosecution's attempt to scare the commission into thinking that the Defense is seeking either the release of Mr. Hamdan or to interfere with the President's ability to wage war are entirely overblown. The Defense does not challenge the President's ability to use troops in any circumstance authorized by Congress or necessary for other reasons. Nor does the defense challenge, as incident to "force," the President's ability to temporarily detain enemy combatants;

e. The Prosecution gravely misreads the Government's defeat in the United States Supreme Court case this June of *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004); and

f. Previous military commissions, such as those in *Quirin* and *Yamashita*, were against individuals who were undoubtedly within the jurisdiction of the military courts. Here, that very fact is in question. To strip away someone's rights on the mere allegation of wrongdoing is impermissible.

The Prosecution makes one argument in this Response that is new, asserting that the Authorization for the Use of Force, 115 Stat. 224 (2001) is somehow retrospective. It is not surprising that the Prosecution failed to make this argument in its relevant location, D-20, for it is belied by the plain text of the statute. True, the opening words of the statute introduce the rationale for force by noting that the United States was attacked, but notably the statute then restricts when force can be used and modifies those very words:

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, *in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.*

Authorization for Use of Military Force, Pub. L. 107-40 section 1-2, 115 Stat. 224 (2001) ("AUMF"). Congress intentionally rejected proposed White House language that would have authorized the use of force against all nations that harbor terrorists, whether or not connected to September 11. *See* John Lancaster & Helen Dewar, *Congress Clears Use of Force, $40 Billion in Emergency Aid*, WASH. POST, Sept. 15, 2001, at A4; *see also* 147 CONG. REC. S9949 (daily ed. Oct. 1, 2001) (statement of Sen. Byrd) ("[T]he use of force authority granted to the President extends only to the perpetrators of the September 11 attack. It was not the intent of Congress to give the President unbridled authority . . . to wage war against terrorism writ large . . . ."); *id.* at S9951 (statement of Sen. Levin) (making a similar point).

The proposed White House resolution evidently stated that the President was authorized to use force not only against those countries and entities responsible for the September 11 attacks, but also "to deter and pre-empt any future acts of terrorism or aggression against the United States." 147 CONG. REC. S9951 (daily ed. Oct. 1, 2001) (reprinting the text of the proposed White House resolution). In this Resolution, moreover, Congress studiously avoided use of the word "war." Representative Conyers, for example, stated that "[b]y not declaring war, the resolution preserves our precious civil liberties" and that "[t]his is important because declarations of war trigger broad statutes that not only criminalize interference with troops and recruitment but also authorize the President to apprehend 'alien enemies.'" 147 CONG. REC. H5638, H5680 (daily ed. Sept. 14, 2001) (statement of Rep. Conyers); *see also id.* at H5653 (statement of Rep. Barr) (arguing that "[w]e need a declaration of war" from Congress to "[g]ive the President the tools, the absolute flexibility he needs").

There is simply no warrant for stretching the language of this statute in a way that Congress itself did not want to stretch it, particularly when its plain text rebels against that interpretation.

Absent specific Congressional authority, the most that Article 21 and Quirin may be cited for is that the President as Commander-in-Chief may try by military commission those persons that are subject to military commission under the Laws of War. As Colonel Winthrop sets forth in his treaties *Military Law and Precedents,* the Laws of War have historically granted military commission's personal jurisdiction over following persons.

> "1) individuals of the enemy's army who have been guilty of illegitimate warfare or other offenses in violation of the laws of war; 2) inhabitants of enemy's country occupied and held by the right of conquest; 3) inhabitants of places or districts under martial law; or 4) officers and soldiers of our own army, or person serving with it in the filed, who, in time of war, become chargeable with crimes or offenses not cognizable, or triable, by the criminal courts or under the Articles of war." William Winthrop, *Military Law and Precedents*, reprinted Beard Books, 2000.

Of the reasons set forth only an individual of an enemy's army is applicable to Mr. Hamdan. Mr. Hamdan, however, at no relevant time served in a martial capacity either with Al Qaeda or personally to Usama Bin Laden. Instead Mr. Hamdan worked solely as a civilian driver in a personal capacity to Usama Bin Laden, as such he cannot be said to be a member of an enemy army or force. Rather he is a civilian and not subject to the jurisdiction of a military commission.

Nor can the fact that Mr. Hamdan is charged as a supporter of Al Qaeda that conspired with enemy forces to commit war crimes confer jurisdiction as pointed out by Colonel Winthrop "it may be added that the jurisdiction of the military commission should be restricted to cases of offense consisting in over acts, i.e. in unlawful commissions or actual attempts to commit, and

not in intentions merely. Thus what would justify in war a precautionary arrest might not always justify a trial as for a specific offense." Id.

The Prosecution asserts that this motion would require a trial on the facts before the actual trial date occurs. This is a non sequitor. The only way this commission can proceed is if it has jurisdiction, and the Prosecution must *prove* jurisdiction before it can haul someone before this commission. Without such proof, anyone of the 5 billion people on the planet, even possibly an American citizen, could be charged before this commission, and forced to go through a painful and debilitating pre-trial incarceration and trial. There is absolutely no warrant for this, which is why courts have consistently and carefully policed personal jurisdiction *before* trial.

5. Files attached.

Accused affidavit of 9 February 2004

6. Oral Argument. The Defense position remains the same, please see D22.

7. Legal Authority Cited.

a. Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004)

b. Authorization for Use of Military Force, Pub. L. 107-40 section 1-2, 115 Stat. 224 (2001) ("AUMF")

c. John Lancaster & Helen Dewar, *Congress Clears Use of Force, $40 Billion in Emergency Aid*, WASH. POST, Sept. 15, 2001

d. 147 CONG. REC. S9949 (daily ed. Oct. 1, 2001)

e. 147 CONG. REC. S9951 (daily ed. Oct. 1, 2001)

f. 147 CONG. REC. H5638 (daily ed. Sept. 14, 2001)

g. William Winthrop, *Military Law and Precedents*, reprinted Beard Books, 2000

8. Witnesses. The Defense position remains the same, please see D22.

9. Additional Information. None.

CHARLES D. SWIFT
Detailed Defense Counsel

UNITED STATES NAVAL STATION:
GUANTANAMO BAY, CUBA:

AFFIDAVIT

I, Salim Ahmed Salim Hamdan, having been duly sworn, states and deposes as follows:

اسمي سالم احمد سالم حمدان وانا مواطن يمني وانا ايضا معروف باسم صقر. ولدت في قرية الخريبة في محافظة حضرموت في سنة 1969 تقريبا وفي سنة 1980 تقريبا انتقلت الى مدينة مكلا حيث سكنت مع ناس اقارب وشغلت في عمل موقت حتى سنة 1990. انتقلت الى العاصمة صنعاء وعمري 20 سنة تقريبا حيث استمريت في البحث عن عمل او وظيفة واشتغلت في اعمال مختلفة ولم انجح في البحث عن وظيفة وبقيت في اعمال مختلفة حتى سنة 1996. والتقيت شخص اسموه علي اليافعي الذي يدور عن ناس ليساعد المسلمين الذين يقاومون الشيوعيين في تاجيكيستان وبعد عدة لقاءات وافقت معه وافقت على الذهاب الى تاجيكيستان ليساعد في المسلمين هناك في المقاومة. سافرت الى باكستان بالطائرة وبعدها الى افغانستان بالسيارة حيث التقيت مع مسلمين اخرين وهم في طريقتهم الى تاخيكيستان الا ان وصلنا الى بدخشان وبعدها كان برجل. ولكن قوات الشيوعيين الموجودة هناك منعونا من الاقتراب للحدود وايضا الطقس كان غير جيد. وبعدها رجعت الى جلال اباد والتقيت مع مهند وقلت له اسافر الى اليمن وهو سالني لماذة؟ وهو قال لي لا توجد لك وظيفة او عمل في اليمن ولكن تبقى هنا يوجد عمل هنا وهي ان تعمل سائق وهو ذهب بي الى عند اسامة بن لادن و هو اعطى لي العمل كسائق في مزرعة اخذ العمال من القرية الى المزرعة ثم الى القرية وبعد 8 اشهور طلب مني اسامة ان اعمل عنده كسائق اخذه الى اماكن الذي يريده. خلال فترة عملي مع بن لادن رجعت الى اليمن مرتين. المرة الاولى كانت في سنة 1998 بهدف الزواج والثانية سافرت الى اليمن للحضور زواج اخو زوجتي وللهدف ذهابي الى الحج. في شهر فبراير 2001 رجعت الى افغانستان لعملي الوظيفة كسائق واستمريت في العمل الى ان بدء هجوم الحلف الشمالي على المدينة التى اسكن فيها. واخر مرة كنت مع بن لادن في كابل. سمعت ان التحالف الشمالي سوف يهجم على مدينة قندهار التى فيها زوجتي بنتي وبيتي فحفت على زوجتي وهي حامل وقررت ان ارجع اليهم وطلبت منه الذهاب الى قندهار ومهما كان جاوبه لي بالموافقة او الرفض ساذهب الى زوجتي. كنت قلق جدا على سلامتهم وقررت ان اوصلهم الى باكستان وقررت استئجار سيارة لاخذ عائلتي الى باكستان وبعد ان وصلت عائلتي الى باكستان حاولت الرجوع الى افغانستان بهدف عودة السيارة الى صاحبها واكي ابيع اشياء و اغراض البيت الشخصية وبعد ذلك ارجع الى زوجتي ونسافر الى اليمن. ولكن في طريقة عودتي مسكوني جنود من الملك السابق ظاهر شاه للافغانستان باحثين عن العرب ليبيعوهم الى الامريكان. عندما مسكوني قد مسكوا عرب اخر قبلي واطلقوا النار عليه وقتلوه. حاولت ان اهرب من المكان ولكن لم انجح في الهرب ومسكوني ثانية وربطوا يديي ورجلي من خلف مثل حيوان بسلك كهرباي وشدوه علي بقوة حتى قطع جسمي واخذوني الى بيت عندهم. وفي اليوم الثاني اخذوني الى بيت اخر لفترة مدتها 7 ايام تقريبا، حيث حقق معي رجل بملابس عسكري وقال لي انه امريكي. الجنود الافغان قالوا لي ان الامريكان دفعوا لهم مبلغ 5000 دولار مقابلني لكي ياخذوني انا. واحد من الجنود الافغان اراد ان يرى الدولارات وفي هذه اللحظة انا رايت الدولارات.

من خلال حبسي عند الامريكان انا ساعدتهم وتعاونت معهم بكل شيء وبرغم من ان تعاونت مه الامريكان اذاوني نفسيا وجسديا. وظهري في حالة سيئة بسبب العمل البنائي في اليمن. انا اخبرت للمحققين الامريكان عن حالي ولكن انتقلوني في وضع سبب لي الم شديد على ظهري ورجلي وكانت ملابسي خفيفة وكان الجو برد جدا, كان جليد. اجبروني الجلوس بدون التحرك للايام كاملة. وفي التحقيقات عندما ليس لي علم بالموضوع التحقيق. ضربوني مع الرجل ومع ايديهم بعدما خرج المحقق واخذوني الى مكاني مع المسجونين الاخرين. واذا لم اخذهم الى مكان بن لادن هددوني بتعذيب وبقتل وبسجن عندما ليس لي علم عن موضوع الاسالة. وكان من اساليب التهديد وضع السلاح المسدس على الطاولة امامي ويرفع المسدس امامي ويقول لي انظر اليه المسدس ما رايك؟ وذهبت معهم الى الاماكن التي سكن فها اسامة بن لادن والتي سافر اليها كذلك. وفي شهر مايو 2002 وصلوني الى جانتانامو وسجنوني في سجن كبير مع مسجونين اخرين كثيرين. حبسوني في زنزانة منفصلة من مجموع من 48 زنزانة. هذه الزنزانات كانت مفتوح للهواء وكنت اقدر اتكلم مع الناس هناك. واعطوني 15 دقيقة مرتين في الاسبوع لاعمل تمرين جسدي في خوش حجمه 8 امتار في 7 امتار تقريبا وكان ياتي الامام المسلم ويتكلم مع الناس الاخرين ومع اي شخص يريد ان يتكلم معه وكلمت انا معه ايضا وكان في قدري ان اسمع الى المؤذن للصلاة. وفي معسكر دلتا الذي اخبروني عنه المحققين كذلك حققوا معي مسؤلين كثيرين من المكتب التحقيقات الامريكية ومن الامن السياسي التابع للدول كثيرة وعرضوا علي صور كثيرة وسالوني عن هويتها. وقد سمحوني مرتين بان اتكلم مع زوجتي لكي اطمن عليها وانا لا اعرف اي شيء عنها بعد ان وصلتها الى باكستان ومسكوني بعدها وانا دائما في قلق وخوف عليهم. وجئني رجال من المكتب التحقيقات الامريكية و من المعسكر وكلهم قالوا لي انت لست مذنب ولم ترتكب اي جريمة. ولكن قالوا لي انهم يريدون مني ان اعطي الشهادة في محكمات ضد ناس اخرين. المحقق قال لي في حال انا موافق على ان اصبح شاهد في قدري الخروج من السجن وان اصبح مواطن امريكي. وكان مع المحقق اتفاق مكتوب وكان يريد مني ان اوقع عليه. وقررت ان لا اتفق على هذا الاتفاق لانه ليس عندي محامي يضمن لي هذا الاتفاق. وبعد ذلك حقق معي ناس كثير ومرات كثيرة جدا من جانب المكتب التحقيقات الامريكية وناس اخرين ومن ديسمبر 2003 اخذوني من معسكر دلتا انتقلوني الى معسكر ثاني في زنزانة صغيرة داخل بيت صغيرة ومن هذا الوقت لم يسمح لي فرصة لكي ارى الشمس او سماع ناس اخرين خارج البيت او اتحدث مع اشخاص اخرين. وانا الان منفصل لوحدي منذو مدة في البيت الصغير الا الحارس الموجود دائما في الغرفة. ومنحوني فرصة لاعمل تمرين جسديا 3 مرات في الاسبوع ولكن ذلك في الليل وليس في النهار واعطوني القران الكريم فقط ولم يعطوا لي الكتب الاخرة. وعندما سالت عن سبب انتقالي الى هذا المكان لم يخبروني احد الا بعد ان طلبت مترجم يتكلم اللغة العربية حيث لا اعرف اتكلم اللغة الانجليزية والحارس امامي لا يتكلم اللغة العربية. المترجم الذي ياتي في اسبوع مرتين ولكن لا يحضر الا بعد طلب شديد والحاح مني. وقال لي تذهب الى المحكمة العسكرية وسوف يوافر لي محامي وكنت اشتكي في امراض عندي في جسدي واطلب الطبيب لكي ياتي ويفحصني ولكن لا ياتي الطبيب. وعندي في جسدي الم في ظهري وفي رجلي وحكة في جسدي انتشرت بسبب عدم تعرضي الشمس. وقال لي العسكري اخبر المحامي اذا جائك بانك طلبت الطبيب ولم يحضر. وقد طلبت بعض الكتب من المكتبة وقالوا لي ان المكتبة مغلقة وانا وحيد لا اتكلم مع اي اشخاص عندي من الزنزانة ولا يوجد سجين اخر اتكلم معه.

في يوم 30 يناير التقيت بالمحامي Charles Swift الذي قال لي انه عينوه للدفاع عني في محكمة عسكرية. سالت المحامي عن التهم الموجه ضدي وهو قال لي ان ليس هناك تهم موجه ضدي لكن قال لي ان الحكومة الامريكية تفكر في ان توجه تهم مؤامرة لارتكاب هجوم ارهابية. سالت المحامي عن سبب عدم توجيه الحكومة تهم ضدي ومتى يكون تاريخ الجلسة الاولى للمحكمة. المحامي قال لي ان الحكومة تطلب مني قرار عن اتفاق يكون بيني وبينهم على ان اعترف بتهم ضدي مقابل اعقاب وحكم وقال لي المحامي كذلك انه باضافة ذلك من الاتفاق يكون لا بد ان اشهد على ناس واشخاص اخرين في محكمات اخرى ولا اعتقد اني اوافق على هذا الاتفاق لاني لم اقوم بارتكاب اي جريمة.

ان وضعي وحبسي في هذه الزنزانة الصغيرة وحيدا وطول المدة هذه لهو صعبا شديدا على نفسي واعصابي وهو اصعب من ظروف معسكر دلتا. هنا شهر واحد مثل سنة واحد. فكرت في الموافقة على الاتفاق ليخرج من هذه الزنزانة. وفي ~~اعتقادي~~ لكني مدني ولست عسكري ولست عضو في منظمة القاعدة وانا لست ارهابي وفي اعتقادي عن في حقي المحكمة المدنية بدلا من محكمة عسكري ولكن اي محكمة كان احسن من حالتي الان.

طلبت من المحامي Charles Swift ان يطلب محكمة في اسرع الوقت واعطي صلحيات له ليمثل لي كصديق في المحكمة المدنية لاني ليس لي عائلة في الولايات المتحدة وافهم ان المحامي Neal Katyal ايضا سيمثل لي امام المحكمة.

هذا التقرير مكتوب بيدي وطبعه بالغة العربية المترجم تابع لفرقة الدفاع عني وهو Charles Schmitz وقد راجعت النسخة المطبوعة ووافق على صحتها

Further your affiant sayeth not.

ضرار ٩-٢-٢٠٠٤

Salim Ahmed Salim Hamdan

Subscribed and sworn before
Me this 9th day of February 2004

JASON E. KREINHOP
Legalman First Class, United States Navy
Notary Public and counsel for the United States
10 U.S.C. 10 44a

Exhibit B

UNITED STATES NAVAL STATION:
GUANTANAMO BAY, CUBA:

AFFIDAVIT

I, Salim Ahmed Salim Hamdan, having been duly sworn, states and deposes as follows:

My name is Salem Ahmed Salem Hamdan and I am a Yemeni citizen. I have been known by the name Saqr. I was born in the village of Khoreiba in the governate of Hadhramout in approximately 1969. In 1980, I moved to Makula, where I lived with relatives and worked odd jobs in the city from age 10 until the age of about 20. From the age of 20 I moved to the capital of Yemen, Sa'ana, where I continued to work and seek better employment opportunities, I was unable to find permanent employment, but continued to work odd jobs. In 1996, I was approached by Ali Al-Yafi who was seeking men to aid Muslims struggling against the communists in Tajikistan. After several meetings I agreed to go with him to Tajikistan to aid my fellow Muslims in their struggle. I traveled to Pakistan and then to Afghanistan where I met with other Muslims who were going to Tajikistan. We traveled by plane then by car and then by foot until we got to Badashaw, the forces at Tajikistan wouldn't allow us to go further, and the weather in the mountains was bad, we turned around and left for Kabul. In Kabul, I told Muhannad, that I wanted to return to Yemen. He asked me why. He said there was no work in Yemen and I should stay here, because he has a job for me. He told me he knew of a job as a driver for me. He took me to a farm in Jalalabad, where I met Osama Bin Laden. Osama Bin Laden offered me a job as a driver on a farm he owned, bringing Afghanis workers from the local village to work and back again. After about seven (7) months Osama Bin Laden began to have me drive him to various places. During the period that I worked for Osama Bin Laden, I traveled back to Yemen twice, the first time in 1998 was to get married, then in August 2000, I went back to Yemen to attend my brother-in-laws wedding and to attend the pilgrimage to the Hajj. In February 2001, I returned to Afghanistan with my wife to continue work as a driver. I was still working as a driver in October 2001, when the Northern Alliance with American support began its offensive. The last time I was with Bin Laden was in Kabul. I heard that the Northern Alliance was attacking Kandahar where my wife and daughter were living and I feared for my wife. I decided to return to them and

I asked him [Bin Laden] if I could go to Kandahar but regardless of his response, affirmative or negative, I was going to my wife. I was worried about their safety and I decided to take them to Pakistan. I decided to borrow a car to drive my family to Pakistan. After I had taken my family to Pakistan, I tried to return to Afghanistan to return the car to its owner and to return to my house to sell my belongings to get money in order to return with my family to Yemen. But while trying to return, I was stopped by soldiers loyal to the former king Zahir Shah of Afghanistan, who were looking for Arabs to sell to American forces. When they stopped me they had already taken another Arab who they shot and killed. I tried to flee, but I failed and they captured me again. They tied my hands and feet behind me like an animal with electrical wire and they tied me so tight that the wire cut me. They took me to a house. After a day, I was taken to another house for seven (7) days where I was questioned by a man in a military uniform, who spoke Arabic and said he was an American. The Afghan soldiers told me they had gotten $5,000.00 from the Americans for me, one of the guards who was at the house wanted to see dollars. When the guard showed the money, I saw it too.

While in Afghanistan, I helped and cooperated with the Americans in every way. Despite the fact that I cooperated with the Americans, I was physically abused. I have a bad back from work in Yemen. I told my investigators of this condition but was transported in positions that caused me physical agony in my back. I was dressed in only bright blue overalls in sub-freezing temperatures and was very cold. I was made to sit motionless on benches with other prisoners for days. When I did not know the answers to the investigators questions, the soldiers would strike me with their fists and kick me with their feet, after the investigator left, before they took me back with the other prisoners. When I took them places I had driven Osama Bin Laden, they would threaten me with death, torture or prison when I did not know the answers to their questions. One of their methods to threaten was to put a pistol on the table in front of me and show me the gun and asked, "What do you think?" I went with them to places that Bin Laden lived and where he traveled.

In June 2002, I was flown to Guantanamo Bay, Cuba. In Guantanamo Bay, Cuba, I was put in a large prison with many other men. I was held in a single cell in a cellblock of

48 men. These cells were open to the air and I could talk to the other men. I was given 15 minutes a week of exercise in a 8 meter by 7 meter fenced in area. A Muslim cleric would come and talk to people and I talked with and I could hear the calls to prayer. At Camp Delta, I was questioned by many people from the FBI and Arab police forces. They showed me pictures and asked me to identify the people. On two (2) occasions they allowed me to call my wife on a portable telephone and speak with her and to calm her. I had not heard from her since I left her in Pakistan and I was worried about her. Men from the FBI and investigators from the camp told me that he did not think I had committed any crime and that I am not guilty, but that he wanted me to be a witness against others. He said that if I was willing to be a witness, I could leave Guantanamo Bay and become an American citizen. He let me call my wife again to discuss it. The FBI agent had a written agreement he wanted me to sign. I decided not to because I did not have a lawyer to guarantee that the agreement would be honored. After that I was questioned many times by the FBI and other people.

In December 2003, I was moved from Camp Delta, and put in a new cell, this cell was enclosed in a house, and from that time I have not been permitted to see the sun or hear other people outside the house or talk with other people. I am alone except for the guard in the house. They allow me to exercise three times per week but only at night and not in the day. They gave me the Quran only but not other books. When I asked why I had been moved to this place no one told me anything until I asked for a translator because I do not speak English and the guard does not speak Arabic. The translator is supposed to come twice a week but the translator did not come except when I demanded urgently. He told me that I will have a military trial and will be given a lawyer and I complained that I have medical problems and I asked for a doctor to come check me but he did not come. I have pains in my back and leg and I itch from lack of sunshine. The soldier told me to inform my lawyer when he comes that you asked for a doctor and he did not come. I asked for books from the library, but was told it was closed. I am alone and I do not talk with anyone in my cell because there is no one else to talk to.

On January 30th, I met LCDR Charles Swift, who told me that he had been assigned to defend me before a military commission. I asked my lawyer what the charges against me

were. LCDR Swift told me that no charges against me, but the government sent him a letter that the charges contemplated were conspiracy to commit terrorism. I asked my lawyer why the government had not prepared the charges and when my trial would be.

LCDR Swift told me that the government letter demanded to know whether I would plead guilty to unspecified charges in exchange for a guaranteed sentence. LCDR Swift also told me that in addition to pleading guilty, that I would have to be a witness for the United States as part of the agreement. I do not believe I should plea guilty, because I do not believe I have committed any crime.

Being held in the cell where I am now is very hard, much harder than Camp Delta. One month is like a year here, and I have considered pleading guilty in order to get out of here. I believe that I am a civilian, I have never been a member of Al-Qaeda and I am not a terrorist and I believe I should have a civilian trial, but any trial is better than what I have now. I have asked LCDR Swift to seek a trial as fast as possible and authorized him to act as my next friend in the civilian court, because I have no relatives in the United States. I understand that Professor Neal Kytal will also represent me. My translator, Mr. Charles Schmitz, prepared this statement in Arabic, which I have read and understand to be the truth. My translator, Mr. Schmitz has prepared an English version of my Arabic hand-written statement and based on his review, I have signed and swear to its authenticity.

Further your affiant sayeth not.

Salim Ahmed Salim Hamdan

Subscribed and sworn before
Me this 9th day of February 2004

JASON E. KREINHOP
Legalman First Class, United States Navy
Notary Public and counsel for the United States
10 U.S.C. 10 44a

UNITED STATES OF AMERICA	)
	)
	) DEFENSE MOTION TO
v.	) DISMISS FOR VIOLATION OF
	) COMMON ARTICLE 3 OF THE
	) GENEVA CONVENTIONS
	)
	)
SALIM AHMED HAMDAN	) 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 prisoner by indigenous Afghanistan forces in late November 2001, where upon he was subsequently turned over to U.S. personnel for a bounty 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 20 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 [redacted] 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/pdffiles/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/adtl.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

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

---

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*, 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.

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 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

---

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

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 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 addition 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: David Brahms, Anne Slaughter, Derek Jinks, Ryan Goodman, Carlos Vasquez, Louise Doswald-Beck, Guy S. Goodwin-Gil, Frits Kalshoven, Marco Sassoli, Doug Cassell, and/or Bridget Arimond (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.

CHARLES D. SWIFT
Lieutenant Commander, JAGC, US Navy
Detailed Military Defense Counsel
Office of Military Commissions

NEAL KATYAL
Defense Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SALIM AHMED HAMDAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Civil Action No. 04-CV-1519 (JR)
DONALD H. RUMSFELD,	)	
	)	Judge James Robinson
Secretary of Defense, *et al.*,	)	
	)	
Respondents.	)	

BRIEF AS AMICUS CURIAE OF LOUISE DOSWALD-BECK, GUY S. GOODWIN-GILL, FRITS KALSHOVEN, MARCO SASSÒLI, AND THE CENTER FOR INTERNATIONAL HUMAN RIGHTS OF NORTHWESTERN UNIVERSITY SCHOOL OF LAW IN SUPPORT OF SALIM AHMED HAMDAN'S PETITION FOR WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. § 1361 OR, IN THE ALTERNATIVE, WRIT OF HABEAS CORPUS

Douglass Cassel
Bridget Arimond
CENTER FOR INTERNATIONAL HUMAN RIGHTS
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
357 E. Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-8579

David R. Berz (D.C. Bar No. 182105)
Lisa R. Fine (D.C. Bar No. 466843)
WEIL, GOTSHAL & MANGES LLP
1501 K Street, NW, Suite 100
Washington, D.C. 20005
Phone: (202) 682-7000

September 30, 2004

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

ARGUMENT 2

I. APPLICABLE INTERNATIONAL NORMS 4

A. Complementarity 11

B. Most Favorable Protection 13

C. Territorial Scope 14

II. THE MILITARY COMMISSION PROCEEDINGS AGAINST PETITIONER HAMDAN VIOLATE INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW 15

A. The Military Commissions Fail to Satisfy Minimum Requirements of Institutional Legitimacy 15

1. The Military Commissions Are Not Established By Law 17

2. The Military Commissions Are Not Independent and Impartial 19

B. The Military Commission Pre-Trial and Trial Procedures Fail to Satisfy Fundamental Fair Trial Requirements 24

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. 24

2. Coercive Conditions at Guantanamo Violate the Right Not to Be Compelled to Testify Against Oneself or to Confess Guilt. 26

3. Restrictions on Legal Assistance Violate the Right to Counsel. 29

4. Monitoring Attorney-Client Communications Violates the Right to Communicate With Counsel in Private. 30

5. Exclusion from Secret Hearings Violates the Rights of the Accused to be Tried in His Presence and to Assistance of Counsel. 32

6. Denials of Secret Documents Violate the Rights to Adequate Facilities for the Defense and to Equality of Arms. 33

7. Denial of Judicial Appeal Violates the Right to Review By a Higher Tribunal. ... 34

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. 35

C. U.S. Military Commissions Impermissibly Discriminate Against Non-U.S.Nationals. 35

CONCLUSION 38

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.

Louise Doswald-Beck is a Professor of the Graduate Institute of International Studies and Director of the University Centre for International Humanitarian Law in Geneva, Switzerland. She was a legal adviser at the International Committee of the Red Cross from 1987 to 2001, and became Head of the Legal Division in 1998. She has written extensively on international humanitarian and human rights law, and played a major role in the negotiations leading to various international legal instruments.

Guy S. Goodwin-Gill is Senior Research Fellow, All Souls College, University of Osford, where he was formerly Professor of International Refugee Law. He served as Legal Advisor in the Office of the United Nations High Commissioner for Refugees from 1976-1988. He founded the International Journal of Refugee Law and was Editor-in-Chief from 1989-2001.

Frits Kalshoven is Professor Emeritus of Public International Law and International Humanitarian Law at the University of Leiden. He took part in the diplomatic conference on "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts" that negotiated the 1977 Protocols to the Geneva Conventions of 1949, and was the Chairman of the United Nations Commission of Experts to investigate war crimes committed in the former Yugoslavia. In 2002, he was awarded the Henry Dunant Medal of the International Red Cross and Red Crescent Movement for his continued effort toward improved knowledge of and respect for international humanitarian law.

Marco Sassòli is Professor of International Law at the University of Geneva, Switzerland and Associate Professor at the University of Quebec in Montreal. He was recently elected President of the Governing Council of the University Centre for International Humanitarian Law in Geneva, Switzerland, and is a former Deputy Head of the International Committee of the Red Cross' Legal Division.

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; *McCullogh 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 153[30] 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 138[34] 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.unhchr.ch/huricane/huricane.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 cij.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.ictr.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. Code[58] – 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); *Grieves 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:

> [redacted]
> of his Marine reservists, [redacted] in the attack on the World Trade Center. Army Lt. Col [redacted] 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.

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 9.3[106] 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 commission[109] – 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 intra*note 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.

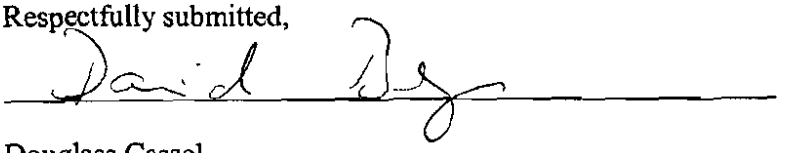
---

[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,



Douglass Cassel
Bridget Arimond
CENTER FOR INTERNATIONAL HUMAN RIGHTS
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
357 E. Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-8579

David R. Berz (D.C. Bar No. 182105)
Lisa R. Fine (D.C. Bar No. 466843)
WEIL, GOTSHAL & MANGES LLP
1501 K Street, NW, Suite 100
Washington, D.C. 20005
Phone: (202) 682-7000

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.

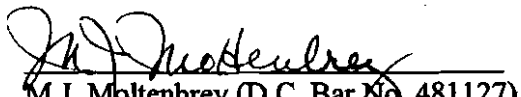
4. This Motion is unopposed. Counsel for *Amici* has contacted counsel for Petitioner and Respondents and all have consented to the *Amici* appearing and filing their Memorandum of Law.

Conclusion

For the foregoing reasons, the United Kingdom and European Parlimentarians 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,



M.J. Moltenbrey (D.C. Bar No. 481127)
FRESHFIELDS BRUCKHAUS DERINGER
701 Pennsylvania Avenue, N.W., Suite 600
Washington, DC 20004-2692
(202) 777-4500

Attorneys for *Amici Curiae*

Of Counsel:

Ralph Wilde
Law Department, University College
University of London
Endsleigh Gardens
London WC1H 0EG

Paul Lomas
Elizabeth Snodgrass
Briana Young
Noah Rubins
FRESHFIELDS BRUCKHAUS
DERINGER
65 Fleet Street
London EC4Y 1HS

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

Of Counsel:

Ralph Wilde
Law Department, University College
University of London
Endsleigh Gardens
London WC1H 0EG

Paul Lomas
Elizabeth Snodgrass
Briana Young
Noah Rubins
FRESHFIELDS BRUCKHAUS DERINGER
65 Fleet Street
London EC4Y 1HS

M.J. Moltenbrey (D.C. Bar No. 481127)
FRESHFIELDS BRUCKHAUS DERINGER
701 Pennsylvania Avenue, N.W., Suite 600
Washington, DC 20004-2692
(202) 777-4500

Attorneys for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES III

IDENTITY AND INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE COURT IS CHARGED WITH ENFORCING THE UNITED STATES' INTERNATIONAL LEGAL OBLIGATIONS 6
- A. International Law Is Part Of The Law Of The United States, And It Is To Be Ascertained And Applied By This Court. 6
- B. Respect For International Law Reflects The United States' Tradition And Serves The United States' Interests. 9

II. INTERNATIONAL LAW APPLIES TO THE CONDUCT OF THE UNITED STATES AT GUANTANAMO BAY. 10
- A. International Law, Including International Human Rights Law, Applies To The Conduct Of The United States Anywhere In The World. 11
- B. International Law Applies In Times Of Armed Conflict And National Emergency. 13
- C. International Law Applies In Respect Of Alleged Al Qaeda Members 15

III. DETAINEES AT GUANTANAMO BAY ARE ENTITLED TO BASIC STANDARDS OF TREATMENT ESTABLISHED AT INTERNATIONAL LAW. 16
- A. The United States Is Bound By The International Covenant On Civil And Political Rights. 16
- B. The United States Is Bound By The Torture Convention. 18
- C. The United States Is Bound Not To Defeat The Object And Purpose Of The American Convention on Human Rights 20
- D. Customary International Law Obliges The United States To Respect Fundamental Human Rights. 20
- E. International Humanitarian Law And The Geneva Conventions Comprehensively Protect Individuals In Armed Conflict 22

IV. THE MILITARY COMMISSION SYSTEM FAILS TO AFFORD DETAINEES THE DUE PROCESS TO WHICH THEY ARE ENTITLED UNDER INTERNATIONAL LAW. 26
- A. The Military Commission System Violates Detainees' Right To An Impartial Determination Of Their Guilt Or Innocence. 26
- B. Military Commissions Violate International Law Because There Is No Appeal To An Independent Judicial Body. 31
- C. International Law Requires That Detainees Be Allowed A Speedy Trial 33
- D. Military Commissions Violate The Right To A Fair Trial Because They Admit Evidence Obtained Through Torture. 36

E. Military Commissions Are Discriminatory Because They Subject Foreign Citizens To Human Rights Violations That United States Citizens Do Not Suffer. 38

CONCLUSION 41

TABLE OF AUTHORITIES

United States Cases

Breard v. *Greene*, 523 U.S. 371 (1998) 9

Doe v. *Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001) 21

F. Hoffman-La Roche Ltd. v. *Empagran S.A.*, __ U.S. __, 124 S. Ct. 2359 (2004) 7

Fujitsu Ltd. v. *Federal Express Corp.*, 247 F.3d 423 (2d Cir. 2001) 9

Haynes v. *State of Washington*, 373 U.S. 503 (1963) 37

Kadic v. *Karadzic*, 70 F.3d 232 (2nd Cir. 1995) 35

Lawrence v. *Texas*, 539 U.S. 558 (2003) 7

Martinez v. *City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998) 21, 35

Murray v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) 7

The Paquete Habana, 175 U.S. 677 (1900) 6

Rasul v. *Bush*, __ U.S. __, 124 S. Ct. 2686 (2004) ..... *passim*

Sosa v. *Alvarez-Machain*, __ U.S. __, 124 S. Ct. 2739 (2004) 6, 7

Thompson v. *Oklahoma*, 487 U.S. 815 (1988) 20

United States v. *Ballesteros*, 71 F.3d 754 (9th Cir. 1995) 21

U'Ren v. *Bagley*, 245 P. 1074 (Or. 1926) 30

Wong Sun v. *United States*, 371 U.S. 471 (1963) 37

Constitution

U.S. Const., art. VI, cl.2 ..... 6, 17

U.S. Const., Fifth Amendment 19

U.S. Const., Eighth Amendment 19

U.S. Const., Fourteenth Amendment 19

Executive Material

Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997) 8

Dept. of Defense announcement of 14 July 2004 "Yemeni Detainee to Face Military Commission" 34

Department of Defense Briefing, 22 January 2002, available at http://www.globalsecurity.org/military/library/news/2002/01/mil-020122-usia01.htm 29

Department of Defense Directive 5105.70 27

"Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism", Military Order of 13 November 2001 31

Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (1998) 17, 19

Letter from William J. Haynes II, Legal Counsel of the U.S. Department of Defense, to the Honourable Patrick J. Leahy, dated June 25, 2003, available online at http://www.hrw.org/press/2003/06/letter-to-leahy.pdf. 36

Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense from Office of Legal Counsel, U.S. Department of Justice, dated January 22, 2002 24

Military Commission Instruction No. 9 28

Military Commission Order No. 1 of March 12, 2002 ..... 27, 28, 36

Press Briefing of Senior Department of Defence Official and Senior Military Officer, July 3 2004, available at http://www.defenselink.mil/transcripts/2003/tr20030703-0323.html 29

Report on the forthcoming Nuremberg Trials by Robert H. Jackson to President Harry S Truman, June 7, 1945, Dep't St. Bull. June 10, 1945, at 1071 3

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 29

Legislative Materials

Declaration to the ICCPR, 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992) 17

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.) 9

Foreign and International Cases

A, B, C, D, E, F, G, H, Mahmoud Abu Rideh Jamal Ajouaou v. *Secretary of State for the Home Department* [2004] EWCA 1123 37

Bankovic v. *Belgium and 16 Other Contracting States*, 11 B.H.R.C. 435 (2001) 12

Barcelona Traction Light and Power (Belg. v. Spain) 1996 I.C.J. Rep. 6 40

Brown v. *Jamaica*, H.R.C. Communication N° 775/1997 of 23 March 1999 35

Cagas v. *The Philippines*, H.R.C. Communication N° 788/1997 of 23 October 2001 34

Casariego v. *Uruguay*, No. 56/1979, Views of the H.R.C., CPR/C/13/D/ 56/1979 (29 July 1981) 11

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) 12, 14

Cooper v. *United Kingdom*, (2004) 39 E.H.R.R. 8 30

Cyprus v. *Turkey*, 13 DR 85 (1977) 12

Findlay v. *United Kingdom*, (1997) 24 E.H.R.R. 221 ..... 29, 30, 31

Francis v. *Trinidad and Tobago*, H.R.C. Communication N° 899/1999 of 25 July 2002 35

G.K. v. *Switzerland*, Committee Against Torture Communication N° 219/2001 of 12 May 2003 37

Grieves v. *United Kingdom*, (2004) 39 E.H.R.R. 2 30

Hauschildt v. *Denmark*, (1990) 12 E.H.R.R. 266 30

Hill v. *Spain*, H.R.C. Communication N° 526/1993 of 23 June 1997 32

LaGrand (Ger. v. U.S.) 2001 I.C.J. 1 (Judgment of 27 June) 9

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, 2004 I.C.J. (Advisory Opinion of 9 July) available at http://www.icj-cij.org/icjwww/idecisions.htm 11, 14

Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (Advisory Opinion of June 24) 10, 14, 22

Liversage v. *Andersen*, 1942 AC 206 3

Loizidou v. *Turkey*, 23 E.H.R.R. 513 (1996) 12

López Burgos v. *Uruguay*, No. 52/1979, Views of the H.R.C., CCPR/C/13/ D/52/1979 (29 July 1981).. ..... 11, 13

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.) 1986 I.C.J. 14 (Judgment of June 27)) 24

Ocalan v. *Turkey*, 37 E.H.R.R. 10 (2003) 12

Paul v. *Guyana*, H.R.C. Communication N° 728/1996 of 21 December 2001 37

Palau-Martinez v. *France*, European Court of Human Rights, Application No. 64927/01 (Judgment of 16 March 2004) available at http://www.echr.coe.int/Eng/judgments.htm 39

Prosecutor v. *Furundzija*, Case No. IT-95-17/1 (ICTY Decision of Dec. 10, 1998) available at http://www.un.org/icty/furundzija/trialc2/judgement/index.htm 36

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 32

Prosecutor v. *Tadic*, Case No. 160 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber, Oct. 2, 1995) available at http://www.un.org/icty/tadic/appeal/decision-e/51002.htm 24, 25, 26

Roach and Pinkerton, Case No. 3/87 (Inter Am. C.H.R. Decision of 27 March 1987) 20

Sextus v. *Trinidad and Tobago*, H.R.C. Communication N° 818/1998 of 16 July 2001 35

Smith v. *Jamaica*, H.R.C. Communication N° 282/1988 of 31 March 1993 33

Vazquez v. *Spain*, H.R.C. Communication N° 701/1996 of 11 August 2000 32

Veznedaroglu v. *Turkey*, European Court of Human Rights, Application No. 32357/96 (Decision of 11 April 2000) available at http://www.echr.coe.int/Eng/judgments.htm .. 37

Treaties and Other International Instruments

American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 ..... *passim*

American Declaration of the Rights and Duties of Man
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) 12, 20

Convention against Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment, Nov. 20, 1994, 1465 U.N.T.S. 85 ..... *passim*

European Convention for the Protection of Human Rights and
Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 ..... *passim*

Geneva Convention Relative to the Treatment of Prisoners of War,
Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362 ..... *passim*

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 22

International Covenant on Civil and Political Rights,
Dec. 19, 1966, 999 U.N.T.S. 171 ..... *passim*

Protocol Additional to the Geneva Conventions of 12 August 1949, and
relating to the Protection of Victims of International Armed Conflicts
(Protocol 1), adopted June 8, 1977, 1125 U.N.T.S. 3 13

Statute of the International Court of Justice, 59 Stat. 1055, T.S. 993, 3
Bevans 1179 ..... 4, 6

Vienna Convention on the Law of Treaties, May 23, 1969,
1155 U.N.T.S. 331 ..... *passim*

Other International Materials

Decision of the Human Rights Committee under the Optional Protocol to the
ICCPR, U.N. Doc. No. CCPR/C/59/D/601/1994 39

Report submitted by the United States of America under Article 40 of the
ICCPR, Aug., 24 1994 ..... 17, 21

United Nations Human Rights Committee, General Comment No. 6(16), U.N.
Doc. CCPR/C/21 Rev.1 33

United Nations Human Rights Committee, General Comment No. 8(16), U.N.
Doc. HRI/Gen/1/Rev.7 ..... 33, 34

United Nations Human Rights Committee, General Comment No. 13(21), U.N. Doc. HRI/Gen/1/Rev.7 34

United Nations Human Rights Committee, General Comment No. 15(27), U.N. Doc. HRI/Gen/1/Rev.7 39

United Nations Human Rights Committee, General Comment No. 20, U.N. Doc. HRI/Gen/1/Rev.7 37

United Nations Human Rights Committee, General Comment No. 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) 15

United Nations International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 82, U.N. GAOR, 56th Sess., Supp. No. 10 and Corriegendum, U.N. Doc. A/56/83 (2001) 8

Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810 ..... *passim*

Other Authorities

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

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, *Rasul* v. *Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-343 and 03-334) 1

Brief of Human Rights Institute of the International Bar Association as *Amicus Curiae* in Support of Petitioners, *Rasul* v. *Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343) 10

Ian Brownlie, Principles of Public International Law (6th ed. 2003) 40

Andrew Buncombe, "Shocking Guantanamo abuses revealed" The Independent, 4 August 2004 38

James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2002) 8

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 38

International Bar Association, "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

Le Monde, September 13, 2001: "Nous sommes tous americains" 3

Leslie C. Green, The Contemporary Law of Armed Conflict 29 (2d ed. 2000) 9

Paul Waugh, "Tarek's Story", The Evening Standard, 3 Aug. 2004 38

President Kennedy, Inaugural Address, 20 January 1961, available at
http://www.bartleby.com/124/pres56.html 3

Restatement (Third) of the Foreign Relations Law of the United
States (1987) 6, 9

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* group[1] 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, 1994, 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 law[9] 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 Corriegendum, 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 VCLOT, 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); *Casariego* 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 Covenant[22] 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 as 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 *Grieves* 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 it 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; *Veznedaroglu* 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.

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

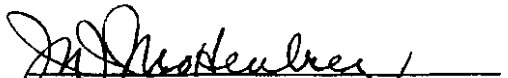
///

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,



M.J. Moltenbrey (D.C. Bar No. 481127)
FRESHFIELDS BRUCKHAUS DERINGER
701 Pennsylvania Avenue, N.W., Suite 600
Washington, DC 20004-2692
(202) 777-4500

Attorneys for *Amici Curiae*

Of Counsel:

Ralph Wilde
Law Department, University College
University of London
Endsleigh Gardens
London WC1H 0EG

Paul Lomas
Elizabeth Snodgrass
Briana Young
Noah Rubins
FRESHFIELDS BRUCKHAUS DERINGER
65 Fleet Street
London EC4Y 1HS

Appendix

LIST OF AMICI

Rt Hon the Lord Ackner

The Lord Ahmed

The Lord Alderdice

Rt Hon the Lord Archer of Sandwell, QC

The Lord Avebury

The Lord Bhatia, OBE

The Lord Borrie, QC

The Lord Bowness, CBE, DL

The Lord Brennan, QC

Rt Hon the Lord Bridge of Harwich

Rt Hon the Lord Brittan of Spennithorne, QC

Rt Hon the Lord Brooke of Sutton Mandeville, CH, PC

The Lord Carlile of Berriew, QC

Rt Hon the Lord Carlisle of Bucklow, QC, DL

The Lord Clarke of Hampstead, CBE

The Lord Clement-Jones, CBE

Rt Hon the Lord Clinton-Davis

The Lord Corbett of Castle Vale

The Lord Dahrendorf, KBE

Rt Hon the Lord Donaldson of Lymington

The Lord Donoughue

The Lord Faulkner of Worcester

Rt Hon the Lord Fraser of Carmyllie, QC

The Lord Freyberg

The Lord Goodhart, QC

The Baroness Greengross, OBE

The Lord Grenfell

The Lord Hannay of Chiswick, CH GCMG

The Baroness Harris of Richmond, DL

The Lord Haskins

Rt Hon the Lord Holme of Cheltenham, CBE

The Lord Hooson, QC

Rt Hon the Lord Howe of Aberavon, CH, QC

Rt Hon the Lord Hurd of Westwell, CH, CBE

The Lord Hutchinson of Lullington, QC

The Lord Hylton

Rt Hon the Lord Jauncey of Tullichettle

The Lord Joffe, CBE

The Lord Judd

The Baroness Kennedy of The Shaws, QC

Professor the Lord Layard

The Lord Lea of Crondall, OBE

Rt Hon the Lord Lloyd of Berwick, DL

Rt Hon the Lord MacKay of Clashfern, KT

The Lord McCluskey, LLD

The Baroness Maddock

The Baroness Mallalieu, QC

Rt Hon the Lord Mayhew of Twysden

The Baroness Miller of Chilthorne Domer

Rt Hon the Lord Millett

The Lord Mischon, QC, DL

Professor the Lord Morgan

The Baroness Northover

Rt Hon the Lord Oliver of Aylmerton

The Lord Peston

The Lord Phillips of Sudbury, OBE

Professor the Lord Plant

The Lord Prys-Davies

The Lord Puttnam, CBE

Rt Hon the Lord Radice

Rt Hon the Lord Rawlinson of Ewell, QC

The Lord Razzall, CBE

The Lord Rea of Eskdale

Rt Hon the Lord Renton, KBE, QC, TD, DL

The Lord Richard of Ammanford

Reverend the Baroness Richardson of Calow, OBE

The Lady Saltoun of Abernethy

The Earl of Sandwich

The Baroness Sharp of Guildford

Professor the Lord Skidelsky

The Baroness Stern, CBE

The Lord Stevenson of Coddenham, CBE

The Lord Stoddart of Swindon

The Lord Taverne, QC

The Lord Taylor of Warwick

Rt Hon the Lord Templeman, MBE

The Lord Thomas of Gresford, OBE, QC

The Lord Thomas of Swynnerton

The Baroness Thomas of Walliswood, OBE, DL

Rt Hon the Lord Thomson of Monifieth, KT

The Lord Tope, CBE

The Lord Tordoff

The Baroness Uddin

The Baroness Walmsley

The Baroness Warnock, DBE

Professor the Lord Wedderburn of Charlton, QC

The Baroness Whitaker

The Baroness Wilkins

Rt Hon the Baroness Williams of Crosby

Rt Hon the Lord Windlesham, CVO

The Lord Wright of Richmond, GCMG

Rt Rev the Lord Bishop of Chelmsford, John Warren Gladwin

Rt Rev the Lord Bishop of Coventry, Colin James Bennetts

Rt Rev Dr the Lord Bishop of Liverpool, James Jones

Rt Rev the Lord Bishop of Norwich, Graham Richard James

Rt Rev the Lord Bishop of Oxford

Rt Rev the Lord Bishop of Portsmouth, Kenneth William Stevenson

Rt Rev the Lord Bishop of Salisbury, David Staffurth Stancliffe

Rt Rev the Lord Bishop of Southwell, George Henry Cassidy

Rt Rev the Lord Bishop of St Edmundsbury and Ipswich, Richard Lewis

Rt Rev the Lord Bishop of Winchester, Michael Charles Scott-Joynt

Rt Rev the Lord Bishop of Worcester, Peter Stephen Maurice Selby

Rt Hon James Arbuthnot, MP

Vera Baird, QC, MP

Anne Begg, MP

Dr Roger Berry, MP

Peter Bottomley Esq, MP

Tom Brake Esq, MP

Richard Burden Esq, MP

Dr Vincent Cable, MP

Patsy Calton, MP

Mrs Anne Campbell, MP

Rt Hon Menzies Campbell, CBE, QC, MP

Alistair Carmichael Esq, MP

Martin Caton Esq, MP

Rt Hon Jean Corston, MP

Brian Cotter Esq, MP

Thomas Cox Esq, MP

Ross Cranston Esq, QC, MP

Mrs Ann Cryer, MP

Edward Davey Esq, MP

Mrs Valerie Davey, MP

Mrs Janet Dean, MP

Andrew Dismore Esq, MP

Jim Dobbin Esq, MP

Sue Doughty, MP

David Drew Esq, MP

Julia Drown, MP

Huw Edwards Esq, MP

Bill Etherington Esq, MP

Annabelle Ewing, MP

Mark Fisher Esq, MP

Edward Garnier Esq, QC, MP

Andrew George Esq, MP

Roger Godsiff Esq, MP

Matthew Green Esq, MP

Mike Hancock Esq, CBE, MP

Nick Harvey Esq, MP

Dai Havard Esq, MP

Paul Holmes Esq, MP

Glenda Jackson, CBE, MP

Helen Jackson, MP

Dr Lynne Jones, MP

Peter Kilfoyle Esq, MP

Norman Lamb Esq, MP

Tony Lloyd Esq, MP

Elfyn Llwyd Esq, MP

Ian Lucas Esq, MP

John McDonnell Esq, MP

Ann McKechin, MP

Kevin McNamara Esq, MP

Calum MacDonald Esq, MP

Mrs Alice Mahon, MP

Judy Mallaber, MP

Rob Marris Esq, MP

Robert Marshall-Andrews Esq, QC, MP

Michael Moore Esq, MP

Mark Oaten Esq, MP

Dr Nick Palmer, MP

Gordon Prentice Esq, MP

Adam Price Esq, MP

Geoffrey Robinson Esq, MP

Joan Ruddock, MP

Bob Russell Esq, MP

Mohammad Sarwar Esq, MP

Malcolm Savidge Esq, MP

Brian Sedgemore Esq, MP

Rt Hon Clare Short, MP

Alan Simpson Esq, MP

Rt Hon Chris Smith, MP

Llewellyn Smith Esq, MP

Andrew Stunell Esq, OBE, MP

Sarah Teather, MP

Simon Thomas Esq, MP

John Thurso, MP

Dr Desmond Turner, MP

Paul Tyler Esq, CBE, MP

Bill Tynan Esq, MP

Keith Vaz Esq, MP

Dr Rudi Vis, MP

Robert Wareing Esq, MP

Brian White Esq, MP

Mrs Betty Williams, MP

Phil Willis Esq, MP

Tony Worthington Esq, MP

Derek Wyatt, MP

Elspeth Attwooll, MEP

Alexander Nuno Alvaro, MEP

Angelika Beer, MEP

Thijs Berman, MEP

John Bowis, MEP

Hiltrud Breyer, MEP

Elmar Brok, MEP

Kathalijne Maria Buitenweg, MEP

Michael Cashman, MEP

Jorgo Chatzimarkakis, MEP

Richard Corbett, MEP

Chris Davies, MEP

Veronique de Keyser, MEP

Nirj Deva, MEP

Avril Doyle, MEP

Andrew Duff, MEP

Said El Khadraoui, MEP

Jillian Evans, MEP

Robert Evans, MEP

Szabolcs Fazakas, MEP

Hélène Flautre, MEP

Glyn Ford, MEP

Neena Gill, MEP

Hélène Goudin, MEP

Fiona Hall, MEP

Gábor Harangozó, MEP

Satu Maijastiina Hassi, MEP

Adeline Hazan, MEP

Chris Heaton-Harris, MEP

Edit Herczog, MEP

Mary Honeyball, MEP

Milan Horąček, MEP

Richard Howitt, MEP

Ian Hudghton, MEP

Stephen Hughes, MEP

Chris Huhne, MEP

Caroline Jackson, MEP

Gisela Kallenbach, MEP

Saj Karim, MEP

Glenys Kinnock, MEP

Silvana Koch-Mehrin, MEP

Magda Kosane Kovacs, MEP

Jean Lambert, MEP

Stéphane Le Foll, MEP

Katalin Lévai, MEP

Marie-Noelle Lienemann, MEP

Alain Lipietz, MEP

Caroline Lucas, MEP

The Baroness Ludford, MEP

Liz Lynne, MEP

Erika Mann, MEP

David Martin, MEP

Linda Mcavan, MEP

Arlene McCarthy, MEP

Claude Moraes, MEP

Eluned Morgan, MEP

Luisa Morgantini, MEP

Pasqualina Napoletano, MEP

Bill Newton Dunn, MEP

Cem Özdemir, MEP

Neil Parish, MEP

John Purvis, MEP

Raul Romeva, MEP

Heide Rühle, MEP

Aloyzas Sakalas, MEP

Csaba Sándor Tabajdi, MEP

Carl Schlyter, MEP

Frithjof Schmidt, MEP

Elisabeth Schroedter, MEP

Frank Schwalba-Hoth, former MEP

Peter Skinner , MEP

Struan Stevensen, MEP

Catherine Stihler, MEP

Gary Titley, MEP

Claude Turmes, MEP

Margrietus van den Berg, MEP

Theresa Villiers, MEP

Johannes Voggenhuber, MEP

Diana Wallis, MEP

GrahamWatson, MEP

Philip Whitehead, MEP

Anders Wijkman, MEP

Terry Wynn, MEP

Tatjana Ždanoka, MEP

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.)

IN SUPPORT OF PETITIONER

David H. Remes
D.C. Bar No. 370782
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
202-662-5212 (tel)
202-778-5212 (fax)

Tara M. Steeley, *pro hac vice* (pending)
Jeffrey C. Wu, *pro hac vice* (pending)
COVINGTON & BURLING
1 Front Street
San Francisco, California 94111
415-591-6000 (tel)
415-591-6091 (fax)

Counsel for Amici

DATED: September 30, 2004

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

INTRODUCTION 2

SUMMARY OF ARGUMENT 7

ARGUMENT 7

I. THE COURT CAN AND SHOULD REQUIRE RESPONDENTS TO AFFORD HAMDAN THE PROTECTIONS OF THE GENEVA CONVENTIONS. 7

A. Federal Courts Are Empowered and Obligated to Interpret Treaties. 7

B. The Court May Compel the Executive Branch to Conform Its Actions to the Requirements of the Geneva Conventions as Judicially Construed. 9

C. Judicial Enforcement of the Geneva Conventions Does Not Depend on Further Action by Congress. 10

1. The Geneva Conventions are "self-executing". 10

2. The federal statute governing military commissions requires compliance with the Geneva Conventions. 15

II. THE MILITARY COMMISSION SYSTEM VIOLATES HAMDAN'S RIGHTS UNDER THE GENEVA CONVENTIONS. 16

A. The Geneva Conventions Apply to Hamdan. 16

1. The Geneva Conventions apply to Hamdan because he was captured during an international armed conflict. 16

2. Hamdan is entitled to be treated as a POW until a competent tribunal determines otherwise. 18

3. Hamdan is protected by Common Article 3 whether or not he is deemed a POW. 22

B. Respondents' Treatment of Hamdan Violates the Geneva Conventions. 23

1. The military commissions violate the Third Geneva Convention and Common Article 3. 24

a) Right to a speedy judicial investigation and trial 24

b) Right to present an adequate defense 26

c) Right to exclude coerced and unreliable confessions as evidence 28

d) Right to an independent and impartial tribunal 28

e) Right to appeal to a civilian court 31

f) Right to be free from retroactive punishments 31

g) Right to nondiscriminatory treatment 32

2. Hamdan's conditions of internment violate the Geneva Conventions. 33

a) Prolonged arbitrary detention 33

b) Questioning under coercion 34

c) Solitary confinement without access to sunlight 34

d) Inadequate medical treatment 35

e) Restrictions on free exercise of religion 35

III. The Court Should Order Respondents to Treat Hamdan in Accordance with the Geneva Conventions. 36

A. Abstention Is Not Appropriate Because Hamdan Challenges Executive Branch Authority. 36

B. Abstention Is Not Appropriate Because Hamdan Raises Substantial Arguments Challenging the Jurisdiction of the Military Commissions 37

C. *Councilman* Does Not Require This Court To Abstain. 38

D. Hamdan Will Suffer Irreparable Harm Unless The Court Intervenes. 39

CONCLUSION 40

TABLE OF AUTHORITIES

FEDERAL CASES

Al Odah v. United States,
321 F.3d 1134 (D.C. Cir. 2003) 14

Baker v. Carr,
369 U.S. 186 (1962) 9

British Caledonian Airways Ltd. v. Bond,
665 F.2d 1153 (D.C. Cir. 1981) 9

Brown v. United States,
12 U.S. (8 Cranch) 110 (1814) 40

Diggs v. Richardson,
555 F.2d 848 (D.C. Cir. 1976) 10, 14

F. Hoffman-LaRoche Ltd. v. Empagran S.A.,
124 S. Ct. 2359 (2004) 15

Factor v. Laubenheimer,
290 U.S. 276 (1933) 9

Foster v. Neilson,
27 U.S. (2 Pet.) 253 (1829) 10

Gherebi v. Bush,
352 F.3d 1278 (9th Cir. 2003),
amended by 374 F.3d 727 (9th Cir. 2004) 20

Hamdi v. Rumsfeld,
124 S. Ct. 2633 (2004) 13, 14, 20, 28

Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003),
vacated, 124 S. Ct. 2633 (2004) 14

Islamic Republic of Iran v. Boeing Co.,
771 F.2d 1279 (9th Cir. 1985) 10

Head Money Cases,
112 U.S. 580 (1884) 10

Japan Whaling Ass'n v. Am. Cetacean Soc'y,
478 U.S. 221 (1986) 8

Jones v. Meehan,
175 U.S. 1 (1899) 8

Kadic v. Karadzic,
70 F.3d 232 (2nd Cir. 1995) 21, 23

Lidas, Inc. v. United States,
238 F.3d 1076 (9th Cir. 2001) 10

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 7, 9

McCulloch v. Sociedad Nacional de Marineros,
372 U.S. 10 (1963) 15

McElroy v. Guarliardo,
361 U.S. 281 (1960) 37

Mehinovic v. Vuckovic,
198 F. Supp. 2d 1322 (N.D. Ga. 2002) 21, 23

Murray v. Schooner Charming Betsy,
6 U.S. (2 Cranch) 64 (1804) 15, 24

N. Pipeline Constr. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982) 36

New v. Cohen,
129 F.3d 639 (D.C. Cir. 1997) 37

Noyd v. Bond,
395 U.S. 683 (1969) 37

Owings v. Norwood's Lessee,
9 U.S. 344 (1809) 8

Parisi v. Davidson,
405 U.S. 34 (1972) 38

Parker v. Levy,
417 U.S. 733 (1974) 38

Padilla ex rel. Newman v. Bush,
233 F. Supp. 2d 564 (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) 14

Perkins v. Elg,
307 U.S. 325 (1939) 8, 10

Rainbow Navigation, Inc. v. Dep't of the Navy,
686 F. Supp. 354 (D.D.C. 1988) 9

Rasul v. Bush,
124 S. Ct. 2686 (2004) 14

Reid v. Covert,
354 U.S. 1 (1957) 37

Schlesinger v. Councilman,
420 U.S. 738 (1975) 37, 38, 39

Sosa v. Alvarez-Machain,
124 S. Ct. 2739 (2004) 33

Sterling v. Constantin,
287 U.S. 378 (1932) 39

Tel-Oren v. Libyan Arab Republic,
726 F.2d 774 (D.C. Cir. 1984) 14

Toth v. Quarles,
350 U.S. 11 (1955) 36, 37, 38, 39

United States v. Decker,
600 F.2d 733 (9th Cir. 1979) 9

United States v. Lindh,
212 F. Supp. 2d 541 (E.D. Va. 2002) 13, 14

United States v. Percheman,
32 U.S. (7 Pet.) 51 (1833) 10

United States v. Noriega,
808 F. Supp. 791 (S.D. Fla. 1992) 11, 13, 14

Warren v. District of Columbia,
353 F.3d 36 (D.C. Cir. 2004) 16

Z & F Assets Realization Corp v. Hull,
114 F.2d 464 (D.C. Cir. 1940) 10

FEDERAL STATUTES
AND STATUTORY MATERIAL

U.S. Const. Art. III 7, 36, 37, 39

U.S. Const. Art. VI 8

10 U.S.C. § 831 28

10 U.S.C. § 836 15

10 U.S.C. § 866 31

10 U.S.C. § 942 31

18 U.S.C. § 2441 11

101 Cong. Rec. 9960 (1955) 3

101 Cong. Rec. 9962 (1955) 3

148 Cong. Rec. S5,843 (2002) 27

Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations, 84th Cong., 1st Sess. (1955) 3, 11

OTHER FEDERAL MATERIALS

Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* 12, 19

Dep't of the Army, Field Manual No. 27-10, The Law of Land Warfare (1956) 12, 19, 23

Dep't of Def. News Release No. 892-03, *U.S. and Australia Announce Agreements on Guantanamo Detainees* (Nov. 25, 2003) 32

Dep't of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* (1992) 21

Dep't of Def. Military Comm'n Order No. 1 (Mar. 21, 2002) 26, 28, 30, 31

Dep't of Def. Military Comm'n Instruction No. 2 (Apr. 30, 2003) 29

Dep't of Def. Military Comm'n Instruction No. 6 (Apr. 30, 2003) 29

Dep't of the Navy, NWP 1-14M: *The Commander's Handbook on the Law of Naval Operations* 20

Dep't of State Bull. 10 (Jan. 4, 1971) 4

Judge Advocate General's School, *Operational Law Handbook* (O'Brien ed.)(2003) 20

Judge Advocate General's School, U.S. Army, *Legal Framework of the Law of War*, in Law of War Workshop Deskbook 25 (Brian J. Bill ed., 2000) 25

Message from the President Transmitting Protocol II Additional to the 1949 Geneva Conventions, 26 I.L.M. 561 (1987) 25

Prugh, Gen. George S., *Vietnam Studies, Law at War: Vietnam 1964-73* (Dep't of Army, 1975) 4

Taft IV, William H., Legal Adviser, Dep't of State, *Memorandum to Counsel to the President* (Feb. 2, 2002) 2, 17

The White House, *President Issues Military Order* (Nov. 13, 2001) 31

INTERNATIONAL MATERIALS

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 ..... 12, 23

Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ..... *passim*

International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 25

International Committee of the Red Cross, *Analysis of Proposed Military Commissions*, Nov. 24, 2003 32

International Committee of the Red Cross, *States Party to the Geneva Conventions and their Additional Protocols*, Feb. 6, 2004 16

European Comm'n for Democracy Through Law (Venice Comm'n), Council of Europe, *Opinion on the Possible Need for Further Development of the Geneva Conventions* (2003) 22

Nicaragua v. United States, 1986 I.C.J. 14 22

Prosecutor v. Tadic, Case No. IT-94-1-A, ICTY, App. Ch., July 15, 1999 23

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 ..... *passim*

Uhler, Oscar M., *et al.*, *Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Jean S. Pictet ed., 1958) ..... *passim*

United States v. Iran, 1980 I.C.J. 3 33

MISCELLANEOUS

Aldrich, George H., *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 Am. J. Int'l L. 891 (2003) 20, 21

Azubuike, Lawrence, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 Conn. J. Int'l L. 127 (2003) 17

Becker, Steven W., *"Mirror, Mirror on the Wall. . .": Assessing the Aftermath of September 11th*, 37 Val. U. L. Rev. 563 (2003) 6

Cassell, Douglass, 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 25

Cloud, John, *What's Fair in War?*, Time, Apr. 7, 2003 6

Contemporary Practice of the United States Relating to International Law, 62 Am. J. Int'l L. 754 (1968) 20

Federalist Papers, The (Clinton Rossiter ed., 1961). 8

Fitzpatrick, Joan, *Agora: Military Commissions: Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 Am. J. Int'l L. 345 (2002) 17

Fitzpatrick, Joan, *Sovereignty, Territoriality, and the Rule of Law*, 25 Hastings Int'l & Comp. L. Rev. 303 (2002) 18

Jinks, Derek, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1 (2003) 22

Koh, Harold Hongju, *The Case Against Military Commissions*, 96 Am. J. Int'l L. 337 (2002), ... 6

Kunz, Josef L., *The Chaotic Status of the Laws of War and the Urgent Need for Their Revision*, 45 Am. J. Int'l L. 37 (1951) 3

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) 6

Levie, Howard S., *Prisoners of War in International Armed Conflict* (1977) 3, 4, 18

McDonald, Neil & Sullivan, Scott, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror"*, 44 Harv. Int'l L.J. 301 (2003) 5

Mofidi, Manooher & Eckert, Amy E., *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 Cornell Int'l L.J. 59 (2003) 6

Naqvi, Yasmin, *Doubtful Prisoner-of-War Status*, 847 Int'l Rev. Red Cross 571 (2002) 18, 20, 21

Note, *Safeguarding the Enemy Within*, 71 Fordham L. Rev. 2565 (2003) 20

Paust, Jordan J., *Judicial Power to Determine the Status and Rights of Persons Detained without Trial*, 44 Harv. Int'l L.J. 503 (2003) 15, 22

Pearlstein, Deborah, *Military Commission Trial Observation*, Aug. 25, 2004. 27

Printer, Jr., Norman G., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen* (2003) 18

Restatement (Third) of the Foreign Relations Law of the United States (1987). 13, 25, 33

Roth, Kenneth, Letter to Defense Secretary Rumsfeld on the Military Commissions at Guantanamo Bay, Sept. 16, 2004 ..... 27, 29

Van Alstine, Michael P., *Federal Common Law in an Age of Treaties*, 89 Cornell L.Rev. 892 (2004) 15

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. Laubenheimer*, 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 manufacturer 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 ("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/fc6fd99c6c0745e185256a1 d00467742/$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. [redacted] 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 evidence[18]; 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 solider 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 theses 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 with 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

COVINGTON & BURLING

By: David H. Remes/JCW.

David H. Remes
D.C. Bar No. 370782
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
202-662-5212 (tel), 202-778-5212 (fax)

Tara M. Steeley, *pro hac vice*
Jeffrey C. Wu, *pro hac vice*
1 Front Street
San Francisco, CA 94111
415-591-6000 (tel), 415-591-6091 (fax)

Counsel for Amici [22]

[22] Counsel for amici gratefully acknowledge the assistance of Covington & Burling summer associates in the preparation of this memorandum.

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:

See Attached Service List

[X] **(BY MAIL)** I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at San Francisco, California

Executed on September 30, 2004, at San Francisco, California.

VERONICA L. CANTON

SERVICE LIST

Jonathan L. Marcus
Assistant Solicitor General
U.S. Dept. of Justice
Washington, D.C. 20530

Terry Marcus Henry
U.S. Dept. of Justice,
Civil Division
P.O. Box 883
20 Massachusetts Ave., NW, Rm. 7144
Washington, D.C. 20044

Neal Katyal
600 New Jersey Ave, NW
Washington, D.C. 20001

Harry H. Schneider, Jr.
Joseph M. McMillan
David R. East
Charles C. Sipos
Perkins, Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

Kelly A. Cameron
Perkins, Coie LLP
607 Fourteenth Street, NW
Suite 800
Washington, D.C. 20005

David Andrew Price
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, D.C. 20036

A copy of the foregoing brief was additionally served electronically upon Mr. Marcus, at Jonathan.L.Marcus@usdoj.gov.

UNITED STATES OF AMERICA	)	**PROSECUTION RESPONSE TO DEFENSE MOTION TO DISMISS**
v.	)	**(VIOLATION OF COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS)**
SALIM AHMED HAMDAN	)	
		15 October 2004

1. Timeliness. This motion response is being filed within the timeline established by the Presiding Officer.

2. Prosecution Position on Defense Motion. The Defense motion to dismiss should be denied. The Defense contends that the Military Commission convened in this case is bound by the provisions of Common Article 3 of the Geneva Conventions. This is incorrect as a matter of law and must be denied.

3. Facts in Agreement. The Prosecution does not agree with or stipulate to any of the Defense's facts as alleged except fact (l). The Prosecution will continue to work with the Defense to obtain a stipulation of fact.

4. Facts.

a. The President's Military Order of 13 November 2001, concerning the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, authorizes the Secretary of Defense or his designee to convene military commissions for the trial of certain individuals "for any and all offenses triable by military commission."

b. The Secretary of Defense promulgated implementing orders to establish procedures for the appointment of military commissions, setting forth various rules governing the appointment, jurisdiction, trial and review of military commissions.

c. The accused in this case was designated by the President for trial by military commission and a commission was appointed by the Appointing Authority in accordance with commission orders and instructions.

5. Legal Authority.

a. The Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 (1955).

b. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).
c. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

d. *Rasul v. Bush*, 124 S.Ct. 2686 (2004).
e. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).
f. *New York Life Ins. Co. v, Hendren*, 175 U.S. 677 (1900).
g. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).
h. *Handel v. Artukovic*, 601 F.Supp. 1421 (C.D. Cal. 1985).
i. War Crimes Act of 1996, 18 U.S.C. § 2441.
j. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
k. *United States v. Noriega*, 808 F.Supp. 791 (S.D. Fla. 1992).
l. *United States v. Lindh*, 212 F.Supp.2d 541 (E.D. Va. 2002).
m. Memorandum for the Vice President, et al. From President, Re: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002).

6. Analysis

The Defense argues that the Accused's status under the Geneva Conventions has not yet been determined by a competent legal authority and he is therefore entitled to prisoner of war status and protections until such time as his status is legally resolved. The Defense further contends that even if the Accused is not entitled to prisoner of war status, he is entitled to the protections of Common Article 3 of the Geneva Conventions and Commission Law fails to satisfy the minimum standards of due process required by Article 3(1)(d).[1]

Contrary to the Defense assertions, the status of the Accused has been determined by the President and confirmed by the subsequent review process. Moreover, the Geneva Conventions invoked by the Defense do not apply to the Accused. First, al Qaeda is not a State and thus cannot receive the benefits of a State party to the Conventions. Second, al Qaeda members fail to satisfy the eligibility requirements for treatment as POWs under the Geneva Convention III (GPW). Third, the international character of the conflict precludes application of common article 3 of the Geneva Conventions. Fourth, even if the standards of common article 3 have become part of customary international law, they are not self-executing, and the Commission must follow Commission Law. Finally, Commission Law provides procedural protections for the Accused that meet the minimal baseline standards of customary international law.

a. The Status of the Accused Under the Geneva Conventions Has Been Determined By the President.

The Defense motion considered here asserts first that the status of the Accused under GPW is in doubt and therefore must be resolved by procedures set forth in Article 5 of that Convention. However, the President has declared that the GPW does not apply to al Qaeda. *See Memorandum for the Vice President, et al. From President, Re:*

[1] Common Article 3 provides in relevant part: "Article 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:...(1)(d) 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."

Humane Treatment of al Qaeda and Taliban Detainees, at 1 (Feb. 7, 2002).[2] The President's memorandum should be given deference by the Commission.

The Geneva Conventions do not apply to every conceivable armed conflict. Common Article 2 of the GPW provides for only three circumstances in which the Conventions apply: (a) in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties;" (b) in 'all cases of partial or total occupation of the territory of a High Contracting Party;" or (c) when a non-signatory "Power[] in conflict" "accepts and applies the provisions [of the Convention]." Because the armed conflict between the United States and al Qaeda satisfies none of these situations, the Geneva Conventions do not apply to al Qaeda fighters such as Hamdan.

The U.S.-al Qaeda armed conflict is not one "between two or more of the High Contracting Parties" within the meaning of Article 2. Al Qaeda has not signed or ratified the GPW, nor could it. Al Qaeda is not a State; rather, it is a terrorist organization composed of members from many nations, with ongoing military operations in many nations. In addition, the U.S.-al Qaeda armed conflict has not resulted in the "occupation of the territory of a High Contracting Party" within the meaning of Article 2. As a non-State actor, al Qaeda has no territory that could be occupied within the meaning of Article 2. Nor is it a "Power in conflict" that can "accept and apply" the Convention. *See, e.g.*, G.I.A.D. Draper, *The Red Cross Conventions* 16 (1958) (arguing that "in the context of Article 2, para. 3, 'Powers' means States capable then and there of becoming Contracting Parties to these Conventions either by ratification or by accession"); 2B *Final Record of the Diplomatic Conference of Geneva of 1949*, at 108 (explaining that article 2(3) would impose an "obligation to recognize that the Convention be applied to the non-Contracting adverse State, in so far as the latter accepted and applied the provisions thereof" (emphasis added). In any event, far from embracing the Convention or any other provision of the law of armed conflict, al Qaeda has consistently acted in flagrant defiance of the law of armed conflict. Thus the Accused in this case cannot claim the protections afforded to POWs under the Third Geneva Convention.

Nonetheless, the Defense implies that because the Accused did not receive a tribunal pursuant to GPW Article 5, the Accused must receive the protections accorded to a POW until such a tribunal determines otherwise. The Defense cites Army Regulation (AR) 190-8 as his bases for this claim. Defense's reliance on AR 190-8 is misplaced.

AR 190-8 is binding on the Army during its operations but does not create any private rights enforceable by the Accused. However, as cited by the defense, AR 190-8 requires only that the Army abide by the provisions of GPW Article 5. GPW Article 5 reads:

> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

[2] This Presidential document is available at www.library.law.pace.edu/government/detainee_memos.html.

> *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.

Id. (emphasis added). The circumstances of the Accused's capture have already been detailed. He has confessed to pledging a loyalty oath to Usuma bin Laden and his own attorney has admitted that the Accused was a driver for him, the leader of al Qaida. There was no doubt about the Accused's status as an unlawful combatant at the time the President made the original determination or during the subsequent review process. As such, AR 190-8 has been fully complied with and the denial of an Article 5 tribunal in no way affects that.

Because the Accused's lack of POW status is so clear, it is equally clear that an Article 5 tribunal was not necessary in his case.

b. The Geneva Conventions Do Not Apply To the United States' Armed Conflict Against Al Qaeda Under the Terms of Common Article 3.

The Defense argues that the Accused is entitled to the protections of common article 3 of the Geneva Conventions. First, as discussed above, the President has determined that the Geneva Conventions do not apply to the armed conflict with al Qaeda in any case. Even if the Conventions applied, Article 3 applies only "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." The armed conflict in which the United States is currently engaged is not an internal conflict, because the United States is prosecuting it in both Afghanistan and around the globe. Thus, by its own terms, Article 3 does not apply to the conflict pursuant to which Hamdan remains confined, so Hamdan cannot invoke it.

Common Article 3 is a unique provision that governs the conduct of signatories to the Conventions in a particular kind of conflict that is not one between High Contracting Parties to the Conventions. Common Article 3 complements common article 2. Article 2 applies to cases of declared war or of any other armed conflict that may arise between two or more state parties to the Conventions, even if a state of war is not recognized by one of them. Common article 3, however covers "armed conflicts not of an international character" that occurs within the territory of one of the High Contracting Parties.

Common article 3's text strongly suggests that it applies specifically to a condition of civil war or a large-scale armed conflict between a state and an armed movement within its own territory. First the text of the provision refers specifically to an armed conflict that is not international and occurs in the territory of a state party to the Convention. It does not encompass all armed conflicts, nor does it address a gap left by common article 2 for international armed conflicts that involve non-state entities (such a s international terrorist organizations) as parties to the conflict. Further, common article 3 addresses only non-international conflicts that occur within the territory of a single state

party, as in a civil war. This provision would not address an armed conflict in which one of the parties operated from multiple bases in several different states.

This interpretation is supported by the commentators. One well-known commentary states that "a non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single state in conflict with one or more armed factions within its territory." *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* at ¶4339 (Yves Sandoz et al., eds. 1987). A legal scholar writing in the same year in which the Conventions were prepared stated that "a conflict not of an international character occurring in the territory of one of the High Contracting Parties...must normally mean a civil war." Joyce A.C. Gutteridge, *The Geneva Conventions of 1949,* 26 Brit. Y.B. Int'l L. 294, 298-99 (1949).

The United States has accepted the proposition that the basic standards of common Article 3 have become customary international law in state practice. Recent opinions by international courts have also taken the view that the protections of common article 3 have become customary international law. *See Prosecutor v. Tadic,*Case No. 160 (ICTY Appeals Chamber, October 2, 1995). In this conception, common article 3 is not just a complement to common article 2, it is a catch-all that establishes standards for any and all armed conflicts not included in common article 2.

c. Customary International Law Is Not Self-Executing and Not Binding Directly On the Commission.

Even though common article 3 does not apply on its own terms, the amicus briefs incorporated by the Defense in this motion argue protections of article 3 have attained universal recognition as customary international law that such "universal principles" are binding on the Commission. The prosecution agrees that minimum protections of common article 3 have indeed become part of customary international law. However, the Commission need not determine how such "universal principles" might apply to Commission proceedings in this case, because the standards of customary international law are not self-executing—that is, they must be incorporated into US law by affirmative legislative action. Standing alone, they do not create private rights enforceable by the Accused. The Commission must follow Commission Law promulgated by the President and Secretary of Defense under United States law.

That the GPW is not self-executing is demonstrated in the text of the GPW, its legislative history, and case law. Indeed the GPW contains many provisions that, when considered together, demonstrate that the contracting parties understood that violations of the treaty would be enforced through diplomatic means. As the Fourth Circuit recently explained:

> What discussion there is [in the text of the GPW] of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inherent in sovereign nations. If two warring parties disagree about what the Convention requires of them, Article 11

> instructs them to arrange a "meeting of their representatives" with the aid of diplomats from other countries, "with a view to settling the disagreement." Geneva Convention, at Article 11. Similarly, Article 132 states that "any alleged violation of the Convention" is to be resolved by a joint transnational effort "in a manner to be decided between the interested Parties." Id. at art. 132; cf. id. at arts. 129-30 (instructing signatories to enact legislation providing for criminal sanction for "persons committing . . . grave breaches of the present Convention"). We therefore agree with other courts of appeals that the language in the Geneva Convention is not "self-executing" and does not "create private rights of action in the domestic courts of the signatory countries."

Hamdi v. Rumsfeld, 316 F.3d 450, 468-469 (4th cir. 2003), vacated on other grounds, 124 S.Ct. 2686 (2004). See also *Al Odeh v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring), overruled on other grounds, *Rasul v. Bush*, 124 S.Ct. 2686 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork J., concurring); *Handel v. Artukovic*, 601 F.Supp. 1421, 1424-1426 (C.D. Cal. 1985). The Fourth Circuit alluded to the fact that there was one area in which the contracting parties sought to go beyond diplomacy to enforce violations of the treaty: "grave breaches," which the parties pledged to punish themselves by enacting domestic criminal legislation. GPW Article 129. Congress responded by enacting the War Crimes Act of 1996, 18 U.S.C. § 2441. That Act provides a means for remedying grave breaches, but does not create any privately enforceable rights. The Executive Branch, through its ability to bring prosecutions, remains responsible for ensuring adherence to the treaty. In light of this clear textual framework for enforcing the treaty, there is no sound basis on which to conclude that the treaty provided individuals with private rights of action.

The legislative history of the GPW does not suggest otherwise. In fact, the Senate Report makes clear that the GPW is not self-executing. In the section titled "Provisions Relating To Execution Of The Conventions," the Report states that "the parties agree, moreover, to enact legislation necessary to provide effective penal sanctions for persons committing violations of the contentions enumerated as grave breaches." S. Exec. Rep. No. 84-9 (1955), at 7. The Report celebrates this provision as "an advance over the 1929 instruments which contained no corresponding provisions." Id.

Significantly, the Supreme Court interpreted the 1929 Geneva Convention in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and held that it was not self-executing. The Court ruled there that the German prisoners of war who were challenging the jurisdiction of the military commission which convicted them could not invoke the Geneva Convention because:

> It is . . . the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting

> powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.

Id. at 789. It should be noted that the Senate that ratified the 1949 GPW was operating post-*Eisentrager,* yet no mention was made of the new GPW or its implementing legislation creating an individually actionable right. Moreover, in addressing how future compliance with the treaty would be achieved, the Senate Report did not mention legal claims or judicial machinery, but instead observed that "the weight of world opinion," would "exercise a salutary restraint on otherwise unbridled actions." S. Exec. Rep. at 32.

Given that it is apparent on the face of the treaty and from the legislative history that the parties contemplated the need for enacting legislation, the Fourth Circuit's conclusion in *Hamdi* that the GPW is not self-executing is undoubtedly correct. As such, the Accused's claim motion should be denied on those grounds.[3] [4]

The consistent holding of the federal courts that the Geneva Conventions are not self-executing, applies with even greater force when the principles of customary international law are at issue (as opposed to treaty law under the Geneva Conventions). The Constitution does not confine presidential or federal power within the brackets of customary international law. When the Supremacy Clause identifies the sources of federal law, it enumerates only "this 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." U.S. Constitution, Article VI, Cl. 2. Customary international law is nowhere mentioned in the constitution as an independent source of federal law or as a constraint on the political branches of government. Indeed, if it were, there would have been no need to grant Congress the power to "define and punish...Offenses against the Law of Nations." U.S. Const. art. I, §8, cl. 10.

Allowing customary international law to rise to the level of federal would create severe distortions in the structure of the Constitution. Incorporation of customary international law directly into federal law would bypass the delicate procedures established by the Constitution for amending the Constitution or enacting legislation. Customary international law has not undergone the difficult constitutional hurdles that

---

[3] *United States v. Lindh*, 212 F.Supp.2d 541 (E.D. Va. 2002), although permitting the assertion of the GPW "as a defense to criminal prosecution," is not controlling in this instance because the Fourth Circuit, a superior court, in *Hamdi* subsequently held the GPW to be non-self-executing. *Hamdi* at 468. Moreover, the case of *United States v. Noriega*, 808 F.Supp. 791 (S.D. Fla. 1992), also offers nothing of substance to the issue. First, *Noriega* was an advisory opinion by a district court. Id. at 799. Second, *Noreiga's* reasoning was that the non-grave-breach articles of the GPW were self-executing specifically because the GPW did not call for implementing legislation. *Id.* at 797. Thus, by the very reasoning in *Noreiga*, Article 103 of the GPW, a grave breach, would not be self-executing as they require implementing legislation pursuant to the plain language of the treaty.

[4] Additionally, the argument that the United States has already implemented the GPW by way of AR 190-8 is spurious. First, the War Crimes Act of 1996, 18 U.S.C. § 2441, is Congress' implementation of the GPW and its legislative history says that. AR 190-8, on the other hand, was enacted to implement DoD Directive 2310.1. DoD Directive 2310.1 merely establishes the Department of Defense's policy with regard to observing the international law of war, including the GPW. The policy of an agency subordinate to the Chief Executive cannot seriously be posited to be the United State's implementing legislation to an international treaty when Congress, the United State's legislative body, was specifically charged with enabling legislation and actually did enact enabling legislation.

stand before enactment of constitutional amendments, statutes, or treaties. As discussed above, even the inclusion of treaties in the Supremacy Clause does not render treaties automatically self-executing in federal court, not to mention against the executive branch. If even treaties that have undergone presidential negotiation and signature and advice and consent of the Senate can have no binding legal effect in the United States until incorporated into U.S. law, then clearly customary international law cannot be self-executing either.

It is well established that the political branches have ample authority to override customary international law within their respective spheres of authority. This has long been recognized by the Supreme Court. *See The Schooner Exchange v. McFaddon,* 11 U.S. (7 Cranch) 116, 145-46 (1812)(applied customary international law to seizure of a French warship only because the U.S. had not chosen a different rule). In *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), Chief Justice Marshall stated that customary international law "is a guide which the sovereign follows or abandons at his will." Id., at 128. In *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, 286-87 (1875), the Supreme Court acknowledged that the laws of war did not qualify as true federal law and could not therefore serve as a basis for federal subject matter jurisdiction. The Court declared that it had no jurisdiction to review "the general laws of war, as recognized by the law of nations applicable to this case," because such laws do not involve the Constitution, laws, treaties, or Executive proclamations of the United States.

Even the case most often cited for the proposition that customary international law is federal law, itself acknowledges that customary international law is subject to override by the action of the political branches. *The Paquete Habana*, 175 U.S. 677 (1900), involved the question whether U.S. armed vessels in wartime could capture fishing vessels belonging to enemy nationals and sell them as prize. The Court applied an international law rule and held that "international law is part of our law." *Id.* at 700. But Justice Gray then continued, "where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." *Id.* In other words, while it was willing to apply customary international as general federal common law, the Court also readily found that the political branches and even the federal judiciary could override it. No Supreme Court decision in modern times has challenged that view.

d. Commission Law Provides Procedural Protections Consistent With Common Article 3.

To the extent that Article 3 might reflects universal principles accepted as customary international law, the Accused's rights have not been violated under those standards. Hamdan has not been "sentenced without previous judgment." To the contrary, the proceedings against Hamdan are in their preliminary stages. Hamdan was charged with an offense on July 9, 2004, and that charge was approved and referred by the Appointing Authority on July 13, 2004. The case is currently scheduled for a December trial date. At his trial, Hamdan will enjoy, *inter alia*, the presumption of innocence, the assistance of counsel, and the opportunity to cross-examine prosecution witnesses, and the government will have to prove his guilt beyond a reasonable doubt. See Military Commission Order No. 1, ¶5. Moreover, any finding of guilt will be

reviewed by a review panel, the Secretary of Defense, and the President, if the President does not designate the Secretary as the final decision-maker. This process is undoubtedly consistent with the baseline protections set out in Common Article 3.

Contrary to the Defense claims, Hamdan's confinement pending his military trial does not constitute the "passing of [a] sentence[]...without previous judgment." GPW Art. 3(1)(d). Hamdan is not being confined at Guantanamo Bay as a punishment for the offense he is alleged to have committed. Rather, by virtue of being designated as eligible for trial before a military commission, Hamdan was assigned petitioner as his counsel to assist him with the legal proceedings. In order to facilitate contacts between the military commission designees and their counsel without jeopardizing security at Guantanamo, the military used a separate facility at Camp Echo to house Hamdan and the other designees. Confining Hamdan for substantial security reasons to facilitate his access to counsel pending his wartime trial does not constitute "punishment." To the contrary, it is well established that the wartime detention of an enemy combatant is a legitimate war measure, not punishment. Hamdi, 124 S. Ct. at 2640 ("The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.").

7. Resolution of Motion. The Defense Motion to Dismiss should be denied.

8. Attachment. Memorandum date 23 February 2003, Subject: In the Case of Salem Hamdan: Questions Regarding Application of Article 10, UCMJ

9. Oral Argument. The Prosecution is prepared to provide oral argument if desired.

Commander, JAGC, USN
Prosecutor

Review Exhibit 32-B

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

February 23, 2004

MEMORANDUM FOR Lieutenant Commander C.D. Swift, USN, Detailed Defense Counsel for Salem Ahmed Hamdan

SUBJECT: In the Case of Salem Ahmed Hamdan: Question Regarding the Application of Article 10, UCMJ

I am in receipt of your February 12, 2004 memorandum requesting a determination that Article 10, UCMJ, applies to the Department of Defense detention of Salem Ahmed Hamdan. The Department of Defense is detaining Mr. Hamdan as an unlawful enemy combatant. Article 10, UCMJ, does not apply to Mr. Hamdan's detention.

Thomas L. Hemingway
Brig Gen, USAF
Legal Advisor to the Appointing Authority
Office of Military Commissions

cc: Chief Defense Counsel

Attachment 1 to RE 32B

Page 1 of 1

UNITED STATES OF AMERICA	)	DEFENSE REPLY TO PROSECUTION RESPONSE TO **D23** (COMMON ART 3 OF THE GENEVA CONVENTIONS)
v.	)	
SALIM AHMED HAMDAN	)	27 October 2004

1. Timeliness. This reply is filed within the time frame established by the Presiding Officer's order during the initial session of Military Commissions on 24 August 2004, and the grant of relief by the Presiding Officer on 22 October 2004 to submit on 27 October 2004.

2. Relief Sought. That the original Defense Motion, D23, be granted.

3. Facts. Please see D23.

4. Law and Discussion.

The Prosecution's response to the Defendant's Motion To Dismiss for Violation of Common Article 3 of the Geneva Conventions is riddled with errors of law and logic. Whatever legal regime they happen to describe, it is certainly not one in the United States of America. Contrary to the government's four central contentions, (1) Article 2 of the Third Geneva Convention *does* apply to Mr. Hamdan, who therefore *is* entitled to POW protections; (2) Common Article 3 of the Third Geneva Conventions *does* apply to any and all armed conflicts, thereby entitling Mr. Hamdan to its protections; (3) the Geneva Conventions bind this body (and, what is more, have been implemented by binding army regulations) and provide Mr. Hamdan with a private right to require compliance with their provisions; and (4) both the military commission and the conditions of confinement imposed on Mr. Hamdan soundly fail to meet the minimum requirements imposed by either Article 2 or Common Article 3.

a. Article 2 of the Third Geneva Convention Does Apply to Mr. Hamdan, Who Is, As Such, Entitled to POW Protections.

1) Article 2 of the Third Geneva Convention Applies to Mr. Hamdan.

The Third Geneva Convention, which governs treatment of prisoners of war, relies upon its second article to dictate when its provisions will apply to the treatment of individuals detained pursuant to an armed conflict. Despite the prosecution's conflation of the Convention's Articles and their distinct mandates, Article 2 clearly indicates that Mr. Hamdan is entitled to the protections of the Third Convention.

The text of Article 2, in full, reads as follows:

> In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to 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.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.[1]

The prosecution responds to this text with two invalid conclusions. First, it asserts that because this Article indicates "three circumstances" in which the Third Convention applies, it provides the "*only* three circumstances in which the Conventions apply."[2] This is flatly wrong. As made irrefutably clear in, for example, Article 3 of the same Convention, Article 2 indicates when *specific provisions* of the Convention *must* apply; it does not provide an exhaustive description of how and when all the Conventions' various provisions adhere. The implications of the prosecution's confusion in this regard are discussed in the discussion of Article 3, in Part II, *infra*.

The prosecution makes a second mistake when it denies that the circumstances outlined in Article 2 apply to the treatment of Mr. Hamdan. They do apply, and therefore do compel adherence to the Third Convention. Characterizing the United States' war with Afghanistan as the "U.S.-al Qaeda armed conflict,"[3] the prosecution proceeds to reject the conclusion that such a war would be within the purview of Article 2 under the theory that al Qaeda is not a High Contracting Party; al Qaeda has no territory to be occupied; and al Qaeda has not accepted and applied the Convention.

In making these claims, the prosecution mischaracterizes the conflict. As the Supreme Court has confirmed, the armed conflict provoking Mr. Hamdan's capture ensued once "the President sent U. S. Armed Forces into Afghanistan to wage a military campaign against al Qaeda *and the Taliban regime that had supported it*."[4] Indeed, it was during this conflict with the Afghan government of the Taliban—and, indeed, it was within the borders of Afghanistan—that the United States government first detained Mr. Hamdan. As the Legal Advisor to Secretary of State Powell explained,

> [The suggestion that there is a] . . . distinction between our conflict and al Qaeda and our conflict with the Taliban does not conform to the structure of the Conventions. The

---

[1] Article 3 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, U.S.T. 3316, 3394, 75 U.N.T.S. 135 (GPW).
[2] Prosecution's Response to Defense Motion to Dismiss (Violation of Common Article 3 of the Geneva Conventions) at 3 (emphasis added).
[3] Prosecution's Response to Defense Motion to Dismiss (Violation of Common Article 3 of the Geneva Conventions) at 3.
[4] Rasul v. Bush, 124 S. Ct. 2686, 2690 (2004); Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2635 (2004).

> 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.[5]

In sum, therefore, it constitutes a factual dodge for the Prosecution to claim that Article 2 of the Geneva Conventions do not apply to an individual such as Mr. Hamdan, for Afghanistan is a High Contracting Party which has ratified the Conventions,[6] and which therefore invokes its protections when in armed conflict with another High Contracting Party such as the United States.[7] The Government cannot circumvent the protections of the Convention simply by assigning Mr. Hamdan membership in some "terrorist organization," particularly when evidence in the record includes Mr. Hamdan's adamant denial that he was ever a member of al Qaeda or engaged in any type of terrorist activity. The presumption of POW status under Geneva Convention Article 5, discussed in the Defendant's Motion To Dismiss at 3 and in this Reply *infra*, illuminates this issue; at a minimum, a competent tribunal should have long ago determined Mr. Hamdan to be a member of al Qaeda and a combatant.

As the first paragraph of Article 2 therefore indicates that the Third Geneva Convention governs the treatment of Mr. Hamdan, the prosecution's persistent attempts to dodge Article 2's second and third paragraphs and its criticisms of al Qaeda become irrelevant. Paragraph 1 clearly states, "the present Convention shall apply" in these circumstances.[8] This, in turn, renders the treatment of Mr. Hamdan subject to the provisions of the "present Convention," including, *inter alia*, its Articles 4 and 5.

2) Mr. Hamdan Is Entitled to POW Protections.

As the preceding discussion confirmed, Mr. Hamdan is entitled to the protections of Articles 4 and 5 of the Third Geneva Convention. Given the government's refusal to provide Mr. Hamdan with a hearing to determine his status under Article 4, these protections necessarily entitle Mr. Hamdan to presumptive prisoner of war status and the protections that affix accordingly. Article 4 is the provision that defines "prisoners of war." Article 5, in full, reads as follows:

> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.
>
> 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

---

[5] *See* Amicus Brief of General David M. Brahms, et al., attached to the Defendant's Motion To Dismiss, at 17. *See also* Rowan Scarborough, *Powell Wants Detainees To Be Declared POWs,* WASH. TIMES, Jan. 26, 2002.
[6] *See* States Party to the Geneva Conventions (February 6, 2004), *available at* www.icrc.org/web/eng/siteeng0.nsf/htmlall/party_gc.
[7] Article 2 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, U.S.T. 3316, 3394, 75 U.N.T.S. 135 (GPW).
[8] Article 2 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, U.S.T. 3316, 3394, 75 U.N.T.S. 135 (GPW).

> 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.[9]

Dismissing the plain language of the second paragraph of Article 5, the prosecution attempts to dismiss its obligation to provide a "competent tribunal" to determine a detained individual's status, and it does so through the flimsiest of means: by pointing to a declaration by the president that "the GPW does not apply to al Qaeda,"[10] and its own assertions that "no doubt" exists to Mr. Hamdan's status. This ridiculous substitution of conclusory assertions for substantive process reveals a clear misreading of the law. GPW Article 5 requires that those "having committed a belligerent act and having fallen into the hands of the enemy" receive full prisoner of war protection *until* "their status has been determined by a competent tribunal" to be that of a civilian rather than of a POW.[11] The clear language of this provision plainly creates a presumption of POW status,[12] which has been the undisputed interpretation adopted by the United States since its ratification of the Geneva Conventions in 1955.[13] As the prosecution concedes, the Army has even incorporated the language of Article 5 directly into its regulations. It has does so in a manner that even more clearly reveals where the burden lies:

> *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 authority. . . . 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.[14]

See also Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2658 (2004) (Souter, J., concurring in the judgment) (acknowledging the "Geneva Convention provision that even in cases of doubt, captives are entitled to be treated as prisoners of war 'until such time as their status has been determined by a competent tribunal.'").

What is more, even if this presumption of POW status did not apply, there exists significant doubt as to Mr. Hamdan's status—far more than would be needed under Article 5's "any doubt" standard. Mr. Hamdan was captured by bounty-hunting Afghan paramilitary forces with every incentive to distort and invent information to secure their rewards. Indeed, "Pakistani intelligence sources said Northern Alliance commanders could receive $5,000 for each Taliban

---

[9] Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, U.S.T. 3316, 3394, 75 U.N.T.S. 135 (GPW).

[10] Prosecution's Response to Defense Motion to Dismiss (Violation of Common Article 3 of the Geneva Conventions) at 2.

[11] Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, U.S.T. 3316, 3394, 75 U.N.T.S. 135 (GPW).

[12] *Id. See also* Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 847 INT'L REV. RED CROSS 571, 574-75 (2002).

[13] *See* Brief of Amici Curiae, Experts on the Law of War, in Support of Petitioners in *Hamdi v. Rumsfeld*, No. 03-6696 (U.S.S.C. 2004), at 6-7, *available at* http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/184/AmiciCuriae_Experts_%20Law.pdf] [hereinafter "*Hamdi* Amici"].

[14] Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-5(a)(2) & § 1-6(a) (1997), *available at* http://www.apd.army.mil/ pdffiles/r190_8.pdf (emphasis added).

prisoner and $20,000 for an al Qaeda fighter. As a result, bounty hunters rounded up any men who came near the battlegrounds and forced them to confess."[15] Mr. Hamdan has, moreover, claimed that he is entitled to POW status, which in itself is sufficient under Army regulations to confirm that his status is "in doubt." Specifically, the regulations read,

> 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 of 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.[16]

A categorical refusal to provide POW protections to a class of detainees, even if made by a President, does not even approach the evidence that would be needed to eliminate the doubt emerging from these circumstances. Indeed, as the drafters of Article 5 made clear, the competent tribunal requirement is meant to counteract precisely what the government is here attempting to achieve, as it ensures that "decisions which might have the gravest consequences [would] not be left to a single person"—even to a president.[17] Nor has the United States in the past allowed denial of privilege without an *individualized* assessment of status.[18] In sum, Respondents' willingness to dismiss Mr. Hamdan's POW status, without first convening a competent tribunal to determine the same, both contravenes these military regulations implementing Article 5 and radically departs from the practices to which the U.S. military has faithfully adhered in every major conflict since World War II.[19] See Amicus Brief of General David M. Brahms, et al., attached to the Defendant's Motion To Dismiss, at 18-22 for further discussion.

3) Even If He Were Not Entitled to POW Protections, Mr. Hamdan Would Still Enjoy Protections Under the Geneva Conventions.

Given the nature of the prosecutor's insinuations,[20] it would seem appropriate at this point to remind the Members that a rejection of Mr. Hamdan's POW status, if eventually warranted, would not result in his person somehow existing beyond the reaches of the Geneva Conventions. On the contrary, as the Official Commentary to the Fourth Geneva Convention explains,

> 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, [or] a

---

[15] Jan McGirk, *Pakistani Writes of His U.S. Ordeal*, Boston Globe, Nov. 17. 2002, at A30.

[16] AR 190-8, § 1-6(b). *See also* FM 27-10, ch. 3, § I ¶ 71(b) (explaining that AR 190-8 is the military's interpretation of Article 5).

[17] Int'l Comm. of the Red Cross, *Geneva Convention Relative to the Treatment of Prisoners of War: Commentary* 77 (Jean S. Pictet ed., 1960).

[18] Jennifer Elsea, Congressional Research Service, *Treatment of "Battlefield Detainees" in the War on Terrorism* 29 (2002), *available at* http://fpc.state.gov/documents/organization/9655.pdf.

[19] *Id. See also Hamdi* Amici at 9. *See generally id.* at 6-15.

[20] Namely, that the "Geneva Conventions do not apply to al Qaeda fighters such as Hamdan" if Article 2 does not apply, Prosecution's Response to Defense Motion to Dismiss (Violation of Common Article 3 of the Geneva Conventions) at 3, and similarly wholesale dismissals of the Conventions.

civilian covered by the Fourth Convention. . . . There is no intermediate status; nobody in enemy hands can be outside the law.[21]

Indeed, in this context, Mr. Hamdan's emphatic denials of any wrongdoing become even more salient, as our military history demonstrates that a detainee's claims of innocence are often adjudicated in his favor. The 1,196 tribunals convened during Operations Desert Storm, for example, resulted in 310 individuals being granted POW status. The remaining 886 detainees presenting claims in front of the tribunals "were determined to be displaced citizens and were treated as refugees."[22]

In any case, the supposed "unlawful combatant" status that the government relies so heavily upon in its attempts to deny protections to Mr. Hamdan has but a single effect under the Geneva Convention: While civilians are generally not lawful targets for military action, "when a civilian . . . is actually found wielding arms in the zone of combat, he may be treated as a lawful target of attack—but only insofar and as long as he takes a 'direct part in hostilities.'"[23] Once the civilian's direct participation has ended, however, he must be treated in the same manner as any other civilian.[24] He, for example, may be prosecuted for engaging in combat, but only in accordance with the protections accorded by the Fourth Geneva Convention.[25]

Such is the treatment owed to Mr. Hamdan if a competent tribunal determines that he does not warrant POW status under the Conventions. Until that time, the law requires the government to grant Mr. Hamdan the protections pursuant to POW status under GPW Article 5.

b. Common Article 3 Of The Third Geneva Conventions Does Apply To Any And All Armed Conflicts, Thereby Ensuring Mr. Hamdan A Baseline Level Of Protection.

---

[21] *See* Int'l Comm. of the Red Cross, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 51 (Jean S. Pictet ed., 1958); *see also* Fourth Geneva Convention arts. 4(1) & 4(3); Additional Protocol I art. 50; Dep't of the Army, Field Manual no. 27-10, *Law of Land Warfare*, para. 73 (1956).

[22] Dep't of Defense, *Conduct of the Persian Gulf War: Final Result to Congress* 578 (1992).

[23] *See also* Brief of *Amici Curiae* Practitioners and Specialists in the International Law of War in Support of Respondents in *Rumsfeld v. Padilla*, No. 03-1027 (U.S.S.C. 2004), at 14-15, *available at* http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/224/AmiciCuriae_Practitioners_Specialists_InternationalLaw.pdf [hereinafter *Padilla* Amici]. *See also id.* ("'Illegal combatant' or 'unlawful combatant' is not a term that appears in any treaty on the law of war. Commentators have occasionally used these phrases to describe someone who does not receive the privileges accorded to combatants, the most important of which are prisoner of war status and immunity from prosecution for engaging in combat. The phrase 'unlawful combatant' actually encompasses two sets of people: members of the regular armed forces who do not wear uniforms and do not bear arms openly (and thereby lose their privileged combatant status), and civilians who unlawfully participate directly in battle (who never had privileged combatant status to begin with). As persons in the latter category retain their civilian status, it is arguably improper to refer to them as combatants at all: they are more accurately described as 'unprivileged belligerents.' . . . The *Quirin* Court's use of the phrase 'unlawful combatants,' *Ex parte Quirin*, 317 U.S. 1, 31 (1942), rather than the categories and terminology of the Geneva Conventions, reflects the fact that *Quirin* predates the 1949 Conventions. Its analysis of [international humanitarian law] must therefore be read in conjunction with the subsequent, authoritative Geneva Conventions.") (emphasis added).

[24] *Padilla* Amici at 14 (citing Fourth Geneva Convention art. 4; *The Law of Land Warfare* para. 73).

[25] *See Padilla* Amici at 14 n.18 ("The Fourth Geneva Convention would not prohibit the detention or criminal prosecution of such a person based on his unlawful participation in hostilities, provided that procedural safeguards were observed.") (citing Fourth Geneva Convention arts. 42, 43, 78; Additional Protocol art. 75(4)).

The purpose and effect of Common Article 3 is to provide for a minimum standard of treatment of detained individuals in *all* armed conflicts. To this end, the defense can, certainly, agree with the fraction of the prosecution's interpretation of Common Article 3 that is correct. The prosecutor states that

> Common Article 3 is a unique provision that governs the conduct of signatories to the Conventions in a particular kind of conflict that is not one between High Contracting Parties to the Conventions. Common Article 3 complements common article 2. . . . The United States has accepted the proposition that the basic standards of common Article 3 have become customary international law in state practice. Recent opinions by international courts have also taken the view that the protections of common article 3 have become customary international law. . . . In this conception, common article 3 is not just a complement to common article 2, it is a catch-all that establishes standards for any and all armed conflicts not included in common article 2. [26]

Despite such promising beginnings, the prosecution couples these excerpts with a conclusion about Common Article 3's applicability in this case that run directly counter to the logic of the discussion. Distorting the language of the Article, the prosecution concludes that "by its own terms, Article 3 does not apply to the conflict pursuant to which Hamdan remains confined . . . ." [27] This assertion is erroneous. Common Article 3 applies to *all* armed conflict, including this one, as the history and structure of the Conventions makes undeniably clear. The relevant paragraph of the Article reads as follows:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions . . . .[28]

The prosecutor's response reveals at least three errors of law. First, the prosecution distorts the phrase "armed conflict . . . occurring in the territory of one of the High Contracting Parties" to be equivalent to an "internal conflict."[29] It then asserts that the "armed conflict in which the United State is currently engaged is not an internal conflict, because the United States is prosecuting it in both Afghanistan and around the globe."[30] While, given the distortion, the relevance of this assertion remains unclear, it maybe appropriate to note at this juncture that it is undisputed that the conflict was, indeed, occurring in Afghanistan—and therefore "occurring in the territory of one of the High Contracting Parties." The argument that the prosecution appears to be offering here (that Common Article 3 only applies to conflicts "occurring in the territory of" the United States) is cryptic, at best.

In any case, such fine distinctions, even if they existed, would not confine the reach of Common Article 3. Indeed, the prosecutor fails to recognize a distinctive feature of Common

---

[26] Prosecution's Response to Defense Motion to Dismiss (Violation of Common Article 3 of the Geneva Conventions) at 4-5.
[27] Prosecution's Response at 4.
[28] Article 3 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, U.S.T. 3316, 3394, 75 U.N.T.S. 135 (GPW).
[29] Prosecution's Response at 4.
[30] *Id.*

Article 3—that its stated applicability, to non-international armed conflict occurring in given territories, does not *limit* its applicability to such conflicts. On the contrary, as the Official Commentary of the Convention emphatically asserts, the very purpose of the Article was to "ensur[e] respect for the few essential rules of humanity which all civilized nations consider as valid *everywhere* and under *all circumstances* and as being above and outside war itself."[31] The Commentary explicitly asserts that "[t]his minimum requirement in the case of a non-international armed conflict, is *a fortiori* applicable in international conflicts."[32] Indeed, the Commentary goes so far as to explain that Common Article 3 "proclaims the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built."[33] The prosecution does a noble job of compiling descriptions of conflicts governed by Common Article 3; yet it does nothing to suggest that this list is exhaustive. Indeed, it confirms, by implication, that it is not: If, as the prosecution asserts, "a conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . must *normally* mean a civil war[,]"[34] then it occasionally must mean something else. In short, the Article does apply to the various conflicts the prosecution describes—it also applies to every *other* armed conflict.

The prosecutor similarly misunderstands the meaning of the phrase "not of an international character" in the context of armed conflict. This descriptive term does not contemplate the borders of countries and the geographical range of a dispute, as the prosecutor's filing suggests,[35] but rather depends on the number of High Contracting Parties participating in the conflict—if there is only one such nation, then the conflict is by definition "not of an international character." The government's contradictory interpretation is implausible, as it would necessarily result in "a gap in protection, which could not be explained by States' concerns about their sovereignty."[36] Given that one of the central aims of the Conventions was to close such gaps in humanitarian coverage, "this confirms that even a conflict spreading across borders remains a non-international armed conflict."[37]

Although the respondents nevertheless attempt to manufacture and then exploit such a gap, the structure of the Conventions confirms that such maneuvers are prohibited. In the context of international law, Common Article 3 is unusual insofar as it provides blanket protections across and within borders. Common Article 3 even pierces a High Contracting Party's veil of sovereignty, for example, to apply to internal armed conflicts. As such, it is "both legally and morally untenable that the rules contained in Common Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than

---

[31] Int'l Comm. of the Red Cross, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 14 (Jean S. Pictet ed., 1958) (emphasis added).
[32] Int'l Comm. of the Red Cross, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 14 (Jean S. Pictet ed., 1958).
[33] *Id.*
[34] *See* Prosecution's Response to Defense Motion to Dismiss (Violation of Common Article 3 of the Geneva Conventions) at 5 (emphasis added).
[35] *See* Prosecution's Response to Defense Motion to Dismiss (Violation of Common Article 3 of the Geneva Conventions) at 5.
[36] Marco Sassòli, *Use and Abuse of the Laws of War in the 'War on Terrorism'*, 22 LAW AND INEQUALITY 195, 201 (2004).
[37] *Id.*

in respect of international conflicts, would not be applicable to conflicts of an international character."[38] The catalogue of jurisdictions explicitly endorsing this all-encompassing scope of the Article is extensive: The applicability of common Article 3 to all international armed conflicts is now recognized in the jurisprudence of the International Court of Justice,[39] the International Criminal Tribunal for the Former Yugoslavia,[40] the International Criminal Tribunal for Rwanda,[41] and the Inter-American Commission for Human Rights.[42] Likewise, the United States has, historically, applied Common Article 3 in *all* armed conflicts subject to its military policy, even in situations not rising to the level of an "armed conflict" (such as domestic disturbances).[43] Perhaps most tellingly, Protocol I to the Geneva Conventions, now ratified by over 160 countries, clarifies that the protections codified in Common Article 3 apply, as a matter of positive international law, to *all* armed conflicts.[44]

In short, it is at this point "indisputable that [C]ommon Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based."[45] There can be no doubt that this "minimum" core of "mandatory" rules applies to the government's treatment of Mr. Hamdan. See also Amicus Brief of General David M. Brahms, et al., attached to the Defendant's Motion To Dismiss, at 22-23, for further discussion.

c. The Geneva Conventions, Which Have Been Implemented By Binding Army Regulations, Are Self-Executing And Provide Mr. Hamdan With A Defense To Require Compliance With Their Provisions.

Contrary to the Prosecution's wishful assertions, Common Article 3 of the GPW guarantees a minimum level of protections to a defendant which cannot be abrogated by this commission. To deny this proposition, the Prosecution must undermine the plain text of the

---

[38] Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, P 143 (Int'l Crim. Trib. for Former Yugoslavia App. Chamber Feb. 20, 2001).

[39] *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 113-14 (June 27).

[40] *See* Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, P 87 (Int'l Crim. Trib. for Former Yugoslavia App. Chamber Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996).

[41] *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Int'l Crim. Trib. for Rwanda Trial Chamber Sept. 2, 1998), *reprinted in* 37 I.L.M. 1399 (1998).

[42] *See* Abella v. Argentina, Case 11,137, Inter-Am. C.H.R., PP 155-56, OEA/ser. L/V.97, doc. 38 (1997).

[43] *See* Dep't of Defense, Directive 5100.77: DoD Law of War Program (Dec. 9, 1998). The directive states, in part: "The Heads of the DOD Components shall: Ensure that the members of their Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations." *Id.* P 5.31, at 4; *see also* Timothy P. Bulman, *A Dangerous Guessing Game Disguised as Enlightened Policy: United States Law of War Obligations During Military Operations Other Than War*, 159 MIL. L. REV. 152 (1999).

[44] Protocol I, art. 75, 1125 U.N.T.S. at 37. Although the United States has not ratified the 1977 Additional Protocols I and II to the Geneva Conventions (which provide further rules for international and non-international armed conflicts, respectively), it recognizes that most of their provisions now constitute customary international law binding upon the United States. *See, e.g.*, Dep't of the Army, *Law of War Deskbook* 32 (Brian J. Bill ed., 2000); Dep't of Army, *Operational Law Handbook* 11 (T. Johnson ed., 2003). *See also Padilla* Amici at 8.

[45] Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, P 143 (Int'l Crim. Trib. for Former Yugoslavia App. Chamber Feb. 20, 2001).

United States Constitution. To deny this proposition, the prosecution must mischaracterize the overwhelming weight of centuries of learned precedent interpreting that plain text. To deny this proposition, the prosecution must rewrite the history of the United States Congress, the Geneva Convention, and the dominant interpretations of the Geneva Convention created by the Department of Defense. And finally, to deny this proposition, the prosecution discards invaluable protections for American soldiers in favor of abstract and ill-founded concerns over the prerogatives of the political branches of American government.

In any event, the entire presupposition of "self-execution" is irrelevant before this commission. It turns out that the Geneva Conventions are self-executing, as it happens, but that is not at all necessary to decide this motion. Self-execution has to do with whether an individual, if a treaty has been violated, can walk into a *federal civil* court and sue for money damages and the like. That has absolutely nothing to do with whether it may be asserted as a *defense* in a commission – particularly a commission that is evaluating whether he can be jailed for years on end. As to that question, the Prosecution offers absolutely no precedent, or even logic, whatsoever. And they cannot, for the entire premise of a military commission is that it is to vindicate the laws of war. One cannot vindicate those rules by conducting a commission that is at odds with the charter document of the laws of war – the Geneva Convention. If there is any doubt about this at all, the text of the Constitution makes it obvious. The Supremacy Clause of the United States Constitution is clear: "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.

While self-execution is therefore not at all relevant in this proceeding, it is worth pointing out that, for the record, the Prosecution's claims about the Geneva Convention are wrong. For centuries, the interpretation of such treaties has been recognized to be the "peculiar province of the judiciary." *Jones v. Meehan*, 175 U.S. 1, 3 (1899). The primacy of judicial interpretations of federal treaties under the Supremacy Clause, even against clearly contrary interpretations provided by Congress or the Executive Branch, has long been upheld. *See, e.g.*, *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *Perkins v. Elg*, 307 U.S. 325 (1939); *Owings v. Norwood's Lessee*, 9 U.S. 344 (1809). A clearly contrary construction of a treaty provided by the Executive Branch may be given some weight, but it is "not conclusive" in the face of consistent judicial interpretation. *See Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933). The prosecution's response to the defense motion to dismiss entirely avoids the necessary dominance of judicial interpretation of federal treaties under the plain text of the Supremacy Clause and centuries of Supreme Court opinion.

The U.S. judiciary has provided a clear interpretation of the scope of the Geneva Conventions. That interpretation commits the United States and this tribunal to recognize that the Geneva Conventions represent "a self-executing treaty to which the United States is a signatory . . . . [They] are a part of American law . . . ." *United States v. Lindh*, 212 F. Supp.2d 541, 553-54 (E.D. Va. 2002) (footnotes omitted); *see also United States v. Noriega*, 808 F. Supp. 791, 797 (S.D. Fla. 1992); *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). The interpretation of the Geneva Conventions advanced by these courts is completely in keeping with longstanding Supreme Court precedent in interpreting and enforcing

the rights guaranteed to individuals by federal treaties. Federal treaties "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 . . . . 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); *see also Kolovrat v. Oregon*, 366 U.S. 187 (1961); *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928); *Asakura v. City of Seattle*, 265 U.S. 332, 339-41 (1924); *Chew Hong v. United States*, 112 U.S. 536 (1884); *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833). Such a rule is provided by Common Article 3. In contrast, the judicial interpretation of the Geneva Conventions advanced by the prosecution relies solely upon discredited, reversed, inapplicable, distorted, or minority judicial positions which lack the governing force of law.[46] They cannot justify the prosecution's strained judicial interpretation of the Geneva Conventions, which runs counter to specific recent precedent and the overwhelming weight of Supreme Court authority.

The clear and unequivocal judicial interpretation of the Geneva Conventions must be given deference as the dominant construction of the Treaty. In response to the Defense Motion to Dismiss, the prosecution concedes, "the minimum protections of common article 3 have indeed become part of customary international law." Prosecution Response at 5. This concession is correct, but it misses the main point: it is the clear and unequivocal interpretation of the Geneva Conventions by United States judicial authority that governs.
The prosecution presents this issue as a false choice for this commission. However, contrary to the prosecution's wishes, this commission is not called upon to arbitrate between an

---

[46] The prosecution relies exclusively on the following cases in its response to the Defense Motion to Dismiss on Common Article 3 grounds. Prosecution Response at 5-6, *citing Hamdi v. Rumsfeld*, 316 F.3d 450, 468-69 (4th Cir. 2003), *rev'd* 124 S.Ct. 2686 (2004); *Al Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring), *rev'd Rasul v. Bush*, 124 S.Ct. 2686 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-10 (D.C. Cir. 1984) (Bork, J., concurring); *Handel v. Artukovic*, 601 F. Supp. 1421, 1424-26 (C.D. Cal. 1985).

The prosecution's main support is provided by a lengthy excerpt from the Fourth Circuit's ruling in *Hamdi*. This opinion was vacated by the Supreme Court, 124 S. Ct. 2686 (2004), in a plurality opinion written by Justice O'Connor. Justice O'Connor specifically avoided "address[ing] at this time whether any treaty guarantees [detainees] . . . access to a tribunal for a determination [of status]." However, Justice O'Connor is on record elsewhere expressing support for the preeminence of the Supremacy Clause in determining the legal force of foreign treaties, and for claiming further that "our status as a free nation demands faithful compliance with the law of free nations." Sandra Day O'Connor, "Federalism of Free Nations," in *International Law Decisions in National Courts* 13, 18 (Thomas M. Franck & Gregory H. Fox, eds., 1996). Whatever precedential value *Hamdi* may provide to this commission, it surely cuts against the prosecution's interpretation of Common Article 3 and in favor of dismissal.

The prosecution also cites Judge Randolph's concurrence in *Al Odah*. However, this citation is not representative of the D.C. Circuit's ruling in *Al Odah*; in any case, *Al Odah* was overruled by *Rasul*.

The prosecution also cites Judge Bork's concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-10 (D.C. Cir. 1984) (Bork, J., concurring). Again, this is not representative of the D.C. Circuit's ruling in *Tel-Oren*; in any case, Judge Bork's concurrence, considered in full, is best understood as ***actually undermining*** the prosecution's argument. *See Tel-Oren*, 726 F.2d at 808-09 (suggesting that treaties which "speak in terms of individual rights," as do the Geneva Conventions generally and Common Article 3 particularly, may be regarded as self-executing).

Finally, the prosecution cites *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985). The prosecution's reliance on this case is completely misplaced, as it involves the predecessor to the 1949 GPW, the 1929 Geneva convention.

In short, the prosecution's claim that the federal courts "consistent holding [is] that the Geneva Conventions are not self-executing" is, if anything, undercut by the judicial opinions cited as support. *See* Prosecution Response at 7.

interpretation of the Geneva Conventions proffered by the executive branch and an interpretation of the Geneva Conventions derived from customary international law. Rather, this commission is compelled to dismiss because the U.S. judiciary has provided a clear interpretation of the Geneva Conventions. This interpretation must be preeminent, even against a clearly contrary construction of the Geneva Conventions by the executive branch, which in any event is lacking in this case.[47] The prosecution's concessions about the overwhelming weight of customary international law provide an informative but ultimately unnecessary sidebar. The plain text of the Constitution and the plain weight of U.S. judicial precedent are at stake before this commission. These authorities alone are sufficient and necessary for dismissal.

It is equally evident that the correct interpretation of the Geneva Conventions generally and Common Article 3 specifically provide privately enforceable rights. As was shown in the original Motion to Dismiss, American courts have historically understood treaty rights to be directly enforceable by private individuals. Defendant's Motion To Dismiss at 6. In response, the prosecution ignores this overwhelming weight of judicial interpretation. Instead, the Prosecution alludes to the 1929 Geneva Convention and *Johnson v. Eisentrager*, 339 U.S. 763 (1950). Prosecution Response at 6-7. The 1929 Geneva Convention is simply not at issue, and *Eisentrager* is irrelevant. However, it is relevant that the legislative history of the 1949 Geneva Conventions clearly demonstrates their intention to protect, "first and foremost . . . 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). It is also relevant that American courts have consistently held that the ultimate goal of the applicable Geneva Conventions "is to ensure humane treatment" for individuals, "not to create some amorphous, unenforceable code of honor among the signatory nations." *Noriega*, 808 F. Supp. at 799; *see also Lindh,* 212 F. Supp.2d at 553-54. The weight of relevant authority requires the rights guaranteed by Common Article 3 to be directly enforceable by private individuals such as Defendant.

As has been repeatedly demonstrated, the judicial interpretation of federal treaties, including the Geneva Conventions, must be paramount. The prosecution claims that dismissal "would create severe distortions in the structure of the Constitution." Prosecution Response at 7. This assertion is worse than incorrect. In fact the converse is true: the interpretation of the Geneva Conventions urged by the prosecution would require this court to ignore and reverse the

---

[47] The prosecution's response implies that the recent presidential memorandum expresses a consistent executive branch interpretation of the GPW. *See* Prosecution Response at 2-3, *citing Memorandum for the Vice President, et al. from President, Re: Humane Treatment of al Qaeda and Taliban Detainees*, at 1 (Feb. 7, 2002). This implication is incorrect: the recent presidential memorandum is inconsistent with the previous weight of executive interpretation. *See* notes 46-47, *supra*. Even if the executive branch interpretation cited by the prosecution were a consistent and compelling alternative, the judicial interpretation of the GPW must be given ultimate precedence. *See Factor v. Laubenheimer*, 290 U.S. 276, 293-94, 295 (1933) (holding that "if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred," and ruling that 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). Moreover, American courts have specifically overturned the interpretations of treaties advanced by the executive branch in situations where individual rights are at stake, even in areas where deference is traditionally due. *See, e.g., Perkins v. Elg*, 307 U.S. 325; *United States v. Decker*, 600 F.2d 733, 738 (9th Cir. 1979). In this case, where the executive interpretation provided by the prosecution is inconsistent even with past executive interpretations, the deference due to the correct judicial interpretation of the treaty must be even greater.

settled and supreme judicial understanding of this treaty in favor of a radical vision justified by limited and controversial executive authority alone. Worse still, the prosecution's interpretation would require this commission to sacrifice invaluable protections afforded to American soldiers by the Geneva Conventions in favor of fictitious concerns for the power of the executive branch. The United States' commitment to broad adherence to the Geneva Conventions has created reciprocal protection for United States military personnel in conflicts across the world for over half a century. *See* Amicus Brief of General David M. Brahms, et al. at 2-7. These safeguards should not be discarded on the basis of the prosecution's ill-founded structural concerns for the prerogatives of the political branches.

d. The Military Commission And The Conditions Of Confinement Imposed On Mr. Hamdan Both Soundly Fail To Meet The Minimum Requirements Imposed By Article 2 And Common Article 3.

1) The military commission falls far short of meeting the minimum standards imposed by the Geneva Conventions.

The list of the ways in which the military commissions fail to satisfy the Geneva Convention is long, and the prosecution has done nothing to remedy or explain these shortcomings through its Response's two-paragraph defense. The following summary of shortcomings includes references to the amicus briefs, attached to the Defendant's Motion To Dismiss, where each failing is discussed in more detail:

a) **The commission system violates the detainees' right to a speedy investigation and trial.** *See* Amicus Brief of General David M. Brahms, et al. at 24-25; Unopposed Motion of 271 United Kingdom and European Parliamentarians at 33-35.

b) **The commission system violates the detainees' right to present an adequate defense.** This includes detainees' right to facilities for the defense, and right to equality of arms. *See* Amicus Brief of General David M. Brahms, et al. at 26-27; Unopposed Motion of 271 United Kingdom and European Parliamentarians at 33-35.

c) **The commission system violates the detainees' right to exclude coerced and unreliable confessions as evidence.** This includes an accused's right not to be compelled to testify against himself, or to confess guilt. *See* Amicus Brief of General David M. Brahms, et al. at 28; Brief of Amicus Curiae of Louise Doswald-Beck, et al. at 26-28.

d) **The commission system violates the detainees' right to an independent and impartial tribunal.** *See* Amicus Brief of General David M. Brahms, et al. at 28-30; Unopposed Motion of 271 United Kingdom and European Parliamentarians at 26-31; Brief of Amicus Curiae of Louise Doswald-Beck, et al. at 19-24.

e) **The commission system violates the detainees' right to a civilian court**. *See* Amicus Brief of General David M. Brahms, et al. at 31.

f) **The commission system violates the detainees' right to be free from retroactive punishments**. *See* Amicus Brief of General David M. Brahms, et al. at 31-32.

g) **The commission system violates the detainees' right to an appeal to an independent judicial body**. *See* Unopposed Motion of 271 United Kingdom and European Parliamentarians at 31-33; Brief of Amicus Curiae of Louise Doswald-Beck, et al. at 34-35.

h) **The commission system violates the detainees' right to fundamental fair trial requirements**, including that of prompt notice, appearance before a judge, judicial recourse, judicial investigation and trial, and to limited pretrial detention of prisoners of war. *See* Brief of Amicus Curiae of Louise Doswald-Beck, et al. at 24-26.

i) **The commission system violates the detainees' right to counsel through restrictions on legal assistance**, including restrictions on the right to communicate with counsel in private. *See* Brief of Amicus Curiae of Louise Doswald-Beck, et al. at 29-30, 30-31, 32.

j) **The commission system violates a detainee's right to be tried in his presence**. *See* Brief of Amicus Curiae of Louise Doswald-Beck, et al. at 32.

k) **The commission system violates the detainees' right to exclude evidence obtained through torture**. *See* Unopposed Motion of 271 United Kingdom and European Parliamentarians at 35-38.

l) **The commission system is unlawfully discriminatory insofar as it subjects foreign citizens to human rights violations that United States citizens do not suffer**. *See* Amicus Brief of General David M. Brahms, et al. at 32; Unopposed Motion of 271 United Kingdom and European Parliamentarians at 38-40; Brief of Amicus Curiae of Louise Doswald-Beck, et al. at 35-37.

m) **The commission system was never itself established by law**. *See* Brief of Amicus Curiae of Louise Doswald-Beck, et al. at 17-19.

n) **The conditions of confinement likewise fail to satisfy the minimum requirements of the Geneva Convention.**

2) A similar list of shortcomings can be compiled in regards to the conditions of Mr. Hamdan's confinement:

a. The government has subjected Mr. Hamdan to **prolonged arbitrary detention**, in violation of the Conventions. *See* Amicus Brief of General David M. Brahms, et al. at 33.

b. The government has subjected Mr. Hamdan to **questioning under coercion**, in violation of the Conventions. *See* Amicus Brief of General David M. Brahms, et al. at 33.

c. The government has subjected Mr. Hamdan to **solitary confinement without access to sunlight**, in violation of the Conventions. *See* Amicus Brief of General David M. Brahms, et al. at 34-35.

d. The government has subjected Mr. Hamdan to **prolonged inadequate medical treatment**, in violation of the Conventions. *See* Amicus Brief of General David M. Brahms, et al. at 35.

e. The government has subjected Mr. Hamdan to **restrictions on free exercise of religion**, in violation of the Conventions. *See* Amicus Brief of General David M. Brahms, et al. at 35.

f. **The prosecutor's attempt to excuse these failings is unavailing.**

The prosecution addresses none of the failings listed above. It does, however, attempt to deny that it has violated Subpart (1)(d) of Common Article 3, which prohibits a Contracting Party from "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." In making this denial, the prosecutor points to reasons it may have confined Mr. Hamdan, often in solitary confinement, for *over three years*, beyond those reason implied by its desire to punish its detainees.

Intent is not, however, at issue here. The prosecutor cannot recharacterize a detention as something else, and he certainly cannot do so retroactively. The fact remains that the lengthy pretrial confinement of Mr. Hamdan in solitary confinement without charge amounts to an arbitrary and illegally imposed sentence that is incompatible with fundamental guarantees of due process. The government cannot now undo this violation by charging Mr. Hamdan two years after it first detained him; nor can it stop its continued violation of this same provision by offering him the possibility of a trial which has no guarantee of ensuring his release even if he is found to be not guilty of the charges against him (which, as the Defendant has explained in its coinciding Motion To Dismiss, are in themselves invalid). The prosecution clings tightly to a distinction without a difference in its attempt to deny that the sentence it has imposed on Mr. Hamdan constitutes a "punishment." Whether this dubious denial is persuasive, neither this word nor its equivalent can be found in Common Article 3, and for good reason—the primary purpose of the Third Geneva Convention is to protect the individual against harsh government treatment, not to ensure that governments are acting on the basis of certain motivations.

The Prosecution's Response fails to refute the law as set forth in the Defendant's Motion To Dismiss for Violation of Common Article 3 of the Geneva Conventions. The Defendant's argument as to the Prosecutor's violations of the Geneva Convention is correct as a matter of law. The Defendant therefore respectfully renews its request that the commission grant this Motion.

5. Files Attached. None.

6. Oral Argument Required. See D23, the Defense position remains the same.

7. Legal Authority Cited.

a. Articles 2,3, and 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, U.S.T. 3316, 3394, 75 U.N.T.S. 135 (GPW)

b. Rasul v. Bush, 124 S. Ct. 2686 (2004)

c. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004)

d. Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 847 INT'L REV. RED CROSS 571 (2002)

e. Brief of Amici Curiae, Experts on the Law of War, in Support of Petitioners in *Hamdi v. Rumsfeld*, No. 03-6696 (U.S.S.C. 2004), at 6-7, *available at* http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/184/AmiciCuriae_Experts_%20Law.pdf]

f. Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-5(a)(2) & § 1-6(a) (1997), *available at* http://www.apd.army.mil/ pdffiles/r190_8.pdf

g. Jan McGirk, *Pakistani Writes of His U.S. Ordeal*, Boston Globe, Nov. 17. 2002

h. Int'l Comm. of the Red Cross, *Geneva Convention Relative to the Treatment of Prisoners of War: Commentary* 77 (Jean S. Pictet ed., 1960)

i. Jennifer Elsea, Congressional Research Service, *Treatment of "Battlefield Detainees" in the War on Terrorism* 29 (2002), *available at* http://fpc.state.gov/documents/organization/9655.pdf

j. Dep't of Defense, *Conduct of the Persian Gulf War: Final Result to Congress* 578 (1992)

k. Brief of *Amici Curiae* Practitioners and Specialists in the International Law of War in Support of Respondents in *Rumsfeld v. Padilla*, No. 03-1027 (U.S.S.C. 2004), at 14-15, *available*

at
http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/224/AmiciCuriae_Practitioners_Specialists_InternationalLaw.pdf

l. Marco Sassòli, *Use and Abuse of the Laws of War in the 'War on Terrorism'*, 22 LAW AND INEQUALITY 195, 201 (2004)

m. Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, P 143 (Int'l Crim. Trib. for Former Yugoslavia App. Chamber Feb. 20, 2001).

n. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27)

o. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, P 87 (Int'l Crim. Trib. for Former Yugoslavia App. Chamber Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996)

p. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Int'l Crim. Trib. for Rwanda Trial Chamber Sept. 2, 1998), *reprinted in* 37 I.L.M. 1399 (1998)

q. Abella v. Argentina, Case 11,137, Inter-Am. C.H.R., PP 155-56, OEA/ser. L/V.97, doc. 38 (1997)

r. Dep't of Defense, Directive 5100.77: DoD Law of War Program (Dec. 9, 1998)

s. U.S. Const., Art. VI, cl. 2.

t. Jones v. Meehan, 175 U.S. 1 (1899)

u. Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986)

v. Perkins v. Elg, 307 U.S. 325 (1939)

w. Owings v. Norwood's Lessee, 9 U.S. 344 (1809)

x. Factor v. Laubenheimer, 290 U.S. 276 (1933)

y. United States v. Lindh, 212 F. Supp.2d 541 (E.D. Va. 2002)

z. United States v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992)

aa. Padilla ex rel. Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002)

bb. The Head Money Cases, 112 U.S. 580 (1884)

cc. Kolovrat v. Oregon, 366 U.S. 187 (1961)

dd. Jordan v. Tashiro, 278 U.S. 123 (1928)

ee. Asakura v. City of Seattle, 265 U.S. 332 (1924)

ff. Chew Hong v. United States, 112 U.S. 536 (1884)

gg. United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833)

hh. Johnson v. Eisentrager, 339 U.S. 763 (1950)

ii. 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)

jj. Amicus Brief of General David M. Brahms, et al.

kk. Unopposed Motion of 271 United Kingdom and European Parliamentarians

ll. Brief of Amicus Curiae of Louise Doswald-Beck

8. Witnesses/Evidence Required. The Defense position remains the same as in D23.

9. Additional Information. None.

NEAL KATYAL
Civilian Defense Counsel

LCDR CHARLES SWIFT
Detailed Defense Counsel

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	)	DEFENSE REPLY TO PROSECUTION RESPONSE TO DEFENSE REQUEST FOR WITNESS: UMAT AL-SUBUR 'ALI QASSIM AL-QAL'A D 30 28 October 2004

The Defense in the above-captioned case hereby files the following reply and request for the production of the above witness. In support of this request, the Defense answers the Prosecution's response as follows:

1. Reply to Prosecution Response to paragraph 3. Mr. Hamdan's words and actions are directly relevant to his mental state and are tend to rebut any circumstantial or direct evidence that Mr. Hamdan had entered into an a criminal agreement with Osama Bin Laden.

2. Reply to Prosecution Response to paragraph 7. The Defense does not believe that alternative to live testimony are feasible in this case further the defense would not agree to such alternatives. The witness will offer testimony tending to rebut the core of the Prosecution's case. The Defense, however, is aware that the witness is a family member of the accused and that witness bias will undoubtedly be at issue. As such the Commissions ability to assess the witness credibility is essential to a fair proceeding

3. Reply to Prosecution Response to paragraph 8. The Prosecution mischaracterizes the Defense assertion that the witness is not cumulative. The witness is offered for unique factual testimony. The fact that portion of the witness testimony overlaps does not change this fact nor does the Prosecution's assertion that Mr. Hamdan could testify to the facts in question. Such a rule is not in keeping with Mr. Hamdan's right to present a defense. If testimony of this witness is somehow "cumulative," and therefore excludable, it would guarantee the exclusion of virtually all of the evidence being sought to be introduced by the prosecution in this trial. To infer that Mr. Hamdan's potential testimony is any way related to this issue is singularly in appropriate and demonstrates a complete absence of an understanding of judicial principals and if adopted would preclude the need for the production of any witness

Review Exhibit 33-A

Page 1 **Of** 3

4. Conclusion. For the reasons set out in it request for production of the witness and this reply, the Defense requests the production of this witness

Charles D. Swift
Lieutenant Commander, U.S. Navy
Detailed Defense Counsel

Review Exhibit 33-A

Page 2 Of 3

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

October 12, 2004

MEMORANDUM FOR DETAILED DEFENSE COUNSEL ICO SALIM AHMED HAMDAN

SUBJECT: Witness Request for Umat al-Subur 'Ali Qassim al-Qal'a – U.S. v. Hamdan

1. On October 8, 2004 the Defense Counsel in U.S. v. Hamdan requested the above named witness be produced for live testimony at Guantanamo Bay, Cuba. The Defense Counsel's request states that she is the defendant's spouse and can testify regarding the defendant's activities in Afghanistan in 1998 through 2001, specifically that he did not attend a training camp, to her knowledge he was not a member of al Qaeda, that he worked for Mr. Bin Laden in order to support himself and his family, and regarding the defendant' attitudes regarding al Qaeda, religious beliefs, characters for peacefulness and truthfulness (paragraph 3).

2. In accordance with the Presiding Officer's Memorandum (POM) Number 10, dated October 4, 2004, regarding witness requests, "A well-written synopsis is prepared as though the witness were speaking (first person), and demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered."

3. The Defense Counsel's request is extremely vague and lacks detailed information required by POM Number 10. As written, your request is denied. If the Defense provides information in accordance with POM Number 10, the Prosecution will reconsider the request at that time.

[redacted]
Commander, U.S. Navy
Prosecutor
Office of Military Commissions

Review Exhibit 33-A

Page 3 Of 3

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	)	PROSECUTION RESPONSE TO DEFENSE REQUEST FOR WITNESS: UMAT AL-SUBUR 'ALI QASSIM AL-QAL'A 25 October 2004

The Prosecution in the above-captioned case hereby files the following response and notification of intent not to produce in accordance with paragraph 6 of POM 10. In support of this response, the Prosecution answers the Defense's Request for Witness as follows:

1. Response to paragraph 2. The Prosecution has no objections or supplements to this paragraph.

2. Response to paragraph 3. The Prosecution does not contest the content of the proffer. However, because much of the testimony will relate to second-hand knowledge and merely repeating what the Accused allegedly told her, we do feel this impacts the analysis in paragraphs 7 and 8.

3. Response to paragraph 4. The Prosecution has no objections or supplements to this paragraph.

4. Response to paragraph 5. The Prosecution has no objections or supplements to this paragraph.

5. Response to paragraph 6. The Prosecution has no objections or supplements to this paragraph.

6. Response to paragraph 7. POM 10, paragraph 4g requires the requestor to state whether they agree to an alternative to live testimony to present what is described in the synopsis, "or the reasons why such an alternative is NOT acceptable." The POM goes on to say that "It is unnecessary to state that live testimony is better than an alternative. . ." Given the requirements of paragraph 4g, the Prosecution is perplexed that the request was found to be in compliance with POM 10 since the request doesn't even state that live testimony is preferred. Paragraph 7 of the request simply states that the witness be present. That's all. No mention whatsoever is made of reasons why alternatives are not acceptable as specifically required by the POM. Because the defense has not complied

with the requirements of POM 10 at this time, the Prosecution cannot take a position on the feasibility of taking this testimony by alternative methods.

7. Response to paragraph 8. The Defense states that no other witness *can* be called to attest to the facts known by this witness. This is not even internally consistent with the Defense's own submissions for two other witnesses they have requested from Yemen. Cumulative with the proffered testimony of this witness, Taqia Muhsin al-Ansi and Muhammad Ali Qassim al-Qal'a are also proffered to provide testimony concerning:

a. the Accused's character for peacefulness;
b. the Accused's character for truthfulness;
c. the circumstances of the Accused's marriage; and
d. the Accused's attitude towards al Qaida.

The Prosecution fully acknowledges that the Accused cannot be required to testify. However, it is misleading to state that no other witness *can* be called to attest to these same facts.

8. Response to paragraph 9. The Prosecution has no objections or supplements to this paragraph.

9. Conclusion. For the reasons mentioned above, the Prosecution requests that this witness be denied. Alternatively, the Prosecution asks that this witness, currently located in Yemen, be allowed to testify in a manner other than appearing personally.

[redacted]
Commander, U.S. Navy
Prosecutor

Review Exhibit 33-B

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	)	DEFENSE REPLY TO PROSECUTION RESPONSE TO DEFENSE REQUEST FOR WITNESS: UMAT AL-SUBUR 'ALI QASSIM AL-QAL'A D 30 28 October 2004

The Defense in the above-captioned case hereby files the following reply and request for the production of the above witness. In support of this request, the Defense answers the Prosecution's response as follows:

1. Reply to Prosecution Response to paragraph 3. Mr. Hamdan's words and actions are directly relevant to his mental state and are tend to rebut any circumstantial or direct evidence that Mr. Hamdan had entered into an a criminal agreement with Osama Bin Laden.

2. Reply to Prosecution Response to paragraph 7. The Defense does not believe that alternative to live testimony are feasible in this case further the defense would not agree to such alternatives. The witness will offer testimony tending to rebut the core of the Prosecution's case. The Defense, however, is aware that the witness is a family member of the accused and that witness bias will undoubtedly be at issue. As such the Commissions ability to assess the witness credibility is essential to a fair proceeding

3. Reply to Prosecution Response to paragraph 8. The Prosecution mischaracterizes the Defense assertion that the witness is not cumulative. The witness is offered for unique factual testimony. The fact that portion of the witness testimony overlaps does not change this fact nor does the Prosecution's assertion that Mr. Hamdan could testify to the facts in question. Such a rule is not in keeping with Mr. Hamdan's right to present a defense. If testimony of this witness is somehow "cumulative," and therefore excludable, it would guarantee the exclusion of virtually all of the evidence being sought to be introduced by the prosecution in this trial. To infer that Mr. Hamdan's potential testimony is any way related to this issue is singularly in appropriate and demonstrates a complete absence of an understanding of judicial principals and if adopted would preclude the need for the production of any witness

Review Exhibit 33C

4. Conclusion. For the reasons set out in it request for production of the witness and this reply, the Defense requests the production of this witness

Charles D. Swift
Lieutenant Commander, U.S. Navy
Detailed Defense Counsel

Review Exhibit 33C

Page 2 **Of** 2