No. 05-184

IN THE SUPREME COURT OF THE UNITED STATES

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF 422 CURRENT AND FORMER MEMBERS OF THE UNITED KINGDOM AND EUROPEAN UNION PARLIAMENTS IN SUPPORT OF PETITIONER

[International Law—Need For Adherence]

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INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of a group of 422 U.K. and European parliamentarians, including 310 current or former Members of the U.K. Parliament and 112 current or former Members of the European Parliament (the "*amici*").[1] The full list of *amici* is attached as an Appendix to this brief.

Amici are drawn from all across Europe, and the group spans the political spectrum, including senior figures from all major political parties in the U.K.. The group also includes 13 former judges of the highest court in the U.K.; senior lawyers; former Cabinet Ministers, including a Secretary of State for Defense; a former Attorney-General; a former European Commissioner and U.K. ambassador to the United Nations; two former Speakers of the House of Commons; 13 Bishops and Archbishops of the Church of England; a former Archbishop of Canterbury; a Vice President of the European Parliament; and a former Vice President of the European Commission.

The same *amicus* group (originally numbering 271, then 304 and now 422 signatories) filed briefs in support of Hamdan in the courts below and also supported Hamdan's petitions for certiorari. In each of those filings, as here, *amici* express no view on whether Hamdan has engaged in acts of terrorism or any other conduct in violation of the laws of war, international law more generally, or U.S. law. Nor do *amici* seek to express any view on the legitimacy of the military action in Afghanistan or Iraq or the politics or tactics of the "war on terror" in general. These are questions on which *amici* hold differing individual views.

Amici have participated in this case from the outset because, despite their divergent political views, they share a

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored the brief in whole or in part and no person or entity other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

common view that it is important to the international legal order that, even when faced with the threat of international terrorism, the United States comply with the standards set by international humanitarian law and human rights law. *Amici* have taken part in these proceedings to urge the courts to ensure that the treatment accorded to prisoners such as Hamdan—be they terrorists or not—meets these standards.

The outcome of this case is, for Hamdan, of course, of enormous personal significance: he faces the prospect of being cast outside the legal order, into a shadow world where neither the Constitution or Laws of the United States nor the rules of international law specifically applicable to individuals caught up in armed combat, nor apparently even the rules of international law relating to fundamental human rights, give him any protection.

For the community of liberal democracies committed to the rule of law, which each member of the *amicus* group is or has been privileged to serve, the stakes are equally high. While this case presents a number of contested issues of U.S. law (which *amici* do not address), to the outside world it boils down to the simple, but crucial, question of whether the system of legal norms that purports to restrain the conduct of states vis-à-vis individuals within their power will survive the terrorist threat. This case can thus be seen as one battle in the war between the evil logic of terrorism and the bedrock principles that individuals are entitled to fair and humane treatment and that the actions of all states are subject to the rule of law—principles which American and coalition soldiers today fight to uphold in Afghanistan, Iraq and elsewhere.

If the Court of Appeals' determination that law, including international law, offers no protection to individuals such as Hamdan is the last word on this question, *amici* fear that the lesson that will be drawn by the wider world is that the evil of terrorism has proved more than a match for our principles. *Amici* urge this Court to reaffirm what liberal democracies the world over have long asserted: that even "amid the clash of arms, the laws are not silent." *Liversage* v. *Andersen*, [1942] A.C. 206 (H.L.).

SUMMARY OF ARGUMENT

This case presents questions of U.S. constitutional and statutory interpretation and issues arising under the Third Geneva Convention, which are addressed in detail in other submissions. Although this *amicus* group has at previous stages of these proceedings addressed the Geneva Conventions in substantive terms,[2] this submission aims solely to provide a perspective on the wider context within which this Court's decision will be viewed.

Accordingly, *amici* draw attention to the common heritage of respect for human rights and the rule of law of civilized nations. The United States has long been a leading proponent of these principles, which are reflected in specific international legal instruments, including not only the Geneva Conventions, but also human rights treaties, and norms of customary international law. When the United States denies the protections of international law to individuals such as Hamdan, it undermines fundamental principles of human rights and the rule of law, and it damages long-standing efforts by civilized nations to achieve universal recognition of and respect for those principles. These principles were recently reaffirmed in two landmark decisions of the U.K. House of Lords ensuring basic human rights for terrorism-related prisoners in the U.K.'s Belmarsh prison (*A and others v. Sec'y of State for the Home Dep't; X and another v. Sec'y of State for the Home Dep't* [2004] UKHL 56) and rejecting the use of evidence obtained by torture in judicial proceedings (*A and others* v. *Sec'y of State for the Home Dep't*, [2005] UKHL 71, available at http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand.pdf).

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[2] See Brief [Revised] of 305 United Kingdom and European Parliamentarians as *Amici Curiae* in support of Petitioner-Appellee, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393); Memorandum of Law on Behalf of 271 United Kingdom and European Parliamentarians as *Amici Curiae* in support of Petitioner, *Hamdan v. Rumsfeld*, 344 F. Supp. 2d. 152 (D.D.C. 2004) (No. 04-1519-JR).

These human rights treaties and customary norms of human rights and humanitarian law—and the fundamental standards they impose—govern the United States' prosecution of the war on terror. Wherever relevant conduct takes place, even in time of war or armed conflict, and in respect of any individual caught up in that conflict, the United States' treatment of prisoners such as Hamdan is to be judged according to these universal standards.

The military commission process to which Hamdan is being subjected falls short of those standards in that it: (a) fails to ensure an impartial determination of prisoners' guilt or innocence; (b) does not provide for appeal to an independent judicial body; (c) occasions detention without trial for periods in excess of three years; and (d) does not prevent the admission of evidence obtained through torture.

ARGUMENT

I. The United States And The Nations Of Europe Share A Common Heritage Of Respect For Human Rights And The Rule Of Law.

A. The United States Has Long Been A Standard Bearer For Human Rights And The Rule Of Law.

The United States has long played a "leading role . . . in the international struggle for human rights." See S. Exec. Rep. No. 23, 102d Cong., 2d Sess. (1992) (on the occasion of ratification of the International Covenant on Civil and Political Rights ("ICCPR")). The human rights and rule of law principles that are the focus of this brief find eloquent expression in the Declaration of Independence and the U.S. Constitution, which themselves both reflect principles in the Magna Carta and have in turn influenced the development of constitutional democracies the world over. Accordingly, the United States has seen itself—and been seen—as a nation "unwilling to witness or permit the slow undoing of those human rights to which this nation has always been committed." J. Kennedy, Inaugural Address (Jan. 20, 1961),

reprinted in Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101-10 (1989).

The United States' historical leadership in this field is especially notable in respect of international humanitarian law, the branch of international law specifically applicable to situations of 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). The Lieber Code, in turn, "had significant influence on the international debate regarding the further codification of the laws of war and is viewed as the starting point for subsequent international conventions", culminating in the Geneva 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*, 542 U.S. 466 (2004) (Nos. 03-334 and 03-343).

B. Our Common Heritage Is Codified In A Network Of Human Rights Treaties And Other International Legal Obligations.

In the modern era, the United States and the nations of Europe have frequently cooperated in developing the international treaties, principles and institutions that create the public international law framework that nations share today. These instruments reflect our common heritage of respect for human rights and the rule of law. They impose binding obligations on every nation that has signed up to them, including the United States, and customary international law binds states universally. Critically, insofar as these treaties relate to human rights, they extend the basic protections of the law to all human beings, without differentiation based on color, creed, gender or nationality.

The United States has pledged to uphold the rights created by the international human rights treaties to which it is party. Exec. Order No. 13,107, 61 Fed. Reg. 68,991 (Dec. 10, 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 . . . .").

1. The United States Is Bound By The ICCPR.

Central to the modern human rights framework is the ICCPR, Dec. 16, 1966, 999 U.N.T.S. 171, which is a treaty that embodies the fundamental civil and political rights contained in the Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810 ("Universal Declaration"), agreed at the United Nations General Assembly on December 10, 1948. With over 150 States Parties, the ICCPR is the most widely accepted human rights treaty in existence. The United States ratified the ICCPR on September 8, 1992, and is therefore bound by its terms. 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". The United States has entered no derogation to the ICCPR in respect of the war on terror.

When ratifying the ICCPR, the United States appended a "declaration" to the effect that the operative provisions of the Covenant are "not self-executing". 138 CONG. REC. S4784 (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.

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, because individuals whose rights have been infringed are entitled to effective equivalent remedies under that law. The declaration amounts to an undertaking to the other States Parties to the ICCPR 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).

This Court has held that the United States exercises effective jurisdiction over the Guantanamo Bay Naval Base. *Rasul* v. *Bush*, 542 U.S. 466, 480 (2004). Accordingly, prisoners at Guantanamo are entitled to the rights guaranteed in the ICCPR. The United States' obligation to protect those rights may be discharged through access to the protections of U.S. law or by direct application of international law. Regardless, though, that obligation persists and must not be ignored.

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

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 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. The Torture Convention prohibits both torture and cruel and inhuman treatment, see arts. 2 and 16, and the use or admission in legal proceedings of evidence obtained by torture, art. 15.

As with the ICCPR, the United States has entered a declaration to the effect that the operative provisions of this convention are not self-executing. Nevertheless, 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.

The Secretary of State has recently reaffirmed that "the United States' obligations under the [Torture Convention] extend to U.S. personnel wherever they are, whether they are in the United States or outside of the United States." Secretary of State Condoleezza Rice, Statement at Press Event with Ukrainian President Viktor Yushchenko (Dec. 7, 2005), transcript available at http://www.state.gov/secretary/rm/2005/57723.htm ("Secretary Rice Statement").

3. The United States Is Bound Not To Defeat The Object And Purpose Of The ACHR.

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 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 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 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 therein 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).[3]

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[3] 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

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

The United States is also 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, 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"), 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* v. *United States*, Case 9647, Inter-Am. C.H.R., Report No. 3/87, OEA/Ser.L./V/11.71, doc. 9 rev. 1 (1987) at ¶¶ 44-8. 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. 18 and 26.

Customary international law on human rights is also codified in the Universal Declaration, *supra*. 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

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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".

is frequently considered in judgments of United States courts. *E.g.*, *United States* v. *Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995) (referring to the Universal Declaration's definition of arbitrary detention); *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1384 n.19 (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 European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 ("ECHR"), incorporates bedrock human rights which are now recognized 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". *Id.* The United States shares the same heritage, and should uphold the same rights and freedoms.

C. It Is Crucial For The International Legal Order That The United States Abide By Its International Legal Commitments.

The obligations and protections established in human rights treaties and customary law are fundamental components of the modern, liberal world order that the United States, together with its allies and other like-minded nations, strives to establish and encourage. To a far greater extent than domestic law, international law depends for its vitality and efficacy on the compliance by States with its dictates. It undermines the political and moral authority of the United States and damages the rule of law in a troubled world if the United States, contrary to its long tradition, fails to uphold the international standards that it has been

so instrumental in creating and with which it has urged other nations to comply. The damage is all the greater when, as did the Court of Appeals, the United States denies that these standards even apply to its conduct.

II. The War On Terror Is Not Conducted In A Legal "Black Hole": It Is Governed By International Legal Standards Of Human Rights And Respect For The Rule Of Law.

The Court of Appeals ruled that the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 2, 1949, 6 U.S.T. 3114, T.I.A.S. 3362 (the "Third Geneva Convention"), offers no protection to Hamdan. *Hamdan* v. *Rumsfeld*, 415 F.3d 33, 40-42 (D.C. Cir. 2005). In thus holding that Hamdan lies outside the *protective* scope of international law, the Court of Appeals effectively concluded that, with respect to its treatment of him, the United States—or any state similarly situated—lies outside of the *prescriptive* scope of international law. For the reasons stated in the preceding section, *amici* have come together to oppose this conclusion.

A. International Legal Standards Of Human Rights And Respect For The Rule Of Law Apply To The Conduct Of The United States Anywhere In The World.

State responsibility under international human rights treaties turns upon whether the respondent state exercises sufficient authority and control in the situation that the action can be said to have been taken under its jurisdiction. Thus, the International Court of Justice ("ICJ") has recently reaffirmed that the ICCPR "is applicable in respect of acts done by a State in the exercise of 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 July 9, 2004), available at http://www.icj-eij.org/icjwww/idocket/imwp/imwp_advisory_opinion ("*Palestinian Wall*"). In so

holding, the ICJ considered the text of the treaty in the light of its object and purpose,[4] "the constant practice of the Human Rights Committee" established under the auspices of the United Nations to monitor compliance with the ICCPR,[5] and the fact that the *travaux préparatoires* 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.* at ¶ 109.

Similarly, the fundamental protections recognized in the American Declaration, to which the United States has in past conflicts conceded it was bound, 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) ("*Coard*"), attach not due to 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, *supra*, arts. 25 and 26.

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*, at 1283, §§ 37, 39, 41 and 43.

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[4] See Vienna Convention on the Law of Treaties, *supra*, 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.").

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

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." *Id*.

The United States unquestionably exercises authority and control at Guantanamo Bay. See *Rasul*, 542 U.S. at 480. 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 v. Uruguay*, No. 52/1979, Views of the H.R.C., U.N. Doc. CCPR/C/13/D/52/1979 at ¶ 12.3 (July 29, 1981). Accordingly, international law governs the treatment of the Guantanamo prisoners and obliges the United States to respect their fundamental human rights.

B. International Legal Standards Of Human Rights And Respect For The Rule Of Law Apply In Times Of Armed Conflict And National Emergency.

The United States has not declared war in the aftermath of September 11, although the "war on terror" has resulted at various times in a state of armed conflict. However, neither the existence of a state of war nor armed conflict suspends 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. Whether or not specific instruments of international humanitarian law apply in a particular case, it has been recognized that, even in situations of armed conflict, "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 I), art. 1(2), *adopted* June 8, 1977, 1125 U.N.T.S. 3.[6]

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 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:

> 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 . . . .

Coard, at ¶ 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 in *Palestinian 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." *Palestinian Wall*, 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 July 8, 1996)). Similar provisions for temporary derogations from particular human rights obligations in order to confront war or other public emergency are

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

provided in other human rights treaties. See ACHR, *supra*, art. 27. These provisions confirm that, absent such a derogation, international human rights norms are not generally suspended in the face of war. As noted above, the United States has not entered a derogation from its obligations under the ICCPR in respect of the "war on terror".

Some human rights 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, the United States' fundamental obligations under international humanitarian and human rights law persist in a situation of war or armed conflict.

C. International Legal Standards Of Human Rights And Respect For The Rule Of Law Apply In Respect Of Alleged Al Qaeda Members.

The characterization of a particular individual as an "al Qaeda detainee," enemy combatant, 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 II 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 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 prisoners 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 prisoners 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. The Military Commission System Does Not Meet International Legal Standards Of Human Rights And Respect For The Rule Of Law.

A. The Military Commission System Violates Prisoners' 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. See, *e.g.*, ICCPR, 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"); ACHR, 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. . . ."). 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, *supra*, preamble & 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 prisoners 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 under the command of, appointed by, and effectively serving at the pleasure of, the President or his delegate. See Department of Defense, Military Commission Order No. 1 (Aug. 31, 2005), ¶ 4(A), superseding Department of Defense, Military Commission Order No. 1 (Mar. 21, 2002), 32 C.F.R. §§ 9.1 to 9.13 (2005) ("Military Commission Order No. 1"); Department of Defense Directive 5105.70, ¶ 3.1, available at http://www0.dtic.mil/whs/directives/corres/pdf/d510570_0211004/d510570p.pdf. Review of military commission determinations is to take place within a closed system also within the Executive Branch. See Military Commission Order No. 1, ¶ 6(H); Department of Defense, Military Commission Instruction No. 9 (Oct. 11, 2005), ¶ 4, available at http://www.defenselink.mil/news/Oct2005/d20051014MCI9.pdf. The President or the Secretary of Defense, exercising authority delegated by the President, finally determines the verdict and sentence imposed on the accused. Military Commission Order No. 1, ¶ 6(H).

As the system is currently constructed, therefore, the same official (or his delegates) is responsible for the original detention,

for laying the charges against a prisoner, selecting the members of the tribunals that will hear the charges (over whom he exercises command authority), and making the final decision as to the prisoner's guilt or innocence of those same charges. There is no appeal from this process.

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*, 24 Eur. H.R. Rep. 221 (1997), 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 pressure; and (iv) whether the tribunal *appears* to be independent. ***Id.*** at ¶ 73.[7] To determine impartiality, one must look at whether the members of the tribunal are free from personal prejudice and bias, both subjectively and objectively. ***Id.*** 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*, 12 Eur. H.R. Rep. 266 ¶¶ 52, 53 (1990). *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.").

The Guantanamo 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

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[7] The tribunal under scrutiny in *Findlay* was, in substance, a court martial. See also *Cooper* v. *United Kingdom*, 39 Eur. H.R. Rep. 8 ¶ 104 (2004) and *Grieves* v. *United Kingdom*, 39 Eur. H.R. Rep. 2 ¶ 69 (2004), 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*.

by which judges are normally detailed to a case in the United States, 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 Commission 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 Defense 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. See *Findlay*, 24 Eur. H.R. Rep. 221 at ¶ 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."). This does not meet the requirement of the appearance of impartiality, and it does not provide adequate guarantees of prisoners' 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. Military Order of Nov. 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," § 7(b), 66 Fed. Reg. 57,833 (Nov. 16, 2001). The Executive Branch is thus prosecutor, judge, and jury,

with the power to impose sentences of life imprisonment, or even death—a situation that does not obtain even with respect to U.S. courts martial, 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 human rights 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 recognizes 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 offenses. *Vazquez* v. *Spain,* H.R.C. Communication No. 701/1996, U.N. Doc. CCPR/C/69/D/701/1996 (Aug. 11, 2000). See also *Hill* v. *Spain,* H.R.C. Communication No. 526/1993 (views adopted on Apr. 2, 1997). Egypt has also drawn criticism for its "Emergency Law," which subjects civilians to military tribunals, without appeal to normal courts of law. See, *e.g*., International Bar Ass'n, "IBA calls for end to use of (Emergency) Supreme State Security Courts

and military courts in Egypt," Feb. 2000, available at http://archive.ibanet.org/humri/intervent.asp.

C. Military Commissions Deny Prisoners' Right To 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". 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").

The same provision of the ICCPR also stipulates: "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody". See also *id*. at ¶ 3 ("[p]re-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 offense, including the right to be tried without undue delay). 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 art. 14. See H.R.C. General Comment No. 13(21), U.N. Doc. 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.

The Third Geneva Convention contains a similar provision. See art. 103 (trial "shall take place as soon as possible", and "in no circumstances" shall pre-trial confinement exceed three months); see also 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").

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 defense, 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 No. 788/1997, U.N. Doc. CCPR/C/73/D/788/1997 (Oct. 23, 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 defense.

Despite its obligations under the ICCPR and the clear provisions of other human rights instruments, the United States has held Hamdan in pre-trial detention for a period of more than three years, 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. Although the United States eventually selected Hamdan for trial by military commission, he is one of only a handful of the hundreds of prisoners at Guanatanamo Bay who is subject to even this imperfect process.

Detention without trial for such a prolonged period 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 No. 775/1997, U.N. Doc. CCPR/C/65/D/775/1997 (Mar. 23, 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 No. 818/1998, U.N. Doc. CCPR/C/72/D/818/1998 (July 16, 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 No. 899/1999 (views adopted on July 25, 2002) (citing H.R.C. Communication No. 473/1991 (*Barroso* v. *Panama*)). U.S. courts also recognize the right to a speedy trial, as protected by international law. In *Martinez* v. *City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998), 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 "detention is arbitrary 'if . . . the person detained is not brought to trial within a reasonable time'." *Id*. at 1384; accord *Kadic* v. *Karad*, 70 F.3d 232, 242 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

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. There is, therefore, no explicit bar to confessions and other evidence procured through questionable interrogation methods, including torture, being admissible against Hamdan and other prisoners. See Military Commission Order No. 1, ¶ 6D(1).

The acceptance of evidence without regard to the means by which it was procured is contrary to international practice. The House of Lords, sitting as the highest court in the U.K., has recently had the occasion to consider the use of torture evidence, in particular evidence obtained by torture of third parties, in legal proceedings in *A and others* v. *Secretary of State for the Home Department*, [2005] UKHL 71 (Dec. 8, 2005). The House of Lords unequivocally rejected any use of torture evidence,

concluding that: "the duty not to countenance the use of torture by admission of evidence so obtained in judicial proceedings must be regarded as paramount and that to allow its admission would shock the conscience, abuse or degrade the proceedings and involve the state in moral defilement." *Id.* at ¶ 150 (per Lord Carswell). Accordingly, "The English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention." *Id.* at ¶ 51 (per Lord Bingham).

In addition to the Torture Convention, which explicitly addresses the issue at art. 15, the use of evidence obtained by torture violates the United States' obligations under the ICCPR and other treaty instruments, which it has publicly pledged to uphold. See Secretary Rice Statement, *supra*; Letter from William J. Haynes II, General 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 ("it is the policy of the United States to comply with all of its legal obligations in its treatment of detainees, and in particular with legal obligations prohibiting torture. Its obligations include conducting interrogations in a manner that is consistent with the [Torture Convention] . . . as ratified by the United States in 1994.").

The principle that evidence obtained using such practices must be inadmissible in the adjudication of guilt or sentencing in any proceedings is a direct corollary of the prohibition on torture and inhuman treatment of detainees, which is widely recognized and explicitly codified in the Torture Convention. See also Universal Declaration, *supra*, art. 5; ECHR, *supra*, art. 3; ICCPR, *supra*, arts. 7 and 10. The H.R.C. has explained that the exclusion of such evidence is essential to the struggle against improper interrogation techniques. H.R.C., 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 No. 728/1996, U.N. Doc. CCPR/C/73/D/728/1996 (Dec. 21, 2001), at § 9.3. The House of Lords similarly recognized the link between excluding the fruits of torture from legal proceedings and reducing the incidence of torture in fact. *A and Others* v. *Sec'y of State for the Home Dep't* [2005] UKHL 71. 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).[8]

In the case of Guantanamo prisoners, these fundamental rules of international law are far from theoretical. Press reports and eyewitness accounts from such facilities as Abu Ghraib, Guantanamo itself, and others have raised serious doubts about the nature, extent and intensity of interrogation techniques employed in connection with the war on terror. These reports underline the seriousness of the due process lacunae in the military commissions' rules of evidence. By not expressly excluding from the military commission process evidence—including possible confessions—obtained by torture, these procedures violate the United States' obligations under the ICCPR, the Torture Convention, and other international instruments.

CONCLUSION

Amici are aware that the threat of terrorism is real. Governments around the world confront the dangers, and the hard choices posed by confronting those dangers. To meet the danger the world needs not only military might, but renewed and sustained commitment to the rule of law and to fundamental principles of human dignity and respect for human rights. In short, the world needs the United States to resume its role as a standard bearer for the principles of the rule of law and the protection of human rights

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[8] U.S. jurisprudence goes still further in deterring improper interrogation of detainees, 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).

and fundamental freedoms which are the shared heritage of a civilized world.

In this submission, *amici* have showed a number of fundamental respects in which the military commission system as contemplated is a stark departure from the fundamental rule of law and human dignity values embodied in numerous human rights treaties to which the United States is party or signatory. To restore faith with those obligations, this Court should not countenance any arguments that the actions of the United States at Guantanamo Bay or in respect of Al Qaeda or the war on terror lie beyond the effective purview of the law—whether that law be expressed in domestic enactments or international conventions.

Respectfully submitted,

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January 5, 2006 *Counsel for Amici Curiae*

APPENDIX

LIST OF AMICI

HOUSES OF PARLIAMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND MEMBERS OF THE EUROPEAN PARLIAMENT

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The Lord Borrie, QC
Rt Hon the Baroness Bottomley of Nettlestone
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Rt Hon the Lord Bridge of Harwich, Kt
The Lord Bridges
Rt Hon the Lord Brittan of Spennithorne, QC, Kt
Rt Hon the Lord Brooke of Sutton Mandeville, CH
The Viscount Brookeborough, DL
Rt Hon the Lord Browne-Wilkinson, Kt
The Lord Campbell of Alloway, QC
Rt Hon the Lord Cameron of Dillington, QC
The Lord Cameron of Lochbroom
Rt Hon, Rt Rev Lord Carey of Clifton
The Lord Carlile of Berriew, QC
The Baroness Chapman
The Lord Chidgey

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The Lord Clement-Jones, CBE
Rt Hon the Lord Clinton-Davis
The Lord Cobbold
Rt Hon the Lord Cooke of Thorndon, ONZ, KBE
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The Lord Hutchinson of Lullington, QC
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The Baroness Wilkins
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Rt Rev the Lord Bishop of Chester, Peter Robert Forster
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Rt Rev the Lord Bishop of Exeter, Michael Langrish
Rt Rev the Lord Bishop of Liverpool, Dr James Jones
Rt Rev the Lord Bishop of Norwich, Graham Richard James
Rt Rev the Lord Bishop of Oxford, Richard Douglas Harrier
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

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Anne Begg, MP
Dr Roger Berry, MP
Harold Best, former MP
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