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

BRIEF AMICUS CURIAE OF LOUISE DOSWALD-BECK, GUY S. GOODWIN-GILL, FRITS KALSHOVEN, VAUGHAN LOWE, MARCO SASSÒLI AND THE CENTER FOR INTERNATIONAL HUMAN RIGHTS OF NORTHWESTERN UNIVERSITY SCHOOL OF LAW IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

OTHER FEDERAL MATERIALS

TABLE OF AUTHORITIES – Continued

INTERNATIONAL MATERIALS

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

MISCELLANEOUS

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*[1]

Amici submit this brief in support of Petitioner Salim Ahmed Hamdan's Petition for Writ of Certiorari because of their commitment to respect for international humanitarian and human rights law, and their conviction that the military commission and procedures established for the trial of Petitioner Hamdan violate those norms, and accordingly violate United States statutes interpreted in light of applicable international law.

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 1987-2001, 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.

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Frits Kalshoven is Professor Emeritus of Public International Law and International Humanitarian Law at the University of Leiden, The Netherlands. 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 Chairman of the United Nations Commission of Experts to investigate war

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person or entity other than the *Amici Curiae* and their counsel made a monetary contribution to the preparation and submission of this brief.

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.

Vaughan Lowe is Chichele Professor of Public International Law at Oxford University and a Fellow of All Souls College at Oxford. He practices as a barrister from Essex Court Chambers, London. A member of the Executive Council of the American Society of International Law, he has written many books and articles on international law and is Co-Editor of the British Yearbook of International Law. He serves as a trainer on the laws of war for British Naval officers.

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 in Chicago 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.

SUMMARY OF ARGUMENT

The ruling below would permit trials by military commission, utilizing procedures that are *ad hoc*, obsolete and contrary to modern international norms for fair trial of persons captured in war. Review by this Court is vital to avoid dilution of hard-won international standards for due process of law.

Among fundamental fair trial standards established by international human rights and humanitarian law, but

jeopardized by the ruling below, are norms requiring that courts be independent and impartial, that accused persons be tried in their presence with assistance of counsel and access to the evidence against them, and that convictions be subject to appeal to higher courts. None of these basic international standards is met by the military commission procedures here.

The court below would allow the trial based on a statute authorizing the President to prescribe procedures for military commissions, 10 U.S.C. § 836. However, the court below failed to interpret that statute in light of the canon of construction that acts 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); *accord., F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 124 S. Ct. 2359, 2366 (2004).

10 U.S.C. § 836 can, and therefore must, be interpreted to require military commission procedures to comply with fair trial norms of international human rights and humanitarian law. So interpreted, the statute does not authorize the trial procedures at issue here, and no trial using such procedures should be allowed to proceed.

The court below also erred in ruling that the 1949 Geneva Convention, as distinct from the 1929 Geneva Convention at issue in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), does not confer judicially enforceable rights. In comparing the two Conventions, the court below overlooked the most relevant difference, namely, new article 5 of the 1949 Convention, which mandates that in case of "any doubt," the status of a prisoner must be "determined by a competent tribunal." The conclusion of the court below that there is "no suggestion of judicial enforcement" in the 1949 Convention is incorrect.

Amici urge this Court to grant review of this case in order to address these important questions affecting basic international standards of fair trial.

ARGUMENT

I. The Military Commission Trial of Petitioner Hamdan Would Violate United States Obligations Under International Human Rights and Humanitarian Law

A. Modern International Human Rights and Humanitarian Law Impose Extensive Fair Trial Obligations

No person – citizen or alien – has been tried by the United States before a military commission since the immediate aftermath of WWII. During the intervening half century, international human rights and humanitarian law have evolved greatly, forging standards not in place when the U.S. last convened a military commission. Key among these standards are the international fair trial standards that are jeopardized by the ruling below.

Numerous international instruments now bind the international community in its professed commitment that every accused must be assured a fair trial. The International Covenant on Civil and Political Rights ("ICCPR") – a human rights treaty to which 154 nations, the United States among them, are parties[2] – contains numerous fair trial provisions.[3] Although the ICCPR permits "derogations" from certain rights in times of national emergency,[4] its fair trial norms are non-derogable: 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 . . . "[5]

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[2] *See* Ratification Table, Office of the U.N. High Commissioner for Human Rights, *available at* http://www.ohchr.org/english/countries/ratification/index.htm (last visited Sept. 2, 2005).

[3] G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1996), 993 U.N.T.S. 3, entered into force, Jan. 3, 1976 [hereinafter ICCPR]. *See e.g.*, arts. 2.1; 14.1; 14.3(d); 14.3(e); 14.5 and 26.

[4] *Id.*, art. 4.

[5] U.N. H.R. Committee *General Comment No. 29: States of Emergency (Article 4)* (Aug. 31, 2001), CCPR/C/21/Rev.1/Add.11, para.

(Continued on following page)

The 1949 Geneva Convention III (prisoners of war) ("GC III"), to which the United States has long been a party,[6] likewise includes fair trial rights. Prisoners of war ("POW's") charged with crimes are expressly guaranteed an extensive series of rights.[7] In addition, GC III guarantees POW's the right to be tried only by the same courts, under the same procedures, as used in cases against military personnel of the detaining power[8] (which in the U.S. means trial by court-martial). Fair trial guarantees are deemed 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 GC III, making the persons responsible subject to criminal punishment.[9]

Customary international law, as reflected in the "Fundamental Guarantees" of Article 75 of the 1977 Geneva Protocol I ("Protocol I"),[10] largely parallels the ICCPR's fair trial safeguards.[11] These fundamental guarantees apply to all persons within the power of a state participant in an armed conflict who do not benefit from more favorable treatment under the Geneva Conventions or Protocol I.[12] Thus, should this Court conclude that

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11. *See also id.* at paras. 15-16. "General Comments" are issued by the Human Rights Committee ("HRC"), a body established by the ICCPR and "charged with implementing and interpreting the ICCPR. . . ." *United States v. Duarte-Acero,* 208 F.3d 1282, 1285 n.12 (11th Cir. 2000).

[6] 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].

[7] *See id.* arts. 99 and 103-07.

[8] *Id*. art. 102.

[9] *Id.* art. 130.

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

[11] *Cf.* ICCPR Art. 14, *supra* n.3, *with* Art. 75.4 of Protocol I.

[12] Protocol I, *supra* note 10, art. 75.1.

Petitioner Hamdan is not entitled to the protections GC III accords POW's, he would nonetheless be protected by these "fundamental guarantees."

These fundamental guarantees 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.[13] The United States has taken the initial step of signing the treaty; its stated reasons for not ratifying do not include objections to article 75; and the State Department transmittal letter recognized that certain provisions of Protocol I reflect customary international law.[14] U.S. government legal experts and military manuals have identified article 75 as among those provisions that reflect customary international law.[15] 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 (*e.g.*, GC III). Leading commentators as well as the American

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[13] *See* The International Committee of the Red Cross States Parties & Signatories Database http://www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=1&Count=150&Expand=52.1#52.1 (last visited Sept. 2, 2005).

[14] *See Message from the President Transmitting Protocol II Additional to the 1949 Geneva Conventions*, attaching State Dept. transmittal letter, 26 I.L.M. 561, 564 (1987).

[15] 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); *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). 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" *available at* http://www.cdmha.org/toolkit/cdmha-rltk/PUBLICATIONS/oplaw-ja97.pdf, (last visited Sept. 2, 2005.) Although more recent editions do not repeat this statement, neither do they qualify or retract it.

Bar Association agree that article 75 reflects customary international law.[16]

B. Because the Statutes on Which the Government Relies As Authority for the Military Commission *Can* Be Construed in a Manner Consistent With U.S. Obligations Under International Law, They *Must* Be So Construed

This Court can and should take account of international law, which has been part of United States law since the founding of the Republic. Under the Supremacy Clause, "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. v. 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").

International law bears on the domestic legal validity of Petitioner Hamdan's military commission and its procedures because the applicable statutes can, and therefore must, be interpreted in accord with international law. As Chief Justice John Marshall declared in *Murray v. Schooner Charming Betsy,* "[A]n Act of 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* canon has been

[16] *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); 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") *available at* http://www.abanet.org/humanrights/torture.pdf (last visited Sept. 2, 2005).

consistently reaffirmed by the Supreme Court. *E.g., F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 124 S. Ct. 2359, 2366 (2004); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *McCullogh v. Sociedad Nacional de Marineros,* 372 U.S. 10, 20-21 (1963). It requires construction of Acts of Congress, wherever possible, in a manner consistent with United States treaty obligations. *Sale v. Haitian Centers Council,* 509 U.S. 155, 178 and n.35 (1993). The *Charming Betsy* canon also requires that construction of U.S. statutes be consistent, if possible, with customary international law. *F. Hoffman-La Roche Ltd.,* 124 S. Ct. at 2366 (statutory construction reflecting "principles of customary international law – law that (we must assume) Congress ordinarily seeks to follow"). Thus, even where the U.S. has not joined a treaty, the treaty must be taken into account in construing U.S. statutes if its applicable norms are widely accepted as customary international law.

The Presidential Order establishing military commissions, on which the subsequent military orders and instructions are based, purports to exercise authority conferred by three statutes, namely, the Authorization for Use of Force Joint Resolution,[17] and 10 U.S.C. §§ 821 and 836(a) (2004).[18] Nothing in these statutes purports to authorize or require military commission procedures in conflict with international law.[19] Thus the statutes may – and accordingly must – be interpreted to authorize only commissions and procedures consistent with United States

[17] Public Law 107-40, 115 Stat. 224 (2001).

[18] *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* (Presidential Military Order), 66 Fed. Reg. 57833 (Nov. 13, 2001), preambular paragraph.

[19] The Joint Resolution makes no express reference to military commissions. Section 821 states that the jurisdiction of courts-martial does not deprive military commissions of concurrent jurisdiction over offenders or offenses "that by statute or by the law of war may be tried by military commissions, . . . " Section 836(a) authorizes the President to prescribe procedures for military commissions, provided they do not violate the Uniform Code.

obligations under treaties and customary international law.

The military commission trial of Petitioner Hamdan would violate numerous critical fair trial norms which the United States is obliged to respect as a matter of international human rights and humanitarian law. Among such minimum standards are norms requiring that all criminal tribunals, including military commissions: (1) must be independent and impartial, (2) must not deny the accused and his counsel access to trial proceedings and documents, and (3) must afford a right of judicial appeal. The Hamdan military commission and its procedures violate each of these critical norms.[20]

C. The Military Commission and Its Procedures Violate International Human Rights and Humanitarian Law Fair Trial Requirements

1. The Military Commission Trying Petitioner Hamdan Is 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."[21]

"Independence" refers to the freedom of tribunal members from external interference with their judicial

[20] The military commission and its procedures violate international law in additional respects which space limitations do not permit us to address. Among these are the requirement that any criminal tribunal be "established by law;" the prohibition against discrimination on the basis of nationality (including between citizens and non-citizens); the right to prompt notification of charges, access to counsel, appearance before a judge, and trial; and the prohibition on using as evidence statements obtained under torture or the duress of coercive conditions.

[21] *González del Río v. Peru,* U.N. H.R. Committee, Communication No. 263/1987 (Oct. 28, 1992), para. 5.2.

functions, and to the "objectively justified" appearance of such independence.[22] "Impartiality" refers to the absence of subjective bias on their part, and to the objectively justified appearance of the absence of bias.[23] In assessing independence and impartiality, the U.N. Human Rights Committee ("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 condition[s] governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch . . . "[24]

By any of these measures, the lack of independence of the military commission trying Petitioner Hamdan is patent. Broad powers over the commission 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.[25] This Authority selects the members of each military commission and the presiding officer.[26] The only criteria provided for selection

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[22] *E.g., Cooper v. U.K.* App. No. 00048843/99, Eur. Ct. H.R. (Dec. 16, 2003), para. 104 *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=3675449&skin=hudoc-en (last visited Sept. 2, 2005).

[23] *Id*.

[24] U.N. H.R. Committee *General Comment No. 13: Equality before the courts and the right to a fair trial and public hearing by an independent court established by law (Art. 14)* (Apr. 13, 1984), para. 3; *see also* U.N. Office of the High Commissioner for Human Rights, *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 Aug. to 6 Sept. 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, paras. 1-6.

[25] Military Commission Order No. 1, *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism,* section 2 (Aug. 31, 2005) [hereinafter MCO No. 1]; *see also* Military Commission Order No. 5, *Designation of Appointing Authority,* (Mar. 15, 2004) (revoking designation of initial Appointing Authority and designating new Appointing Authority) http://www.dod.mil/news/Aug2004/commissions_orders.html (last visited Sept. 2, 2005).

[26] *Id*. MCO No. 1, sections 4(A)(1)-(4).

are that commission members must be U.S. military officers and "competent to perform the duties involved,"[27] and that the presiding officer must be a U.S. military lawyer.[28] The lack of both criteria for selection and transparency in the selection process raises troublesome questions of potential unseen interference in the independence of the commissions. Nothing precludes the 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 Authority's discretion to control the composition of commissions is wide and unchecked.

The same Authority has sole power to decide many critical questions normally ruled on by courts, further undermining any military commission claim to independence. The commissions are not allowed to decide any interlocutory question whose outcome might result in termination of the proceedings; instead, the presiding officer must refer all such questions to the Authority.[29] Any and all other interlocutory questions may also be referred to the Authority for decision.[30] A plea agreement is subject to approval, not by the commission, but by the Authority.[31] The Authority may close the proceedings to the public and may even exclude the accused and his civilian defense counsel.[32] The Authority directs the time and place of each commission session,[33] conducts an "administrative review" of the trial record and may thereafter return the

[27] *Id*., section 4(A)(3).

[28] *Id*., section 4(A)(4).

[29] *Id*., section 4(A)(5)(d).

[30] *Id.*.

[31] *Id.*, section 6(A)(4).

[32] *Id*., section 6(B)(3).

[33] *Id*., section 6(B)(4).

case for further proceedings,[34] and approves or disapproves any communications regarding military commissions by prosecutors or defense counsel to the news media.[35] Exercise of these normally judicial powers by an executive officer constitutes (and objectively appears to constitute) direct interference with the independence of the commissions.

In addition, all members of the military commissions are serving military officers,[36] a factor justifying doubt as to their independence and impartiality.[37] They are subject to military performance evaluations,[38] and most have career aspirations within the military.[39] While the commissions are instructed to act "impartially,"[40] and officers' performance as commission members is not to be taken into account in their evaluations,[41] under international law

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[34] *Id*., section 6(H)(3).

[35] Military Commission Instruction No. 3, July 15, 2005, *Responsibilities of the Chief Prosecutor, Deputy Chief Prosecutor, Prosecutors, and Assistant Prosecutors*, section 5(c); Military Commission Instruction No. 4, *Responsibilities of the Chief Defense Counsel, Deputy Chief Defense Counsel, Detailed Defense Counsel, and Civilian Counsel*, (July 15, 2005) section 5(c). Both *at* http://www.dod.mil/news/Aug2004/commissions_instructions.html (last visited Sept. 2, 2005).

[36] MCO No. 1, *supra* note 25, section 4(A)(3).

[37] *Cooper v. U.K.*, Eur. Ct. H.R., *supra* note 22, para. 117; *Incal v. Turkey*, App. No. 00022678/93, Eur. Ct. H.R. (June 9, 1998), para. 68; *Ocalan v. Turkey,* App. No. 00046221/99, Eur. Ct. H.R. (March 12, 2003), paras. 111-21.

[38] Military Commission Instruction No. 6, *Reporting Relationships for Military Commission Personnel,* (Apr. 15, 2004), section 3(A)(8), commission members "continue to report to their parent commands." *Id*., section 3(B)(10). A*vailable at* http://www.dod.mil/news/Aug2004/commissions_instructions.html (last visited Sept. 2, 2005)

[39] MCO No. 1, *supra* note 25, section 4(A)(3) requires that commission members be military officers, although they may include retired officers recalled to active duty.

[40] MCO No. 1, *supra* note 25, section 6(B)(2).

[41] MCI No. 6, *supra* note 38, section 3(B)(10).

these formal undertakings do not suffice to assure impartiality in fact or in appearance.[42]

These pervasive structural defects are aggravated by public statements by the Commander in Chief, characterizing the prisoners at Guantanamo as "bad men,"[43] 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."[44] 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.

The structural defects also mean that the lack of independence and impartiality cannot be cured by the particular composition of a commission or by disqualification of individual members. Doubts about the independence and impartiality of the commission trying Petitioner Hamdan are objectively justified by its structural deficiencies. It thus fails the international tests of independence and impartiality.

The statutes referring to the jurisdiction of military commissions and authorizing the President to prescribe their procedures, 10 U.S.C. §§ 821 and 836(a), must be

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[42] *Findlay v. U.K.*, App. No. 00022107/93, Eur. Ct. H.R. (Feb. 25, 1997), paras. 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 v. Turkey,* Eur. Ct. H.R., note 37 *supra*, 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; *Polay Campos v. Peru*, U.N. Doc. CCPR/C/61/D/577/1994, U.N. H.R. Comm. (Jan. 9, 1998), para. 8.8.

[43] *E.g.*, N. Watt, *Bush Aids Blair By Halting Trial of Britons in Guantanamo Bay*, The Guardian (London), July 19, 2003, p. 8.

[44] 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.mil/transcripts/2004/tr20040213-0445.htm (last visited Sept. 2, 2005).

interpreted to contemplate only commissions which are independent and impartial. The commission trying Petitioner Hamdan is neither.

2. The Military Commission Procedures Impermissibly Deny Access to Secret Trial Proceedings and Documents

a. Exclusion From Secret Hearings Violates Petitioner Hamdan's Rights to Be Tried in His Own Presence and to Assistance of Counsel

The procedures of the Hamdan military commission permit the exclusion of the accused from portions of his own trial. While generally the accused may be present at every stage of the trial, his presence must be "consistent with Section 6(B)(3)."[45] 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 . . . "[46]

Such exclusion violates Petitioner Hamdan's right under international humanitarian and human rights law "[t]o be tried in his presence, . . . "[47] The ICRC Commentary[48] explains that "the important thing is that

[45] MCO No. 1, *supra* note 25, section 5(K).

[46] *Id.*, section 6(B)(3).

[47] ICCPR, *supra* note 3, art. 14.3(d). Accord, Protocol I, *supra* note 10, 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.*, *Belziuk v. Poland*, App. No. 00023103/93, Eur. Ct. H.R. (Mar. 25, 1998) para. 39 *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=3675449&skin=hudoc-en (last visited Sept. 2, 2005).

[48] Claude Pilloud *et al.*, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz *et al.* eds., International Committee of the Red Cross, 1987).

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."[49]

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 under ICCPR art. 14.3(d). Even though military defense counsel may be present at all sessions of the trial, this fails to cure the violation, because military 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."[50]

The statute authorizing the President to prescribe procedures for military commissions, 10 U.S.C. § 836(a), can, and therefore must, be construed to require procedures that meet these minimum international standards for trial in one's presence and to assistance of counsel. The procedures for the commission trial of Petitioner Hamdan therefore violate the statute.

b. Denial of Access to Secret Documents Violates Petitioner Hamdan's Rights to Adequate Facilities for the Defense and to Equality of Arms

The military commission procedures deny the accused and his counsel access to documents containing "protected information" – broadly defined – even if that evidence would be exculpatory. While the prosecution is directed to provide the defense with access to evidence that the prosecution intends to introduce at trial, as well as other evidence known to the prosecution that tends to exculpate

[49] *Id.,* art. 75, para. 3110.

[50] MCO No. 1, *supra* note 25, section 6(B)(3).

the accused, there are caveats to these requirements that substantially undercut them.[51] Such access is only to be granted where it is consistent with subsequent provisions relating to broadly-defined "protected information."[52]

With respect to evidence the prosecution intends to introduce, the Presiding Officer may direct the deletion of "protected information" from documents before they are made available to the accused and his military and civilian defense counsel, "or" the substitution of either a "portion or summary" of the information or a statement of the facts that the omitted information tends to prove.[53] But even where a deletion is accompanied by a substitution, it is no cure, since neither the accused nor his counsel has any way to know whether the substitute fairly and adequately compensates for the denial of access to the original.

With respect to exculpatory evidence – evidence the accused could use to demonstrate his innocence – the denial of access is even more severe. So long as the prosecution does not intend to introduce the evidence at trial, the prosecution is not required, and indeed is not allowed, to disclose to the accused or his counsel any protected information, *even if* that information is of an exculpatory character.[54] The defense thus may never learn of the existence of critical exculpatory information.

For these reasons, permitting the denial of "protected" information to the defense violates the right of Petitioner Hamdan under both international human rights and humanitarian law to "adequate . . . facilities for the preparation of his

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[51] *Id.*, section 5(E).

[52] 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").

[53] MCO No. 1, *supra* note 25, section 6(D)(5)(b).

[54] *Id.,* sections 5(E), 6(D)(5)(b).

defense"[55] and to equality of arms. The statute can and must be construed consistent with these international rights. Petitioner Hamdan's commission trial procedures therefore violate 10 U.S.C. § 836(a).

3. The Military Commission Procedures Deny Judicial Appeal in Violation of the Right to Review By a Higher Tribunal

No judicial appeal is permitted from the decisions of military commissions.[56] Instead, commission decisions are subject to review only by a "review panel" whose members are appointed by the Secretary of Defense and must be military officers or civilians temporarily commissioned as military officers.[57] 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.[58] 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.[59] In contrast, review panel members may be removed by the Secretary of Defense, without notice or hearing, for "military exigency."[60] The review panel thus

[55] ICCPR, *supra* note 3, 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, . . . " *General Comment 13, supra* note 24, para. 9. *See also* GC III art. 105 (right to "necessary facilities to prepare the defense"); and Protocol I art. 75.4(a) (right to "all necessary rights and means of defense").

[56] Presidential Military Order, *supra* note 18, section 7(b)(2).

[57] MCO No. 1, *supra* note 25, section 6(H)(4).

[58] 10 U.S.C. § 942(b)(1).

[59] 10 U.S.C. § 942(c) (2004).

[60] Military Commission Instruction No. 9, *Review of Military Commission Proceedings,* Dec. 26, 2003, section 4(B)(2), Dec. 26, 2003, *at* http://www.dod.mil/news/Aug2004/commissions_instructions.html (Secretary may

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lacks the structural independence essential to judicial review.[61]

This lack of judicial appeal violates the ICCPR article 14.5 right of "everyone" convicted of a crime to have his conviction and sentence "reviewed by a higher tribunal according to law."[62] In the 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."[63] Because this infirmity is a structural one, it cannot be cured by the qualifications of the particular individuals appointed to the review panel. No matter how distinguished the members of a review panel appointed by a Secretary of Defense may be, they are not a reviewing "tribunal" in the sense of article 14.5, because they are not a structurally independent and impartial court.[64]

The right to appellate judicial review of all criminal convictions, guaranteed by article 14.5, is not a mere procedural nicety, but "an imperative norm of international law" to which all courts must adhere.[65] The statute on commission procedures, 10 U.S.C. § 836(a), can and therefore must be interpreted to authorize only procedures

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remove a panel member for "good cause," which includes "military exigency") (last visited Sept. 2, 2005).

[61] *See supra* part I.C.1.

[62] ICCPR, *supra* note 3, Art. 14.5.

[63] GC III, *supra* note 6, Art. 106. U.S. military personnel convicted in courts-martial have the right to appeal to courts.

[64] The Inter-American Court of Human Rights has held that an appeal by convicted terrorists to a military court does not satisfy their comparable "right to appeal the judgment to a higher court" in article 8.2(h) of the American Convention on Human Rights, because the appellate court, too, must "satisfy the requirements that a court must meet to be a fair, impartial and independent tribunal previously established by law." *Castillo Petruzzi et al. Case*, Inter.-Am. C.H.R. (May 30, 1999), para. 161 accessible at www.worldlii.org/int/cases/IACHR/1999/6.html (last visited Sept. 2, 2005).

[65] *Prosecutor v. Tadic*, Case No. IT-94-1-A-AR77, Judgment (Feb. 27, 2001), *available at* www.icty.org (last visited Sept. 2, 2005).

which include this minimum international standard. The procedures for Petitioner Hamdan's commission trial violate the statute, thus construed.

II. Unlike the 1929 Convention, the 1949 Geneva Convention No Longer Relies On Exclusively Diplomatic Remedies to Vindicate Rights of Enemy Aliens, But Expressly Contemplates Judicial Remedies as Well.

The Court of Appeals ruled that this Court's footnote in *Johnson v. Eisentrager*,[66] stating that the 1929 Geneva Convention[67] was not judicially enforceable because enforcement responsibility rested with political and military authorities, is "still good law."[68] In order to reach this mistaken view, the Court of Appeals compared various provisions of the 1929 and 1949 Conventions, finding that there is still "no suggestion of judicial enforcement."[69]

The Court of Appeals' comparison of the two Conventions, however, overlooks both the full text of *Eisentrager* and the most relevant difference between the 1929 and 1949 Conventions. In excluding judicial review in *Eisentrager*, this Court noted that rights of alien enemies under the 1929 Convention were vindicated "only" by diplomatic protests and intervention.[70]

That is no longer true. New article 5 of the 1949 Convention – which the Court of Appeals discusses elsewhere, but not in this context or in comparing the two Conventions – expressly confers judicially enforceable rights on alien enemies.[71] It provides that in cases of

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[66] *Johnson v. Eisentrager,* 339 U.S. 763, 789 n.14 (1950).

[67] Convention Relative to the Treatment of Prisoners of War. Geneva, 27 July 1929.

[68] *Hamdan v. Rumsfeld*, 2005 U.S. App. LEXIS 14315, 14316 (D.C. Cir. 2005).

[69] *Id.* at 14318.

[70] *Eisentrager,* 339 U.S. at 789 n.14.

[71] GC III, *supra* note 6.

doubt, their status must be determined by a "competent tribunal."

In other words, the 1949 Convention provides a judicial remedy for what was previously redressed "only" by diplomatic protest and intervention. The rationale of *Eisentrager*, resting on the exclusively diplomatic remedies of the 1929 Convention, no longer applies to the 1949 Convention. *Eisentrager's* interpretation of the 1929 Convention does not, therefore, justify denial of judicial enforcement of the new rights conferred by the 1949 Convention.

For this additional reason, this Court should grant review to consider this erroneous ruling of the Court of Appeals, which if allowed to stand, would have the important effect of denying judicial review of all violations of the 1949 Geneva Convention in the very Circuit where all cases from Guantanamo are consolidated for hearing.

CONCLUSION

Amici urge this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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