IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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INTEREST OF AMICI

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

I. APPLICABLE INTERNATIONAL NORMS

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

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

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

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

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

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[3] *See infra* at p. 11-13.
[4] Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, entered into force, Oct. 21, 1950, entered into force for the U.S., Feb. 2, 1956, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].
[5] Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, entered into force, Oct. 21, 1950, entered into force for the U.S., Feb. 2, 1956, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].
[6] Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, entered into force, Dec. 7, 1978, reprinted in 16 I.L.M. 1391 (1977) [hereinafter Protocol I].
[7] G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force, Jan. 3, 1976 [hereinafter ICCPR].
[8] G.A. Res. 39/46, annex, 39 U.N. GAOR Supp., (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force, June 26, 1987 [hereinafter Torture Convention].
[9] The United States ratified GC III and GC IV in 1956. *See supra* notes 4 and 5.

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

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

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

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

[11] *Id.*, art. 102.

[12] *Id.*, art. 130.

[13] *Id.* art. 5.

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

[15] *Id.*, art. 147.

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

[17] *Id.*, art. 5.

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

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

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

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

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

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

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

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

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

The "fundamental guarantees" set out in Article 75 of Protocol I are even more protective of fair trials than the 1949 Geneva Conventions. These fundamental guarantees largely parallel the fair trial safeguards of ICCPR Article 14.[24] The fundamental guarantees of Article 75 apply to all persons who are within the power of a state participant in an armed conflict and who do not benefit from more favorable treatment under the Geneva Conventions or Protocol I.[25] This would include a person, such as Mr. Hamdan, who is not a national of a party to the conflict and whose State has normal diplomatic representation in the detaining power.[26]

The fundamental guarantees of Article 75 of Protocol I have attained the stature of customary international law and thus bind the United States even though it has not ratified Protocol I. More than 160 states are parties to Protocol I. Although the United States has not ratified Protocol I, it has signed the treaty, and its stated reasons for not ratifying did not include objections to the fair trial guarantees of Article 75.[27] On the contrary, U.S. government legal experts and military manuals have identified Article 75 as among those provisions of Protocol I

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

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

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

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

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

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

The International Covenant on Civil and Political Rights ("ICCPR") is a multilateral treaty to which 153[30] countries are States Parties. Following signature by the President and consent to ratification by the Senate, the United States in 1992 became party to, and thus bound by, the ICCPR.[31] Among the rights guaranteed by this treaty are the right to judicial review of the lawfulness of detentions (art. 9.4), to a catalogue of fair trial safeguards for "everyone" charged with a criminal offense (art. 14), to the treatment of prisoners with humanity and respect for their inherent dignity (art. 10.1), and to non-discrimination and equality before the law (arts. 2.1, 14.1, and 26).

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

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

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

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

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

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

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

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention") was adopted by the UN General Assembly in 1989, and has 138[34] States Parties, including, since 1994, the United States. Among its provisions, the Torture Convention requires States Parties to ensure "that any statement which is established to have been made as a result of torture shall not be invoked as evidence" against an accused. Although the United States attached reservations and understandings to its ratification of the Torture Convention, none sought to limit the applicability of this exclusionary rule.[35]

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

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

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

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

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

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

A. Complementarity

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

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

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

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

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

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

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

[38] *See supra* at p. 5.

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

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

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

[42] *Id.* art. 75, para. 3031.

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

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

B. Most Favorable Protection

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

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

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

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

[46] *Id.*, para. 3142.

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

C. Territorial Scope

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

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

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

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

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

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

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

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

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

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

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

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

1. The Military Commissions Are Not Established By Law

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

The proposed military commissions do not meet this standard of institutional legitimacy: they are at their core a creature of executive directive. No statute duly enacted by Congress establishes these military commissions. While the President's Military Order references as the basis of its authority three acts of Congress – the authorization for use of military force following the attacks of September 11, 2001,[57] and sections 821 and 836 of title 10 of the U.S. Code[58] – none of these provides the necessary basis for military commissions to be "established by law."

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

[54] *Zand*, 15 DR paras. 66, 68, 69.

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

[56] *Id.* para. 4

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

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

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

Nor does any other U.S. statute "establish by law" the military commissions envisioned in the President's Military Order. Statutes do provide that two particular offenses – aiding the enemy and spying – may be tried by "court martial or military commission."[61] But these statutes fall far short of "establishing by law" the military commissions contemplated by the President's Military Order for trial of some 26 specified principal offenses, plus others unspecified.[62] Significantly for the present case, Mr. Hamdan is not charged with either of the two offenses addressed in these statutes.

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

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

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

[61] 10 U.S.C. §§ 904 and 906 (2004).

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

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

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

2. The Military Commissions Are Not Independent and Impartial

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

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

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[63] While neither of these statutory provisions uses the term "jurisdiction," they could be read to confer such jurisdiction, by implication, on any military commissions that may be established.
[64] U.S. statutory provisions on military commissions authorize convening authorities to assign them court reporters and interpreters; require witnesses to appear and prohibit contemptuous acts; permit commissions to receive certain sworn testimony given before courts of inquiry; and direct military lawyers to revise and record their proceedings. 10 U.S.C. 828, 847, 848, 850, 3037, 8037 (2004). Other statutes exclude military commissions from general laws on judicial review of agency action (5 U.S.C. sections 551(1)(F) and 701 (b)(1)(F)) and on pretrial release and speedy trials (18 U.S.C. 3156 and 3172), and provide that extraterritorial jurisdiction of U.S. courts over members or employees of the U.S. armed forces or persons who accompany them outside the U.S. do not deprive military commissions of any jurisdiction they may have "by statute or by the law of war." 18 U.S.C. 3261(c)(2004).
[65] *Zand*, 15 DR para. 69.
[66] *González del Río v Peru*,UN Doc. CCPR/C/46/D/263/1987, H.R. Comm. (Oct. 28, 1992), para. 5.2.
[67] *See supra* at p. 7.
[68] *E.g., Cooper v. U.K.* App. No. 00048843/99, Eur. Ct. H.R. (Dec. 16, 2003), para. 104.
[69] *Id.*

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

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

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

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[70] Gen. Cmt 13, *supra,* note 55, para. 3; *see also Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Milan, 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, paras. 1-6.
[71] U.S. Dept. of Defense Military Commission Order No. 1, section 2, Mar. 21, 2002 [hereinafter MCO No. 1]; *see also* U.S. Dept. of Defense Military Commission Order No. 5, Mar. 15, 2004 (revoking designation of initial Appointing Authority and designating new Appointing Authority). Both *at* http://www.dod.mil/news/Aug2004/commissions_orders.html.
[72] *Id.* MCO No. 1, sections 4(A)(1)-(4).
[73] *Id.* 4(A)(3).
[74] *Id.* 4(A)(4).

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

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

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

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[75] *Id.* 4(A)(5)(d).
[76] *Id.* 6(A)(4).
[77] *Id.* 4(A)(5)(d).
[78] *Id.* 6(B)(3).
[79] *Id.* 6(B)(4).
[80] *Id.* 6(B)(4).

[81] MCI No. 3, April 15, 2004, *Responsibilities of the Chief Prosecutor, Prosecutors, and Assistant Prosecutors*, section 5(c); MCI No. 4, April 15, 2004, *Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel*, April 30, 2003, section 5 (c). Both *at* http://www.dod.mil/news/Aug2004/commissions_instructions.html.
[82] MCI No. 7, April 30, 2003, *Sentencing*, section 4(A).
[83] MCO No. 1, *supra* note 71, section 4(A)(3).
[84] *Cooper*, App. No. 00048843/99, Eur. Ct. H.R., para. 117 (participation of civilians in key positions on British air force courts-martial found to be "one of the most significant guarantees of the independence of the court-martial proceedings"); *Incal v. Turkey*, App. No. 00022678/93, Eur. Ct. H.R. (June 9, 1998), para. 68 (independence and impartiality of Turkish National Security Courts were negated by fact that one of three members of these courts was a military judge, and such officers are "servicemen who still belong to the army, which in turn takes its orders from the executive." In addition, security courts' impartiality was open to doubt because they empowered members of one armed force to sit in judgment on their presumed enemies.); *Ocalan v. Turkey*, App. No. 00046221/99, Eur.Ct. H.R. (March 12, 2003), paras. 111-21 (even a single military judge on a three-judge tribunal, even for only a portion of the proceedings, tainted its impartiality and independence; among other

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[94] *Id.*

[95] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[101] GC III, *supra* note 4, art. 103. Although POW's may be held in normal POW quarters until the conflict is over, they may be held only 3 months in pretrial confinement.
[102] Protocol I, *supra* note 6, art. 75.4(a).
[103] *Drescher Caldas v. Uruguay*, U.N. Doc. CCPR/C/19/D/43/1979, U.N. H.R. Comm. (July 21, 1983), para. 14; *Bithashwiwa v. Zaire*, U.N. Doc. CCPR/C/37/D/241/1987 (Nov. 29, 1989), para. 13 (b).
[104] *Fillastre and Bizouarn v. Bolivia*, U.N. Doc. CCPR/C/43/D/336/1988, U.N. H.R. Comm. (Nov. 6, 1991), para. 6.4.

before a judge or judicial officer "must not exceed a few days;"[105] delays as short as four or five days have been found to violate ICCPR Article 9.3[106] Similarly, the HRC has found violations of ICCPR article 9.4 in cases where the accused was prevented for a period of as little as one week from bringing judicial proceedings to challenge his detention.[107] In addition to the GC III rule (art. 103) that pretrial detention of POW's not exceed three months, the ICCPR rule for other prisoners is that any pretrial detention must be "as short as possible."[108]

The delays in Mr. Hamdan's case, and in the case of Guantanamo detainees generally, vastly exceed the delays that have been deemed unacceptable by the HRC. Even taking into account the difficulty of prosecuting cases against alleged members of a secretive and clandestine international terrorist organization, the delays far exceed the time periods allowed under the ICCPR and Geneva Conventions. Nor can the delay be excused on the ground that Mr. Hamdan was initially being held for intelligence and security reasons, rather than for criminal prosecution. Even were one to accept the premise that the clock does not start to run until it is determined that a person is being held for criminal prosecution, the relevant time period in Mr. Hamdan's case would begin on July 3, 2003, when the President issued his determination that Mr. Hamdan was subject to trial by military commission[109] – a full year before Mr. Hamdan was charged. These delays violate international law.

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

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[105] General Comment 8, *Right to Liberty and Security of Persons*, 30 June 1982, para. 2, [hereinafter Gen. Cmt. 8].
[106] *Freemantle v. Jamaica*, U.N. Doc. CCPR/C/68/D/625/1995, U.N. H.R. Comm. (Apr. 28, 2000), paras. 7.4 and 7.5; *Terán Jijón v. Ecuador*, U.N. Doc. CCPR/C/44/D/277/1988, U.N. H.R. Comm. (Apr. 8, 1992), para. 5.3.
[107] *Torres v. Finland*, U.N. Doc. CCPR/C/38/D/291/1988, H.R. Comm. (Apr. 5, 1990), para. 5.3.
[108] Gen. Cmt. 8, *supra* note 105, para. 3.
[109] *See supra* note 99.

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

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

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

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

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

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

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

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[112] Gen. Cmt. 13, *supra* note 55, 13 para. 14.
[113] MCO No. 1, *supra* note 71, section 5.F.
[114] *Id.* para. 5.D(1).
[115] Prospective plea bargains at Guantanamo have been reported in the press. E.g., J. Mintz, *Deals Reported Afoot for Detainees; But Lawyers Question Pacts for Clients Without Access to Counsel*, THE WASHINGTON POST, Dec. 6, 2003, p. A6; M. Dunn, *Hicks considers pleading guilty*, HERALD SUN (Melbourne, Australia), 27 May 2004.
[116] U.S. Dept. of Defense News Briefing, Note 116, March. 21, 2002, Transcript published by M2, Presswire, Mar. 22, 2002 (accessible at www.lexis.com, news library).
[117] *See supra* note 111.

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

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

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

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[118] MCO No. 1, *supra* note 71, section 5(D).
[119] Hamdan Aff., *supra* note 96, at pp. 10 and 11 of Schmitz Decl. (second and third page of Hamdan Aff.) (Hamdan was captured in November 2001, flown to Guantanamo in June 2002, and first met his military defense counsel on January 30, 2004).
[120] MCO No. 1, *supra* note 71, sections 5(F) and 6(D)(1).
[121] The UN Human Rights Committee has found violations of the right to counsel where access was denied for as few as five days after a person was taken into custody. *Kelly v. Jamaica*, Comm. No. 537/1993, Views of 29 July 1996, para. 9.2. See also, *Imbrioscia v. Austria*, App. No. 00013972/88, Judgment of 24 Nov. 1993, Eur.Ct.H.Rts., para. 33-34, 36.
[122] Secretary of the Navy Gordon England, Special Department of Defense Briefing with Navy Secretary Gordon England (Sept. 8, 2004), *available at* http://www.defenselink.mil/transcripts/2004/tr20040908-1284.html.
[123] Associated Press, *Bin Laden - Linked Suspect Boycotts Hearing* (Sept. 24, 2004), *available at* http://abcnews.go.com/wire/World/ap20040924_1062.html. *See also Two Detainees Brought Before Military Panel,* Seattle Times, Sept. 16, 2004, at A12.

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

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

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

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

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

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

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

[127] *Id.* para. 4 (A).

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

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

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

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

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

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

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

[133] *Id.* para. 48.

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

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

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

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

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

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

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[136] MCO No. 1, *supra* note 71, section 5.K.
[137] ICCPR, *supra* note 7, art. 14.3 (d). Accord, Protocol I, *supra* note 6, art. 75.4 (e): "Anyone charged with an offense shall have the right to be tried in his presence." This includes, at minimum, all hearings in which the prosecutor participates. *E.g.*, Eur.Ct.H.Rts., *Belziuk v. Poland*, App. No. 00023103/93, Judgment of 25 March 1998, para. 39.
[138] ICRC Commentary to Protocol I, *supra* note 23, art. 75, para. 3110.
[139] MCO No. 1, *supra* note 71, section 6(B)(3).

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

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

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

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

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

[141] *Id.* section 6(D)(5)(b).

[142] The presiding officer is authorized to direct the deletion of protected information "or" a substitution. *Id.*

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

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

[145] *Id.* section 5.E.

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

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

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

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

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[146] ICCPR, *supra* note 7, art. 14.3(b). The Human Rights Committee explains that the "facilities must include access to documents and other evidence which the accused requires to prepare his case, …" Gen. Cmt. 13, para. 9. See also GC III art. 105 (right to "necessary facilities to prepare the defence"); GC IV art. 72 (right to "the necessary facilities for preparing the defence"); and Protocol I art. 75.4(a) (right to "all necessary rights and means of defence").
[147] President's Military Order, section 7(b)(2).
[148] MCO No. 1, *supra* note 71, section 6(H)(4).
[149] *Id.* section 6(H)(4).
[150] *See* note 160.
[151] 10 U.S.C. 942 (c) (2004).
[152] MCI 9, section 4(B)(2), Dec. 26, 2003, *at* http://www.dod.mil/news/Aug2004/commissions_instructions.html (Secretary may remove a panel member for "good cause," which includes "military exigency").
[153] *See supra* part II.A.2.
[154] ICCPR, *supra* note 7, Art. 14.5.

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

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

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

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

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

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[155] GC III, *supra* note 4, Art. 106. U.S. military personnel convicted in courts-martial have the right to appeal to courts. *See intra*note 162.
[156] ICCPR *supra* note 7, art. 14.1.
[157] Common Article 3(1)(d). The "fundamental guarantees" of Protocol I, *supra* note 6, Art. 75 give "valuable indications to help explain the terms of [Common] Article 3 on guarantees." ICRC Commentary to Protocol I, *supra* note 23, art. 75.4, para. 3084.
[158] Protocol I, *supra* note 6, Art. 75.4.
[159] President's Military Order, *supra* note 58, section 2(a). The title of the Order is "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism."
[160] The U.S. Congress has established a Court of Appeals for the Armed Forces, consisting of five judges "appointed from civilian life" by the President, subject to advice and consent of the Senate, for 15 year terms, who can be removed only for neglect of duty, misconduct or mental or physical disability. 10 U.S.C. 941, 942 (a), (b) and (c) (2004). All courts-martial death sentences are subject to mandatory review by that Court, and all persons whose court-martial convictions have been upheld by a military appeals court are entitled to petition for review by that Court. 10 U.S.C. 867 (a)(1) and (3) (2004). Discretionary review

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

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

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

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

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

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

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

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

criteria but on the nationality of the suspected terrorists," the result is "discrimination based on nationality."[166]

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

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

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

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[166] Report of the Working Group on Arbitrary Detention, E/CN.4/2004/3, 15 Dec. 2003, para. 67.
[167] Gen. Cmt. 15, *supra* note 162, para. 7.
[168] *Supra* Note 4, Art. 102.
[169] *Id.* Art. 75.1.
[170] See Views of the Human Rights Committee in *Gueye v. France*, Communication no. 196/1985, Decision of the Human Rights Committee, 6 April 1989, CCPR/C/35/D/196/1985, para. 9.4 (nationality discrimination constitutes discrimination based on "other status" under art. 26 of the ICCPR). See also Int.-Am.Ct.H.Rts, Adv.Op. OC-18, *Legal Status and Rights of Undocumented Migrants* (2003), paras. 110 (principle of non-discrimination is *jus cogens*) and 121 (due process must be guaranteed to all without discrimination based on migratory status).

CONCLUSION

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

Respectfully submitted,

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