IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
NO. 04-5393

SALIM AHMED HAMDAN

Petitioner-Appellee,

v.

DONALD H. RUMSFELD, ET AL.,

Respondent-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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

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

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

Attorneys for *Amici Curiae*

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and *Amici*

All parties, intervenors and *amici* appearing before the District Court are listed in the Brief for Appellants.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellants.

C. Related Cases

As is stated in the Brief for Appellants, there are several related cases brought by detainees at the Guantanamo Naval Base pending in the District Court in this Circuit:

1. *Hicks (Rasul) v. Bush,* S. Ct; D.C. Cir. No. 02-5284; No. 02-CV-0299 (D.D.C.) (J. Kollar-Kotelly);
2. *Al-Odah v. United States,* No. 02-CV-0828 (D.D.C.) (J. Kollar-Kotelly);
3. *Habib v. Bush,* No. 02-CV-1130 (D.D.C.) (J. Kollar-Kotelly);
4. *Kurnaz v. Bush,* No. 04-CV-1135 (D.D.C.) (J. Huvelle);
5. *O.K. v. Bush,* No. 04-CV-1136 (D.D.C.) (J. Bates);
6. *Begg v. Bush,* No. 04-CV-1137 (D.D.C.) (J. Collyer);
7. *Khalid (Benchellali) v. Bush,* No. 04-CV-1142 (D.D.C.) (J. Leon);
8. *El Banna v. Bush,* No. 04-CV-1144 (D.D.C.) (J. Roberts);
9. *Gherebi v. Bush,* No. 04-CV-1164 (D.D.C.) (J. Walton);

10. *Boumediene v. Bush,* No. 04-CV-1166 (D.D.C.) (J. Leon);

11. *Anam v. Bush,* No. 04-CV-1194 (D.D.C.) (J. Kennedy);

12. *Almurbati v. Bush,* No. 04-CV-1227 (D.D.C.) (J. Walton);

13. *Abdah v. Bush,* No. 04-CV-1254 (D.D.C.) (J. Kennedy);

14. *Belmar v. Bush,* No. 04-CV-1997 (D.D.C.) (J. Collyer);

15. *Al-Qosi v. Bush,* No. 04-CV-1937 (D.D.C.) (J. Friedman);

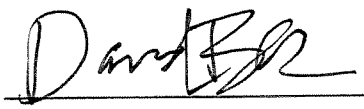
16. *Jarallah Al-Marri v. Bush* (recently filed or shortly to be filed in the federal district court in D.C.);

17. *Al-Marri v. Bush,* No. 04-CV-2035-GK (D.D.C.) (J. Kessler);

18. *Paracha v. Bush,* No. 04-CV-2022-PLF (D.D.C.) (J. Friedman); and

19. *Zemiri v. Bush,* No. 04-CV-2046-CKK (D.D.C.) (J. Kollar-Kotelly).

Counsel is not aware at this time of any other related cases within the meaning of D.C. Cir. Rule 28(a)(1)(C).



David R. Berz (D.C. Bar No. 182105)
Counsel for Amici Curiae

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INTEREST OF AMICI

With the consent of all parties, Amici submit this brief in support of petitioner Salim Ahmed Hamdan and in support of affirming the judgment below. They do so because of their commitment to respect for international humanitarian and human rights law.

Louise Doswald-Beck is a Professor of the Graduate Institute of International Studies and Director of the University Centre for International Humanitarian Law in Geneva, Switzerland. She was a legal adviser at the International Committee of the Red Cross from 1987 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 Oxford, 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, The Netherlands. He took part in the diplomatic conference on "Reaffirmation and Development of

International Humanitarian Law Applicable in Armed Conflicts" that negotiated the 1977 Protocols to the Geneva Conventions of 1949, and was Chairman of the United Nations Commission of Experts to investigate war crimes committed in the former Yugoslavia. In 2002, he was awarded the Henry Dunant Medal of the International Red Cross and Red Crescent Movement for his continued effort toward improved knowledge of and respect for international humanitarian law.

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

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

The Center for International Human Rights of Northwestern University School of Law in Chicago engages in education, research, technical assistance and advocacy in support of international human rights and humanitarian law.

ARGUMENT

United States military commissions and procedures must meet minimum standards of modern international human rights and humanitarian law, which bind the United States by treaty and by customary international law, and guide the interpretation of federal statutes concerning military commissions.

The judgment below concluded that petitioner Hamdan may not be tried by military commission, unless and until (1) a competent tribunal determines that he is not a prisoner of war ("POW"), and (2) military commission rules are amended so that he may not be excluded from secret proceedings and denied access to secret evidence. *Hamdan v. Rumsfeld*, 2004 U.S. Dist. LEXIS 22724 (Nov. 8, 2004) (hereafter "*Hamdan*"), at 56-57. The first ground was based on interpretation of a statute (10 U.S.C. §821) in light of international law, *id.* at 29; the second on interpretation of a related statute, 10 U.S.C. §836(a), *id.* at 43, 53.

Amici support affirmance of the first ruling on the ground that the statute can, and under a longstanding canon of construction must, be interpreted in accord with international law. In addition, Amici offer alternative, international law

grounds to affirm the second ruling and the judgment. Specifically, the statutes at issue can, and must, be interpreted to meet minimum international law standards.

This Court can and should take account of international law. Under the Supremacy Clause, "all Treaties made" share with the Constitution and federal statutes the status of "supreme Law of the Land." U.S. Const. Art. VI, §2. "A treaty . . . is a law of the land as an act of congress is." *Edye v. Edye*, 112 U.S. 580, 598-99 (1884).

Relevant United States treaties must be considered in the interpretation of federal statutes. "[A]n Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains ..." *Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804); *accord, e.g., F.Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S.Ct. 2359, 2366 (2004). The canon requires construction of Acts of Congress, wherever possible, in a manner consistent with United States treaty obligations. *Sale v. Haitian Centers Council,* 509 U.S. 155, 178 and n. 35 (1993).

The *Charming Betsy* canon also requires that construction of U.S. statutes be consistent, if possible, with another prong of the "law of nations," namely customary international law, *Hoffman-La Roche, supra*, 124 S.Ct. at 2366 Customary international law consists of norms reflecting general practices of

nations, accepted by them as binding norms.[1] Thus, even where the U.S. has not joined a treaty, the treaty must be taken into account in construing U.S. statutes if its applicable norms are widely accepted as customary international law.

The Presidential Order establishing military commissions[2] purports to exercise authority conferred by three statutes, namely the Authorization for Use of Force Joint Resolution,[3] and 10 U.S.C. §§ 821 and 836(a) (2004). The Joint Resolution makes no reference to military commissions. Section 821 states that the jurisdiction of courts-martial does not deprive military commissions of concurrent jurisdiction they, "by statute or by the law of war," may otherwise have. Section 836(a) authorizes the President to prescribe procedures for military commissions.

Nothing in these statutes purports to authorize military commissions or procedures in conflict with international law. Thus the statutes may -- and accordingly must -- be interpreted to authorize only commissions and procedures consistent with United States obligations under international law.

Section I of this brief discusses the applicability of certain international norms to military commissions. Section II identifies five minimum international

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

[2] Military Order of Nov. 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 FED.REG. 57833 (Nov. 16, 2001), preambular paragraph.

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

standards violated by Mr. Hamdan's military commission, which thereby also violate the federal statutes interpreted in light of these standards.

I. APPLICABLE INTERNATIONAL NORMS

International humanitarian law confers rights in the context of armed conflict, while international human rights law applies in peace as well as in war. Both bodies of law require fair trials of persons accused of crimes. Both apply to the trial by military commission of Mr. Hamdan.

Among the humanitarian law treaties to which the United States is a party is the 1949 Geneva Convention on prisoners of war ("GC III").[4] Other pertinent humanitarian law obligations reflect customary international law, especially the "fundamental guarantees" (art. 75) of the 1977 Geneva Protocol I ("Protocol I").[5] Among the human rights treaties to which the United States is a party is the International Covenant on Civil and Political Rights ("ICCPR").[6]

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[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] 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].

[6] 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].

The 1949 Geneva Convention III (prisoners of war) ("GC III") guarantees prisoners of war charged with crimes a series of fair trial rights.[7] It also guarantees POW's the right to be tried only by the same courts, under the same procedures, as sit in cases against military personnel of the detaining power (which in the U.S. means trial by court-martial).[8] *Hamdan* at 19-34. Amici are not in possession of sufficient, verified facts to express an opinion on whether Mr. Hamdan 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."[9] *Id.* at 23-24.

Customary International Law as reflected in the "Fundamental Guarantees" of Article 75 of the 1977 Geneva Protocol I ("Protocol I"). These fundamental guarantees largely parallel the fair trial safeguards of ICCPR article 14 (discussed below).[10] They apply to all persons, such as Mr. Hamdan, within the power of a state participant in an armed conflict, if they do not benefit from more favorable treatment under the Geneva Conventions or Protocol I.[11] Thus, if Mr.

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[7] GC III, *supra* note 4, arts. 99 and 102-07.
[8] *Id.*, art. 102.
[9] *Id.* art. 5.
[10] The right to counsel, although not expressly granted by Article 75, is implicit in the "necessary rights and means of defence." Claude Pilloud et al., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al. eds., International Committee of the Red Cross, 1987) [hereafter ICRC Commentary to Protocol I], art. 75.4(a), para. 3096.
[11] Protocol I, *supra* note 5, art. 75.1.

Hamdan were found not to be a POW protected by GC III, he would nonetheless be protected by these "fundamental guarantees."

These fundamental guarantees reflect customary international law and thus bind the United States even though it has not ratified Protocol I.[12] More than 160 states are parties to Protocol I. The stated reasons of the United States for not ratifying do not include objections to article 75, and the State Department "recognize[s] that certain provisions of Protocol I reflect customary international law."[13] U.S. government legal experts and military manuals have identified article 75 as among those provisions.[14] Article 75 is consistent with the fair trial standards of widely ratified treaties on both human rights (*e.g.*, ICCPR Article 14)

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[12] The government argues that the U.S. is not bound by Protocol I because it has not ratified the treaty. Brief for Appellants, Dec. 8, 2004, at 50 and n. 10. However, the government there refers to article 45 of Protocol I, not to Article 75, which is widely recognized as customary international law.

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

[14] T. Meron, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 64-65 (1989; *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). 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, http://www.cdmha.org/toolkit/cdmha-rltk/PUBLICATIONS/oplaw-ja97.pdf , visited June 4, 2004).

and humanitarian law (e.g., GC III). Leading commentators as well as the American Bar Association agree that it reflects customary international law.[15]

The International Covenant on Civil and Political Rights ("ICCPR") is a human rights treaty to which 154 countries are States Parties.[16] The United States ratified the ICCPR in 1992.[17] It guarantees everyone a fair trial (art. 14); non-discrimination and equality before the courts (arts. 2.1, 14.1 and 26); and a judicial appeal (art. 14.5).

Guidance in interpreting the ICCPR is provided by the Human Rights Committee ("HRC"), established by and "charged with implementing and interpreting the ICCPR . . . ." *United States v. Duarte-Acero,* 208 F.3d 1282, 1285 n.12 (11th Cir. 2000).

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[15] *E.g.*, George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 893 (2002); Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP. & INT'L L. 185, 190 (1996); American Bar Association Recommendation 10-B, adopted by the ABA House of Delegates, Aug. 9, 2004.

[16] *See* Ratification Table, Office of the U.N. High Commissioner for Human Rights (visited Dec. 23, 2004) http://www.ohchr.org/english/countries/ratification/index.htm.

[17] 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992). *See also* S. Rep. No. 103-35, at 6-10 (1993).

Although ICCPR article 4 permits "derogations" from certain rights in times of national emergency, its fair trial norms are non-derogable.[18] The United States has not attempted to invoke the derogation clause.

* * *

Each of these sources of international law applies to the military commission proceedings against petitioner Hamdan. Under the *Charming Betsy* canon, each must be applied to the interpretation of the relevant statutes. To the extent the commission and its procedures conflict with these international norms, they exceed the President's statutory authority.

Three preliminary principles governing the application of these norms -- complementarity, most favorable protection, and territorial scope -- are discussed below.

A. Complementarity

> International humanitarian and human rights law are "complementary, not mutually exclusive," in wartime.[19] "[T]he protection offered by human rights conventions does not cease in case of armed conflict, ..."[20]

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[18] HRC, *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.

[19] HRC, *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].

[20] International Court of Justice, Advisory Op. of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. - -

The complementary nature of international human rights and humanitarian law is especially clear in regard to fair trial rights. The due process protections of Article 75 of Protocol I are "additional to ... other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict."[21] These "other applicable rules" include ICCPR norms.[22]

Thus, as reaffirmed by the United Nations High Commissioner for Human Rights, "Any possible trials [at Guantanamo] should be governed by the principles of fair trial . . . provided for in the ICCPR and the Third Geneva Convention."[23]

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] or from customary law."[24] This principle applies as well where there is doubt about whether a prisoner qualifies as a prisoner of war.

-, para. 106 (subject to derogation, which the U.S. has not done here, as noted above), available at http://www.icj-cij.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_20040709.pdf . *See also, id.* at para. 105.

[21] Protocol I, *supra*, note 5, Art. 72.

[22] ICRC Commentary to Protocol I, *supra* note 10, art. 72, para. 2927-28.

[23] Statement of the High Commissioner, 16 Jan. 2002, available at http://www.unhchr.ch/huricane/huricane.nsf/view01/C537C6D4657C7928C1256B43003E7D0B?opendocument (last visited Aug. 9, 2004).

[24] ICRC Commentary to Protocol I, *supra* note 10, para. 3146.

"In case of doubt, the defendant can always invoke the most favourable provision."[25] Whatever his status is ultimately determined to be, petitioner Hamdan is thus entitled to the most favourable protection afforded by GC III, Protocol I, or the ICCPR.

C. Territorial Scope

International humanitarian and human rights law reach beyond a state's borders and govern trials of persons, like Mr. Hamdan, within the effective power and control of the United States at Guantanamo. On this point Amici adopt the argument of the Amici Curiae British Parliamentarians.[26]

* * *

In sum, both international humanitarian and human rights law guide the interpretation of the statutes concerning military commissions. They require that petitioner Hamdan be given the benefit of the most favorable applicable norms. The next section addresses five critical respects in which his military commission violates these norms.

II. THE MILITARY COMMISSION TRYING PETITIONER HAMDAN AND ITS PROCEDURES VIOLATE INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW

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

[26] Brief of 305 United Kingdom and European Parliamentarians as *Amici Curiae* in Support of Petitioner-Appellee, filed December 23, 2004, pp. 8-10.

International human rights and humanitarian law require that governments guarantee every person accused of crime certain fundamental rights essential to a minimum standard of fair treatment. Five such minimum standards are discussed below.

A. The Military Commission Trying Mr. Hamdan Is Not Established By Law

Article 14.1 of the ICCPR requires that every tribunal hearing criminal cases be "established by law." The central purpose is to guard against excessive executive discretion by mandating that tribunals be established not by executive fiat but by laws duly promulgated by a nation's legislative body.[27] While the legislation 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."[28] To demonstrate compliance with A[29]rticle 14, States Parties are directed by the HRC to specify the "constitutional and legislative texts which provide for the establishment of the

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[27] 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).

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

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

courts . . .."[30] This applies not only to ordinary national courts, but equally to any military or other special courts.[31]

The military commission trying Mr. Hamdan is not "established by law," but is instead a creature of the executive. No statute establishes it. Although the President's Military Order references three acts of Congress,[32] none "establishes" military commissions "by law." The use of force resolution does not mention military commissions.[33] 10 U.S.C. Section 821 merely provides that the jurisdiction of courts-martial does not deprive military commissions of jurisdiction that they, "by statute or by the law of war," may otherwise have. And 10 U.S.C. 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.

The government's brief acknowledges Congress's "hands-off approach" to military commissions.[34] The original purpose of the language now codified in 10 U.S.C. §821, the government emphasizes, "was not *establishing* military commissions and defining or limiting their jurisdiction," but merely "recognizing

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[30] 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].
[31] *Id.* para. 4
[32] President's Military Order, preambular paragraph.
[33] Authorization for the Use of Military Force Joint Resolution, Public Law 107-40, 115 Stat. 224 (2001).
[34] Brief for Appellants, Dec. 8, 2004, at 15-16.

their existence and preserving their authority ..."[35] The statute "simply preserves Executive Branch practice."[36]

Nor does any other U.S. statute "establish by law" the military commission trying petitioner Hamdan. Although other statutes provide that two particular offenses – aiding the enemy and spying – may be tried by "court martial or military commission,"[37] Mr. Hamdan is not charged with either offense.

In short, no statute purports to establish the commission trying Mr. Hamdan. None defines its appointment or composition. And with exceedingly limited exceptions,[38] none establishes its procedures. Hence, no statute meets the minimum international law requirement of "establish[ing] at least the organizational framework for the judicial organization."[39]

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[35] *Id.* at 34, 35 (emphasis in original).
[36] *Id.* at 36.
[37] 10 U.S.C. §§ 904 and 906 (2004).
[38] 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 does 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).
[39] *Zand,* note 27 *supra,* 15 DR para. 69.

The military commission trying petitioner Hamdan accordingly is not established by law and hence lacks competence under international law to try any offense. Sections 821 and 836(a) can, and therefore must, be interpreted to refer only to commissions that meet this minimum standard of the ICCPR.

B. The Military Commission Trying Mr. Hamdan Is Not Independent and Impartial

Article 14.1 of the ICCPR guarantees an accused the right to be tried by a tribunal that is "independent and impartial." This is "an absolute right that may suffer no exception."[40]

"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.[41] "Impartiality" refers to the absence of subjective bias on their part, and to the objectively justified appearance of the absence of bias.[42] 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 condition[s] governing

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[40] *González del Río v Peru,* UN Doc. CCPR/C/46/D/263/1987, H.R. Comm. (Oct. 28, 1992), para. 5.2.
[41] *E.g., Cooper v. U.K.* App. No. 00048843/99, Eur. Ct. H.R. (Dec. 16, 2003), para. 104.
[42] *Id.*

promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch ..."[43]

The lack of independence of the military commission trying Mr. Hamdan is patent. Broad powers over the commission are exercised by the "Appointing Authority," an executive officer appointed by, and who serves at the pleasure of, the Secretary of Defense.[44] This Authority selects the members of each military commission and chooses one to be the presiding officer.[45] The only criteria provided for selection are that commission members must be U.S. military officers and "competent to perform the duties involved,"[46] and at least one must be a U.S. military lawyer.[47] 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 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

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[43] Gen. Cmt 13, *supra,* note 30, para. 3.
[44] U.S. Dept. of Defense Military Commission Order No. 1, section 2, Mar. 21, 2002 [hereinafter MCO No. 1], *at* http://www.dod.mil/news/Aug2004/commissions_orders.html.
[45] *Id.* MCO No. 1, sections 4(A)(1)-(4).
[46] *Id.* 4(A)(3).
[47] *Id.* 4(A)(4).

another, or may be appointed repeatedly. The Authority's discretion to control the composition of commissions is wide and unchecked.

The same Authority has sole power to decide many critical questions normally ruled on by courts, further undermining any military commission claim to independence. The commissions are not allowed to decide any interlocutory question whose outcome might result in termination of the proceedings; instead, the presiding officer must refer all such questions to the Authority.[48]

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.[49] The Authority may close the proceedings to the public and may even exclude the accused and his civilian defense counsel.[50] The Authority directs the time and place of each commission session,[51] conducts an "administrative review" of the record of trial and may return the case for further proceedings if necessary,[52] approves or disapproves any communications regarding military commissions by prosecutors or defense counsel to the news media,[53] and may limit the time between the trial on the merits and the

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[48] *Id.* 4(A)(5)(d); see also *id.* at 6(A)(4).
[49] *Id.* 4(A)(5)(d).
[50] *Id.* 6(B)(3).
[51] *Id.* 6(B)(4).
[52] *Id.* 6(B)(4).
[53] MCI No. 3, April 15, 2004, *Responsibilities of the Chief Prosecutor, Prosecutors, and Assistant Prosecutors*, section 5(c); MCI No. 4, April 15, 2004,

sentencing hearing.[54] 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,[55] a factor justifying doubt as to their independence and impartiality.[56] They are subject to military performance evaluations,[57] and most have career aspirations within the military.[58] While the commissions are instructed to act "impartially,"[59] and officers' performance as commission members is not to be taken into account in their evaluations,[60] under international law these formal undertakings do not suffice to assure impartiality in fact or in appearance.[61]

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.

[54] MCI No. 7, April 30, 2003, *Sentencing*, section 4(A).

[55] MCO No. 1, *supra* note 44, section 4(A)(3).

[56] *Cooper v. U.K.*, Eur. Ct. H.R., note 41 *supra*, para. 117; *Incal v. Turkey*, App. No. 00022678/93, Eur. Ct. H.R. (June 9, 1998), para. 68; *Ocalan v. Turkey,* App. No. 00046221/99, Eur.Ct. H.R. (March 12, 2003), paras. 111-21.

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

[58] MCO No. 1, *supra* note 44, section 4(A)(3) requires that commission members be military officers, although they may include retired officers recalled to active duty.

[59] MCO No. 1, *supra* note 44, section 6(B)(2).

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

[61] *Findlay v. U.K.*, App. No. 00022107/93, Eur. Ct. H.R. (Feb. 25, 1997), para. 35, 75, 80; *Incal v. Turkey,* Eur. Ct. H.R. , note 56 *supra*, paras. 27, 67, 73; *Grieves v. U.K.*, App. No. 00057067/00, Eur. Ct. H.R. (Dec. 16, 2003), paras. 84, 85, 88, 91; *Ocalan v. Turkey,* Eur.Ct. H.R., note 56 *supra*, paras. 111-21; *Polay Campos v.*

The structural defects also mean that the lack of independence and impartiality cannot be cured by the particular composition of a commission or by disqualification of individual members.

The statutes must be interpreted to contemplate only commissions which are independent and impartial. The commission trying Mr. Hamdan is neither.

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.[62] 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.[63]

Peru, U.N. Doc. CCPR/C/61/D/577/1994, U.N. H.R. Comm. (Jan. 9, 1998), para. 8.

[62] President's Military Order, *supra* note 2, section 2(a). The Order is entitled, "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism."

[63] The Court of Appeals for the Armed Forces consists 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

This discrimination contravenes international 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 other ICCPR rights may be denied to non-citizens, "[t]he general rule is that each one of the rights of the [ICCPR] must be guaranteed without discrimination between citizens and aliens."[64]

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."[65] 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

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or physical disability. 10 U.S.C. 941, 942 (a), (b) and (c) (2004). 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 is available from the U.S. Supreme Court. 10 U.S.C. 867a (a).

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

[65] General Comment No. 18, *Non-discrimination*, 10 Nov. 1989, para. 13. The United States interprets articles 2.1 and 26 to permit distinctions which 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.

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."[66] 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 criteria but on the nationality of the suspected terrorists," the result is "discrimination based on nationality."[67]

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," including for aliens.[68]

A recent judgment of Britain's highest court confirms that the ICCPR prohibits discrimination against suspected terrorists who happen to be foreign nationals.[69] The Law Lords considered a British law which permits prolonged detention without trial of suspected terrorists, but only if they are foreign nationals

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[66] President's military order, *supra* note 2, Sections 1 (e) and (f).
[67] Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2004/3, 15 Dec. 2003, para. 67.
[68] HRC, Gen. Cmt. 15, *supra* note 64, para. 7.
[69] House of Lords, Lords of Appeal, *A(FC) and others (FC) v. Secretary of State*, and *X (FC) and another (FC) v. Secretary of State*, 16 Dec. 2004, 2004 UKHL 56 (accessible in LEXIS International Law Library, Cases file (visited Dec. 23, 2004)).

awaiting deportation, not British citizens.[70] The Lords ruled by an 8-1 vote that the law is "incompatible" with the European Convention on Human Rights, as both disproportionate and discriminatory.[71] In Lord Bingham's words, article 14 of the European Convention on Human Rights and article 26 of the ICCPR, which Britain's Attorney General conceded are "to the same effect," are "inimical to the submission that a state may lawfully discriminate against foreign nationals by detaining them but not nationals presenting the same threat in a time of public emergency."[72]

The ICCPR is no less inimical to the submission that a state may lawfully discriminate against foreign nationals by subjecting them, but not nationals presenting the same threat, to the lesser procedural protections of trial by military commission.

International humanitarian law likewise prohibits discrimination in trial procedures for 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.[73] And the fundamental guarantees of article 75 of Protocol I

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[70] *Id.* at pars. 2, 3, 12, 14 and 46.
[71] *Id.* at pars 73, 85, 139, 160, 190, 234-39 and 240. Lord Hoffman joined in the judgment on the separate ground that there was no emergency sufficient to justify derogation from the right to liberty. *Id.* at pars 50-53.
[72] *Id.* par. 63; see also pars. 73, 76, 136, and 139.
[73] *Supra* note 4, Art. 102.

must be provided "without any adverse distinction" based upon, among other grounds, "other status."[74] This includes discrimination based on nationality.[75]

The use of military commissions exclusively against petitioner Hamdan, then, discriminates in violation of international law, and thus also exceeds any authority under the statutes, as interpreted in light of minimum international standards.[76]

D. Denial of Access To Secret Trial Proceedings and Documents

1. Exclusion from Secret Hearings Violates Mr. Hamdan's Rights 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. The commission's presiding officer -- or the Appointing Authority -- may close proceedings for such purposes as protecting classified information or intelligence sources, methods or activities, or "other national

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[74] *Id.* Art. 75.1.

[75] See, e.g., 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).

[76] The ruling below that Hamdan's equal protection claims under the U.S. Constitution and a civil rights act "need not be ruled upon at this time," *Hamdan* at 53-54, 56 and n. 19, does not address the separate point that statutes relating to military commissions must be construed in accord with international law.

security interests." And they may "exclude the Accused, [and] Civilian Defense Counsel..."[77]

Mr. Hamdan's exclusion is not merely an academic possibility, but has already occurred in preliminary proceedings and is planned to occur at trial as well. *Hamdan* at 50.

Such exclusion violates his right under international law "[t]o be tried in his presence, ..."[78] 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."[79]

The military commission procedures breach not only this "important" element of the right to be tried in one's presence, but also the right to assistance of counsel under ICCPR art. 14.3 (d). Even though military defense counsel may be present at all sessions of the trial, this fails to cure the violation, because military counsel "may not disclose any information presented during a closed session to

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[77] MCO No. 1, *supra* note 44, sections 5.K, 6(B)(3).
[78] ICCPR, *supra* note 6, art. 14.3 (d). Accord, Protocol I, *supra* note 5, 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.
[79] ICRC Commentary to Protocol I, *supra* note 10, art. 75, para. 3110.

individuals [such as the accused and civilian defense counsel] excluded from such proceeding."[80]

The statutes can, and therefore must, be construed to require procedures that meet these minimum international standards. The procedures for the commission trial of Mr. Hamdan therefore violate the statute.

2. Denials of Secret Documents Violate Mr. Hamdan's 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."[81] The officer may substitute instead a portion or a summary, or a statement of the relevant facts the withheld documents would prove.[82] But this does not cure the problem.

First, there is no requirement to make any substitution; even though protected information is admitted into evidence, it may simply be withheld from Mr. Hamdan and his defense counsel.[83]

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[80] MCO No. 1, *supra* note 44, section 6(B)(3).

[81] 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").

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

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

Second, neither he 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"[84] – *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 Mr. Hamdan and defense counsel, both civilian and military.[85] This includes information that may tend to exculpate Mr. Hamdan. Generally the prosecution must turn over such exculpatory information.[86] However, if it is "protected," the prosecution is not required and, indeed, not permitted to disclose it. The defense thus may never learn of the existence of exculpatory information.

Permitting the denial of "protected" information to the defense thus violates the right of Mr. Hamdan under international law to "adequate ... facilities for the preparation of his defense"[87] and to equality of arms. The statute can and must be

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[84] *E.g.*, Human Rights Committee views in *Aarela and Nakkalajarvi v. Finland*, Comm. No. 779/1997, Views of 7 Nov. 2001, para. 7.4.
[85] MCO No. 1, *supra* note 44, section 6(D)(5)(b).
[86] *Id.* section 5.E.
[87] ICCPR, *supra* note 6, 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"); and Protocol I art. 75.4(a) (right to "all necessary rights and means of defence").

construed consistent with these international rights. Mr. Hamdan's commission trial procedures therefore violate 10 U.S.C. §836(a).

E. Denial of Judicial Appeal Violates Mr. Hamdan's Right to Review By a Higher Tribunal

No judicial appeal is permitted from the decisions of military commissions.[88] Commission decisions are subject to review only by a "review panel"[89] whose members are appointed by the Secretary of Defense and must be military officers or civilians temporarily commissioned as military officers.[90] The review panels thus contrast unfavorably with the Court of Appeals for the Armed Forces, which reviews judgments of courts-martial; its judges are nominated by the President and confirmed by the Senate, and are civilians.[91] They may be removed only by the President, upon notice and hearing, and only for neglect of duty, misconduct or disability.[92] In contrast, review panel members may be removed by the Secretary of Defense, without notice or hearing, for "military exigency."[93] The review panel thus lacks the structural independence essential to judicial review.[94]

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[88] President's Military Order, section 7(b)(2).
[89] MCO No. 1, *supra* note 44, section 6(H)(4).
[90] *Id.* section 6(H)(4).
[91] See note 63 *supra*.
[92] 10 U.S.C. 942 (c) (2004).
[93] 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").
[94] *See supra* part II.A.2.

This lack of judicial appeal violates the ICCPR article 14.5 right of "everyone" convicted of a crime to have his conviction and sentence "reviewed by a higher tribunal according to law."[95] In the case of prisoners of war, it also violates their right to appeal "in the same manner as members of the armed forces of the Detaining Power."[96]

Nonetheless the Court below, evidently impressed by the "distinguished civilian lawyers" appointed by the Secretary to the review panel, ruled that the absence of any judicial appeal does not violate the Uniform Code of Military Justice. *Hamdan* at 38-39. The Court did not, however, address the requirement that the statute must be interpreted, if possible, to conform to international law. No matter how distinguished the members of a panel appointed by a Secretary of Defense, they are not a reviewing "tribunal" in the sense of article 14.5, because they are not a structurally independent and impartial court.[97]

The right to appellate judicial review of all criminal convictions is not a mere procedural nicety, but "an imperative norm of international law" to which all

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[95] ICCPR, *supra* note 6, Art. 14.5.
[96] GC III, *supra* note 4, Art. 106. U.S. military personnel convicted in courts-martial have the right to appeal to courts. Note 63 *supra*.
[97] Cf. Int.-Am.Ct. Hum. Rts, *Castillo Petruzzi et al. Case*, Judgment of May 30, 1999, par. 161 (construing right of judicial appeal under American Convention on Huiman Rights) (accessible at http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/OASpage/humanrights.htm, visited Dec. 24, 2004).

courts must adhere.[98] The statute on commission procedures can and therefore must be interpreted to authorize only procedures which include this minimum international standard.

CONCLUSION

The military commission trying petitioner Hamdan and its procedures violate fundamental norms of international humanitarian and human rights law. The statutes relating to military commissions can, and therefore must, be interpreted to meet minimum international law standards. Under the *Charming Betsy* canon, the commission trying Mr. Hamdan and its procedures exceed the President's statutory authority. Amici urge this Court to consider these violations as additional, alternative grounds to affirm the judgment below.

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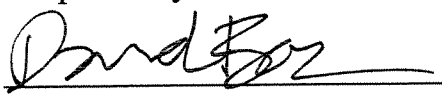
[98] *Prosecutor v. Tadic*, Int. Crim. Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-94-1-A-AR77, Judgment of Feb. 27, 2001, p. 3 (accessible at www.icty.org, visited Dec. 23, 2004).

Dated: December 29, 2004

Respectfully submitted,

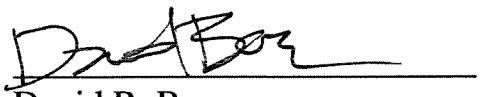


Douglass Cassel
Bridget Arimond
CENTER FOR INTERNATIONAL HUMAN RIGHTS
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
357 E. Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-8579

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

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I, David R. Berz, undersigned counsel for the Amici listed below, hereby certify that the Brief for complies with the type-volume limitations therein. The Brief for Louise Doswald-Beck, Guy S. Goodwin-Gill, Frits Kalshoven, Vaughan Lowe, Marco Sassoli and the Center for International Human Rights of Northwestern University School of Law is proportionally spaced, has a typeface of 14 point and contains 6,994 words.



David R. Berz

CERTIFICATE OF SERVICE

I, Lisa R. Fine, hereby certify that on this 29th day of December, 2004, copies of the foregoing BRIEF AS *AMICI 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, as well as their motion for leave to file the aforementioned brief, were filed with the United States Court of Appeals for the District of Columbia and hand-delivered, or, with consent of the parties, served via e-mail and deposited in the U.S. Mail, first-class postage pre-paid, addressed to the following:

Jonathan L. Marcus
Robert Loeb
U.S. Dept. of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

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

Neal Katyal
Georgetown University Law Center
600 New Jersey Ave, NW
Washington, D.C. 20001

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

Charles Swift
Office of Chief Defense
Counsel for Military Commissions
1851 South Bell Street
Suite 103
Alexandria, VA 22202

Paul D. Clement
Acting Solicitor General
U.S. Department of Justice
950 Pennsylvania Ave.
Washington, D.C. 20530

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

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

Lisa R. Fine