ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005

United States Court of Appeals

for the

District of Columbia Circuit

No. 04-5393

SALIM AHMED HAMDAN,

Petitioner-Appellee,

v.

DONALD H. RUMSFELD, United States Secretary of Defense;
JOHN D. ALTENBURG, Appointing Authority for Military Commissions,
Department of Defense; THOMAS L. HEMINGWAY, Brigadier General,
Legal Advisor to the Appointing Authority for Military Commissions;
JAY HOOD, Brigadier General, Commander Joint Task Force, Guantanamo,
Camp Echo, Guantanamo Bay, Cuba;
GEORGE W. BUSH, President of the United States,

Respondents-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA IN CASE NO. 04cv01519
JAMES ROBERTSON, UNITED STATES DISTRICT JUDGE

BRIEF FOR *AMICUS CURIAE* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONER-APPELLEE AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and *Amici*

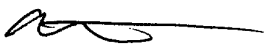
Except for *amicus curiae* Association of the Bar of the City of New York ("ABCNY"), all parties, intervenors, and *amici* appearing before the District Court and in this Court are listed in the Briefs for Appellants and Appellees.

(B) Rulings Under Review

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

(C) Related Cases

ABCNY is unaware of any related cases, except for those listed in the Brief for Appellants.



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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 26.1

ABCNY certifies that it has no parent corporation and is not owned, wholly or in part, by any publicly-held company. ABCNY is a non-profit trade association comprised of members of the bar of New York that operates for the purpose of studying, addressing, and promoting the rule of law, and where appropriate, legal reform. Through its many standing committees, ABCNY educates the bar and public about legal issues relating to the war on terrorism, the pursuit of suspected terrorists, and the treatment of detainees.

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CERTIFICATE AS TO RULE 29(d)

ABCNY certifies that it was not practicable to join other *amicus curiae* briefs because we believe our issue is not substantially similar to that of other *amici*.

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GLOSSARY

ABCNY.....Association of the Bar of the City of New York

Dist. Ct. Op.....November 8, 2004 District Court Opinion

ECHR.....The European Convention on Human Rights

Gov't Br.....December 8, 2004 Government Brief

ICCPR.....International Covenant on Civil and Political Rights

I.C.J.....International Court of Justice

ICRC.....International Committee of the Red Cross

ICTFY.....International Criminal Tribunal for the Former Yugoslavia

ICTR.....International Criminal Tribunal for Rwanda

POW.....Prisoner of War

UCMJ.....Uniform Code of Military Justice

UDHR.....Universal Declaration of Human Rights

INTEREST OF *AMICUS CURIAE* AND SOURCE OF AUTHORITY TO FILE

The Association of the Bar of the City of New York ("ABCNY") is a professional association of over 22,000 attorneys. Founded in 1870, ABCNY has long been committed to studying, addressing, and promoting the rule of law and, when appropriate, law reform. Through its many standing committees, ABCNY educates the bar and public about legal issues relating to the war on terrorism, the pursuit of suspected terrorists, and the treatment of detainees. While it embraces the necessity of apprehending and punishing those responsible for terrorist acts and preventing future acts of terrorism, ABCNY believes that the Executive's actions in this and similar cases are dangerously eroding civil liberties and human rights. In particular, ABCNY believes that the Administration's cramped and unprecedented interpretations of the four Geneva Conventions of 1949 ("the Geneva Conventions" or "the Conventions") are incompatible with the United States' treaty obligations. ABCNY submits this brief to present the Court with authority regarding the proper application of the Conventions in this case. [1] All parties have consented to this filing.

[1] ABCNY expresses no view with respect to the merits of Hamdan's case, including his alleged membership in Al Qaeda and his guilt or innocence on the charges that have been filed against him.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than a half-century, the four Geneva Conventions of 1949 have stood as bulwarks, safeguarding minimum standards of humanity amidst the barbarism of war. Applied faithfully by the United States for decades, the Conventions offer basic protection from mistreatment to persons in the hands of an unfriendly military force. In particular, Common Article 3, so called because it is common to all four Conventions, establishes a minimum level of protections that must be afforded to *all* persons captured in a military conflict in a contracting party's territory. Among those protections is the requirement that a person may be punished only after trial before a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949 ("Geneva III"), art. 3, 6 U.S.T. 3316.

As set forth below, Common Article 3 plainly applies to the conflict in Afghanistan. Moreover, the procedural rules governing military commissions at Guantanamo (the "Commissions") fail to comply, on their face, with the minimal requirements of this Article. Specifically, the Commission rules abridge the following indispensable rights in violation of Common Article 3: (1) presence at trial; (2) cross-examination of adverse witnesses; (3) prompt charges and trial; and (4) trial by an independent and impartial tribunal.

To ensure that the government adheres to its treaty obligations, we respectfully urge this Court to affirm the District Court's order granting a writ of habeas corpus and, more specifically, to rule that: (1) the Commission proceedings must comply with Common Article 3; and (2) before Hamdan may be tried by a Commission, the government must correct the facial defects in the procedural rules governing the Commissions.

ARGUMENT

I. BOTH THE THIRD GENEVA CONVENTION AND THE PROTECTIONS OF COMMON ARTICLE 3 APPLY TO THE AFGHAN CONFLICT AND TO PERSONS LIKE HAMDAN WHO WERE ALLEGEDLY ENGAGED IN IT

In the decision below, the District Court correctly interpreted the Conventions as offering a cohesive mantle of protection to Hamdan, a foreign national captured in the Afghan conflict. The District Court first addressed the Third Convention, which protects prisoners of war ("POWs") and offers protections even more robust than those of Common Article 3. The District Court correctly held that the Third Convention generally applies to the conflict in Afghanistan. As a consequence of this holding and the "undisputed" fact that Hamdan has asserted POW status, *see* Dist. Ct. Op. at 5, the District Court granted Hamdan's habeas petition on grounds that he is entitled, under Article 5 of the Third Convention, to a status hearing before a "competent tribunal" so that his POW status may be determined. *See id.* at 17-19. The Court went on to hold that

even if the "competent tribunal" ultimately finds that Hamdan is not a POW, Hamdan nevertheless enjoys the more limited Common Article 3 protections. As the District Court reasoned, it is "universally agreed, and is demonstrable in the Convention language itself," that Common Article 3 sets forth the "most fundamental requirements of the law of war" and is thus independently applicable. *See id.* at 19-20 (quoting *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) (internal quotations omitted)).

In its brief, the government takes issue with both aspects of the District Court's analysis. It maintains that Hamdan exists in a sort of legal no-man's-land, completely outside the protections of Conventions.

According to the government, the Third Convention applies only in international conflicts between states that have signed or agreed to apply the Conventions. The government insists that Hamdan cannot claim those protections because the war in Afghanistan is being fought against Al Qaeda, which is not a nation and thus cannot adopt the Conventions. *See* Gov't Br. at 40-46. Having asserted that the war against Al Qaeda in Afghanistan is beyond the purview of the Conventions because it is *not* international, the government then pivots on a dime to argue that Hamdan should also be denied the more limited protections of Common Article 3 because the conflict with Al Qaeda *is* "of an international character." *See* Gov't Br. at 32 n.5 (internal quotations omitted). Based on this

Catch-22, the government argues that Hamdan falls completely outside the Conventions. As set forth below, the government's construction of the Conventions is both novel and wrong.

A. Background Of The Geneva Conventions

In 1949, soon after the horrors of World War II, representatives of 61 nations met in Geneva, Switzerland to consider revisions to the existing 1929 Geneva Conventions. The delegates ultimately drafted four separate treaties guaranteeing protections to (1) wounded and sick soldiers in the field; (2) wounded, sick and shipwrecked sailors; (3) prisoners of war; and (4) civilians. The four 1949 Conventions are commonly referred to by number; *i.e.,* the "First Geneva Convention" and so forth. The United States ratified all four of the 1949 Conventions in 1955. As of December 2004, almost 200 states, including Afghanistan, had ratified the Conventions.

B. The Third Geneva Convention Applies To The Afghan Conflict

As the District Court concluded, the Third Convention generally applies to persons captured in the course of the Afghan conflict. *See* Dist. Ct. Op. at 14-16. Article 5 of that Convention extends to any individuals whose POW status is in doubt "the protection of the [Third] Convention until such time as their status has been determined by a competent tribunal." Geneva III at art. 5. The District Court "rejected" the government's contention that the Third Convention is inapplicable

because Hamdan was captured "not in the course of a conflict between the United States and Afghanistan, but in the course of a 'separate' conflict with al Qaeda." Dist. Ct. Op. at 14. Although ABCNY takes no position as to whether Hamdan or any other Guantanamo detainees are entitled to POW status (a decision that will presumably be made by the status tribunal), we agree fully with the District Court that the Third Convention generally applies to the Afghan conflict. A discussion of the applicability of the Third Convention is, in turn, essential to an understanding of the broader applicability of Common Article 3 and the universal nature of the Conventions' protections.

As the District Court reasoned, the Third Convention applies to the Afghan conflict under the plain language of Article 2, which defines the scope of the Third Convention's protections respecting international conflicts. The first paragraph of Article 2 states that "the present Convention shall apply to all cases of declared war or of any other armed conflict *which may arise between two or more of the High Contracting Parties*." Geneva III at art. 2 (emphasis added). Here, the U.S. and Afghanistan are both signatories to the Third Convention, and were engaged in an armed conflict in relation to which Hamdan was captured. By the plain language of Article 2, therefore, the Third Convention applies to the Afghan conflict and those captured in it, including Hamdan.

In an attempt to evade the language of the first paragraph of Article 2, the government points to the third paragraph of Article 2, which provides that if "one of the Powers in conflict [is not] a party to the present Convention, the Powers who are parties thereto . . . shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof." *Id.* The government contends that because Al Qaeda has not accepted and applied the protections of the Conventions, its alleged members, including Hamdan, are not entitled to even the status determination guaranteed by the Third Convention.

By its terms, however, the third paragraph is a narrow exception to the broad coverage of Article 2 that is only applicable to a "Power" that is not a party to the Third Convention. As the government's brief concedes, only a State can qualify as a "Power" under Article 2. "Al Qaeda . . . cannot qualify as a 'Power in conflict' that could benefit from the Convention" because "the term 'Power' refers to States that would be capable of ratifying the Convention and other international agreements — something that a terrorist organization like al Qaeda cannot do." Gov't Br. at 44-45 (citing G.I.A.D. Draper, *The Red Cross Conventions* 16 (1958) ("'Powers' means States capable then and there of becoming Contracting Parties to these Conventions"); 2B Final Record of the Diplomatic Conference of Geneva of 1949, at 108 (interpreting the term "Power" to mean "State")). Thus, on the government's own account, the third paragraph of Article 2 has no bearing here.

Failure to provide the status determination guaranteed by the Third Convention to all combatants in the Afghan conflict would frustrate the intent behind Article 2 as well as its language. Article 2 was drafted broadly because, in prior conflicts, nations had tried to evade their treaty obligations by, for example, rejecting "the legitimacy of the enemy Government." International Committee of the Red Cross ("ICRC"), *Commentaries to the Convention (III) Relative to the Treatment of Prisoners of War* 19-20 (1949).[2] The government's attempt to exclude combatants captured in the Afghan conflict entirely from the Third Convention reflects the type of hair-splitting that was intended to be rendered obsolete by Article 2.

Tellingly, the U.S. State Department has recognized the applicability of the Conventions to *all* combatants captured in Afghanistan, including alleged Al Qaeda members. In a February 2, 2002 memorandum, William H. Taft IV, the Legal Adviser to the Department of State, wrote that an attempted distinction between Al Qaeda and the Taliban in the context of the Afghanistan conflict "does not conform to the structure of the Conventions." Memorandum from William H. Taft, IV,

[2] The ICRC Commentaries are "widely recognized as a respected authority on interpretation of the Geneva Conventions. The authors of the Commentary were primarily individuals intimately involved with the revision of the Convention of 1929 and the drafting of the present Conventions." *United States v. Noriega*, 808 F. Supp. 791, 795 n.6 (S.D. Fla. 1992).

Legal Adviser, Dep't of State, to Counsel to the President (Feb. 2, 2002), http://www.fas.org/sgp/othergov/taft.pdf ("Taft Memorandum"). Taft went on:

> The Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions are applicable to all persons involved in that conflict—al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc. If the Conventions do not apply to the conflict, no one involved in it will enjoy the benefit of their protections as a matter of law.

Id.[3]

In his Memorandum, Taft observed that the United Nations has historically endorsed the application of the Conventions to all factions in Afghanistan's war-filled history. *Id.* (citing U.N. Security Council Res. 1193). The government suggests that the U.N. has changed this stance, based on an isolated sentence quoted from Ho-Jin Lee, *The United Nation's* [sic] *Role in Combating International Terrorism* at 15, presented at U.N. Conference on Disarmament Issues (Aug. 2002), http://disarmament.un.org:8080/rcpd/pdf/5cnfamblee.pdf. As quoted in the government's brief, that sentence states that the "1949 Geneva Conventions, specifying that they apply to contracting parties, i.e. States, were not

[3] In his Memorandum, Taft also noted that broad application of the Conventions would be wise from a policy perspective, since it would help assure protection for U.S. troops who fall into enemy hands:

> A decision that the Conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged deprives our troops there of any claim to the protection of the Convention in the event they are captured and weakens the protections afforded by the Conventions to our troops in future conflicts.

Taft Memorandum. In the decision below, the District Court made this same astute observation. Dist. Ct. Op. at 21-22.

designed for a situation in which the chief adversary is a non-state group." *See* Gov't Br. at 45 n.8. Remarkably, the government glosses over the very next sentence in the same U.N. publication: "However, if allied forces engage in combat, *for example in Afghanistan against the non-state group of Al Qaeda*, or against those harboring them such as the Taliban, the law of war can be applied." Lee, *supra*, at 15. (emphasis added). Thus, far from contradicting the previous U.N. position, the cited article in fact supports it.

Finally, the government's attempt to deny Hamdan the Third Convention's guarantee of a status determination is not only legally wrong, but also distorts the facts. The notion that Al Qaeda is separate from the Taliban government is belied by the Justice Department's own analysis. Memorandum from Jay S. Bybee, Assistant Attorney General, to Counsel to the President (Jan. 22, 2002), http://library.usu.edu/Govdocs/bush_admin/012202bybee.pdf ("there appears to be developing evidence that the Taliban leadership had become closely intertwined with, if not utterly dependent upon, al Qaeda"). Indeed, as the September 11 Commission Report recounts, the very premise for the U.S. attack on Afghanistan was the web of interconnections between the Taliban and Al Qaeda. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* 326, 333-34 (W.W. Norton & Co. 2004). *See also id.* at 66 ("Al Qaeda members could travel freely within the country, enter and exit it without visas or

any immigration procedures, purchase and import vehicles and weapons, . . . enjoy the use of official Afghan Ministry of Defense license plates[, and use] the Afghan state-owned Ariana Airlines to courier money into the country").

C. Regardless Of The Classification Of The Afghan Conflict, Common Article 3 Protects Hamdan

Even if a "competent tribunal" ultimately determines that Hamdan is not a POW and thus is not entitled to the full protections of the Third Convention, he is nevertheless plainly entitled to the more limited guarantees of Common Article 3. Common Article 3 prohibits torture, cruelty, and "humiliating and degrading treatment" and guarantees humane, non-discriminatory treatment. Geneva III at art. 3. Of particular importance in this case, Common Article 3 also provides that individuals detained by enemy forces may only be sentenced after court proceedings "affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* This provision was inserted with the intention that "[a]ll civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors." ICRC, *Commentaries to the Convention (IV) Relative to the Protection of Civilian Persons in Time of War* 40 (1949) ("ICRC Commentaries").

By its terms, Common Article 3 applies "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." Seizing upon the words "not of an international character,"

the government maintains that Common Article 3 only applies to local or internal conflicts such as civil wars, leaving Hamdan's case outside its ambit. *See* Gov't Br. at 32 n.5. In doing so, the government ignores both the history of Common Article 3 and relevant precedent, all of which demonstrate that Common Article 3 applies to *any* armed conflict in the territory of a contracting party.

When crafting Common Article 3, the authors of the Conventions could easily have confined its scope to "internal conflicts" or "civil wars," but they did not do so. The Red Cross initiated consideration of Common Article 3 by submitting draft language that would have extended the full protection of the Conventions to "all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion." ICRC Commentaries at 30. There was, however, "almost universal opposition to the application of the Convention, with all its provisions," to non-international conflicts, even when the Conference delegates proposed compromises "limiting the number of cases in which the Convention was to be applicable." *Id.* at 32. A solution was found, however, when the French delegation suggested drafting Common Article 3 so that its substantive protections would be limited, rather than the types of conflicts to which they applied. *Id.* Thus, the final deliberations over the Article were based on the understanding that it embodied provisions "which were to be equally applicable to civil and to international wars." *Id.* at 33.

Given this history, it is not surprising that Common Article 3 serves as a baseline for *all* armed conflicts, international or not. As the ICRC Commentaries stress, Common Article 3 "is a fortiori applicable in international conflicts." *Id.* at 14. This conclusion follows from the fact that Common Article 3 was constructed to provide at least some protection in any conflict not covered by the rest of the Conventions; since the rest of the Conventions, with their stronger protections, cover international conflicts, all conflicts are governed at a minimum by the protections of this Article. *Id.* at 38 ("Representing, as [Common Article 3] does, the minimum which must be applied in the least determinate of conflicts, its terms must a fortiori be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable").

U.S. courts have recognized Common Article 3's universal applicability. For example, in *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1351 (N.D. Ga. 2002), a case against a former Bosnian Serb police officer who perpetrated acts of torture during the Yugoslav conflict, the Court found the defendant liable, under the Alien Tort Claims Act, for violating Common Article 3. In so doing, the Court noted that the conflict in the former Yugoslavia had been recognized as international in character, but nevertheless held that the standards of Common Article 3 are broadly applicable "'to any armed conflict, whether it is of an internal or international character.'" *Id.* at 1351 n.39 (quoting *Prosecutor v. Tadic*,

Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (ICTFY Appeals Chamber Oct. 2, 1995) ("*Tadic*")). *See also Kadic*, 70 F.3d at 243 (under Common Article 3, "all 'parties' to a conflict . . . are obliged to adhere to these most fundamental requirements of the law of war").

International jurisprudence on this point is even more firmly established. In *Military and Paramilitary Activities In And Against Nicaragua (Nicar. v. U. S.)*, 1986 I.C.J. 14 (June 27) ("*Nicaragua*"), the International Court of Justice considered claims that the United States had encouraged the Nicaragua Contras in violating norms of international law. Noting the difficulty of characterizing the underlying conflict as internal (as a Nicaraguan civil war) or international (because of the allegation of U.S. involvement), the I.C.J. concluded that "[b]ecause the minimum rules applicable to international and to non-international conflicts are identical . . . [t]he relevant principles are to be looked for in the provisions of Article 3." *Id.* at ¶ 219.

More recently, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("ICTFY") considered whether the Yugoslavian conflict was international or non-international, and concluded, citing *Nicaragua*, that the "character of the conflict is irrelevant" because Common Article 3 reflects "'elementary considerations of humanity'

applicable under customary international law to any armed conflict, whether it is of an internal or international character." *Tadic* ¶ 102. Six years later, the ICTFY reaffirmed its ruling in *Tadic*, holding that Common Article 3 applied to the Yugoslav conflict even though the conflict was held to be international in nature. *Prosecutor v. Delalic*, Judgement, ¶ 140-50 (ICTFY Appeals Chamber Feb. 20, 2001) ("*Delalic*"). *See also Prosecutor v. Furundzija*, Judgment, ¶ 138 (ICTFY Trial Chamber Dec. 10, 1998) (Common Article 3 "is applicable both to international and internal armed conflicts").[4]

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[4] In addition to being binding as a matter of treaty law, Common Article 3 is also recognized as embodying the standards of customary international law. *Kadic*, 70 F.3d at 243 ("the most fundamental norms of the law of war [are] embodied in common article 3"); *accord Mehinovic*, 198 F. Supp. 2d at 1351; *Delalic* at ¶ 420 ("as a rule of customary international law, [Common Article 3's] substantive provisions are applicable to internal and international conflicts alike"); *Tadic* at ¶ 98 ("Indeed, the interplay between [customary law and treaty law] is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3").

Over a century ago, the Supreme Court held that customary international law is binding on U.S. courts. *The Paquete Habana*, 175 U.S. 677, 700 (1900); *accord Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2764 (2004); *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring). In its brief, the government cites a passage in *The Paquete Habana* to argue that the Executive has inherent power to override customary international law on his own authority. *See* Gov't Br. at 32 n.5. Although there is some authority supporting the government's suggestion, *see Garcia-Mir v. Meese*, 788 F.2d 1446, 1454-55 (11th Cir. 1986), one federal court has rejected such an expansive view of executive power, *see United States v. Buck*, 690 F. Supp. 1291, 1301 (S.D.N.Y. 1988), and another has upheld customary international law principles in the face of contrary executive action, *see Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980). Moreover, other language in *Paquete Habana* can be read to indicate that an executive act trumps customary international law only if it is specifically authorized by an act of Congress, 175 U.S. at 710-11 (even in wartime, customary international law cannot be contradicted "even by direction of the Executive, without express authority from Congress"), and this Court has found customary international law superseded only by an "applicable treaty, statute, or constitutional provision." *Tag v. Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959); *accord Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 939 (D.C. Cir. 1988); *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991). Further, U.S.

II. THE COMMISSIONS VIOLATE THE MINIMAL STANDARDS SET BY COMMON ARTICLE 3

A. Common Article 3 Entitles Hamdan To Basic Judicial Safeguards

As noted above, Common Article 3 requires, of any sentencing court, judicial safeguards that are "recognized as indispensable by civilized peoples." The precise contours of those safeguards were not defined in the 1949 Conventions, but were subsequently delineated in Article 75 of Protocol I to the Conventions, which was adopted in 1977 ("Article 75").[5] ICRC, *Commentaries to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* 878 (1977) ("Protocol I Commentaries"). Although the U.S. has not adopted Protocol I because of objections to other provisions, "it does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled." William H. Taft, IV, *The Law of Armed Conflict After 9/11*, 28 Yale J. Int'l L. 319, 322 (2003); *see also* Conference, *The Sixth Annual American Red Cross-Washington College of Law Conference on International*

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courts have historically interpreted U.S. law in a way that comports with principles of customary international law. *E.g.*, *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

In this case, this Court need not reach the issue of whether the Commissions violate customary international law because they clearly violate Common Article 3, which is binding upon the government as a duly ratified treaty.

[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, art. 75, 1125 U.N.T.S. 3.

Humanitarian Law, 2 Am. J. Int'l L. & Pol'y 415, 427 (1987) (remarks of U.S. Dep't of State Legal Adviser Michael J. Matheson that the U.S. supports "the fundamental guarantees contained in article 75"). Therefore, to comport with Common Article 3, the Guantanamo Military Commissions must satisfy the provisions of Article 75, which include:

(1) prompt judicial proceedings;

(2) the right to be tried in one's presence;

(3) the right to not be compelled to testify against himself;

(4) the right to cross-examine witnesses against him and to provide witnesses on his behalf; and

(5) release from detention with the minimum delay possible as soon as the circumstances justifying the arrest have ceased to exist.

Article 75 at ¶ 4.

These guarantees are, of course, deeply rooted in our own Constitutional traditions. For example, in *Crawford v. Washington*, 124 S. Ct. 1354, 1363 (2004), Justice Scalia admonished that the rights enshrined in the Sixth Amendment's Confrontation Clause have historically been considered "indispensable conditions" and "founded on natural justice" (internal quotations omitted). Another "principle of natural justice" is the right of the accused to be present at his trial. *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876); *accord United States v. Bentvena*, 319 F.2d 916, 943 (2d Cir. 1963); *see also Lewis v. United States*, 146 U.S. 370, 372 (1892)

(absence of defendant at his own trial is "contrary to the dictates of humanity") (internal quotations omitted); *accord United States v. Washington*, 705 F.2d 489, 496-97 (D.C. Cir. 1983). The Supreme Court has also declared that keeping evidence, favorable or not, from the eyes of the accused violates fundamental precepts of fairness. *See, e.g.*, *Brady v. Maryland*, 373 U.S. 83, 88 (1963) (withholding of favorable evidence from an accused "does not comport with standards of justice"); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-71 n. 17 (1951) ("[t]he plea that evidence of guilt must be secret is abhorrent to free men") (internal quotations omitted).

The requirements of Article 75 are also embodied in international covenants respecting human rights, such as Articles 9 and 14 of the International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 ("ICCPR"). In 1992, the U.S. ratified the ICCPR, which includes a guarantee of an "independent and impartial tribunal." *Id.* at art. 14. The importance of an independent and impartial tribunal is also recognized in Article 10 of the Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. GAOR 3, U.N. Doc. A/810 at 71 (1948) ("UDHR"), which the U.S. government has recognized as a charter of inalienable human rights. *See, e.g.*, U.S. Dep't of State Statement on Human Rights, http://www.state.gov/g/drl/hr/ ("a central goal of U.S. foreign policy has been the

promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights").

Because the safeguards demanded by Common Article 3 (as spelled out in Article 75) are universally recognized as bedrock requirements of any civilized justice system, it is hardly surprising that they have been incorporated into the international tribunals established since the passage of Protocol I. These tribunals have tried defendants (including ex-Serbian president Slobodan Milosevic) accused of the most heinous crimes, including genocide. *See generally* Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (1993) ("ICTFY Statute") at art. 20-21; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994) ("ICTR Statute") at art. 19-20; The European Convention on Human Rights, Nov. 4, 1950, art. 5-6, 213 U.N.T.S. 221 ("ECHR"). As discussed below, however, the Commissions fail, in several important respects, to provide the safeguards demanded by Common Article 3.

B. The Commissions Are Not Equipped With The Judicial Safeguards Deemed Indispensable By Common Article 3

The Order establishing the Commissions, 32 C.F.R. § 9, fails to meet the requirements of Common Article 3 in at least four ways: (1) it allows for Hamdan to be unwillingly excluded from his trial; (2) it permits the tribunal to eviscerate

his right to cross-examine adverse witnesses; (3) it has permitted Hamdan to be detained for years before trial; and (4) it fails to provide an impartial and independent tribunal. These defects are evident on the face of the Commission rules and in light of events that have already taken place. Additional deficiencies in the tribunal may become apparent during the course of a proceeding (*i.e.*, if the Commissions were to consider evidence acquired through torture), but we do not discuss such potential future problems here. At this stage, we merely urge this Court to declare that Common Article 3 applies to the Commissions and to require the government to correct the facial shortcomings that are already apparent in the Commission rules.

While the government repeatedly invokes the specter of past military tribunals for the proposition that war-time tribunals may diverge from court procedures, it tellingly omits the details of those past tribunals to illustrate its point. Although varying procedures have been used over the nation's history, and although evidence of those specific procedures is sometimes sparse, we are aware of no tribunals that have denied all of the basic rights that are abridged by the Commissions, even where the accused was an enemy combatant.

For example, in the Civil War, the bloodiest war in the nation's history, a military tribunal tried Clement Vallandigham for treason. A military commission of 8 officers tried Vallandigham the day after he was arrested. James L.

Vallandigham, *A Life of Clement L. Vallandigham* 262 (Turnbull Bros. 1872). Vallandigham was given the option to object to any of the commission members, but he declined. *Id.* By all indications, Vallandigham was not only represented by counsel, but was able to be present for the whole trial; in fact, he cross-examined both prosecution witnesses himself. *Id.* at 264-77. Moreover, Vallandigham's tribunal maintained the appearance of impartiality, ruling on objections for both sides and permitting Vallandigham time to consult with counsel. *Id.* The tribunal eventually found Vallandigham guilty and sentenced him to imprisonment. *Id.* at 283.

Almost eighty years later, during World War II, the U.S. tried eight German saboteurs who had planned to use explosives to destroy "war industries and war facilities in the United States." *Ex parte Quirin*, 317 U.S. 1, 8 (1942). The saboteurs were charged about two weeks after they were captured, and were tried soon thereafter, in July 1942. *Id.* Although information on the *Quirin* procedures is scant, it appears that the tribunal could close proceedings to the public and press but not the defendants. Louis Fisher, *Nazi Saboteurs on Trial* 54 (Univ. Press of Kansas 2003). Each of the defendants was allowed to testify, and each denied any plan to conduct sabotage in the U.S. *Id.* at 69. The tribunal, however, found all 8 guilty and deserving of the death penalty. *Id.* at 77. The most notable aspect of the *Quirin* tribunal, however, arose in its aftermath. In 1944, a repeat German

sabotage effort led to another military commission, but the government decided that the 1942 tribunals were procedurally flawed. *Id.* at 140-43. Accordingly, the structure of the 1944 tribunal was made more independent of the President, removing his ability to pick the commission members and having the trial record reviewed by the Judge Advocate General rather than the President directly. *Id.* at 143.

A far more complete record regarding military commission procedures is set forth in *Madsen v. Kinsella*, 343 U.S. 341 (1952). There, the defendant shot her husband in Germany in 1952, was charged the next day, and was tried six months later by an American military tribunal. *Id.* at 343-44. Among the rights guaranteed by that tribunal were an *unqualified* right to be present at trial and to cross-examine witnesses, right to counsel of one's choice, and right to present any material witnesses in one's defense. *Id.* at 358 n.24.

The safeguards built into tribunals such as the one in *Madsen* confirm that even military commissions must afford basic procedural rights to the defendant. Reinforcing this same point, the U.S. declared after World War II that a Japanese tribunal trying American bomber pilots had committed war crimes by failing to provide basic safeguards to the pilots. *United States v. Uchiyama*, Review of Staff Judge Advocate, at 29 (Yokohama July 1, 1948) (cited in Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama*, Army Lawyer, Nov. 2003, at 18). As

discussed below, the Commissions fail to satisfy the standards of Common Article 3.

1. Right To Be Present At Trial

Although the Commission rules nominally recognize Hamdan's right to be present at his tribunal, 32 C.F.R. § 9.5(k), that right yields if the Commission closes the proceedings to Hamdan and his Civilian Defense Counsel based on anything the Presiding Officer or Secretary of Defense deems to be a matter of national security. 32 C.F.R. § 9.6(b)(3). The Presiding Officer may exclude Hamdan upon his or her own initiative, or upon an ex parte presentation by the prosecution. *Id.* This rule violates Hamdan's "right to be tried in his presence." Article 75 at ¶ 4(e); ICCPR art. 14 at ¶ 3(d); ICTFY Statute art. 21 at ¶ 4(d); ICTR Statute art. 20 at ¶ 4(d). Hamdan's exclusion also neutralizes his right to cross-examine witnesses by preventing him from observing them and conferring with his counsel. Article 75 at ¶ 4(g); ICCPR art. 14 at ¶ 3(e); ICTFY Statute art. 21 at ¶ 4(e); ICTR Statute art. 20 at ¶ 4(e); ECHR art. 6 at ¶ 3(d).

Compounding this violation is the Commission's ability to offer evidence, under the rubric of "Protected Material," against Hamdan without his ever knowing about it. *See* 32 C.F.R. § 9.6(d)(5). Although any admitted evidence must be seen by Detailed Defense Counsel, *id.* at §9.6(d)(5)(ii)(C), Detailed Defense Counsel is not permitted to share the content of that evidence with

Hamdan or Civilian Defense Counsel. "Thus, for example, testimony may be received from a confidential informant, and Hamdan will not be permitted to hear the testimony, see the witness's face, or learn his name." Dist. Ct. Op. at 31. The consequences of such secret evidence are dire: Hamdan could be sentenced to a lengthy prison term, or even executed, without ever knowing on what grounds he has been found guilty.

The fact that Detailed Defense Counsel can be present at all stages of the trial does not cure the problem of Hamdan's exclusion. As the District Court noted, it essential for counsel to turn to his client and say, "Did that really happen? Is that what happened?" Dist. Ct. Op. at 32 (internal quotations omitted). *See also* Protocol I Commentaries at 883 ("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 [and] to ask questions himself").

The government has not provided a single instance of a past tribunal, whether court proceeding or military commission, that has allowed for the involuntary exclusion of a defendant for any reason other than disruption of proceedings. The UCMJ, of course, does not allow for such measures. 10 U.S.C. § 839(b); *United States v. Daulton*, 45 M.J. 212, 219 (C.A.A.F. 1996).

2. Right To Cross-Examine Adverse Witnesses

The Commissions' rules compromise Hamdan's confrontation and cross-examination rights beyond excluding him. *See* Article 75 at ¶ 4(g); ICCPR art. 14 at ¶ 3(e); ICTFY Statute art. 21 at ¶ 4(e); ICTR Statute art. 20 at ¶ 4(e); ECHR art. 6 at ¶ 3(d). The Commission is allowed to consider any evidence it deems probative "including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports." 32 C.F.R. § 9.6(d)(3). Thus, even if Hamdan is present, the Commission may receive anonymous unsworn statements whose sources Hamdan cannot confront or impeach. This is exactly the situation the Supreme Court found an affront to historical concepts of natural justice in *Crawford*, 124 S. Ct. at 1363. Furthermore, the military commissions in *Madsen*, on which the government has often relied, explicitly guaranteed the defendant the rights to be present at her proceeding and to cross-examine adverse witnesses without qualification. 343 U.S. at 358 n.24.

3. Right To Prompt Judicial Proceedings

Hamdan has endured an unconscionably lengthy pre-trial detention. He was brought to Guantanamo in June 2002, and the decision to try him by military commission was made over a year later in July 2003, but he was not charged until after another full year, in July 2004. In short, Hamdan has been subjected to

prolonged periods of detention, infrequently punctuated with belated steps toward resolution of his case. Common Article 3's promptness requirement does not countenance such delays. Indeed, the Protocol I Commentaries establish a *10 day* time limit for being informed of charges. Protocol I Commentaries at 876-77.

International law entitles the accused to be "promptly informed of any charges against him" and "to trial within a reasonable time." ICCPR art. 9 at ¶ 2, 3; *accord Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998); *see also* Article 75 at ¶ 3, 4(a); ICTFY Statute art. 21 at ¶ 4(a), 4(c); ICTR Statute art. 20 at ¶ 4(a), 4(c); ECHR art. 6 at ¶ 1, 3(a). As the Supreme Court has emphasized, unreasonable delay in proceedings not only subjects an accused to the harm of a lengthy pretrial confinement, but impairs the accused's defense "by dimming memories and loss of exculpatory evidence." *Doggett v. United States*, 505 U.S. 647, 654 (1992). None of the military tribunals in U.S. history involved detention as prolonged as Hamdan's. *Madsen*, 343 U.S. at 343-44 (defendant charged a day after arrest and tried six months later); *Application of Yamashita*, 327 U.S. 1, 5 (1946) (defendant charged within a month of capture and tried two weeks later); *Quirin*, 317 U.S. at 7-8 (defendants charged within three weeks of capture and tried less than a week later). Accordingly, this Court should require that detainees such as Hamdan be charged and tried within a reasonable time.

4. Right To Be Tried By An Independent And Impartial Tribunal

Finally, the Commissions are not an "independent and impartial tribunal" as required by Common Article 3. ICCPR art. 14 at ¶ 1; UDHR art. 10; ECHR art. 6 at ¶ 1. The Commission members are appointed by the Secretary of Defense, and can be removed at any time for "good cause." 32 C.F.R. § 9.4(a)(1)-(3). Once the Commission renders a decision, the case passes automatically to a Review Panel, which either recommends a disposition to the Secretary of Defense or remands the case to the Commission for further proceedings. 32 C.F.R. § 9.6(h)(4). The Secretary of Defense, in turn, either forwards the case to the President with a recommended disposition or remands the case to the Commission for further proceedings. 32 C.F.R. § 9.6(h)(5). The President may approve or disapprove the recommendation; change the conviction to one of a lesser included offense; mitigate, commute, defer or suspend the sentence imposed; or delegate his final authority to the Secretary of Defense. 32 C.F.R. § 9.6(h)(6). Although the President or Secretary of Defense cannot change a "Not Guilty" finding to "Guilty," a "Not Guilty" disposition will not take effect until it is finalized by the President or Secretary of Defense. 32 C.F.R. § 9.6(h)(2).

As the foregoing structure makes clear, the Commissions are under the control of the President and Secretary of Defense. But these two individuals have already asserted that the Guantanamo detainees are guilty. For example, the

President has unequivocally said of the Guantanamo detainees: "these are killers." Press Release, President Meets with Afghan Interim Authority Chairman (Jan. 28, 2002), http://www.whitehouse.gov/news/releases/2002/01/20020128-13.html. The Secretary of Defense, meanwhile, has called the Guantanamo detainees "among the most dangerous, best-trained, vicious killers on the face of the Earth." Jess Bravin, Jackie Calmes & Carla Anne Robbins, *Status of Guantanamo Bay Detainees Is Focus of Bush Security Team's Meeting*, Wall St. J., Jan. 28, 2002, at A16; *see also* Transcript, Defense Department Briefing (Jan. 22, 2002), http://www.globalsecurity.org/military/library/news/2002/01/mil-020122-usia01.htm (quoting Secretary of Defense as calling Guantanamo detainees "committed terrorists" who "have been found to be engaging on behalf of the al Qaeda").

It is impossible to call a tribunal "independent" or "impartial" when it is controlled by two individuals who have prejudged the defendants' guilt. The government can offer no precedent for a military tribunal operating under such an overt bias. To the contrary, as noted above, the 1944 German saboteur tribunals were modified so that they would be more independent than the *Quirin* tribunals.

CONCLUSION

For the reasons stated, this Court should affirm the District Court's grant of habeas corpus, declare that the Commissions must comply with Common Article 3, and direct the government to correct the facial deficiencies outlined herein prior to subjecting Hamdan to trial before a Commission.

Respectfully Submitted,

/AK

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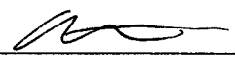

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December 29, 2004

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Salim Ahmed Hamdan,

vs.

Donald H. Rumsfeld, et al.

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STATE OF NEW YORK)

COUNTY OF NEW YORK)

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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