[ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005]

No. 04-5393

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SALIM AHMED HAMDAN,

Petitioner-Appellee,

v.

DONALD H. RUMSFELD, ET AL.,

Respondents-Appellants.

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

BRIEF [REVISED] OF 305 UNITED KINGDOM AND EUROPEAN PARLIAMENTARIANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and *Amici*

Except for the fact that this *amicus* group now numbers 305, 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);

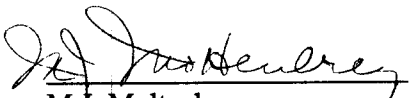
16. *Jarallah Al-Marri* v. *Bush* (recently filed or shortly to be filed in the federal district court in D.C.);

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).



M.J. Moltenbrey
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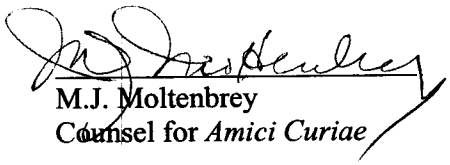
CERTIFICATE PURSUANT TO CIRCUIT RULE 29(D)

Although the United Kingdom and European parliamentarians who are signatories to this brief understand that there may be additional *amicus* submissions in support of Petitioner-Appellee, as elected officials these *amici* are not in a position to endorse the submissions of any other *amicus*, and they express no view on the detail of those submissions.



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GLOSSARY

ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221
ICCPR	International Covenant on Civil and Political Rights,
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
Third Geneva Convention	Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362
VCLOT	Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331

BRIEF OF 305 UNITED KINGDOM AND EUROPEAN PARLIAMENTARIANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLEE

IDENTITY AND INTEREST OF THE *AMICI CURIAE*

The *amicus* group[1] numbers 305, comprising 220 Members of the Houses of Parliament of the United Kingdom of Great Britain and Northern Ireland (the "UK Parliament") and 85 current or former Members of the European Parliament and a Vice President of the European Commission. The *amicus* group spans the political spectrum. It includes senior figures from all the major political parties in the United Kingdom, 6 retired Law Lords (judges in the highest court in the UK), including a former Lord Chancellor, other senior lawyers, some of whom have held high judicial office, 11 Bishops of the Church of England and former Cabinet ministers.

Amici consider that aspects of the military commission system being challenged in this action put the United States in breach of its international law obligations. *Amici* further consider that this situation is deeply regrettable, as now, more than ever, the international legal order needs to be strengthened by the world's most powerful nations transparently and effectively demonstrating their adherence to the rule of law and to the legally mandated protection of the due process rights of individuals, including those affected by the war on terror. Adherence to the United States' international legal obligations inhibits neither the protection of U.S. citizens nor the effective defence of the United States. Rather, ensuring that those accused of terrorist acts are subjected to a process that meets international legal standards

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[1] The members are identified individually in an Appendix to this Memorandum. *Amici* file this brief with the consent of Petitioner-Appellee and Respondents-Appellants.

enhances the political capital of the United States, while disregard of those standards imperils its moral authority.

Amici express no view on the guilt of any individual detainee generally and none on the position of Salim Ahmed Hamdan specifically. Equally, they do not express any view on the legitimacy of the military action in Afghanistan or Iraq, the politics or tactics of the war on terror in general, or against al Qaeda in particular, or on the decisions of any individual member of the U.S. administration. *Amici* hold different individual views on these issues. But *amici* share the view that, however horrific and barbaric the attacks on the United States on 11 September 2001,[2] and whatever the continuing threat to world security posed by terrorism, these threats can and should be met without breach of the United States' international legal obligations.[3] The United States must ensure a process for the prosecution of those accused of terrorism-related crimes that does, and is seen to, satisfy the United States' international legal obligations.

Amici respect the independence of the judiciary in a friendly foreign state. Nevertheless, they hope that the views of leading parliamentarians in states with close legal, historical and political ties to the United States may be of assistance to the Court when it is weighing the arguments. They base that hope on the long tradition of shared policies, joint legal progress and mutual learning that have characterised the development of law in the United States of America and in other democracies

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[2] The nations of Europe joined the widespread condemnation of those attacks and support for the United States that followed, most famously, perhaps, in the headline of *Le Monde*, September 13, 2001: "Nous sommes tous americains" (We are all Americans).

[3] As was famously stated in a leading UK case, *Liversage v. Andersen* 1942 AC 206, "amid the clash of arms, the laws are not silent. They may be changed but they speak the same language in war as in peace".

governed by the rule of law. The United States has long been known as a nation "unwilling to witness or permit the slow undoing of those human rights to which this nation has always been committed."[4]

Moreover, in the modern era, the United States and the nations of Europe, including the United Kingdom, have frequently cooperated in developing the international treaties, principles and institutions that create the public international law framework that nations share today.[5] *Amici* submit their arguments in the light of that shared tradition.

SUMMARY OF ARGUMENT

The United Kingdom and European parliamentarians in the *amicus* group address the courts of the United States, through this *amicus* submission, in order to advance two basic propositions: (1) the Rule of Law values shared by the United States and countries which are its friends and allies endorse, and indeed require, enforcement by the courts of international legal standards, particularly those relating to due process and fair trial, even against the Executive, and even in time of war or national crisis; and (2) as determined by the District Court, Petitioner-Appellee is *a priori* entitled to the protections of international law, and in particular of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362 (the "Third Geneva Convention").

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[4] President Kennedy, Inaugural Address, 20 January 1961, available at http://www.bartleby.com/124/pres56.html.

[5] The Statute of the International Court of Justice, 59 Stat. 1055, T.S. 993, 3 Bevans 1179; Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (ICCPR); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nov. 20, 1994, 1465 U.N.T.S. 85; and the Geneva Conventions of 1949.

ARGUMENT

I. THE COURTS OF THE UNITED STATES HAVE AN IMPORTANT ROLE TO PLAY IN ENFORCING INTERNATIONAL LEGAL STANDARDS, WHICH APPLY EVEN IN TIME OF WAR OR NATIONAL CRISIS.

A. The Courts Of The United States Are Empowered To Address And Apply International Law.

Amici note the well-established principle that international law is part of the law of the United States and that federal courts are to ascertain and apply it. See *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2764-5 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. . . . It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.") (citations omitted); *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."). "Courts in the United States are bound to give effect to international law . . . ." Restatement (Third) of the Foreign Relations Law of the United States 1561 (1987).

The courts of the United States also apply international law indirectly: They do so by applying the longstanding principle that, so far as is possible, the laws of the United States should be interpreted in accordance with international law. See *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that "an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains"); accord *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004) (describing the *Charming Betsy* rule as outgrowth of comity towards other nations that is underpinned by principles of customary

international law). Additionally, in constitutional cases with no obvious international dimension, the Supreme Court has looked to international law as a reflection of the "values that we share with a wider civilization" to inform its evaluation of the demands of due process. *Lawrence* v. *Texas*, 123 S. Ct. 2471, 2483 (2003). In these cases, the Court has referred to such international legal sources as the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (ECHR), not by way of applying the treaty, or indeed international law directly, but out of a recognition that consideration of what international law requires appropriately informs the courts' determinations under federal statutes and even their interpretation of the Constitution of the United States. Thus, the authority of the courts to ascertain and apply international law in this case, as the District Court did, is unquestioned.

The interpretation and application of international law by the courts of the United States is also in keeping with the United States' leadership in the development of international human rights norms and its longstanding tradition of respect for international law. Moreover, it serves the United States' immediate interests.

Having taken the lead in the development of international humanitarian law,[6] following the Second World War, the United States supported the negotiation of - and promptly ratified - the Geneva Conventions of 1949, widely regarded as the pillars of contemporary international humanitarian law, and binding both as treaties and as a

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[6] The Lieber Code, which was "[t]he first modern attempt to draw up a binding code for the conduct of an armed force in the field," was "promulgated as law by President Lincoln in 1863 during the American Civil War", Leslie C. Green, The Contemporary Law of Armed Conflict 29 (2d ed. 2000), and is widely recognized "as a starting point for subsequent international conventions" on the laws of war, see Brief of Human Rights Institute of the International Bar Association as *Amicus Curiae* in Support of Petitioners, at 23 n.16, *Rasul* v. *Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343).

matter of customary international law.[7] When it disregards international law and breaches these fundamental protections, the United States risks setting precedents that will adversely affect its own citizens abroad. With the war on terror now being fought on multiple fronts, the United States has a compelling interest in securing the fullest protection possible for all individuals operating in zones of conflict, including American soldiers and civilians.

It is particularly appropriate for courts to observe the rule of law by enforcing international law in times of war or national emergency, when the need to protect the nation as a whole must be balanced against the need to protect the fundamental rights and freedoms of individuals within that nation, including those rights conferred by international law. *Amici* note in this connection the decision on 16 December 2004 of the House of Lords, the United Kingdom's highest court, in *A and others* v. *Secretary of State for the Home Department* [2004] UKHL 56, in which the Lords ruled that a law entitling the U.K. government to detain foreign terrorist suspects indefinitely and without trial is incompatible with its obligations under international human rights law.

B. The United States' International Legal Obligations Persist Irrespective Of Domestic Legal Provisions For Enforcement.

The District Court determined that the Third Geneva Convention is self-executing. *Amici* do not address this issue, but note that international law, including the relevant provisions of the Geneva Conventions, govern the actions of the United States irrespective of whether or not the Conventions are self-executing.

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[7] See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 257 (Advisory Opinion of June 24) (holding the terms of the Geneva Conventions binding as a matter of customary international law because they protect rights that are so "fundamental" as to be "intransgressible").

The status of a treaty as self-executing or not affects only direct enforcement of that treaty by U.S. courts and does not reduce its binding force in international law. This is an implication of the well established principle of international law that a state "may not rely on the provisions of its internal law as justification for failure to comply with its obligations," United Nations International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, art. 32, G.A. Res. 82, U.N. GAOR, 56th Sess., Supp. No. 10 and Corriegendum, U.N. Doc. A/56/83 (2001);[8] accord Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331 (VCLOT).[9] Because of this principle, the status and binding force of a treaty or customary rule as a matter of international law does not depend upon the provision made for domestic enforcement of that rule.[10]

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[8] As a resolution of the United Nations' General Assembly, the Articles on State Responsibility are not in themselves binding, but they are authoritative to the extent that they codify international law. As the individual who served as the ILC's Rapporteur on state responsibility notes, the principle reflected in article 32 "is supported both by State practice and international decisions" and thus reflects customary international law. James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries 207 (2002).

[9] Although not a party to the VCLOT, the United States "recognizes the Vienna Convention as a codification of customary international law, . . . considers the Vienna Convention 'in dealing with day-to-day treaty problems' and acknowledges the Vienna Convention as, in large part, 'the authoritative guide to current treaty law and practice.'" *Fujitsu Ltd.* v. *Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001) (internal citation omitted); see also Restatement (Third) of Foreign Relations Law of the United States 144-5 (1987) ("The Department of State has on various occasions stated that it regards particular articles of the [Vienna] Convention as codifying existing international law; United States courts have also treated particular provisions of the Vienna Convention as authoritative.").

[10] Thus was it possible for the International Court of Justice to hold the United States liable for a violation of the Vienna Convention on Consular Relations, see *LaGrand* (Ger. v. U.S.) 2001 I.C.J. 1 (Judgment of 27 June), even though the courts of the United States had determined that the same treaty gave rise to no individual claim for a violation, see *Breard* v. *Greene*, 118 S. Ct. 1352 (1998).

C. International Law, Including Human Rights Law And International Humanitarian Law, Applies To The Conduct Of The United States At Guantanamo Bay.

Amici express no view on the application of domestic law, but emphasize that, even in the context of the war on terror, international law applies to the actions of the United States Government in respect of detainees at Guantanamo Bay.

1. International Law, Including Human Rights Law And International Humanitarian Law, Applies To The Conduct Of The United States Anywhere In The World.

It is well established that state responsibility under international human rights treaties turns not exclusively upon geography, but also upon whether the respondent state exercises sufficient authority and control over a situation outside its territory that the action can be said to have been taken under the jurisdiction of the state in question. Thus, for example, each State Party to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (ICCPR), (including the United States) expressly undertakes "to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant." ICCPR, art. 2(1). The International Court of Justice (ICJ) has recently reaffirmed that the effect of this provision is "that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory." *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 2004 I.C.J., at ¶ 111 (Advisory Opinion of 9 July), available at http://www.icj-cij.org/idecisions.htm.

Similarly, the fundamental protections recognized in the American Declaration of the Rights and Duties of Man, to which the United States has in past

conflicts conceded it was bound,[11] attach not by virtue of the territorial *locus* of state conduct but by virtue of the fact that the state exercises authority and control over individuals claiming the protection. See American Declaration of the Rights and Duties of Man, arts. XXV, XXVI, May 2, 1948, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L. V/II.82 doc. 6 rev. 1 (1992). The Inter-American Commission on Human Rights, authoritatively interpreting the American Declaration, has held that "[g]iven that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction" and has specifically ruled that jurisdiction "may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state—usually through the acts of the latter's agents abroad." *Coard* v. *United States*, *supra*, at 1283, §§ 37, 39, 41 & 43 (1999).[12]

It is therefore well established that the application of international human rights norms "turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control." *Ibid.*

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[11] See *Coard* v. *United States*, Case 10.951, Inter Am. C.H.R. Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999).

[12] The position under the ECHR is similar, with the European Commission and the European Court of Human Rights holding that states are "bound to secure the rights of all persons under their actual authority and responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad." *Cyprus* v. *Turkey*, 13 DR 85 (1977); *Loizidou* v. *Turkey*, 23 E.H.R.R. 513 (1996); *Bankovic* v. *Belgium and 16 Other Contracting States*, 11 B.H.R.C. 435 (2001); *Ocalan* v. *Turkey*, 37 E.H.R.R. 10 (2003).

Whatever the position in terms of ultimate sovereignty over Guantanamo Bay, the United States unquestionably exercises authority and control there. See *Rasul* v. *Bush*, 124 S. Ct. 2686, 2696 (2004). To paraphrase the words of the Human Rights Committee, it would be "unconscionable to so interpret the responsibility" of the United States under international human rights treaties as to allow the U.S. "to perpetrate violations [of human rights norms] on the territory of another State, which violations it could not perpetrate on its own territory." *López Burgos* v. *Uruguay*, No. 52/1979, Views of the H.R.C. at ¶ 12.3, CCPR/C/13/D/52/1979 (29 July 1981). Accordingly, to comply with international law the treatment of the Guantanamo detainees must be consistent with fundamental human rights, and in particular must comply with international human rights treaties to which the United States is a party, including the ICCPR.

2. International Law, Including Human Rights Law And International Humanitarian Law, Applies In Times Of Armed Conflict And National Emergency.

The United States has not declared war in the aftermath of the September 11 atrocities, although the war on terror has resulted at various times in a state of armed conflict. Neither the existence of a state of war, nor the existence of an armed conflict, suspends the application of international law. Indeed, the norms of international humanitarian law, and particularly the Geneva Conventions, specifically apply to situations of armed conflict. Moreover, whether or not a specific instrument or provision of international humanitarian law applies in a particular case, it has been recognised that "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the

Protection of Victims of International Armed Conflicts (Protocol 1), art. 1(2), *adopted* June 8, 1977, 1125 U.N.T.S. 3.[13]

There is no tension between the application of international humanitarian law in time of war or armed conflict and the residual application of international human rights law at the same time. *See Coard, supra*, ¶ 39 (footnotes omitted). Indeed, the non-derogable rules of international human rights law continue to operate even in times of war and armed conflict, as the ICJ has repeatedly ruled. In its opinion on the *Legal Consequences of the Construction of a Wall* the ICJ reaffirmed the determination in a previous Advisory Opinion that "the protection of the International Covenant of Civil and Political Rights does not cease in time of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency." 2004 I.C.J. at ¶ 105 (quoting *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 266, 240 (Advisory Opinion of 8 July)). Similar provisions for temporary derogations from particular human rights obligations in order to confront war or other public emergency are provided in other human rights treaties. See American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, art. 27, ECHR, art. 15. These provisions confirm that, absent such a derogation, international human rights norms are not generally suspended in the face of war. The United States has not entered a derogation from its obligations under the ICCPR or other treaties in respect of Guantanamo Bay or the military action in Afghanistan.

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

Some obligations are, in any event, simply non-derogable. As the United Nations Human Rights Committee has ruled in respect of the ICCPR, these norms include "humanitarian law" and "peremptory norms of international law" such as those prohibiting hostage-taking, the imposition of collective punishments, "arbitrary deprivations of liberty" and "deviating from fundamental principles of fair trial". General Comment No. 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶ 11 (2001). The United States' obligations under both international humanitarian law and international human rights law persist, despite the existence of a state of armed conflict or national emergency.

3. International Law, Including Human Rights Law And International Humanitarian Law, Applies In Respect Of Alleged Al Qaeda Members.

The characterization of a particular individual as an "al Qaeda detainee" does not eliminate the protections afforded to that individual under international law; those rights pertain to the individual, not to any state or sub-state entity. One of the principal achievements of international law in the decades following the Second World War was the widespread recognition of individual rights and obligations under international law, which hitherto had generally addressed only the rights and duties of states. The legacy of the Nuremberg Trials was the imposition of individual responsibility for some violations of the international law governing armed conflict, while the legacy of the United Nations system and the Universal Declaration of Human Rights was the recognition of the inherent dignity of individuals and their enjoyment of fundamental rights protected by international law.

As a result of these developments, international law governing armed conflict and international human rights law operate not exclusively on the plane of inter-state relations, but also, and most importantly, on the plane of relations between states and

individuals subject to their authority. Therefore the status of al Qaeda as a non-state actor, or even as a terrorist organization, does not remove individuals alleged to be associated with al Qaeda from the protections of these bodies of international law. Indeed, that the United States plans to prosecute Petitioner-Appellee and other detainees for alleged violations of the laws of war—that is to say, for violations of international law governing armed conflict—is an implicit recognition that these individuals, even if they are members or associates of al Qaeda (which Petitioner-Appellee denies), remain subjects of international law. It is only just and proper that Petitioner-Appellee and other detainees be subjected to international law equally with respect to its benefits—the protections of international humanitarian and human rights law—as with respect to its burdens.

II. THE DISTRICT COURT'S DETERMINATION THAT HAMDAN IS ENTITLED TO THE PROTECTIONS OF THE THIRD GENEVA CONVENTION IS CONSISTENT WITH INTERNATIONAL AUTHORITIES ON THE SCOPE AND APPLICATION OF THAT CONVENTION.

A. The Geneva Conventions Comprehensively Protect Individuals In Armed Conflict: There Is No Gap.

The Third Geneva Convention is one of four conventions negotiated following the Second World War that govern the treatment of individuals in armed conflict and that form the central pillars of modern international humanitarian law. The object and purpose of international humanitarian law, including the Geneva Conventions, was to provide comprehensive protection to individuals caught up in armed conflict.

Those who are deemed or alleged to be combatants come within the scope of the Third Geneva Convention, while non-combatants are covered by the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, to which the United States is also a party. The

Geneva Conventions protect "intransgressible" rights; reflect customary international law, see *Legality of Threat or Use of Nuclear Weapons* (Advisory Opinion), *supra*, at 257; and parallel the numerous other international legal instruments discussed in this brief, which, of course, continue to apply regardless of the applicability of the Geneva Conventions in a particular case. Individuals may have different rights and duties depending upon whether they are, e.g., combatants or civilians, but no one lies outside the protection of the law. There is not, and should not be, any "gap" or "black hole".

B. Armed Conflict Cannot Be Neither "International" Nor "Not Of An International Character": The Geneva Conventions Comprehensively Address Armed Conflict.

A key determinant of which provisions of the Geneva Conventions apply to a particular individual is characterization of the conflict in which he was involved (whether as a combatant or not). The majority of the specific provisions of the Geneva Conventions (including articles 5 and 103 of the Third Geneva Convention relied upon by Petitioner-Appellee) apply in cases of *international armed conflict.* Article 3, which is common to all four Geneva Conventions (and hence is known as "common article 3"), applies to "*armed conflict not of an international character,*" and provides baseline protection against, *inter alia*, "cruel treatment and torture," "humiliating and degrading treatment" and "the passing of sentences . . . without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples".

Respondents-Appellants renew in this Court their attempts to rend the fabric of the Geneva Conventions to fit the exigencies of the current situation, by putting in issue the character of the armed conflict in question. Respondents-Appellants would characterize some aspects of the conflict in Afghanistan as armed conflict that is neither international because, by assertion, it is not between states, nor "not of an

international character" because it occurs in the territory of more than one state. Respondents-Appellants seek to create an exceptional third category, tailored to suit their actions in relation to the individuals detained at Guantanamo Bay (or some category of them that includes Petitioner-Appellee), which is entirely outside the protections of the Geneva Conventions.

It is inconsistent with logic, and with a uniform and coherent application and the intent of the States Party to the Geneva Conventions, that armed conflict could simultaneously not be international and also not be "armed conflict not of an international character". Moreover, such an approach conflicts with recent authority on the scope of application of the Geneva Conventions. The United States Government has separately acknowledged authority directly undermining the Respondents' arguments: internal government documents (which have been made public) analyzing the application of international legal norms, including the Third Geneva Convention, to the detention of individuals as Guantanamo Bay, and elsewhere take note of recent authority, including authority from the International Court of Justice, "that common Article 3 is better read as applying to all forms of non-international armed conflict" and "that all 'armed conflicts' are either international or non-international, and that if they are non-international, they are governed by common Article 3." See Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defence from Office of Legal Counsel, U.S. Department of Justice, dated January 22, 2002, at 8 n.23 (citing Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 ¶ 4339 n.2 (Yves Sandoz et al. eds., 1987); *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S.) 1986 I.C.J. 14, 114 (Judgment of June 27)); see also *id.* at 8 (citing the decision of the

International Criminal Tribunal for the Former Yugoslavia in *Prosecutor* v. *Tadic*, Case No. 160 (ICTY Appeals Chamber, Oct. 2, 1995)). Respondents-Appellants emphasize that the President chose not to take the advice contained in this Memorandum, but this fact does nothing to reduce the authority of the ICJ and ICTY precedents on which it was based.

Specifically, this Court should take account of *Tadic*, in which the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia emphasized the comprehensive scope of international humanitarian law and rejected an argument that neither the branch of international humanitarian law applicable to non-international armed conflict (common article 3) nor that applicable to international armed conflict (the remaining provisions of the Geneva Conventions)—applied to one phase of the hostilities in the former Yugoslavia. See *Prosecutor* v. *Tadic*, Case No. 160, ¶¶ 66-70 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995) available at http://www.un.org/icty/tadic/appeal/decision-e/51002.htm. The Appeals Chamber emphasized that "the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities", *id.*, ¶ 67, to encompass "the entire territory of the Parties to the conflict", *id.*, ¶ 68. Accordingly, the Appeals Chamber concluded:

> an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts the whole territory under the control of a party, whether or not actual combat takes place there.

Id., ¶ 70.

Thus, international humanitarian law applies from the time of the initiation of hostilities until their conclusion and throughout the territory of the parties to the conflict. The "armed conflict with al Qaeda" began, at the latest, with an invasion of Afghanistan, which constituted "declared war or . . . any other armed conflict . . . between two or more of the High Contracting Parties"; Afghanistan like the United States is a party to the Geneva Conventions. The Geneva Conventions thus began to apply, and they persist in application throughout the territory of Afghanistan (or at the least throughout the "whole territory under the control of a party" to the hostilities) "until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved." *Id.* Individuals detained prior to any such time - military actions in Afghanistan are ongoing and the United States has repeatedly indicated that the war on terror continues - are entitled to the protection of the Geneva Conventions.

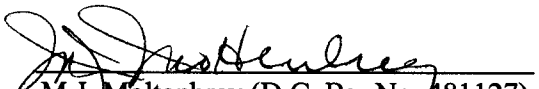
Given the central importance of the Geneva Conventions to securing all individuals caught up in armed conflict against the barbarism of war, this Court must give full weight to the *Tadic* decision and other international authorities confirming the scope of the Geneva Conventions. The Court should evaluate the parties' arguments on the application of the Third Geneva Convention against the backdrop of the United States' commitment to international law; its obligations to perform treaties in good faith, see VCLOT, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); the tradition of respect for the rule of law upheld by the United States; and the tradition of leadership by the United States in the field of human rights and international humanitarian law.

Amici support the motion for en banc consideration of this case, for the reasons stated in their brief to the Supreme Court in support of Petitioner-Appellee's motion for certiorari before judgment (See http://www.legalaffairs.org/howappealing/FinalbriteurAmicusBrief.pdf), in light of the exceptional public importance of this issue to the United States and to the world more generally.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

Respectfully submitted,



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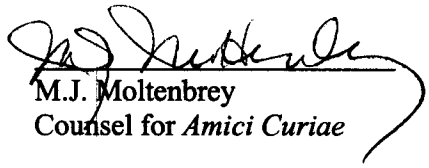
I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 12 point and contains 5,351 words (which does not exceed the applicable 7,000 word limit).



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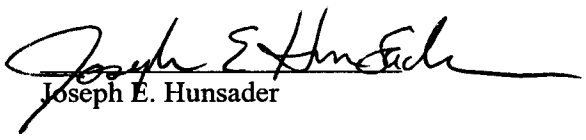

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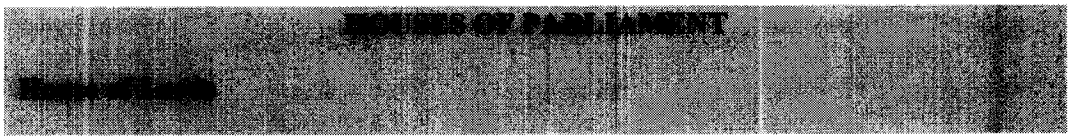

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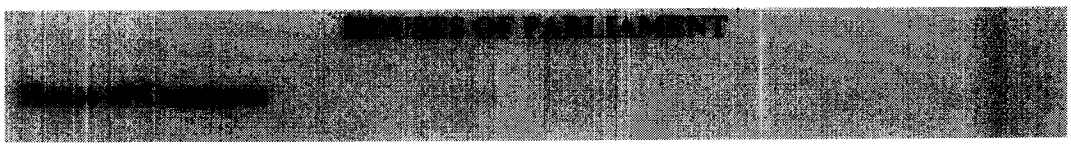

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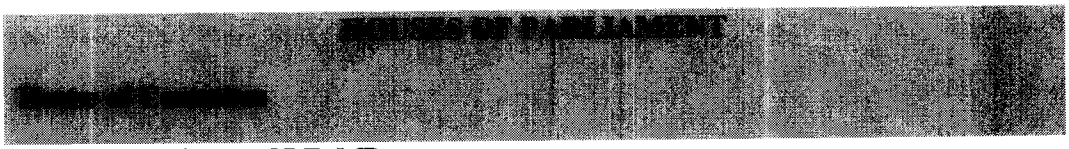

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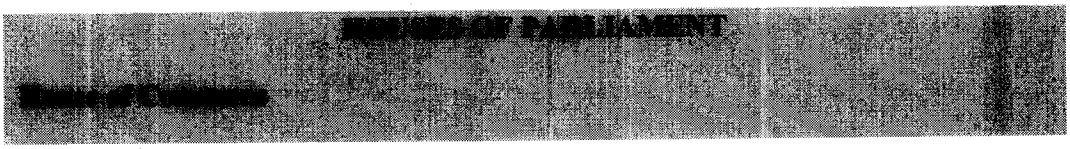

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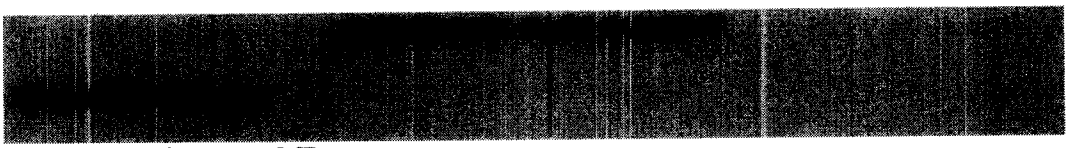

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