IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SALIM AHMED HAMDAN, *Petitioner*, *v.* ROBERT GATES, *et al.*, *Respondents.*	Judge Robertson [No. 04-CV-1519-JR]

MEMORANDUM OF LAW ON BEHALF OF UNITED KINGDOM AND EUROPEAN PARLIAMENTARIANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER'S MOTION FOR A PRELIMINARY INJUNCTION

IDENTITY AND INTEREST OF THE *AMICI CURIAE*

The identity of the *amici*

The *amicus* group is comprised of 375 United Kingdom and European Parliamentarians: 264 current or former Members of the Parliament of the United Kingdom of Great Britain and Northern Ireland and 111 current or former Members of the European Parliament.[1]

Amici are drawn from all across Europe, and the group spans the political spectrum, including senior figures from all major political parties in the United Kingdom. The group also includes several former judges of the highest court in the United Kingdom; former Cabinet Ministers, including a Secretary of State for Defense; a former

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[1] The members of the *amicus group* are identified individually in an Appendix to this Memorandum. Counsel for Petitioner has consented to the filing of this brief. Counsel for Respondents have indicated that they do not take a position regarding the proposed filing at this time.

Attorney-General of the United Kingdom; a former European Commissioner and United Kingdom ambassador to the United Nations; two former Speakers of the House of Commons; 9 Bishops and Archbishops of the Church of England; a former Archbishop of Canterbury; a Vice President of the European Parliament; and a former Vice President of the European Commission.

The interest of the *amici*

Amici take no view on whether Petitioner is guilty of acts of terrorism or conduct in violation of the laws of war. Nor do *amici* seek to express any view on the legitimacy of the military action in Afghanistan or Iraq or the politics or tactics of the war on terror in general, or against al Qaeda in particular. These latter issues are questions on which *amici* continue to hold differing individual views.

Amici have nevertheless come together to present arguments in this case in support of Petitioner since the case was first before this Court in 2004 and throughout the proceedings in the Court of Appeals and in the Supreme Court of the United States because, despite their divergent political perspectives, they share a common view: that it is essential to the international legal order that, even when faced with the threat of international terrorism, all states comply with the standards set by international humanitarian law and human rights law. *Amici* share a concern that the prosecution by military commission to which Petitioner will imminently be subjected will contravene these standards.

Amici hope that the views of leading parliamentarians from states with close legal, historical and political ties to the United States may be of assistance to the Court when it is weighing Petitioner's request for a preliminary injunction to stay his military

commission trial pending this Court's resolution of the merits of his challenges to the legality of those proceedings. *Amici* note the long tradition of shared policies, joint legal progress and mutual learning that have characterized the development of relevant domestic and international law in the United States and in other democracies 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." President Kennedy, Inaugural Address, 20 January 1961, available at http://www.bartleby.com/124/pres56.html. The international legal principles to which *amici* wish to draw this Court's particular attention find eloquent expression in the Declaration of Independence and the Constitution of the United States, which themselves reflect principles in the Magna Carta and the English Bill of Rights. These principles have in turn influenced the development of constitutional democracies the world over at the same time that they have underpinned the treaties, principles and institutions that form the international humanitarian and human rights law framework that nations today rely upon to discipline the exercise by states of authority vis-à-vis individuals within their power and to humanize, as much as possible, the treatment of individuals caught up in armed conflict.

Amici, concerned that, in the context of a global struggle to defend the very freedoms and limitations on state power that are the bedrock of contemporary international humanitarian and human rights law, the United States should be seen clearly to respect its international legal obligations, submit their arguments in the light of this shared legal tradition and the international legal commitments of both the United States and the countries of Europe.

SUMMARY OF ARGUMENT

Amici focus in this Memorandum on two aspects of Petitioner's pending military commission trial that are clearly at odds with the most basic norms of fair trial and due process reflected in international humanitarian and human rights law and guaranteed by Common Article 3 of the Geneva Conventions, *see* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 2, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, art. 3 ("Common Article 3"), which the Supreme Court has held to be applicable to Petitioner and to his military commission trial, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796 (2006). Each call out for this Court to act to prevent and restrain the imminent breach of the United States' international legal obligations, the irreparable harm to Petitioner of being subjected to an unlawful process, and the immeasurable harm to the international legal system of countenancing violations of international law.[2]

First, *amici* understand that Petitioner stands to be tried for "conspiracy" and "material support for terrorism" on the basis of acts allegedly committed prior to his being taken into U.S. custody in 2001. Prior to the enactment of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"), neither offence had been recognized as a violation of the law of war. Trying Petitioner for such offences would therefore certainly contravene the well-recognized international legal principle of legality, pursuant to which individuals may not be tried for acts that were not crimes at the time the acts were allegedly committed. This principle is enshrined in

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[2] *Amici* note that Petitioner challenges the legality of the military commission process on numerous other grounds. The focus in this Memorandum on specific bright-line violations of international law is without prejudice to any arguments that international legal norms of fair trial and due process are implicated by the other bases on which Petitioner challenges the military commission process.

numerous international human rights treaties to which the United States is a party and which the United States is bound to uphold. This principle is widely recognized and accepted, and it undoubtedly constitutes one of "the judicial guarantees which are recognized as indispensable by civilized peoples" within the meaning of Common Article 3, which applies to Petitioner, and with which his military commission trial must therefore comply.

Second, *amici* are concerned that Petitioner's imminent military commission trial will not exclude evidence that contravenes international legal standards of fair trial, due process and the protection of human rights. In particular, the MCA does not exclude evidence obtained by coercion, cruel, inhuman and degrading treatment, *see* 10 U.S.C. § 948r, and Petitioner's efforts to exclude evidence obtained in apparent contravention of the international legal protection against self-incrimination have failed, *see United States v. Hamdan*, D-030, Ruling on Motion to Suppress Statements of the Accused (June 6, 2008), at p. 4 ("Ruling on Motion to Suppress"). The international legal prohibition on torture and other cruel, inhuman or degrading treatment is explicitly to be enforced by the suppression of evidence obtained in contravention of the prohibition. Similarly, as with the protection in U.S. law, meaningful implementation of the international legal protection against self-incrimination requires the suppression or non-admission of statements obtained prior to trial in circumstances where the protection was not afforded. These protections are among "the judicial guarantees which are recognized as indispensable by civilized peoples" within the meaning of Common Article 3, which applies to Petitioner, and with which his military commission trial must therefore comply.

Allowing a military commission trial for *ex post facto* offences to proceed would itself breach the United States' international legal obligations, including its obligations under Common Article 3. In addition to exposing Petitioner to the irreparable harm of an unlawful trial for *ex post facto* offences, this breach will do incalculable harm to the fabric of international humanitarian and human rights law. As such, there is clearly a compelling public interest to be served by a preliminary injunction in these circumstances. Allowing Petitioner's military commission trial to proceed on the basis of either evidence obtained by coercion, cruel, inhuman or degrading treatment or evidence obtained without regard for the privilege against self-incrimination would also violate the United States' international legal obligations by failing to afford to Petitioner "the judicial guarantees which are recognized as indispensable by civilized peoples" and which are guaranteed to him by Common Article 3. This similarly entails an irreparable injury to Petitioner and to the international legal system of which the United States has historically been such a strong proponent, and it plainly implicates a compelling public interest. This Court should grant Petitioner's motion to ensure that his military commission trial, when it does proceed, does not violate international law and to forestall the irreparable harm of allowing a patently unlawful process to proceed.

ARGUMENT

I. Petitioner's Imminent Military Commission Trial for Conspiracy and Material Support for Terrorism Would Contravene the Principle of Legality Reflected in International Law, Including Common Article 3.

Amici understand that Petitioner stands to be tried for "conspiracy" and "material support for terrorism" on the basis of acts allegedly committed prior to his being taken into U.S. custody in 2001. So far as *amici* are aware, the Military Commissions Act of

2006, Pub. L. No. 109-366, 120 Stat. 2600, ("MCA"), was the first legal instrument to purport to define these acts as violations of the laws of war. It is possible that such an enactment *might*, given time and given circumstances in which other members of the international community accepted by their objective conduct and subjective manifestations of *opinio juris* that such acts should be recognized as violations of the laws of war, contribute to the future development of the laws of war. *Cf.* Statute of the International Court of Justice, art. 38(1)(b), 59 Stat. 1055, T.S. 993, 3 Bevans 1179. But such development of a new rule of international law does not and cannot occur as the result of the legislative fiat of one state alone. Accordingly, as a matter of international law, the MCA of itself does not establish that "conspiracy" and "material support for terrorism" are today violations of the laws of war: that, as a plurality of the Supreme Court observed in *Hamdan v. Rumsfeld*, would require the demonstration of a "plain and unambiguous precedent" amounting to "'universal agreement and practice' both in this country and internationally." 126 S. Ct. 2749, 2780 (2006) (quoting *Ex parte Quirin*, 317 U.S. 1, 30 (1942)).

Amici are aware of no such precedent or agreement. Moreover they do not understand it to have been contended in this case that any such international consensus can be demonstrated. In fact, both historical and contemporary war crimes tribunals have refused to recognize conspiracy to commit a war crime as a violation of the laws of war. *See* Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*, 75 Geo. Wash. L. Rev. 1165, 1174 (2007). The Statutes of both the International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Tribunal for the Former Yugoslavia

("ICTY") generally do not recognize culpability for conspiracy, except in the context of genocide, and the Statute of the International Criminal Court makes no reference to a crime of "conspiracy" whatsoever. In short, for the reasons that are elaborated in detail in Petitioner's Memorandum and which are not recapitulated here, "conspiracy" and "material support for terrorism" were not recognized as violations of the laws of war at the time of the acts which Petitioner is alleged to have committed.

Accordingly, trying Petitioner for such offences would certainly contravene the well-recognized international legal principle of legality, pursuant to which individuals may not be tried for acts that were not crimes at the time the acts were allegedly committed.

This principle is enshrined in numerous international human rights treaties to which the United States is a party and by which the United States is bound. For example, the principle of legality is reflected in article 15 of the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 ("ICCPR"): "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed . . . ." The United States is a party to, and bound by, the ICCPR.[3] The

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[3] As a treaty to which the United States is a party, the ICCPR is the "law of the land" in the United States, *see* U.S. Const., art. VI, cl. 2, and the United States has pledged to uphold the rights created by it and all international human rights treaties to which it is a party, Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (1998) ("It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR . . . . It shall also be the policy and practice of the Government of the United States to promote respect for international human rights . . . .").

When ratifying the ICCPR, the United States appended a "declaration" to the effect that the operative provisions of the Covenant are "not self-executing." 138 Cong. Rec. S54781-01 (daily ed. Apr. 2, 1992). The basis for this declaration was that "the fundamental rights and freedoms protected by the Covenant are already guaranteed as a matter of U.S. law, either by virtue of constitutional protections

principle of legality is also reflected in article 9 of the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 ("ACHR"): "No one shall be convicted of any act or omission that did not constitute a criminal offence, under the applicable law, at the time it was committed."[4] And this principle is also reflected in a panoply of regional and other human rights treaties, including the European Convention on Human Rights and Fundamental Freedoms, art. 7, Nov. 4, 1959, 213 U.N.T.S. 221 ("ECHR"), and the African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217, art. 7. The principle of legality is also a recognized and well-established principle of customary international law, *see* 1 Jean-Marie Henckaerts & Louise Doswald-Beck, International Committee of the Red Cross, *Customary International Humanitarian Law* 371-1 (2005) ("Rule 101"), which of course also binds the United States.

The principle of legality is routinely applied by international war crimes tribunals, such as the ICC, the ICTY and the ICTR. Articles 22 and 24 of the Rome Statute establishing the ICC echo the principle of legality. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, arts. 22 & 24 ("Rome Statute"). In establishing the ICTY, the Secretary-General of the United Nations endorsed the principle of legality as among the "rules of international humanitarian law which are

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or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases." Report submitted by the United States of America under Article 40 of the ICCPR, U.N. Doc. CCPR/C/81/Add 4(1994), at 2. This declaration does not relieve the United States of its obligations on the international legal plane. Rather it operates as a representation to the international community that the United States' international legal obligation to confer the fundamental rights and protections enshrined in the ICCPR will be discharged through the medium and mechanisms of U.S. domestic law, such that individuals will be entitled to effective protection of their rights under that law.

[4] As a signatory of the ACHR, although it has not ratified the convention, the United States is bound not to defeat its object and purpose, *see* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 18, and the United States must avoid taking any action that is inconsistent with the rights set out therein.

beyond any doubt part of customary law." Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808, ¶ 34, UN Doc. S/25704, May 3, 1993. And the ICTY itself has repeatedly acknowledged and applied the principle, *see Prosecutor v. Delalic et al.*, Case No. IT-96-21, Judgement, ¶ 402 (Nov. 16, 1998) (describing the prohibition against *ex post facto* criminal laws as a "fundamental principle"); *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Appeals Chamber Judgement, ¶ 78 (July 29, 2004) (characterizing the principle of legality as a component of customary international law), as has the ICTR, *see Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Preliminary Motions by the Defence Challenging Jurisdiction in Relation to Joint Criminal Enterprise, ¶ 39 (May 11, 2004).

This universally accepted principle undoubtedly constitutes one of "the judicial guarantees which are recognized as indispensable by civilized peoples" within the meaning of Common Article 3. As the Supreme Court observed in *Hamdan*, where it held that Common Article 3 applies to Petitioner and in any military commission process to which he is to be subjected, 126 S. Ct. at 2796, the reference in Common Article 3 to these "judicial guarantees" must be understood to incorporate at least "the barest of those trial protections that have been recognized by customary international law" and that "[m]any of these [protections] are described in article 75 of Protocol I" to the Geneva Conventions, *id.* at 2797 (plurality op.). Article 75(4)(c) of Protocol I states plainly that "no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed . . . ." Protocol Additional to the Geneva Conventions of 12 August 1949, art. 75(4)(c), *opened for*

signature 8 June 1977, 1125 U.N.T.S. 3 ("Protocol I"). Accordingly, there can be no doubt that the principle of legality is one that applies to the United States' conduct of Petitioner's military commission trial.

This principle straightforwardly prohibits trying anyone for an act that was not recognized as an offence at the time it was alleged to have been committed. Allowing Petitioner's military commission trial for the *ex post facto* offences of "conspiracy" and "material support for terrorism" to proceed would therefore itself breach the United States' international legal obligations, including its obligations under Common Article 3.

II. The Evidentiary Standards To Be Applied in Petitioner's Imminent Military Commission Trial Contravene International Law, Including Common Article 3.

Amici are concerned that Petitioner's imminent military commission trial will not exclude evidence that contravenes international legal standards of fair trial, due process and the protection of human rights. In particular, the MCA does not exclude evidence obtained by coercion, cruel, inhuman and degrading treatment, *see* 10 U.S.C. § 948r, and Petitioner's efforts to exclude evidence obtained in apparent contravention of the international legal protection against self-incrimination have failed, *see* Ruling on Motion to Suppress, *supra*, at p. 4. The admission of evidence in either category in Petitioner's military commission trial is inconsistent with international law, including Common Article 3.

A. International Law Requires The Suppression of Evidence Obtained By Torture or Coercion.

The MCA contemplates the admission into military commission trials of evidence obtained through coercion. Statements obtained by "torture", which is defined

as involving only acts "specifically intended to inflict severe physical or mental pain or suffering . . . upon another person," Pub. L. No. 109-366, 120 Stat. 2600 § 6(b)(1)(B), are excluded. 10 U.S.C. § 948r(b). But the MCA expressly contemplates that statements obtained by a degree of coercion that is "disputed" – that is, that the Government does not *admit* amounted to torture – may be admitted. 10 U.S.C. §§ 948r(c) and (d). And with respect to statements obtained by such coercive tactics prior to December 30, 2005, there is no guarantee under the MCA that the statements deployed as evidence in military commission trials were not obtained by cruel, inhuman or degrading treatment. *Id.* Such loopholes and fine distinctions fall far short of meeting the United States' clear international legal obligations with respect to the prohibition and prevention of torture and cruel, inhuman or degrading treatment.

International law prohibits not only "torture" as such, but also cruel, inhuman or degrading treatment. The international law prohibition on torture and cruel, inhuman or degrading treatment is widely recognized. For example, the Universal Declaration of Human Rights, which is acknowledged to reflect customary international law, *see Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001), provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Dec. 10, 1948, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, art. 5; *see also* ECHR, art. 3. The ICCPR is unequivocal in its condemnation of torture and inhuman and degrading treatment. ICCPR, art. 7. In particular, it provides that prisoners must be treated with humanity, and that their dignity must be respected. *Id.*, art. 10. Under the ICCPR *any* direct or indirect physical or undue psychological pressure on the accused is prohibited. *See* Human Rights Committee, General Comment No. 32, ¶ 42, UN Doc. CCPR/C/GC/32, Aug. 21,

2007. Likewise, the Rome Statute provides that a person "shall not be subjected to *any* form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment." Rome Statute, *supra*, art. 55(1)(a) (emphasis added).

So fundamental is the prohibition on torture that it has not only entered into customary international law but also has acquired the status of *jus cogens* (a peremptory norm of international law from which no derogation is permitted). *See, e.g.*, *Prosecutor v. Furundzija*, Case No. IT-95-17/1, ICTY Decision, ¶¶ 137 and 153 *et seq.* (Dec. 10, 1998), available at http://www.un.org/icty/furundzija/trialc2/ judgement/index.htm.

The prohibition is perhaps most clearly articulated in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 ("Torture Convention"). Like the ICCPR (and customary international law), the Torture Convention binds the United States and it is the "law of the land."[5] The definition of "torture" in the Torture Convention includes:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, . . . when such pain or suffering is inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity.

Id., art. 1(1). Pursuant to the Torture Convention, and as a matter of international human rights law more generally, there is no distinction between "torture" as such, and other coercion amounting to cruel, inhuman or degrading treatment. All are equally prohibited.

[5] As with the ICCPR, the United States has entered a declaration to the effect that Part I of the Torture Convention is not self-executing. Nevertheless, again as with the ICCPR, the Torture Convention remains a valid instrument of international law to which the United States is a party, to which it has pledged to adhere, *see* Exec. Order No. 13,107, *supra*, and by which it is bound. *See also* discussion *supra* at note 4.

A direct corollary of the prohibition on torture and cruel, inhuman or degrading treatment as a matter of international law is that evidence obtained using such practices must be inadmissible in the adjudication of guilt or sentencing. Article 15 of the Torture Convention makes this quite plain: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." The United Nations Human Rights Committee has explained that that the exclusion of such evidence is essential to the struggle against improper interrogation techniques. Human Rights Committee, General Comment No. 20, U.N. Doc. HRI/Gen/1/Rev.7, at § 12. The Human Rights Committee reiterated this principle in *Paul v. Guyana*: "It is important for the prevention of violations under Article 7 [of the ICCPR] that the law must exclude the admissibility in judicial proceedings of statements or confessions obtained through torture *or other prohibited treatment.*" Human Rights Committee, Communication No. 728/1996 of 21 December 2001, at § 9.3 (emphasis added). One consequence of the absolute nature of the prohibition on torture and cruel, inhuman or degrading treatment is that the bar on tainted evidence must apply in "any proceedings," not merely regular court trials. *G.K. v. Switzerland*, Committee Against Torture Communication No. 219/2001 of 12 May 2003, at § 6.10. (The Committee Against Torture is the body established under the Torture Convention to assess alleged violations of the Convention by signatory states.) The European Court of Human Rights has held that the prohibition on torture in the ECHR (article 3) necessitates the exclusion of evidence obtained by conduct that fell short of torture, but amounted to cruel, inhuman or degrading treatment:

> The Court has not found in the instant case that the applicant was subjected to torture. In its view, incriminating evidence—whether in the form of a confession or real evidence—obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture—should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the US Supreme Court's judgment in the *Rochin* case [*Rochin v. California*, 342 U.S. 165 (1952)] . . . to 'afford brutality the cloak of law'. . . . It cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial.

Jalloh v. Germany, 44 Eur. H.R. Rep. 32, ¶ 105 (2007).

Given the widespread acceptance of this norm, the exclusion of evidence obtained by torture and coercive cruel, inhuman or degrading treatment undoubtedly constitutes one of "the judicial guarantees which are recognized as indispensable by civilized peoples" within the meaning of Common Article 3 of the Geneva Conventions. As the United Kingdom House of Lords recently held, rejecting the admissibility of evidence obtained by torture, cruel, inhuman or degrading treatment after an exhaustive consideration of the issue,

> The use of such evidence is excluded not on grounds of its unreliability—if that was the only objection to it, it would go to its weight, not to its admissibility—but on grounds of its barbarism, its illegality and its inhumanity. The law will not lend its support to the use of torture for any purpose whatever. It has no place in the defence of freedom and democracy, whose very existence depends on the denial of the use of such methods to the executive.

A and Others v. Secretary of State for the Home Dep't [2005] UKHL 71, [2006] 2 A.C. 221, 287 (Hope, L.J.).

B. International Law Enshrines the Protection Against Self-Incrimination, Effective Implementation of Which Requires the Suppression of Pre-Trial Statements Obtained in Contravention of that Protection.

The protection against self-incrimination is unquestionably one of "the judicial guarantees which are recognized as indispensable by civilized peoples" within the meaning of Common Article 3. Article 75 of Protocol I to the Geneva Conventions, to which the *Hamdan* plurality looked for guidance on the substance of these "judicial guarantees," 126 S. Ct. at 2797 (plurality op.), states categorically that "no one shall be compelled to testify against himself or to confess guilt," Protocol I, art. 75(4)(f). The privilege against self-incrimination is expressly articulated in article 14 of the ICCPR and in article 8(2)(g) of the ACHR, international legal instruments that bind the United States. The privilege against self-incrimination is also recognized explicitly in the international instruments establishing contemporary international war crimes tribunals. *See* Statute of the ICTR, *annexed to* S.C. Res. 955, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994), art. 20; Statute of the ICTY, *annexed to* S.C. Res. 827, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993), art. 21.

Implementing this clearly defined fair trial and due process guarantee, contemporary international war crimes tribunals also enforce the obligation to caution individuals in custody about the privilege against self-incrimination. This obligation is spelled out in article 55 of the Rome Statute, *supra*, and in article and in rules 55, 42 and 63 of the Rules of Procedure and Evidence of both the ICTY, Rules of Procedure and Evidence, UN Doc. IT/32/Rev. 41 (Feb. 28, 2008), *available at* http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev41eb.pdf ("ICTY Rules of Procedure and Evidence"), and the ICTR, Rules of Procedure and Evidence (Mar. 14,

2008), *available at* http://69.94.11.53/ENGLISH/rules/080314/080314.pdf ("ICTR Rules of Procedure and Evidence").

And in proceedings before these international legal tribunals, consistently with the international legal protection against self-incrimination, evidence that was obtained in circumstances in which the privilege was not protected must be suppressed. International tribunals recognize that suppression is required in circumstances where the evidence was "obtained by methods which cast substantial doubt on its reliability *or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.*" *See* ICTY Rules of Procedure and Evidence, *supra*, rule 95 and ICTR Rules of Procedure and Evidence, *supra*, rule 95 (emphasis added). Accordingly, as the Trial Chamber of the ICTY has indicated, admitting the report of a pre-trial interview that was not voluntarily given would violate the privilege against self-incrimination: "According to the jurisprudence of the Tribunal a pre-requisite for admission of evidence must be *compliance by the moving party with any relevant safeguards and procedural protections . . . .*" *See Prosecutor v. Halilovic*, Case No. IT-01-48-T, Decision on Admission into Evidence of Interview of the Accused, ¶ 10 (June 20, 2005).

As these precedents recognize, meaningful protection for the privilege against self-incrimination requires the suppression of statements made in circumstances where the protection against self-incrimination has not been maintained. *Amici* understand that Petitioner's efforts to exclude self-incriminating statements from his pending military commission trial have been unsuccessful on the basis that the privilege against self-incrimination as set forth in the MCA does not extend to pre-trial statements. *See* Ruling on Motion, *supra*, at p. 4. International law does not support this distinction, and indeed

the practice of international tribunals is directly to the contrary. Allowing Petitioner's military commission trial to proceed on the basis of such evidence would thus fail to provide the "judicial guarantees" secured to Petitioner by Common Article 3.

III. This Court Should Grant Petitioner's Motion To Enjoin a Procedure That Patently Contravenes International Law, Including Common Article 3.

Amici are keenly aware of the challenges posed by the terrorist threat: in their legislative capacities they are and have been called upon to address these threats. Not in spite of, but because of this perspective, *amici* are bold to share and endorse the following statement from the Council of Europe:

> The temptations for governments and parliaments in countries suffering from terrorist action is to fight fire with fire, setting aside the legal safeguards that exist in a democratic state. But let us be clear about this: while the State has the right to employ to the full its arsenal of legal weapons to repress and prevent terrorist activities, it may not use indiscriminate measures which would undermine the fundamental values they seek to protect. For a State to react in such a way would be to fall into the trap set by terrorism for democracy and the rule of law.

Guidelines on Human Rights and the Fight Against Terrorism, adopted by the Council of Ministers at the 804th Meeting of Ministers' Deputies, Directorate General of Human Rights, July 11, 2002. *Amici* urge this Court to avoid the trap of terrorism, to uphold the key principles of fair trial and due process—those "judicial guarantees which are recognized as indispensable by civilized peoples"—even in the face of the terrorist threat.

Amici have highlighted above aspects of Petitioner's pending military commission trial that would patently contravene the United States international legal obligations, including its binding and undoubtedly applicable obligations under Common Article 3 of the Geneva Conventions. Petitioner's Memorandum elaborates on the irreparable harm

that he will suffer from being subjected to an unlawful process. *Amici* endorse, but do not recapitulate those arguments here.

Rather *amici* draw the Court's attention to the irreparable harm that will be done to the fabric of international law, and in particular to the network of international humanitarian law and human rights law norms that are the shared legal tradition of the United States and those other liberal democracies that are committed to the rule of law, if an unlawful process is allowed to proceed unchecked.

The emergence of an effective international legal system for regulating States' treatment of individuals within their power—both on and off the battlefield—was one of the signal achievements of the second half of the Twentieth Century. This was a joint achievement of the community of liberal democracies, of which the United States has traditionally been a leader by example. *Amici* believe that this system, and the freedoms it guarantees, have incalculable value. The United States has historically endorsed this view. But the legal system protecting human rights and fundamental freedoms at any given time is only as robust as the will of Governments to comply with it—or of national courts to enforce it where Governments do not.

Enjoining a military commission process that is patently at variance with several bright-line international legal obligations of the United States, and that patently fails to secure to Petitioner the "judicial guarantees which are recognized as indispensable by civilized peoples" afforded him under Common Article 3, is required to secure the public interest in maintaining and upholding the very freedoms that are being fought for in the war on terror.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant Petitioner's motion for a preliminary injunction.

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Respectfully submitted,

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