[ORAL ARGUMENT NOT YET SCHEDULED]

No. 11-1257

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

SALIM AHMED HAMDAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON APPEAL FROM THE COURT OF MILITARY
COMMISSION REVIEW (CASE NO. CMCR-09-002)

CORRECTED BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF PETITIONER

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/s/ J. Wells Dixon
J. Wells Dixon

STATEMENT OF CONSENT

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure and Circuit Rule 29, *Amicus Curiae* hereby states that all parties have consented to this filing.

/s/ J. Wells Dixon
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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Center for Constitutional Rights ("CCR") respectfully submits this brief as *Amicus Curiae* in support of Petitioner Salim Ahmed Hamdan.[1]

CCR is a national non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966, CCR has a long history of litigating cases on behalf of those with the fewest protections and least access to legal resources.

In early 2002, CCR filed the first *habeas corpus* petitions on behalf of foreign nationals detained by the Executive at the U.S. Naval Station at Guantánamo Bay, Cuba, without counsel, the right to a trial, or knowledge of any allegations against them. In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court held that the federal courts have jurisdiction to hear the petitioners' *habeas* challenges to the legality of their indefinite detention at Guantánamo. In *Boumediene v. Bush*, 553 U.S. 723, 769 (2008), the Supreme Court confirmed that "[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States." *See also Rasul*, 542 U.S. at 480. *Boumediene* held that the detainees' right to petition for *habeas* review is protected by the

[1] No party or party's counsel authored this brief in whole or in part; no one other than *Amicus Curiae* funded it.

Suspension Clause of the Constitution, U.S. Const. art. I, § 9, cl. 2, which has full effect at Guantánamo, *see* 553 U.S. at 771, and "the costs of delay can no longer be borne by those who are held in custody." *Id.* at 795.

CCR currently represents individuals detained at Guantánamo, including former Baltimore-area resident Majid Khan, who was tortured in secret CIA detention for more than three years before he was transferred to Guantánamo in September 2006. *See Khan v. Obama*, C.A. No. 06-1690 (RBW) (D.D.C.). CCR also represents Mohammed al Qahtani, a Saudi citizen detained at Guantánamo since January 2002, who was the subject of the "First Special Interrogation Plan," a regime of aggressive government-approved interrogation. *See Al-Qahtani v. Obama*, C.A. No. 05-1971 (RMC) (D.D.C.). In early 2008, the U.S. military announced military commission charges against al Qahtani; all charges against him were dismissed three months later. In January 2009, a senior U.S. official reported that al Qahtani was tortured at Guantánamo between 2002 and 2003.[2]

In addition, since its victory in *Rasul*, CCR has organized and coordinated more than 500 *pro bono* lawyers from across the country to represent Guantánamo detainees. CCR has submitted *amicus* briefs in cases involving suspected "enemy combatants" held in military custody. *See Hamdi v. Rumsfeld*, 542 U.S. 507

[2] *See* Bob Woodward, *Detainee Tortured, Says U.S. Official*, Wash. Post, Jan. 14, 2009.

(2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). CCR also submitted an *amicus* brief in *United States v. Ahmed Khalfan Ghailani*, S10 98 Crim. 1023 (LAK) (S.D.N.Y.), involving a former CIA prisoner and Guantánamo detainee, at the district court's invitation.[3]

SUMMARY OF ARGUMENT

In a June 24, 2011 *en banc* decision, the Court of Military Commission Review ("CMCR") held, pursuant to the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006) ("2006 MCA"), that "Providing Material Support for Terrorism" is a cognizable offense under the laws of war and therefore within the subject-matter jurisdiction of the military commissions. The CMCR relied, in part, on Hamdan's purported status as an "unlawful enemy combatant" as a basis to conclude that he committed war crimes. It determined that because Hamdan was not entitled to the privilege of a combatant to engage in belligerency – or combat immunity – his direct participation in hostilities violated the laws of war. *See United States v. Hamdan*, CMCR 09-002, 2011 U.S. CMCR LEXIS 1 (C.M.C.R. June 24, 2011) (*en banc*) ("CMCR Op.").

The CMCR erred in upholding Hamdan's war crimes conviction on the basis of his purported status as an "unlawful enemy combatant" for several reasons.

[3] Ghailani was charged before a military commission at Guantánamo; those charges were dropped, and he was transferred to the United States for prosecution.

First, Hamdan has civilian status under the laws of war because the armed conflict with Al Qaeda, if any, is governed by Common Article 3 of the Geneva Conventions. Common Article 3 applies to non-international armed conflicts in which combatant status is not recognized. Second, a civilian's direct participation in hostilities is not a war crime *per se*. Hamdan's participation in hostilities without the combatant's privilege arguably placed him within the 2006 MCA's "unlawful enemy combatant" definition (or the "unprivileged enemy belligerent" definition in the Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190 (Oct. 28, 2009) ("2009 MCA"), which superseded the 2006 MCA[4]), but it was not prohibited or criminalized by the laws of war. Third, if upheld the CMCR decision would have sweeping and unprecedented ramifications. It obscures the fundamental distinction between combatants and civilians in armed conflict, violates the principle of legality, and sets a precedent for war crimes trials of civilian U.S. officials who directly participate in hostilities without combat immunity. The CMCR decision should be reversed.

ARGUMENT

Hamdan allegedly provided services or other material support for Osama bin Laden and Al Qaeda, which included driving, acting as a bodyguard, transporting

[4] The 2009 MCA replaced the term "unlawful enemy combatant" with the term "unprivileged enemy belligerent." *Compare* 10 U.S.C. §§ 948a(1)(A), 948c (2006), *with* 10 U.S.C. §§ 948a(7), 948c (2009).

weapons, and unspecified training. Pet'r's Br. at 5. Under the 2006 MCA, Hamdan had to be an "alien unlawful enemy combatant[ ] engaged in hostilities against the United States" in order for his acts to constitute offenses triable by military commission. 10 U.S.C. § 948b(a) (2006).[5] The Act expressly limited personal jurisdiction to non-U.S. citizens determined to be "unlawful enemy combatant[s]." *Id.* §§ 948c, 948a(3). It defined "unlawful enemy combatant," in relevant part, as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)." *Id.* § 948a(1)(A)(i). The Act designated "[l]awful enemy combatant[s]," including members of the armed forces of a State, and members of militias or volunteer corps forming part of those forces, as not triable by military commission; they remained subject to prosecution by military court martial for war crimes. *Id.* §§ 948a(2), 948d(b).

The CMCR determined that Hamdan met the 2006 MCA's requirements because, given that he lacked the combatant's privilege, his direct participation in hostilities was "wrongful," and the wrongfulness of his conduct rendered his actions a war crime. "It is not appellant's conduct in isolation that constitutes a

[5] The 2006 MCA purported to codify offenses "traditionally [ ] triable by military commission"; it did not purport to "establish new crimes that did not exist before its enactment." *Id.* § 950p(a).

law of war violation triable by military commission," the CMCR stated, but "[r]ather, it is his knowledge, intent, and conduct, in support of terrorism, and in the specific context of a conflict triggering application of U.S. treaty obligations per Common Article 3, which make it cognizable under the 2006 MCA." CMCR Op. at *71. It reasoned that personal jurisdiction of the military commissions under the 2006 MCA is "strictly limited" to "alien unlawful enemy combatants"; that "[t]he MCA incorporates the necessity that the accused must be an unlawful combatant to emphasize the requirement of wrongfulness"; and that a finding of wrongfulness – *i.e.*, supporting terrorism – distinguishes the defendant's conduct from "legitimate warfare undertaken by a lawful combatant." *Id.* at *71-73.

The CMCR thus concluded that "wrongfully" providing material support for terrorism (which it found similar to other international law offenses) violated the laws of war, and that Hamdan was subject to trial by military commission, "because [he] engaged in an unlawful belligerency." *Id.* at *191-92. Yet the CMCR decision failed to properly address the nature of the conflict with Al Qaeda,

Hamdan's civilian status, or the fact that the laws of war, if applicable,[6] do not prohibit or criminalize civilian direct participation in hostilities.

I. Hamdan Is a Civilian Under the Laws of War

A. In an Armed Conflict Governed by Common Article 3, Hamdan Is Properly Afforded "Civilian" Status

Under the laws of war, there are two principal types of armed conflict – international and non-international – each of which triggers different rights and protections to persons impacted by the conflict. *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-32 (2006). An "international armed conflict" is waged between two nation-states which are signatories to the Geneva Conventions, leading to the intervention of forces, even if one party denies the existence of a state of war.

[6] Hamdan's conduct had to take place "in the context of and [in] associat[ion] with an armed conflict" in order to trigger the application of the laws of war. Manual for Military Commissions pt. IV, ¶ 6(25) (2007). The question of whether the United States was engaged in armed conflict with Al Qaeda at the time of Hamdan's offense conduct was submitted by the military judge to the commission for a factual finding beyond a reasonable doubt. CMCR Op. at *78-81 & n.54. However, whether a conflict rises to the level of armed conflict is a jurisdictional issue that turns on the existence of a sufficient level of hostilities in a given locale between two or more organized armed groups. *See Prosecutor v. Tadić* Case No. IT-94-1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), ¶¶ 65- 70 (Oct. 2, 1995); HCJ 769/02 *Pub. Comm. against Torture in Israel v. Israel* [2006] ¶¶ 18, 21. CCR doubts the conflict with Al Qaeda rises to the level of armed conflict; if it does, it surely does not extend worldwide. *See also* U.N. Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum*, ¶¶ 52-53, U.N. Doc. A/HRC/14/24/Add.6 (28 May, 2010) (*prepared by* Philip Alston) [hereinafter *Report of the Special Rapporteur*].

Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316 ("Third Geneva Convention"); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516 ("Fourth Geneva Convention"); Int'l Comm. of the Red Cross, *Commentary I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 32 (Jean S. Pictet ed. 1952) [hereinafter *Commentary I*]; Gabor Rona, *An Appraisal of U.S. Practice Relating to "Enemy Combatants,"* 10 Y.B. of Int'l Humanitarian L. 232, 237 (2007) [hereinafter *Appraisal of U.S. Practice*]. Such an international armed conflict is triggered when one state party uses force against another state party, and it is in these conflicts that the Third and Fourth Geneva Conventions apply. *See* ICRC, *Commentary I* at 32; Rona, *Appraisal of U.S. Practice* at 236-37.

The Third Geneva Convention applies to "combatants," including members of a state's armed forces that are engaged in hostilities against the United States.[7] *See Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (combatants include individuals who "associate themselves with the military arm of the enemy government") (citing *Ex Parte Quirin*, 317 U.S. 1, 37-38 (1942)); *see also* Third Geneva Convention, art. 4(A)(1)-(2) ("[p]risoners of war" include, among others,

[7] The requirements for combatancy are set forth in the regulations annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

"[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces"). Additional Protocol I, which the United States has signed (but not ratified) and essentially recognized as binding customary international law, also applies to international armed conflict.[8] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 43(2), 16 I.L.M. 1391, 1410 ("Additional Protocol I") (defining "combatants" as "[m]embers of the armed forces of a Party to a conflict" other than medical and religious personnel). These authorities require that combatants captured in international armed conflict must be treated humanely, and are entitled to combat immunity (*i.e.*, immunity from prosecution for engagement in belligerency) as long as they do not commit war crimes such as using prohibited means or methods of warfare. *See Al-Marri v. Pucciarelli*, 534 F.3d 213, 227 n.11 (4th Cir.) (Motz, J., concurring) (discussing combatants and combat immunity), *cert. granted*, 555 U.S. 1066 (2008), *judgment vacated and remanded with instructions to dismiss as moot*, 555 U.S. 1220 (2009).

[8] *See* Rona, *Appraisal of U.S. Practice* at 236-37 n.16; David W. Glazier, *Playing by the Rules: Combating al Qaeda Within the Law of War*, 51 William & Mary L. Rev. 957, 995 (2009) [hereinafter *Playing by the Rules*]; David W. Glazier, *Still a Bad Idea: Military Commissions Under the Obama Administration* 27 (Loyola Law Sch., L.A., Working Paper No. 2010-32, Dec. 13, 2010), *available at* SSRN: http://ssrn.com/abstract=1658590 [hereinafter *Still a Bad Idea*].

Under the logic of the Geneva Conventions, anyone who is not a "combatant" in international armed conflict is considered a "civilian." Additional Protocol I, art. 50 ("A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 . . . of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."); *see also* HCJ 769/02 *Pub. Comm. against Torture in Israel v. Israel* [2006] ¶ 26 ("The approach of customary international law is that 'civilians' are those who are not 'combatants' . . . . That definition is 'negative' in nature. It defines the concept of 'civilian' as the opposite of 'combatant.'") (citing International Criminal Tribunal for the former Yugoslavia); Int'l Comm. of the Red Cross, *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 51 (Jean S. Pictet ed., 1958) ("*There is no* intermediate status") (emphasis in original). The Fourth Geneva Convention governs the treatment of civilians in international armed conflict. A civilian is not lawfully entitled to directly participate in hostilities and may be tried for crimes arising from engagement in unlawful belligerency under domestic law (such as assault or murder). *See Al-Marri*, 534 F.3d at 227 n.11, 235 (Motz, J. concurring); *see also* Rona, *Appraisal of U.S. Practice* at 240, 241.

Non-international armed conflicts, by contrast, include conflicts not waged between nation-states but which reach a threshold of violence that exceeds mere

"internal disturbances and tensions" such as riots or sporadic violence. ICRC, *Commentary I* at 32; Rona, *Appraisal of U.S. Practice* at 237-38; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 1(2), 16. I.L.M. 1442 ("Additional Protocol II")[9]; *see also Al-Marri*, 534 F.3d at 227-28, 234-35 (Motz, J., concurring). Non-international armed conflicts are not subject to the extensive regulations of the Third and Fourth Geneva Conventions. They are governed instead by Common Article 3 of the Third and Fourth Geneva Conventions, which sets forth a minimum baseline of human rights protections, including the requirement that sentences must be imposed by a regularly constituted court. *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-32 (2006).

Unlike international armed conflicts, and of particular relevance in Hamdan's case, non-international armed conflicts simply do not contemplate a status of "combatant." Non-international armed conflicts involve only "civilians." *See* Alston, *Report of the Special Rapporteur* ¶ 58 ("In non-international armed conflict, there is no such thing as a 'combatant.'").

As a longtime expert at the United States Military Academy has explained:

> The traditional view is that, . . . there are no "combatants," lawful or otherwise, in common Article 3 conflicts. There may be combat in the

[9] Additional Protocol II also largely reflects binding customary international law. Rona, *Appraisal of U.S. Practice* at 236-37 n.16; Glazier, *Still a Bad Idea* at 66.

> literal sense, but in terms of [the laws of war] there are fighters, rebels, insurgents, or guerrillas who engage in armed conflict, and there are government forces, and perhaps armed forces allied to the government forces. There are no combatants as that term is used in customary law of war, however. Upon capture such fighters are simply prisoners of the detaining government; they are criminals to be prosecuted for their unlawful acts, either by a military court or under the domestic law of the capturing state.

Gary D. Solis, *The Law of Armed Conflict, International Humanitarian Law in War* 191 (2010) [hereinafter *The Law of Armed Conflict*]; *see also id.* at 219; Glazier, *Playing by the Rules* at 991 ("[I]nternational law has never defined opposition participants in [non-international armed conflicts] as 'combatants' or 'prisoners of war'"); Int'l Comm. of the Red Cross, Statement, *The Relevance of IHL in the Context of Terrorism* (July 21, 2005) (last updated Jan. 9, 2011) ("In non-international armed conflict, combatant and prisoner of war status are not provided for . . . . In non-international armed conflict combatant status does not exist."), *available at* http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm [hereinafter *Relevance of IHL*].[10]

In Hamdan's case, there is little doubt that an international armed conflict existed between the United States and the Taliban government of Afghanistan –

[10] It is also a matter of common sense that in the absence of armed conflict, the laws of war do not apply and individuals involved in violence must be civilians. ICRC, *Relevance of IHL* ("From [a law of war] perspective, the term 'combatant' or 'enemy combatant' has no legal meaning outside of armed conflict.").

both signatories to the Geneva Conventions – after the U.S. invasion in October 2001 and at the time of his capture in November 2001. *Hamdan*, 548 U.S. at 628-29. However, as a matter of law, the international armed conflict should have been deemed concluded on December 22, 2001, after the fall of Kabul and the collapse of the Taliban government, when the United States "formally recognized and extended full diplomatic relations to the new government of Hamid Karzai." *United States v. Prosperi*, 573 F. Supp. 2d 436, 455 (D. Mass. 2008). "That recognition signaled the cessation of a state of war with Afghanistan." *Id.*; *cf.* News Transcript, U.S. Dep't of Defense, May 1, 2003 (Secretary Rumsfeld announcing end of "major combat activity" in Afghanistan and shift to "period of stability and stabilization and reconstruction and activities"), *available at* http://www.defenselink.mil. In any case, the charges against Hamdan relate to his alleged affiliation with Al Qaeda, and the Supreme Court has recognized that the conflict with Al Qaeda is not and has never been an international armed conflict.

Hamdan, 548 U.S. at 628-29; *Al-Marri*, 534 F.3d at 233 (Motz, J., concurring).[11]

B. "Unlawful Enemy Combatant" Is Not a Recognized Status Under the Laws of War

The nature of any armed conflict with Al Qaeda and the combatant-civilian distinction are important in this case because, notwithstanding the 2006 MCA's jurisdictional parameters, there is not – and has never been – an internationally recognized category or status of detainee called "enemy combatant" or "unlawful enemy combatant" that is separate and distinct from the two categories recognized under the laws of war, combatants and civilians. *See* Solis, *The Law of Armed Conflict*, ch. 6.7.2; *id.* at 187 (quoting Francis Lieber: "All enemies in regular war are divided into two general classes – that is to say, into combatants and noncombatants"); *id.* at 207 ("Recall that there are only two categories of individuals on the battlefield: combatants and civilians."); *see also* HCJ 769/02

[11] Hamdan moved to dismiss the charges against him on the ground that the military commission lacked jurisdiction over him because the prosecution had failed to show that he was an "alien unlawful enemy combatant." In the course of those proceedings, Hamdan was afforded a hearing pursuant to Article 5 of the Third Geneva Convention to determine his entitlement to prisoner of war status. He was denied that status in December 2007. *See* On Recons. Ruling on Mot. to Dismiss for Lack of Jurisdiction, *United States v. Hamdan*, M.C. (Dec. 19, 2007). He was also denied status as a protected person under the Fourth Geneva Convention in March 2008. *See* Ruling on Mot. for Order Implementing Fourth Geneva Convention, *United States v. Hamdan*, M.C. (Mar. 24, 2008). However, the military judge determined that Hamdan was entitled to the protections of Common Article 3. *Id.*

Pub. Comm. against Torture in Israel v. Israel [2006] ¶ 28 (concluding there is no third category of unlawful combatants); ICRC, *Relevance of IHL*.

Terms such as "enemy combatant" and "unlawful enemy combatant" appeared in the context of U.S. and international law prior to September 11th and enactment of the 2006 MCA, but only as descriptive terms. "Enemy combatant," for example, was used as a descriptive (albeit redundant) term for "combatants" or enemy soldiers. "Unlawful combatant" was likewise used as a descriptive (albeit oxymoronic – because "combatants" may lawfully engage in belligerency) term for "civilians" who directly participate in hostilities without authority under international law to do so, and who consequently could be targeted with force under certain limited conditions. *See, e.g.*, *Ex Parte Quirin*, 317 U.S. 1, 31 (1942). However, the use of those terms did not reflect or create new categories of individuals under the laws of war separate and apart from combatants and civilians. *See* Solis, *The Law of Armed Conflict* at 208, 226; ICRC, *Relevance of IHL* ("In its generic sense, an 'enemy combatant' is a person who, either lawfully or unlawfully, engages in hostilities for the opposing side in an international armed conflict. . . . To the extent that persons designated 'enemy combatants' have been captured in international or non-international armed conflict, the provisions and protections of international humanitarian law remain applicable regardless of how such persons are called. Similarly, when individuals are captured outside of armed

conflict their actions and protection are governed by domestic law and human rights law, regardless of how they are called.").

Accordingly, Hamdan, whose alleged conduct included material support for Al Qaeda in the context of what the Supreme Court assumed was non-international armed conflict, has civilian status under the laws of war and is subject to criminal prosecution for directly participating in hostilities under domestic law. Labeling Hamdan an "unlawful enemy combatant" for purposes of trying him for war crimes under the 2006 MCA did not alter his civilian status. Indeed, while it may be "the understandable instincts" of some to treat suspected terrorists as "combatants" in a "global war on terror," *Al-Marri*, 534 F.3d at 235 (Motz, J., concurring), Hamdan's alleged support for Al Qaeda did not transform him from a civilian into a combatant subject to trial by military commission. Whether his conduct was lawful or unlawful, he remained a civilian. *See* HCJ 769/02 *Pub. Comm. against Torture in Israel v. Israel* [2006] ¶ 25 ("The terrorists and their organizations . . . do not fall into the category of combatants. . . . [They] are not combatants according to the definition of that term in international law; they are not entitled to the status of prisoner of war; they can be put on trial for their membership in terrorist organizations and for their operations against the army."); *id.* ¶ 26 ("The result is that an unlawful combatant is not a combatant; rather a 'civilian.'"); *see also* CrimA 6659/06, *A. v. Israel* [2008] ¶ 12 ("[T]he finding that

'unlawful combatants' belong to the category of 'civilians' in international law is consistent with the official interpretation of the Geneva Conventions").

II. A Civilian's Direct Participation in Hostilities Does Not Constitute a War Crime

As a civilian, Hamdan may be subject to war crimes prosecution for engaging in conduct which violates the laws of war, including, for example, using prohibited means of warfare such as poisons or attacks by perfidy. *See* David W. Glazier, *A Court Without Jurisdiction: A Critical Assessment of the Military Commissions Charges Against Omar Khadr* 11 (Loyola Law Sch., L.A., Working Paper No. 2010-37, Aug. 31 2010), *available at* SSRN: http://ssrn.com/abstract=1669946 [hereinafter *A Court Without Jurisdiction*]. But his mere engagement in hostilities without combat immunity does not constitute a war crime. *See* Glazier, *Playing by the Rules* at 1006 ("Most legal scholars agree that persons not entitled to combatant status do not commit a war crime just by participating in hostilities, but rather that any acts of violence they commit are punishable as crimes under domestic law.").

A civilian's direct participation in hostilities without the combatant's privilege does not constitute a war crime because "the law of war does not proscribe the routine killing of combatants, even by those with no right to participate in hostilities. . . . [The law of war] refrains from stigmatizing the acts as criminal. It merely takes off a mantle of immunity from the defendant, who is

therefore accessible to penal charges for any offense committed against the domestic legal system." Glazier, *A Court Without Jurisdiction* at 13 (quoting Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 200 (2004)) (internal quotation marks omitted).

As explained by the International Committee of the Red Cross:

> The absence in [the laws of war] of an express right for civilians to directly participate in hostilities does not necessarily imply an international prohibition of such participation. Indeed, as such, civilian direct participation in hostilities is neither prohibited by [the laws of war] nor criminalized under the statutes of any prior or current international criminal tribunal or court. However, because civilians . . . are not entitled to the combatant privilege, they do not enjoy immunity from domestic prosecution for lawful acts of war, that is, for having directly participated in hostilities while respecting [the laws of war].

Int'l Comm. of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 83-84 (2009); *see also* Alston, *Report of the Special Rapporteur* ¶ 71 ("Under [the laws of war], civilians . . . are not prohibited from participating in hostilities."); Glazier, *Still a Bad Idea* at 72 ("[T]he law of war does not proscribe the routine killing of combatants, even by those with no right to participate in hostilities.").

"There is no reason for the [laws of war] to criminalize the use of force by unprivileged belligerents . . . because these individuals lack immunity from ordinary civil law and can be held accountable for any acts of violence they commit under domestic law, and [laws of war] experts are in general agreement

that it does not." Glazier, *A Court Without Jurisdiction* at 10; Glazier, *Still a Bad Idea* at 69-70. Again, civilians who directly part in hostilities are "mere criminals under domestic law" who may be prosecuted for engaging in belligerency, Rona, *Appraisal of U.S. Practice* at 241 – under the laws of their home country or the country of their capture, or under U.S. federal statutes such as those criminalizing material support for terrorism, *see, e.g.*, 18 U.S.C. § 2339B – but not under retroactive provisions in the 2006 MCA. "It is logical that, since civilian, non-international armed conflict fighters gain no status in international law, and since there is no conflict between two or more sovereigns, the [laws of war] of non-international armed conflict should be silent, in deference to national law, on questions of detention" and prosecution of crimes arising from direct participation in hostilities. Rona, *Appraisal of U.S. Practice* at 241.

Further, to the extent the CMCR relies on *Ex Parte Quirin*, 317 U.S. 1 (1942), in support of its conclusion that Hamdan is guilty of war crimes based on his unprivileged status, *i.e.*, because he unlawfully or wrongfully provided material support to the enemy without the combatant's privilege to participate in hostilities, the CMCR fundamentally misapprehends that decision. CMCR Op. at *179-80.

Quirin involved individuals who associated themselves with the German Marine Infantry – the armed forces of an enemy State – and entered the United States to commit hostile acts during the international armed conflict of World War

II. Although they were trained, instructed, funded, transported, and outfitted with military uniforms by the German military, they cast off their uniforms – a violation of the laws of war – thus losing their combat immunity and exposing themselves to war crimes prosecutions. It was their treacherous acts – the war crime of perfidy – which rendered their belligerency unlawful and made them "unlawful combatants." Although *Quirin* references "lawful and unlawful combatants," as well as "enemy combatant[s]," it used those terms in relation to the *conduct* of the accused, not their *status*. *Id.* at 31. The Court explained that the accused were subject to military detention and trial not because of their status as "enemy combatants" or even for attempting to enter the United States for hostile purposes, but "for *acts* which render[ed] their belligerency unlawful," *i.e.*, discarding their uniforms. *Id.* (emphasis added). *Quirin* simply did not involve a category of belligerent other than the category of "combatant" recognized in the context of international armed conflict, nor did it involve "associated" forces except in terms of forces associated with the "military arm of the enemy government," *i.e.*, service in an enemy government's military. *Id.* at 37. *Quirin* therefore does not support the proposition that hostilities perpetrated by unprivileged belligerents are in and of themselves war crimes, which underlies the CMCR's decision to uphold Hamdan's conviction

under the 2006 MCA based on his purported "unlawful enemy combatant" status.[12]

III. If Upheld, the CMCR's Decision Would Have Sweeping and Unprecedented Ramifications

"Modern sentiment and usage have induced in the practice of war few changes so marked as that which affects the status of prisoners . . . The time has long passed when 'no quarter' was the rule on the battlefield, or when a prisoner could be put to death by virtue simply of his capture." William Winthrop, *Military Law and Precedents* 788 (2d ed. 1920). The fundamental purpose of the laws of war has since remained the same:

> [S]ince war itself cannot be prevented, even though it may be legally prohibited, its horrors might at least be ameliorated through rules that limit the means and methods used, that require distinction between combatants and non-combatants (civilians), and that mandate the humane treatment and fair trials of detainees who are accused of crimes. Equally important has been the consensus that the laws of war apply only in and to armed conflicts.

Rona, *Appraisal of U.S. Practice* at 248. Yet the CMCR's decision contravenes these well-settled principles in several ways.

By upholding Hamdan's conviction on the basis of his purported status, the decision fails to differentiate clearly between international and non-international armed conflict, and obscures the fundamental distinction between combatants and

[12] The CMCR decision also relies on the 1914 Army Field Manual, cited in *Quirin*, *see* 317 U.S. at 34, and the 1956 Army Field Manual, in support of the proposition that unprivileged belligerents are war criminals. Those arguments are addressed in Petitioner's Brief at 42-43 & n.17.

civilians. The CMCR effectively places Hamdan in a separate, third category of "unlawful enemy combatant" (or "unlawful enemy belligerent"), and on the basis of that status subjects him to prosecution for war crimes under the 2006 MCA. It does so absent any claim that his actual conduct (driving, acting as a body guard, transporting weapons, and training) was inherently a war crime or would have violated the laws of war if undertaken by a "lawful combatant." Indeed, the CMCR specifically distinguished Hamdan from "[l]awful enemy combatants and those lawfully aiding or providing material support to lawful enemy combatants," who would retain combat immunity for similar conduct. CMCR Op. at *73.

The CMCR overlooks Hamdan's civilian status, which conflates the clear distinction between combatants and civilians and places both at unwarranted risk of harm. It deprives them of the certainties of the privileges and protections that flow from their respective statuses. It also undermines the purpose of the Geneva Conventions, whose drafters assumed that authority to prosecute criminal offenses in non-international armed conflict would be supplied by domestic law because hostile conduct by fighters in non-international armed conflict is criminal. *See* Int'l Comm. of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* 1332 (Yves Sandoz et al. eds. 1987) ("In general it seems unrealistic to establish combatant status for persons who have participated in hostilities and have been captured in non-international

armed conflicts. In fact, such status would be incompatible, first, with respect for the principle of sovereignty of States, and secondly, with national legislation which makes rebellion a crime. On the other hand, a trend emerged . . . [to treat captured insurgents] in accordance with . . . humanitarian law").

In addition, the CMCR decision departs from established law of war principles by upholding the 2006 MCA's prohibition and criminalization of civilian direct participation in hostilities without combat immunity as a war crime. Indeed, by essentially classifying as a war crime any direct participation in hostilities undertaken by non-U.S. citizen civilians against the United States, during a period of armed conflict, the 2006 MCA sweeps far beyond the traditionally limited category of grave breaches and other serious violations of the laws of war which are recognized as war crimes. *See* Int'l Comm. of the Red Cross, *Commentary III Geneva Convention Relative to the Treatment of Prisoners of War* 421-22 (Jean S. Pictet ed. 1960) (historical discussion of grave breaches of the Conventions and other war crimes); Int'l Comm. of the Red Cross, *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 586 & n.1 (Jean S. Pictet ed. 1958); Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, arts. 22-28, 36 Stat. 2277, T.S. No. 539.

In this respect, Hamdan's war crimes conviction under the 2006 MCA, based on his status, violates the principle of legality. In particular, it violates the Ex Post Facto Clause of the Constitution, U.S. Const. art. I, § 9, cl. 3, as well as human rights law, including the non-derogable fair trial rights guaranteed by Articles 4 and 15 of the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976[13]; *see also* Additional Protocol II art. 6(2)(c); *cf. also* Third Geneva Convention, art. 99. *See generally* Pet'r's Br. at 51-53.

Broadly classifying hostilities perpetrated by non-combatants as war crimes would also have perverse consequence. As a leading expert has explained:

> The U.S. approach has the practical effect of converting this armed conflict into a human hunting season; the government asserts U.S. combatants had the right to shoot [an unprivileged belligerent] on sight . . . yet criminally prosecute him for fighting back. This approach repudiates the functional equivalence between the conflict parties which is a core element of the [laws of war] and attempts to transform this law from one evenhandedly regulating the conduct of both parties into a unilateral shield for one side.

Glazier, *A Court Without Jurisdiction* at 15-16.

[13] *See* Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant Concluding Observations of The Human Rights Committee United States of America, CCPR/C/USA/CO/3/Rev.1, Dec. 18, 2006, ¶ 10, p.3 (urging the United States to "acknowledge the applicability of the [ICCPR] with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war").

> The United States logically has no obligation to treat al Qaeda fighters as combatants . . . . It would be entirely unprecedented, however, to declare them to be combatants for purposes of granting America legal authority to kill them on sight, detain them for the duration of hostilities, or try them for alleged law of war violations while denying them any right to participate in hostilities at all. The so called 'war on terror' is not legally a war at all under this approach.

Glazier, *Still a Bad Idea* at 31.

Moreover, if upheld the CMCR's decision would set a precedent for war crimes trials of civilian U.S. officials based on their status. This might include U.S. Special Operations forces who fight partially or entirely in civilian clothing (and thus lose their combat immunity and entitlement to prisoner of war status under Article 4 of the Third Geneva Convention if captured), as well as CIA paramilitary officers who fight alongside them (such as at the Battle of Tora Bora), and, perhaps most notably, civilian CIA officers piloting unmanned aerial "drone" aircraft, who lack the privilege of belligerency. *See* Glazier, *Playing by the Rules* at 1016-17; Glazier, *A Court Without Jurisdiction* at 17-18; Gary Solis, *CIA Drone Attacks Produce America's Own Unlawful Combatants*, Wash. Post, Mar. 12, 2010, at A17 ("CIA agents are, unlike their military counterparts but like the fighters they target, unlawful combatants. No less than their insurgent targets, they are fighters without uniforms or insignia, directly participating in hostilities, employing armed force contrary to the laws and customs of war. . . . They are not entitled to prisoner-of-war status [if captured] . . . They are civilians"). Thus, if the

CMCR decision is "correct that participation in hostilities by a non-uniformed civilian constituted a war crime, then it would be declaring all those participating in, supervising, and having authorized, the CIA's drone program to be war criminals, including logically both the immediate past and current commanders-in-chief." Glazier, *Still a Bad Idea* at 76.

As explained by Colonel Morris Davis, former chief prosecutor for the military commissions at Guantánamo:

> The CIA civilian employees and civilian contractors are not lawful combatants and are not entitled to combatant immunity. . . . The concern over using civilian CIA personnel to conduct combat operations is not inconsequential. . . . [T]he US undermines the law of war by blurring the intended bright line separating combatants from civilians. The ability to bend the law to what we want it to be at any given moment diminishes us and our commitment to abide by the proper rules of law.

Morris Davis, *Combatant Immunity and the Death of Anwar al-Awlaqi*, JURIST - Forum, Oct. 17, 2011, *available at* http://jurist.org/forum/2011/10/morris-davis-anwar-al-awlaqi.php.

Finally, it bears emphasis that CIA officers who target and kill suspected terrorists in Afghanistan (or Yemen or Somalia or wherever the United States determines it is engaged in armed conflict with Al Qaeda) would, but for their U.S. citizenship, fall squarely within the purported offense of "Murder in Violation of the Laws of War" under the 2006 MCA or the 2009 MCA. *See* 10 U.S.C. § 950v(15) (2006); 10 U.S.C. § 950t(15) (2009); Alston, *Report of the Special*

Rapporteur ¶ 71 ("CIA personnel could be prosecuted for murder under the domestic law of any country in which they conduct targeted drone killings, and could also be prosecuted for violations of applicable US law."); *cf. also* Third Geneva Convention, art. 87 (prisoners of war must be tried by the same military authorities and courts as members of the armed forces of the detaining power who have committed the same acts).

Military Commission rules are clear that the lack of combat immunity renders these killings not only murder but also war crimes:

> For the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy. . . . *[S]uch unlawful enemy combatants do not enjoy combat immunity* because they have failed to meet the requirements of lawful combatancy under the laws of war.

Manual for Military Commissions pt. IV, ¶ 6(15)(c) (2007) (emphasis added); *see also* Manual for Military Commissions pt. IV, ¶ 5(15)(c) (2010) ('[A]n accused may be convicted in a military commission for these offenses if the commission finds that the accused . . . engaged in conduct traditionally triable by military commission [including] murder committed while the accused did not meet the requirements of privileged belligerency[ ] even if such conduct does not violate the international law of war.").

Accordingly, by recognizing war crimes based on a defendant's status, as opposed to his specific conduct in violation of the laws of war, the CMCR decision

is wrong legally, and also sets a new precedent that one day may be cited by other nations as a basis to subject U.S. civilians to war crimes trials before military commissions just for engaging in hostilities without the combatant's privilege.

CONCLUSION

The Court should reverse the CMCR decision and vacate Petitioner's conviction.

Date: November 28, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, in accordance with Federal Rules of Appellate Procedure 32(a)(7)(C) and 29(d), and D.C. Circuit Rule 32(a), this *amicus* brief is proportionately spaced, has a typeface of 14 point font, and does not exceed the applicable 7,000 word limit.

/s/ J. Wells Dixon
J. Wells Dixon

CERTIFICATE REGARDING SINGLE BRIEF

I hereby certify, pursuant to D.C. Circuit Rule 29(d), that a separate *amicus* brief in support of Petitioner is necessary because, upon information and belief, no other *amici* intend to address the issues raised by the Center for Constitutional Rights concerning war crimes based on a defendant's status.

/s/ J. Wells Dixon
J. Wells Dixon

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2011, I caused the foregoing Corrected Brief of *Amicus Curiae* Center for Constitutional Rights in Support of Petitioner to be filed with the Court and served on counsel for all parties, including without limitation counsel listed below, by using the appellate CM/ECF system.

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