Nos. 06-1196 and 06-1195

IN THE SUPREME COURT OF THE UNITED STATES

KHALED A.F. AL ODAH, ET AL., *Petitioners,*
v.
UNITED STATES OF AMERICA, ET AL., *Respondents.*

LAKHDAR BOUMEDIENE, ET AL., *Petitioners,*
v.
GEORGE W. BUSH, ET AL., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF 383 UNITED KINGDOM AND EUROPEAN PARLIAMENTARIANS IN SUPPORT OF PETITIONERS

[International Law—Need for Adherence]

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INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of a group of 383 U.K. and European parliamentarians, including 272 current or former Members of the U.K. Parliament and 111 current or former Members of the European Parliament (the "*amici*").[1] The full list of *amici* is attached as an Appendix to this brief.

Amici are drawn from all across Europe, and the group spans the political spectrum, including senior figures from all major political parties in the U.K. The group also includes several former judges of the highest court in the U.K.; senior lawyers; former Cabinet Ministers, including a Secretary of State for Defense; a former Attorney-General; a former European Commissioner and U.K. ambassador to the United Nations; two former Speakers of the House of Commons; 12 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.

Amici note that Petitioners have not been charged by the United States with any war crimes or other crimes, acts of terrorism or acts in violation of the laws of war. *Amici* express no view on whether Petitioners or any of them have in fact engaged in any such acts. 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

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored the brief in whole or in part and no person or entity other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

terror" in general. These are questions on which *amici* hold differing individual views.

Amici have come together to participate in this case because, despite their divergent political views, they share a common view that it is important to the international legal order that, even when faced with the threat of international terrorism, all States, including the United States, comply with the standards set by international humanitarian law and human rights law. *Amici* share a concern that the treatment of Petitioners currently falls short of these standards and urge the Court to ensure that these standards are observed in relation to Petitioners.

The outcome of this case is, for Petitioners, of course, of enormous personal significance: if denied meaningful access to the courts to challenge the legality of their detention or the process to which they have been subjected they face the prospect of remaining indefinitely outside the legal order, unprotected by either the Constitution or Laws of the United States or the rules of international law specifically applicable to individuals like Petitioners, engaged or caught up in armed combat, or apparently even the general rules of international law relating to fundamental human rights.

For the community of liberal democracies committed to the rule of law, which each member of the *amicus* group is or has been privileged to serve, the stakes are equally high. While this case presents a number of contested issues of U.S. law (which *amici* do not address), to the outside world it boils down to the simple, but crucial, question of whether the system of legal norms that purports to restrain the conduct of States vis-à-vis individuals within their power will survive the terrorist threat. This case can thus be seen as one battle in the ongoing war between the evil logic of terrorism and the bedrock principles that individuals are entitled to fair and

humane treatment under the rule of law—principles which American and coalition soldiers today fight to uphold in Afghanistan, Iraq and elsewhere.

If the Court of Appeals' determination that the doors of the courts are effectively closed to Petitioners' *habeas corpus* challenge to their prolonged, indefinite detention stands, *amici* fear that the lesson that will be drawn by the wider world is that the evil of terrorism has proved more than a match for our principles and that accordingly other States will fail to abide by these principles in their own conduct. To avoid thus eroding bedrock principles of human rights and the rule of law, *amici* urge this Court to reaffirm what liberal democracies the world over have long asserted: that even "amid the clash of arms, the laws are not silent." *Liversage v. Andersen*, [1942] A.C. 206 (H.L.).

SUMMARY OF ARGUMENT

This case presents questions of U.S. constitutional and statutory interpretation which are addressed in detail in other submissions. This *amicus* submission aims to provide an international perspective on the wider context within which this Court's decision will be viewed.

Accordingly, *amici* draw attention to the common heritage of respect for human rights and the rule of law of civilized nations. The United States has long been a leading proponent of these principles, which are reflected in specific international legal instruments, including not only the Geneva Conventions of 1949, relating in particular to armed conflict, but also human rights treaties, and norms of customary international law. When the United States acts inconsistently with international law, it undermines fundamental principles of human rights and the rule of law and it damages long-standing efforts by civilized nations to achieve universal recognition of and respect for those

principles. These principles have recently been reaffirmed in two landmark decisions of the U.K. House of Lords ensuring basic human rights for terrorism-related prisoners, *A and others v. Sec'y of State for the Home Dep't; X and another v. Sec'y of State for the Home Dep't* [2004] UKHL 56, and rejecting the use of evidence obtained by torture in judicial proceedings, *A and others v. Sec'y of State for the Home Dep't*, [2005] UKHL 71.

The United States' prosecution of the "war on terror" is subject to human rights treaties and customary norms of human rights and humanitarian law and the fundamental standards they impose. Wherever and whenever relevant conduct takes place, even in time of war or armed conflict, the United States' treatment of prisoners such as Petitioners will be assessed according to these universal standards.

Amici are concerned that the treatment to which Petitioners have been subjected falls short of those fundamental standards and the United States' international legal obligations. In particular, the Combatant Status Review Tribunal (CSRT) process contravenes applicable international legal standards of fairness because it: (a) fails to ensure an impartial determination of the basis for Petitioners' continued detention; (b) reverses the presumption of innocence to which Petitioners are entitled; (c) does not provide Petitioners the right to confront all the evidence against them; and (d) does not afford Petitioners the chance to offer evidence on their own behalf on equal terms. In addition, the CSRT process violates international law by failing to exclude evidence obtained through torture.

Moreover, if, as the Court of Appeals held, the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"), strips the courts of jurisdiction to hear Petitioners' *habeas* challenges to their detention and bars

meaningful scrutiny by the courts of the factual and legal basis for Petitioners' claims that their continued detention is unlawful, the United States will have failed in its basic and non-derogable international legal obligation to ensure that anyone deprived of his liberty has the right to meaningful access to a court to challenge the lawfulness of his detention.

The rule of law, humanitarian and human rights principles at stake in this case are the very principles which the coalition of liberal democracies together seek to uphold and defend in the "war on terror." The Court should bear these stakes in mind in considering the questions presented in these petitions.

ARGUMENT

I. The United States And The Nations Of Europe Share A Common Heritage Of Respect For Human Rights And The Rule Of Law.

A. The United States Has Long Been A Standard Bearer For Human Rights And The Rule Of Law.

The United States has long played a "leading role . . . in the international struggle for human rights." *See* S. Exec. Rep. No. 23, 102d Cong., 2d Sess. (1992) (on the occasion of ratification of the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 ("ICCPR")). The human rights and rule of law principles that are the focus of this brief find eloquent expression in the Declaration of Independence and the U.S. Constitution, which themselves both reflect principles in the Magna Carta and have in turn influenced the development of constitutional democracies the world over. Accordingly, the United States has seen itself—and been seen—as a nation "unwilling to witness or permit the slow undoing of those human rights to

which this nation has always been committed." J. Kennedy, Inaugural Address (Jan. 20, 1961), *reprinted in* Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101-10 (1989).

B. Our Common Heritage Is Codified In A Network Of Human Rights Treaties And Other International Legal Obligations.

In the modern era, the United States and the nations of Europe have frequently cooperated in developing the international treaties, principles and institutions that create the public international law framework that nations share today. These instruments reflect our common heritage of respect for human rights and the rule of law. They impose binding obligations on every nation that has signed up to them, including the United States, and customary international law binds States universally. Critically, insofar as these treaties relate to human rights, they extend the basic protections of the law to all human beings, without differentiation based on color, creed, gender or nationality.

The United States has pledged to uphold the rights created by the international human rights treaties to which it is a party. Exec. Order No. 13,107, 61 Fed. Reg. 68,991 (Dec. 10, 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], the [Torture Convention], and the [Convention on the Elimination of All Forms of Racial Discrimination]. It shall also be the policy and practice of the Government of the United States to promote respect for international human rights . . . .").

1. The United States Is Bound By The ICCPR.

Central to the modern human rights framework is the ICCPR, which is a treaty that embodies the fundamental civil and political rights contained in the Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810 ("Universal Declaration"), agreed at the United Nations General Assembly on December 10, 1948.

Among other protections, the ICCPR guarantees fair-trial rights, including not only the fundamental right "to a fair and public hearing by a competent, independent and impartial tribunal established by law," art. 14(1), but also "the right to be presumed innocent until proved guilty according to law," art. 14(2), the right of a prisoner "to be informed promptly and in detail . . . of the nature and cause of the charge against him," art. 14(3)(a), and the right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him," art. 14(3)(e). The ICCPR also enshrines *habeas corpus* as a fundamental human right: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful," art. 9(4).

With over 150 States Parties, the ICCPR is the most widely accepted human rights treaty in existence. The United States ratified the ICCPR on September 8, 1992, and is therefore bound by its terms.

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. S4784 (daily ed. Apr. 2, 1992). The basis for this declaration (the effect of which is that the ICCPR does not, of itself, create private rights directly enforceable in U.S. courts) 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 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 (emphasis added).

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 of U.S. domestic law, including the U.S. Constitution, because individuals whose human rights may be infringed are entitled to effective equivalent remedies under that law. The declaration amounts to an undertaking to the other States Parties to the ICCPR that the United States will secure the protections set forth in the ICCPR through domestic law as applicable to "all individuals within its territory and subject to its jurisdiction", *see* ICCPR, art. 2(1).

This Court has held that the United States exercises "'complete jurisdiction and control' over the Guantanamo Bay Naval Base." *Rasul v. Bush*, 542 U.S. 466, 480 (2004). Accordingly, prisoners at Guantanamo are entitled to the fair trial, *habeas* and other rights guaranteed in the ICCPR.

2. The United States Is Bound By The Torture Convention.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 ("Torture Convention"), was ratified by the United States in October 1994 and entered into force for the United States on November 20, 1994. The Torture Convention prohibits both torture and cruel and inhuman treatment, *see* arts. 2 and 16, and the use or admission in legal proceedings of evidence obtained by torture, *see* art. 15.

As with the ICCPR, the United States has entered a declaration to the effect that the operative provisions of this convention are not self-executing. Such a declaration constitutes a representation to the international community that U.S. domestic law will conform to the Torture Convention. And 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.

The Secretary of State has reaffirmed that "the United States' obligations under the [Torture Convention] extend to U.S. personnel wherever they are, whether they are in the United States or outside of the United States." Secretary of State Condoleezza Rice, Statement at Press Event with Ukrainian President Viktor Yushchenko (Dec. 7, 2005), *transcript available at* http://www.state.gov/secretary/rm/2005/57723.htm ("Secretary Rice Statement"). Accordingly, the Torture Convention applies to the conduct of CSRT proceedings by U.S. personnel concerning detainees held at the U.S. Naval installation at Guantanamo Bay.

3. The United States Is Bound Not To Defeat The Object And Purpose Of The ACHR.

The American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 ("ACHR"), is a regional human rights instrument existing under the aegis of the Organization of American States. It contains protections for civil and political rights—including the right to challenge the lawfulness of any deprivation of liberty in court, *see* ACHR, art. 7(6), and the right to a fair trial in terms similar to the ICCPR, *see* ACHR, art. 8—as well as economic, social and cultural rights.

The United States has signed, but not ratified, the ACHR. As a signatory, although it is not strictly bound by the ACHR, the United States has an obligation 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 must therefore avoid taking any action that is inconsistent with the rights set out therein. The object and purpose of the ACHR extends to guaranteeing the rights contained therein on an individual basis. *See* ACHR, fourth preambular paragraph. U.S. courts can, and frequently do, refer to the ACHR in determining the scope and existence of obligations under international law. *E.g.*, *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (referring to the ACHR, ICCPR and Geneva Conventions in support of the decision to vacate a sentence of death imposed on a juvenile).

4. Customary International Law Obliges The United States To Respect Fundamental Human Rights.

The United States is also bound by the customary international law of human rights. Customary international law is established by authoritative state practice. The

relevant norms have been codified in a number of documents. These include the American Declaration of the Rights and Duties of Man, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev. 1 (1992) ("American Declaration"), which binds the United States (as a signatory of the Charter of the Organization of American States) as a matter of international law. *Roach and Pinkerton v. United States*, Case No. 9647, Inter-Am. C.H.R., Report No. 3/87, OEA/Ser. L./V/11/71, doc. 9 rev. 1, ¶¶ 44-8 (1987). Among the fundamental human rights enshrined in the American Declaration (and therefore considered provisions of customary international law) are the right to a fair trial and the right to due process of law, including the right to an impartial and public hearing in courts previously established in accordance with pre-existing laws. American Declaration, arts. 18 and 26.

Customary international law on human rights is also codified in the Universal Declaration, *supra*. The Universal Declaration is not a treaty, but a series of statements defining the civil, political, economic, social and cultural rights of all human beings. It is the primary United Nations document establishing human rights standards and norms, and it forms the basis for many of the human rights instruments enacted since its adoption, including those referenced above. Through time, its various provisions have become so accepted by States that it now amounts to customary international law. *See Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 1995). Like the ICCPR and the ACHR, the Universal Declaration is frequently considered in judgments of United States courts. *E.g.*, *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995) (referring to the Universal Declaration definition of arbitrary detention); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 n.19 (9th Cir. 1994) (noting that there is a "clear international

prohibition against arbitrary arrest and detention", and citing the Universal Declaration as an example).

Most pertinent here, the Universal Declaration recognizes the right of every person "to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him," art. 10, and such guarantees of fairness as the presumption of innocence, *see* art. 11(1). The Universal Declaration states a clear proscription against arbitrary detention: "No one shall be subjected to arbitrary arrest, detention or exile," art. 9. And the Declaration guarantees to "[e]veryone . . . the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law," art. 8.

C. It Is Crucial For The International Legal Order That The United States Abide By Its International Legal Commitments.

The obligations and protections established in human rights treaties and customary law are fundamental components of the modern world order under the rule of law that the United States, together with its allies and other like-minded nations, strives to establish and encourage. To a far greater extent than domestic law, international law depends for its vitality and efficacy on the compliance by States with its dictates. It undermines the political and moral authority of the United States and damages the rule of law in a troubled world if the United States, contrary to its long tradition, fails to uphold the international standards that it has been so instrumental in creating and with which it has urged other nations to comply. The damage is all the greater when, as did the Court of Appeals, the United States denies that its conduct may even be scrutinized for compliance with these standards.

II. The War On Terror Is Not Conducted In A Legal "Black Hole": It Is Subject To International Legal Standards Of Human Rights And Respect For The Rule Of Law.

The decision below would insulate from meaningful judicial review Petitioners' claims that their prolonged, indefinite detention by U.S. military authorities is unlawful and unjustified. But closing the doors of the courts to the detainees' petitions for *habeas corpus* means only that the persistent questions about the consistency of the United States' conduct of the "war on terror" with the rule of law and due process values reflected in U.S. law and the international law instruments by which the United States is bound will go unanswered. They will not go away, for it is indisputable that Petitioners are entitled to the protection of international human rights and humanitarian law—whether or not the U.S. courts will vindicate those rights.

A. International Legal Standards Of Human Rights And Respect For The Rule Of Law Apply To The Conduct Of The United States Anywhere In The World.

State responsibility under international human rights treaties turns upon whether the respondent State exercises sufficient authority and control in the situation that the action can be said to have been taken under its jurisdiction. Thus, the International Court of Justice ("ICJ") has recently reaffirmed that the ICCPR "is applicable in respect of acts done by a State in the exercise of jurisdiction outside its own territory." *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 2004 I.C.J. 136, 180 (July 9). In so holding, the ICJ considered the text of the treaty in the light of its object and

purpose,[2] "the constant practice of the Human Rights Committee" established under the auspices of the United Nations to monitor compliance with the ICCPR,[3] and the fact that the *travaux préparatoires* of the ICCPR "show that in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory." 2004 I.C.J. at 179.

Similarly, the fundamental protections recognized in the American Declaration, to which the United States has in past conflicts conceded it was bound, *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), attach not due to 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, *supra*, arts. 25 and 26.

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

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[2] *See* Vienna Convention on the Law of Treaties, *supra*, art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

[3] *See López Burgos v. Uruguay*, No. 52/1979, Views of the H.R.C., U.N. Doc. CCPR/C/13/D/52/1979 at ¶ 12.3 (July 29, 1981); *Casariego v. Uruguay*, No. 56/1979, Views of the H.R.C., U.N. Doc. CCPR/C/13/D/56/1979 at ¶¶ 10.1-10.3 (July 29, 1981) (both applying the ICCPR to extraterritorial state actions).

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* at 1283, ¶¶ 37, 39, 41 & 43.

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." *Id*. at ¶ 37.

The United States unquestionably exercises authority and control at Guantanamo Bay. *See Rasul*, 542 U.S. at 480. 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., U.N. Doc. CCPR/C/13/D/52/179, at ¶ 12.3 (July 29, 1981). Accordingly, international law governs the treatment of the Guantanamo prisoners, including Petitioners, and obliges the United States to respect their fundamental human rights.

B. International Legal Standards Of Human Rights And Respect For The Rule Of Law Apply In Times Of Armed Conflict And National Emergency.

The United States has not declared war in the aftermath of September 11, although the "war on terror" has resulted at various times and places in a state of armed conflict. Moreover, neither a state of war nor armed conflict

suspends the application of international law. Indeed the norms of international humanitarian law, and especially the Geneva Conventions of 1949, apply in terms to situations of armed conflict; Common Article 3 applies "at any time and in any place whatsoever." *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. Whether or not specific instruments of international humanitarian law apply in a particular case, it has been recognized that, even in situations of armed conflict, "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 I), *adopted* June 8, 1977, 1125 U.N.T.S. 3, art. 1(2).

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. As the Inter-American Commission stated when considering the application of international human rights norms in a case arising out of the U.S. military engagement in Grenada:

> There is an integral linkage between the law of human rights and humanitarian law because they share a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity," and there may be a substantial overlap in the application of these bodies of law. Certain core guarantees apply in all circumstances, including situations of conflict . . . .

Coard at ¶ 39 (footnotes omitted). Thus the non-derogable rules of international human rights law continue to operate even in times of war and armed conflict.

The ICJ concurs, having repeatedly rejected the assertion that international human rights protections cease to apply at such times. 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 [*sic*] 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 177-8 (quoting *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 266, 240 (July 8)). 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* ACHR, *supra*, art. 27. 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 in respect of the "war on terror".

Some human rights obligations are in any event non-derogable. As the United Nations Human Rights Committee (H.R.C.) 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, including the presumption of innocence." H.R.C. General Comment No. 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶ 11 (2001). Moreover, as will be discussed in more detail

below, the right of an individual to meaningful access to the courts to challenge the legality of his detention is another such non-derogable right. Accordingly, the United States' fundamental obligations under international humanitarian and human rights law persist in a situation of war or armed conflict.

III. The Combatant Status Review Tribunals Do Not Meet International Legal Standards Of Human Rights And Respect For The Rule Of Law.

Petitioners have been detained by the United States Government at Guantanamo Bay, without charge or trial, for more than five years. Their continued detention is premised on the determination by a CSRT that they are "enemy combatants." The CSRT process fails to live up to standards of fairness imposed by international law in a number of respects, and it also contravenes international law by failing to exclude evidence procured by torture.

A. The CSRT Process Violates Petitioners' Right To An Independent And Impartial Tribunal.

The right to be tried by an independent and impartial tribunal is a cardinal component of international human rights law. It is protected by all major human rights treaties. *See*, *e.g.*, ICCPR, art. 14(1) ("In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."); ACHR, art. 8(1) ("Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or

for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.").

The common source of all these instruments is the entitlement to an independent tribunal, enshrined as one of the "equal and inalienable rights of all members of the human family" in the Universal Declaration, *supra*, preamble & art. 19 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.").

International humanitarian and human rights law complement this fundamental right with a number of specific procedural guarantees, including the right of the accused to confront the evidence offered against him, ICCPR, art. 14(3)(a) and (d); ACHR, art. 8(2)(b) and (f); the right of the accused to offer evidence on his own behalf on equal terms, ICCPR, art. 14(3)(e); ACHR, art. 8(2)(f); and the benefit of a presumption of innocence, ICCPR, art. 14(2); ACHR, art. 8(2). The CSRTs, as established and implemented by the United States with respect to Petitioners and other prisoners at Guantanamo Bay, and subject only to limited review under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2740, 10 U.S.C. § 801, do not sufficiently safeguard these and other fundamental due process rights.

By applying a "rebuttable presumption in favor of the government's evidence," Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, dated July 7, 2004 ("CSRT Order"), at ¶ (g)(12), the CSRT process patently "stacks the deck" against prisoners seeking to resist their continued detention, shifting to those prisoners the burden of proving (while in prolonged detention thousands of miles from home and from any theatre of armed conflict in which they allegedly participated) that

they are *not* enemy combatants. The CSRTs cannot, therefore, be seen as "independent and impartial" tribunals, as required by international law. This presumption also effectively reverses the ordinary presumption of innocence, to which Petitioners are entitled as a matter of human rights law.

The CSRTs infringe Petitioners' human rights in violation of international law in at least two further respects. First, by providing that the detainee's "Personal Representative" may not share classified information with the detainee, CSRT Order ¶ (c), and by excluding the detainee from CSRT proceedings whenever his presence "would compromise national security," *id.* at ¶ (g)(4), the CSRTs deny Petitioners the right to see, and therefore to confront, all of the evidence offered by the Government to support their continued detention. This is inconsistent with the United States' obligations under the ICCPR, the ACHR and other binding international legal instruments.

Second, detainees are only entitled to call witnesses on their behalf if the Tribunal determines that such witnesses are "reasonably available" or, in the case of witnesses who are members of the U.S. Armed Forces, if attending a hearing in Guantanamo Bay would not, in the view of their commanding officer, "affect combat or support operations." CSRT Order ¶ (g)(8). The Government's ability to call witnesses in support of detention is not limited in this way. As such, the CSRT process does not provide detainees with the right guaranteed by the ICCPR "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." *See* ICCPR, art. 14(3)(e).

B. The CSRT Process Further Violates International Law By Failing To Exclude Evidence Obtained Through Torture.

Standard rules on the admission of evidence applied in U.S. courts do not apply to the CSRT process. CSRT Order, ¶ (g)(9) ("The Tribunal is not bound by the rules of evidence such as would apply in a court of law."). Rather, "the Tribunal shall be free to consider *any* information it deems relevant and helpful to a resolution of the issue before it." *Id.* (emphasis added). There is, therefore, no bar to the admission of confessions and other evidence procured through questionable interrogation methods, including torture, in CSRT proceedings.

The acceptance of evidence without regard to the means by which it was procured is contrary to international practice and international law. The House of Lords, sitting as the highest court in the United Kingdom, has had the occasion to consider the use of torture evidence, in particular evidence obtained by torture of third parties, in legal proceedings in *A and others v. Sec'y of State for the Home Dep't*, [2005] UKHL 71. The House of Lords unequivocally rejected any use of torture evidence, concluding that: "the duty not to countenance the use of torture by admission of evidence so obtained in judicial proceedings must be regarded as paramount and that to allow its admission would shock the conscience, abuse or degrade the proceedings and involve the state in moral defilement." *Id.* at ¶ 150 (per Lord Carswell). Accordingly, "The English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention." *Id.* at ¶ 51 (per Lord Bingham).

In addition to contravening the Torture Convention—which at article 15 explicitly prohibits the invocation of any statement obtained by torture as evidence in any proceeding—the use of evidence obtained by torture violates the United States' obligations under the ICCPR and other treaty instruments, which it has publicly pledged to uphold. *See* Secretary Rice Statement, *supra*; Letter from William J. Haynes II, General Counsel of the U.S. Department of Defense, to the Honorable Patrick J. Leahy, dated June 25, 2003, *available at* http://www.hrw.org/press/2003/06/letter-to-leahy.pdf ("it is the policy of the United States to comply with all of its legal obligations in its treatment of detainees, and in particular with legal obligations prohibiting torture. Its obligations include conducting interrogations in a manner that is consistent with the [Torture Convention] . . . as ratified by the United States in 1994.").

The principle that evidence obtained using such practices must be inadmissible is a direct corollary of the prohibition on torture and inhuman treatment of detainees, which is widely recognized and explicitly codified in the Torture Convention. *See also* Universal Declaration, art. 5; ICCPR, arts. 7 & 10. The H.R.C. has explained that the exclusion of such evidence is essential to the struggle against improper interrogation techniques. H.R.C. General Comment No. 20, U.N. Doc. HRI/Gen/1/Rev.7, at ¶ 12. The H.R.C. reiterated this principle in *Paul v. Guyana*: "It is important for the prevention of violations under Article 7 that the law must exclude the admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment." H.R.C. Communication No. 728/1996, U.N. Doc. CCPR/C/73/D/728/1996 (Dec. 21, 2001), at ¶ 9.3. The House of Lords similarly recognized the link between excluding the fruits of torture from legal proceedings and reducing the incidence of torture in fact. *A and Others v. Sec'y of State for the Home Dep't*, [2005]

UKHL 71. The Supreme Court of the United States has also recognized that to admit improperly-acquired evidence will encourage detaining authorities to employ such tactics, undermining the integrity of the judicial system and the United States' ideals of due process. *Haynes v. Washington,* 373 U.S. 503, 515 (1963).[4]

In the case of Guantanamo prisoners, these fundamental rules of international law are far from theoretical. Press reports and eyewitness accounts from such facilities as Abu Ghraib, Guantanamo itself and elsewhere have raised serious doubts about the nature, extent and intensity of interrogation techniques employed in connection with the "war on terror." These reports underline the seriousness of the due process flaws in the CSRT process. By not expressly excluding from that process evidence obtained by torture, these procedures violate the United States' obligations under the ICCPR, the Torture Convention and other international instruments.

IV. International Law Entitles Petitioners To *Habeas* Review Or Meaningful Alternative Access To The Courts To Challenge The Legality Of Their Detention.

The Court of Appeals held that the MCA bars Petitioners' petitions for writs of *habeas corpus*. Petitioners argue that denying them access to *habeas* would contravene U.S. law.

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[4] U.S. jurisprudence goes still further in deterring improper interrogation of detainees, excluding from evidence even subsequent confessions that could be regarded as "fruit of the poisonous tree." *Wong Sun v. United States,* 371 U.S. 471 (1963).

Whatever the position as a matter of U.S. domestic (statutory and constitutional) law, a subject on which *amici* offer no views, denying Petitioners access to *habeas* review—or to a meaningful equivalent—would undoubtedly contravene the United States' international legal obligations. The human rights treaties by which the United States is bound uniformly oblige signatories to provide adequate access to the courts so that individuals deprived of their liberty may challenge the legality of their detention on any factual or legal basis—statutory, constitutional or international. The ICCPR provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful," art. 9(4). The ACHR provides identical protection. *See* ACHR, art. 7(6). And the Universal Declaration, reflecting customary international human rights law, guarantees "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law," art. 8.

So central is this right, so fundamental to securing all other rights, that as a matter of international law it may not be derogated from even in times of war or public emergency. As the H.R.C. has commented, "In order to protect [other] non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by a State party's decision to derogate from the Covenant." H.R.C. General Comment No. 29, *supra*, at ¶ 16; *accord* H.R.C., Concluding Observations of the Human Rights Committee: Israel, Aug. 18, 1998, U.N. Doc. CCPR/C/79/Add.93, ¶ 21 ("a State party may not depart from the requirement of effective judicial review of detention"); Official Records of the General Assembly, U.N. Doc. A/49/40, vol. I, annex XI,

¶ 2 ("the right to habeas corpus . . . should not be limited in situations of emergency").

The substance of the right of *habeas corpus* at international law is access to the courts for a meaningful review of the factual and legal bases on which liberty is being denied. Depriving Petitioners of access to the courts to challenge the legality of their detention and those aspects of the CSRT process to which they are subject which themselves contravene applicable international and other legal standards in a proceeding commensurate with *habeas corpus* would involve the United States in further violations of bedrock human rights and rule of law principles and obligations. Any interpretation of the MCA that would have this effect should therefore be resisted. *Cf. Murray v. The Charming Betsey*, 6 U.S. (2 Cranch) 64, 118 (1804).

CONCLUSION

In this submission, *amici* have showed a number of fundamental respects in which the CSRT process and insulating Petitioner' continued detention from *habeas* review or its equivalent departs from the fundamental rule of law and human dignity values embodied in treaties to which the United States is a party or a signatory, including the ICCPR, the ACHR and the Torture Convention. *Amici* are fully aware that the threat of terrorism is real. Governments around the world confront the dangers, and the hard choices posed by confronting those dangers, on an ongoing basis. The support for international law, human rights and the rule of law articulated in this brief comes, therefore, not from any underestimation of the terrorist threat, but rather from a keen appreciation of the extent to which those principles and values which most obviously distinguish us from those who target us with terror are endangered.

To meet the danger the world needs not only military might, but renewed and sustained commitment to the rule of law and to fundamental principles of human dignity and respect for human rights. In short, the world needs the United States to resume its role as a standard bearer for the principles of the rule of law and the protection of human rights and fundamental freedoms which are the shared heritage of a civilized world—and which are the heritage that together we seek to defend against the terrorist threat.

Respectfully submitted,

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APPENDIX

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