No. 16-1307

In the Supreme Court of the United States

ALI HAMZA AHMAD SULIMAN AL BAHLUL,
PETITIONER
v.
UNITED STATES,
RESPONDENT.

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

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

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Constitutional Rights ("CCR") is a national non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. 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. 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. Appeals from those petitions have twice reached this Court. *See Rasul v. Bush*, 542 U.S. 466 (2004); *Boumediene v. Bush*, 553 U.S. 723 (2008).

CCR currently represents a number of men detained at Guantánamo, including three who have faced military commissions charges, and has represented dozens of individuals in habeas proceedings and administrative proceedings before the Periodic Review Board. 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 before this Court involving suspected "enemy combatants" held in military custody. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Hamdan v.*

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[1] Pursuant to this Court's Rule 37.2(a), counsel of record for both parties received timely notice of *amici curiae's* intent to file this brief; letters of consent from both parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Rumsfeld, 548 U.S. 557 (2006); *see also Hamdan v. United States,* 696 F.3d 1238 (2012). 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.

SUMMARY OF ARGUMENT

The last decade and a half of military commission proceedings have produced relatively few convictions (almost none of which have withstood appeal) and dozens of fractured opinions in the lower courts. Those opinions, including the *en banc* decision in the instant case, have failed to produce clear guidance on fundamental issues. Much of this confusion arises from the government's intentional blurring of the clear distinction between the legal regimes governing international armed conflict and non-international armed conflict. Its selective application of law of war principles preordains outcomes: the detainee always loses. Because the lower courts have failed to correct the government's obfuscating approach to the bright lines established by the law of war, issues such as those presented by Petitioner will repeatedly arise in Guantánamo detainee cases unless this Court steps in and restores clarity to the legal status of detainees held during armed conflict.

Petitioner was convicted of the inchoate crime of conspiracy. The decisions below in the Court of Military Commission Review and the D.C. Circuit were premised on the determination that Petitioner is not a prisoner of war, and may be prosecuted by military commission for the ordinary crime of conspiracy, which is not otherwise prohibited by the international law of war. The government's theory of prosecution stems from the novel idea that the U.S. common law of war is separate and distinct

from the international law of war. But the very notion that Petitioner can be tried by military commission for conspiracy rests on a misapplication of the international law of war, specifically, the longstanding distinction between civilians and combatants.

Properly applied, international armed conflict recognizes only two categories of individuals: "combatants," who are entitled to a privilege of belligerency and may become prisoners of war upon capture, and "civilians," who lack combat immunity and may become internees upon capture. Combatants cannot be prosecuted for actions that do not constitute war crimes, and may be detained in military custody as prisoners of war until the end of active hostilities. Anyone who is not a combatant/prisoner of war is by definition a civilian, and may be detained in military custody only as long as that person presents an imperative security threat. Yet, unlike combatants, civilians *may* be prosecuted in domestic courts for acts of violence committed on the battlefield that do not constitute war crimes. In addition, non-international armed conflicts do not contemplate a status of combatant who may be held indefinitely in military custody. Those armed conflicts involve only civilians, who must be charged criminally under applicable domestic law or released. (Applicable domestic law might include the domestic law of the location of the criminal activities or of their impact, or the domestic law of the country of nationality, the country where detained, or the detaining power.)

As this Court has recognized, the conflict with al-Qaeda is a non-international armed conflict, *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-29 (2006), and Petitioner is properly afforded the status of civilian. Accordingly, he may not be prosecuted by military commission for actions that do not constitute war crimes and is not detainable until the end of hostilities. Instead, he must be

charged under domestic criminal law, or not at all. Even if the government applies international armed conflict rules in the context of a non-international armed conflict, which it should not, Bahlul's detention and prosecution should be governed by international armed conflict rules that apply to civilians.

The government's approach, selectively applying whatever rules it finds convenient to ensure a favorable result, has created confusion in the courts below. This Court should grant certiorari in order to clarify the proper status of detainees under the laws of war. Limiting the government's ability to obscure the law of war to its perpetual benefit, as Bahlul has requested in his petition, will help staunch the stream of ever-more confusing and fractured precedent arising from the military commissions and lower courts. Redrawing the traditional lines with clarity now, in this case, will also help prevent the loss of the tremendous quantity of resources currently being expended on military commission prosecutions that may end up being invalidated years from now because of the same fundamental flaws Bahlul raises today.

ARGUMENT

I. UNDER THE LAWS OF WAR, THERE IS A CLEAR DISTINCTION BETWEEN THE LEGAL REGIMES GOVERNING INTERNATIONAL ARMED CONFLICT AND NON-INTERNATIONAL ARMED CONFLICT.

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*, 548 U.S. at 628-32.

An "international armed conflict" is waged between two or more nation-states which are signatories to the Geneva Conventions, even if one party denies the exist-

ence of a state of war. 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"); Gabor Rona, *An Appraisal of U.S. Practice Relating to "Enemy Combatants,"* 10 Y.B. of Int'l Humanitarian L. 232, 237 (2009) [hereinafter *Appraisal of U.S. Practice*]. An international armed conflict is triggered when one state uses force against another, and it is governed by the Third and Fourth Geneva Conventions.

The Third Geneva Convention applies to "combatants," including members of a state's armed forces that are engaged in hostilities against the United States. *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, "[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. 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 prose-

cution 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).

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 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. 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");[2] Rona, *Appraisal of U.S. Practice* at 237-38; *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*, 548 U.S. at 628-32.

Unlike international armed conflicts, non-international armed conflicts simply do not contemplate a status of "combatant." Non-international armed conflicts involve only "civilians." *See* U.N. Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum*, ¶ 58, U.N. Doc. A/HRC/14/24/Add.6 (28 May, 2010) (*prepared by* Philip Alston) ("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:

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[2] Additional Protocol II also largely reflects binding customary international law. Rona, *Appraisal of U.S. Practice* at 236-37 n.16; David W. Glazier, *Still a Bad Idea: Military Commissions Under the Obama Administration* 66 (Loyola Law Sch., L.A., Legal Studies Paper No. 2010-32, Dec. 13, 2010), *available at* SSRN: http://ssrn.com/abstract=1658590 [hereinafter *Still a Bad Idea*].

> The traditional view is that ... there are no "combatants," lawful or otherwise, in common Article 3 conflicts. There may be combat in the 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; David W. Glazier, *Playing by the Rules: Combating al Qaeda Within the Law of War*, 51 William & Mary L. Rev. 957, 991 (2009) [hereinafter *Playing by the Rules*] ("[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. 1, 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* https://www.icrc.org/eng/resources/documents/faq/terrorism-ihl-210705.htm [hereinafter *Relevance of IHL*].

The government has long acknowledged that its detention authority under the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224

(2001), is informed and limited by these law-of-war principles. *See* Resp'ts' Mem. Regarding the Gov't's Detention Authority Relative to Detainees Held at Guantánamo Bay at 1, *In Re Guantánamo Bay Detainee Litigation*, No. 08-mc-442 (TFH) (D.D.C. Mar. 13, 2009) (dkt. no. 1689) [hereinafter "Resp'ts' Mem."] ("Principles derived from law-of-war rules governing international armed conflicts, therefore, must inform the interpretation of the detention authority Congress has authorized for the current armed conflict.") (citing Geneva Conventions). As this Court has recognized, the conflict with al-Qaeda is not an international armed conflict. *Hamdan*, 548 U.S. at 628-29. It is a non-international armed conflict subject to Common Article 3.[3] Accordingly, as set forth above, to the extent that Bahlul is detained and prosecuted in connection with that conflict, he must be afforded the status of "civilian."

Bahlul's principal alleged conduct involves editing an al-Qaeda propaganda film in the context of a non-international armed conflict, which the government concedes is not a violation of the international law of war. *Al Bahlul v. United States*, 792 F.3d 1, 10 (D.C. Cir. 2015) (citing U.S. Appellee's Br. to the *En Banc* Court at 34 (July 10, 2013)). Absent such a violation, Bahlul is properly subject to criminal prosecution for his actions under domestic law; otherwise, he must be released. His alleged support for al-Qaeda does not transform him from a civilian to a combatant subject to trial by military

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[3] The government concedes that the ongoing conflict is governed by Common Article 3. *See* Exec. Order 13,492, § 6, 74 Fed. Reg. 4897, 4899 (Jan. 22, 2009). Common Article 3 appears in each of the four Geneva Conventions and is the only provision in the four conventions that applies to non-international armed conflicts. *See* Solis at 97.

commission for conduct that does not violate the law of war.

Notably, however, the government does not treat Bahlul consistently as either a combatant or a civilian. For example, although Bahlul would not be subject to trial by military commission for his alleged conduct if he had prisoner of war status in international armed conflict, the government claims that if he were acquitted by a military commission or the charges against him were dismissed, it would retain the authority to hold him indefinitely under the laws of war until the end of active hostilities precisely as if he were a prisoner of war in international armed conflict. The government cannot have it both ways: if it applies international armed conflict rules by analogy in the context of non-international armed conflict, which it should not, it must treat Bahlul *either* as a prisoner of war *or* as a civilian, and it must do so consistently. Nonetheless, as explained above, Bahlul is a civilian whether held pursuant to international armed conflict or non-international armed conflict, and is therefore neither subject to trial by military commission for his alleged offenses nor detainable until the end of hostilities in any event.

II. The Government Has Intentionally Blurred the Line Between International and Non-International Armed Conflict, Always to the Detriment of the Detainees.

The government resorts to cherry-picking international armed conflict rules and applying them by analogy to non-international armed conflict. Its intentional blurring of the lines distinguishing international and non-international armed conflict always disadvantages the detainee. *See, e.g., United States v. Khadr*, 717 F. Supp. 2d. 1215 (C.M.C.R. 2007) (claiming authority under the laws of international armed conflict to detain child sol-

dier until the end of hostilities, but depriving him of prisoner of war status and subjecting him to trial by military commission for lawful acts of belligerency against legitimate military targets in a war zone); *United States v. Hamidullin*, 144 F. Supp. 3d 365 (E.D. Va. 2015) (holding detainee indefinitely in military custody at Bagram, similar to a prisoner of war, but, after losing the ability to hold him in military custody when Bagram was returned to the Afghan government, changing his status as a matter of convenience to prosecute him in domestic court, as a civilian, for criminal charges arising from privileged belligerent acts committed on the battlefield). Various panels of the D.C. Circuit have also endorsed this approach, including in the detainee habeas cases, but it has not been addressed *en banc* or by this Court. *See, e.g., Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010) ("any person subject to a military commission trial is also subject to detention, and that category of persons includes those who are part of forces associated with Al Qaeda or the Taliban or those who purposefully and materially support such forces in hostilities against U.S. Coalition partners."); *Hussain v. Obama*, 134 S. Ct. 1621, 1622 (2014) (statement of Justice Breyer respecting denial of certiorari) ("The Court has not directly addressed whether the AUMF authorizes, and the Constitution permits, detention on the basis that an individual was part of al Qaeda, or part of the Taliban, but was not 'engaged in an armed conflict against the United States' in Afghanistan prior to his capture.").

For purposes of prosecution by military commission the government applies rules governing non-international armed conflict, but does so selectively and only where advantageous to its litigation positions, depriving detainees of prisoner of war status but also refusing to treat them as civilians. Prisoner of war status is advantageous because captured individuals afforded

such status are recognized as "combatants" who may lawfully engage in hostilities in connection with an international armed conflict, and are not subject to prosecution for engaging in such belligerency unless they commit war crimes. (For example, combatants cannot be prosecuted for murder under either state's law for shooting at opposing troops in accordance with the rules of lawful combat.) By contrast, there are no combatants in non-international conflicts; there are only civilians and government forces. Civilians may be subject to war crimes prosecution for engaging in conduct that 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 Commission Charges Against Omar Khadr* 11 (Loyola Law Sch., L.A., Legal Studies Paper No. 2010-37, Aug. 31 2010), *available at* SSRN: http://ssrn.com/abstract=1669946 [hereinafter *A Court Without Jurisdiction*]. But civilians may not properly be prosecuted *by military commission* for mere engagement in hostilities without combat immunity, which 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."). However, they can be criminally prosecuted under domestic law for acts of violence committed on the battlefield. Glazier, *A Court Without Jurisdiction* at 10; Glazier, *Still a Bad* Idea at 69-70; Int'l Comm. of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 83-84 (2009) ("because civilians…are not entitled to combatant privilege, they do not enjoy immunity from domestic prosecution for lawful acts of war…"). Civilians who directly par-

ticipate in hostilities are "mere criminals under domestic law" who may be prosecuted for engaging in belligerency under the laws of their home country, 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. "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.

The confusion and seeming indecisiveness generated by the government's approach arises from the misapplication of this Court's decision in *Hamdi*. The government, citing *Hamdi*, claims authority to hold Petitioner, similar to all other Guantánamo detainees, until the end of hostilities, which is a concept that applies only to prisoners of war in international armed conflict. *See generally* Resp'ts' Mem. at 7 (the government's detention authority pursuant to the AUMF "is not limited to persons captured on the battlefields in Afghanistan…individuals who provide substantial support to al-Qaida forces in other parts of the world may properly be deemed part of al-Qaida itself"). The government appears to contend that the Court's citation to the Third Geneva Convention—which again properly applies only to prisoners of war held in international armed conflict—provides general authorization for it to selectively apply international armed conflict rules in the context of non-international armed conflict in the manner described above. *See Hamdi,* 542 U.S. at 520-21 (citing Article 118 and stating "detention may last no longer than active hostilities.").

But the government places far too much reliance on the plurality's opinion in *Hamdi*. Indeed, the govern-

ment overlooks the the "narrow circumstances" addressed in *Hamdi*, 542 U.S. at 510, where the detainee was captured fighting U.S. forces on a battlefield in what was then an international armed conflict within Afghanistan. *See also id.* at 449 (Souter, J., concurring) (Hamdi would "seem to qualify for treatment as a prisoner of war under the Third Geneva Convention.... By holding him incommunicado, however, the Government obviously has not been treating him as a prisoner of war."). The government also overlooks that civilians captured pursuant to an international armed conflict may only be subject to detention or internment if "absolutely necessary." Fourth Geneva Convention, art. 42. In addition, the government ignores the existence of binding customary international humanitarian law rules limiting detention in both international and non-international armed conflict to valid needs. *See*, *e.g.*, Jean-Marie Henckaerts & Louise Doswald-Beck, 1 *Customary International Humanitarian Law*, Rule 99, at 344-45 (Int'l Comm. of the Red Cross, Cambridge Univ. Press reprtg. 2009) (detention not authorized in international armed conflict where it no longer serves an imperative security purpose (in the case of civilians) or where a detainee is "no longer likely to take part in hostilities against the Detaining Power" (in the case of combatants)); *id.* at 348 (Rule 99 specifies "the need for a valid reason for the deprivation of liberty concerns both the initial reason for such deprivation and the continuation of such deprivation in non-international armed conflict"); *id.* at 451 (Rule 128(C) specifies that "Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist."). *See also* Additional Protocol I, art. 75 (3) ("Any person arrested, detained or interned for actions related to the armed conflict ... shall be released with the minimum delay possible and in any event as soon as the cir-

cumstances justifying the arrest, detention or internment have ceased to exist.").[4]

The unifying theme of the government's selective approach is that the detainee always loses. The government picks and chooses which rules or principles of international or non-international armed conflict that it wishes to apply to Guantánamo detainees like Petitioner in order to suit its needs, but it does so selectively and always to the detriment of those detainees. In order to justify trial by military commission, the government denies Bahlul combat immunity while also declining to prosecute him as a civilian under domestic criminal laws. Were the conspiracy charge against Bahlul dropped, the government would borrow from international armed conflict rules applicable to prisoners of war and claim detention authority until the end of hostilities. This selective application of non-international armed conflict rules for prosecution purposes and international armed conflict rules for detention purposes deprives Bahlul, and indeed, all Guantánamo detainees, of any status recognized by the laws of war.

There is no internationally recognized status other than combatant and civilian. *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

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[4] The government has conceded that Article 75(3) is legally binding on the United States and other nations as a matter of customary international law. *See* Dep't of Defense, Law of War Manual § 8.1.4.2, at 512 & n.16 (June 2015)(last updated Dec. 2016), *available at* http://bit.ly/2nVkLAj; *see also* Law of Armed Conflict Documentary Supplement 234 (5th ed.), *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/LOAC-Documentary-Supplement-2015.pdf.

categories of individuals on the battlefield: combatants and civilians."); *see also* HCJ 769/02 *Pub. Comm. against Torture in Israel v. Israel* [2006] ¶ 28 (concluding there is no third category of unlawful combatants); ICRC, *Relevance of IHL*. Petitioner must be afforded the status of *either* combatant *or* civilian, and this status must be consistently maintained for the entirety of his time in U.S. custody. The United States would expect nothing less than fair, consistent treatment under the law of war for its citizens who might fall into enemy hands.

CONCLUSION

The Court should grant certiorari in order to clarify the status of Guantánamo detainees under the laws of war. The fundamental questions presented by Petitioner—whether Article III reserves trial of domestic crimes such as conspiracy to the judiciary, whether the Military Commissions Act can retroactively criminalize crimes such as conspiracy that are not recognized as international war crimes, and whether noncitizens accused of such offenses may be relegated to a segregated system of justice under the commissions—all relate to whether persons who should properly be tried as civilians may be shunted out of the ordinary criminal courts and into a parallel military system lacking in fixed standards or boundaries. The gradual, progressive blurring of clear lines between these parallel systems has tempted successive administrations to invest ever more resources into pending military commission prosecutions that may collapse, years from now, when these same issues reach this Court. Were this Court to grant certiorari now and resolve any of these questions in Petitioner's favor, many such prosecutions would instead move forward in the federal courts. The government might well be the prime beneficiary in the long run.

Respectfully submitted,

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