RECORD OF TRIAL

COVER SHEET

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES

V.

DAVID M. HICKS

ALSO KNOWN AS:

ABU MUSLIM AL AUSTRAILI
MUHAMMED DAWOOD

NO. 040001

VOLUME ___ OF ___ VOLUMES

4TH VOLUME OF REVIEW EXHIBITS (RE): REs 35-77

NOVEMBER 1-3, 2004 SESSIONS

(REDACTED VERSION)

United States v. David M. Hicks

INDEX OF VOLUMES
[A detailed index for each volume is included within the particular volume concerned]

The volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Appointing Authority will certify the records concerning this case. The volumes of the record of trial will receive their final numbering just prior to this certification.

VOLUME NUMBER	SUBSTANCE OF CONTENTS
I*	Military Commission Primary References (President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda)—includes rescinded publications
II*	Supreme Court Decisions: *Rasul v. Bush*, 542 U.S. 466 (2004); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); *Ex Parte Quirin*, 317 U.S. 1 (1942); *Ex Parte Milligan*, 71 U.S. 2 (1866)
III*	DoD Decisions on Commissions including Appointing Authority orders and decisions, as well as DoD administrative documentation
IV*	Federal Litigation at U.S. Supreme Court and D.C. Circuit, involving *Hamdan v. Rumsfeld*
V*	Federal Litigation at U.S. District Courts
VI*	Transcript (25 August and 1-3 November 2004 sessions)
VII*	Review Exhibits 1-16 (25 August 2004 session)
VIII*	Review Exhibits 13**-20 (1-3 November 2004 session)
IX*	Review Exhibits 21-34 (1-3 November 2004 session)
X*	Review Exhibits 35 to 77 (1-3 November 2004 Session)

* Interim volume numbers. Final numbers to be added when trial is completed.
** Review Exhibits 13 to 16 were issued at both the Aug. and Nov. 2004 sessions.

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit **PAGE No.**

1ST VOLUME OF REVIEW EXHIBITS

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

2ND VOLUME OF EXHIBITS

REVIEW EXHIBITS FROM NOVEMBER 2004 SESSION

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit **PAGE No.**

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UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

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UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

Description of Exhibit **PAGE No.**

4TH VOLUME OF REVIEW EXHIBITS

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

UNITED STATES OF AMERICA	)	
	)	**DEFENSE MOTION - THE ENTIRE COMMISSION TO GRANT PRODUCTION OF WITNESS DENIED IN D 23**
v.	)	
	)	
DAVID HICKS	)	**(Cherif Bassiouni)**
	)	29 October 2004

The Defense previously requested that name of witness be produced. The request was denied by the Presiding Officer under the provisions of Military Commission Order 1, section 5H.

The Defense requests the Commission direct the production of the witness, and that the Commission consider the following previously made filings, and the attachments thereto, per the Filings Inventory D23, in making its determination.

a. Motion by the defense requesting Mr. Bassiouni.
b. Decision of the Presiding Officer denying the witness.
c. The government response to D23, if any.

By: _____
M.D. MORI
Major, U.S. Marine Corps

Review Exhibit 35

Page 1 **Of** 1

NOTE: This request was reformatted by the Assistant solely to append all attachments and the denial of the request by the Prosecution into one PDF file. [redacted] 19 Oct 04

UNITED STATES OF AMERICA	)	
	)	**DEFENSE REQUEST FOR WITNESS**
v.	)	
	)	**(Professor Cherif Bassiouni)**
DAVID M. HICKS	)	3 October 2004

The Defense in the case of the *United States v. David M. Hicks* requests the following witness for the 01 November 2004 motion hearing at Guantanamo Bay and in support of this request the defense states:

1. **Witness information**:

Professor Cherif Bassiouni
Professor of Law
DePaul University, School of Law
Office Phone: 312.362.8332
cbassiou@depaul.edu

2. **Need for translator**: None

2. **Synopsis of testimony**: It is anticipated the Mr. Bassiouni will testify as an expert in international criminal law, including but not limited to, the following:

a. He will explain that the conspiracy charge listed in MCI 2 is not valid under international criminal law.

b. He will explain the common law system and the civil law system, and the differences and similarities of same, used in various countries around the world. He will explain how the overwhelming majority of countries have rejected the use of conspiracy as a criminal offense.

c. He will explain the theories of inchoate liability for offenses employed by a majority of countries, i.e., attempt, aiding and abetting, or complicity.

d. He will explain the use of "joint criminal enterprise" or "common criminal purpose" doctrines used to form the basis for liability for individuals when a crime is committed by more than one person. He will explain that, except for the crime of conspiracy to commit genocide, a key element needed to prosecute an individual under the above referenced theories, is that the crime must have been committed or attempted.

3. **Source of knowledge**: I have spoken to him previously.

4. **Use of testimony**: This witness will testify at the motion hearing scheduled to begin 1 November 2004.

5. **Reasonable availability of witness**: Mr. Bassiouni says he is available and willing to come to GTMO for the hearing

6. **Alternative to live testimony**: Stipulation of Fact

NOTE: This request was reformatted by the Assistant solely to append all attachments and the denial of the request by the Prosecution into one PDF file. [redacted]19 Oct 04

7. **Is the witnesses cumulative with other witnesses**: No.

8. **Attachments**: The CV for Mr. Bassiouni.

By: _____
M.D. MORI
Major, U.S. Marine Corps

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

October 14, 2004

MEMORANDUM FOR DETAILED DEFENSE COUNSEL ICO DAVID MATTHEW HICKS

SUBJECT: Witness Request for Cherif Bassiouni – U.S. v. Hicks

1. On October 8, 2004 the Defense Counsel in U.S. v. Hicks requested the above named witness be produced for live testimony at Guantanamo Bay, Cuba. The Defense request for Professor Bassiouni presents a generalized description of the subject matter the Defense wishes to explore with Professor Bassiouni: the differences between the common law and civil law systems, "theories of inchoate liability for offenses employed by a majority of countries," etc. There is no explanation that details his testimony and how it relates to the Accused. (Paragraph 3).

2. Presiding Officer's Memorandum (POM) Number 10, dated October 4, 2004, regarding witness requests provides:

> c. Paragraph 3: {Synopsis of witness' testimony}. What the requester believes the witness will say. *Note*: Unnecessary litigation often occurs because the synopsis is insufficiently detailed or is cryptic. A well-written synopsis is prepared as though the witness were speaking (first person), and demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered.

3. The Defense Counsel's request indicates the general subject matter of the testimony but does not provide the information required by POM Number 10. In addition, there is no explanation as to why Professor Bassiouni's testimony is not cumulative with Professor Cassese's. As written, your request is denied. If the defense produces information in accordance with POM Number 10, the Prosecution will reconsider the request at that time.

4. The Prosecution further objects to the testimony of Prof. Bassiouni for the reasons set out in the document entitled: "Prosecution Response to Defense Witness Requests of 8 October 2004 and Motion to Exclude Attorney and Legal Commentator Opinion Testimony," served upon Defense on October 13, 2004 and attached hereto.

[redacted]
Lieutenant Colonel, U.S. Marine Corps
Prosecutor
Office of Military Commissions

Attachment:
As stated

19 April 2004

Curriculum Vitae

M. CHERIF BASSIOUNI

$ Distinguished Research Professor of Law, DePaul University (since 1964), and President, International Human Rights Law Institute (since 1990); President, International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy (since 1988), Dean (1976-88); President, International Association of Penal Law (since 1989), Secretary General (1974-89); Non-resident Professor of Criminal Law, The University of Cairo (since 1996); Guest Scholar, Woodrow Wilson International Center for Scholars, Washington, D.C. (1972); Visiting Professor of Law, N.Y.U. (1971); Fulbright-Hays Professor of International Criminal Law, The University of Freiburg, Germany (1970). A frequent lecturer at universities in the U.S. and abroad.

$ Author of 24 and editor of 44 books on International Criminal Law, Comparative Criminal Law, Human Rights, and U.S. Criminal Law; and author of 217 articles published in law journals and books in the U.S. and other countries. These publications are in Arabic, English, French, Italian and Spanish. Some of them have been cited by the International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the United States Supreme Court, as well as by several United States Appellate and Federal District Courts, and also by several State Supreme Courts.

$ United Nations positions: Commission on Human Rights' Independent Expert on Human Rights in Afghanistan (2004-present); Chairman of the Drafting Committee of the 1998 United Nations Diplomatic Conference on the Establishment of an International Criminal Court; Vice-Chairman of the General Assembly's Preparatory Committee on the Establishment of an International Criminal Court (1996-98); Vice-Chairman of the General Assembly's Ad Hoc Committee on the Establishment of an International Criminal Court (1995); Chairman of the United Nations Commission of Experts Established Pursuant to Security Council 780 (1992) to Investigate Violations of International Humanitarian Law in the Former Yugoslavia (1993), and the Commission's Special Rapporteur on Gathering and Analysis of the Facts (1992-93); Commission on Human Rights' Independent Expert on The Rights to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms (1998-2000); Consultant to the Sixth and Seventh U.N. Congress on Crime Prevention (1980-85); Honorary Vice-President to the Fifth Congress on Crime Prevention (1975); Consultant to the Committee on Southern African, Commission of Human Right (1980-81), prepared a Draft Statute for the Creation of an International Criminal Court to prosecute *apartheid*; Co-chairman of the Committee of Experts which prepared the U.N. Convention on the Prevention and Suppression of Torture (1978).

$ Consultant to the U.S. Departments of State and Justice on projects relating to international traffic in drugs (1973) and international control of terrorism (1975 and 1978-79), and as a consultant to the Department of State on the defense of the U.S. hostages in Iran (1979-80).

$ Among the many distinctions and awards he received include: Nomination to the Nobel Peace Prize (1999); Special Award of the Council of Europe (1990); Defender of Democracy Award, Parliamentarians for Global Action (1998); and The Adlai Stevenson Award of the United Nations Association (1993).

$ Honorary degrees: Doctor of Law *honoris causa* (LL.D.), National University of Ireland, Galway (2001); Doctor of Law *honoris causa*, University of Niagara (1997); Doctor of Law *honoris causa* (Docteur d'Etat en Droit), University of Pau, France (1986); Doctor of Law *honoris causa* (Dottore in Giurisprudenza), University of Torino, Italy (1981).

$ Medals: Order of Military Valor, Egypt (1956); Order of Merit, Italy (Rank of Commendatore) (1976); Order of Merit of the Republic, Italy (Rank of Grand Ufficiale) (1977); Order of Sciences (First Class), Egypt (1984); Order of Merit of the Austrian Republic (Rank, Grand Cross) (1990); Order of Lincoln, USA (2001); Legion d'Honneur (Officier), France (2003); Cross of the Order of Merit, Federal Republic of Germany (Commander) (2003).

$ Earned law degrees: LL.B. University of Cairo; J.D. Indiana University; LL.M. John Marshall Law School; S.J.D. George Washington University. Also studied law at Dijon University, France, and at the University of Geneva, Switzerland.

$ Admitted to the practice of law in Illinois, Washington, D.C. and before the United States Supreme Court. Handled many cases of international dimensions; in particular, represented the government of Kuwait in its dispute concerning the nationalization of the Kuwait Oil Company. Also consulted with governments on important and major cases. Specialized in extradition and international cooperation cases, and handled over 100 such cases in the past 30 years. Coordinated major litigation involving multiple parties concerning international matters. Admitted to the practice of law in Egypt (Member, Egyptian Lawyers' Association).

UNITED STATES OF AMERICA	)	
	)	**DEFENSE MOTION - THE ENTIRE COMMISSION TO GRANT PRODUCTION OF WITNESS DENIED IN D 30**
v.	)	
	)	**(Michael Schmitt)**
DAVID HICKS	)	
	)	29 October 2004

The Defense previously requested that name of witness be produced. The request was denied by the Presiding Officer under the provisions of Military Commission Order 1, section 5H.

The Defense requests the Commission direct the production of the witness, and that the Commission consider the following previously made filings, and the attachments thereto, per the Filings Inventory D30, in making its determination.

a. Motion by the defense requesting Mr. Schmitt.
b. Decision of the Presiding Officer denying the witness.
c. The government response to D30, if any.

By: _____
M.D. MORI
Major, U.S. Marine Corps

Review Exhibit 36
Page 1 Of 1

UNITED STATES OF AMERICA	)	
	)	**DEFENSE MOTION - THE ENTIRE COMMISSION TO GRANT PRODUCTION OF WITNESS DENIED IN D 25**
v.	)	
	)	
DAVID HICKS	)	**(Antonio Cassese)**
	)	29 October 2004

The Defense previously requested that name of witness be produced. The request was denied by the Presiding Officer under the provisions of Military Commission Order 1, section 5H.

The Defense requests the Commission direct the production of the witness, and that the Commission consider the following previously made filings, and the attachments thereto, per the Filings Inventory D25, in making its determination.

a. Motion by the defense requesting Mr. Cassese.
b. Decision of the Presiding Officer denying the witness.
c. The government response to D25, if any.

By: _____
M.D. MORI
Major, U.S. Marine Corps

Review Exhibit 37

Page 1 **Of** 1

NOTE: The Detailed Defense Counsel advises this witness request is a substitute for the one filed 8 Oct 04. APO. (D25)

UNITED STATES OF AMERICA	)	**DEFENSE REQUEST FOR WITNESS**
v.	)	**(Professor Antonio Cassese)**
DAVID M. HICKS	)	8 October 2004 **(Updated 19 October 2004) (Supplemented 26 October 2004)**

The Defense in the case of the *United States v. David M. Hicks* requests the following witness for the 01 November 2004 motion hearing at Guantanamo Bay and in support of this request the defense states:

1. **Witness information**:
   Professor Antonio Cassese
   Professor of International Law, Florence University
   Office Phone: +39 (055) – 682-1060
   cassesea@tin.it

2. **Need for translator**: None

3. **Synopsis of testimony**: (Supplement) It is anticipated the Professor Cassese will testify as an expert in international law, including but not limited to, the following:

Professor Cassese will testify that the conspiracy charge the government has leveled against Mr. Hicks does not state an offense under the law of armed conflict or any other international law. He will testify that conspiracy is only a valid offense in international law in the context of the crime of genocide.

Professor Cassese will further testify that the government's charge or theory of criminal liability based in alleged common criminal purpose between Mr. Hicks and al Qaida is only valid if Mr. Hicks participated in the actual offenses that were the subject of the criminal purpose. Professor Cassese will further testify that the charge of conspiracy contained in MCI No. 2, improperly attempts to merge the concepts of conspiracy and common criminal purpose, and that such a merger is not accepted in international criminal law.

Professor Cassese will further testify regarding misuse by the government's citation of his opinion in the *Tadic* case regarding the definition of an armed conflict. He will explain that the cited section encompassed both the definition of an international armed conflict and internal armed conflict. Additionally, he will opine U.S. military operations around the world against al Qaida are not an international armed conflict under international law which will contradict the prosecution's position taken in several of its' motions.

The above is merely a synopsis of Professor Cassese's expected testimony. He may, of course, testify regarding other relevant issues during the course of direct examination.

4. **Source of knowledge**: I have spoken to him previously.

5. **Use of testimony**: This witness will testify on for the motion hearing scheduled to begin 1 November 2004.

6. **Reasonable availability of witness**: (Update portion) Since my initial request to the prosecution, Mr. Cassese has been named as Chairman for the International Commission of Enquiry into Genocide in Darfur. As this appointment will require him to be preparing at the UN High Commissioner's office, Geneva, he will only be able to testify via VTC or telephone on 1 Nov.

7. **Alternative to live testimony**: (Supplement) The defense believes that a stipulation of expected testimony is not a viable option for this witness. Much of the expected testimony is intended to educate the commission on relevant areas of law, some of which will include opinion. Further, a stipulation of expected testimony would take away the commission's opportunity to question this witness regarding complex issues of the LOAC and its implications for Mr. Hicks case. Moreover, some of the facts and opinions the witness will testify about are in direct contravention of opinions the prosecution has cited in its responses to defense motions. Alternatives to testimony such as written opinions, briefs, telephonic testimony, or affidavits will not be sufficient to adequately convey to the commission the complex concepts of LOAC and its application to Mr. Hicks' continued detention, trial by military commission for certain offenses, the implications of the existence of an armed conflict with al Qaida and/or the Taliban regime and/or its remnants. Moreover, using such alternatives to testimony would deprive the commission of the important opportunity to question Professor Cassese regarding the topics on which he would testify, and others topics in to which the commission desired to inquire.

8. **Is the witness cumulative with other witnesses**: No.

9. **Attachments**: I am waiting on his CV as he is currently away from his home on business. I will forward his full CV as soon as I receive it. (Updated portion) Professor Cassese's decisions from his time on the ICTY are cited as legal authority in the prosecution's responses to defense motions.

Below is a brief review of Mr. Cassese's career.

Since 1981, Professor Cassese has taught International Law at the University of Florence, however his professional academic career dates back to 1972. A visiting professor at numerous universities including the Universities of Cambridge and Oxford, Professor Cassese has dedicated substantial energy to the development of the United Nations International Criminal Tribunals for Rwanda and the Former Yugoslavia.

Between 1993 and 2000, Professor Cassese fulfilled a judicial appointment with the International Criminal Tribunal for the Former Yugoslavia, and was the tribunal's President in 1993 and 1995 and acted as an Appellate Justice from 1997to 2000.

Between 1984 and 1988, Professor Cassese was a member of the Italian delegation to the Council of Europe's Steering Committee for Human Rights, acting as the Committee's Chairman in 1987. During the late 1980, he was also a member, and subsequently President of the Council of Europe's Committee for the Prevention of Torture.

Professor Cassese was also a member of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1977, and Rapporteur for the "Study on the Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile from 1977 to 1988.

Recognizing his life-long dedication to international and human rights law, Professor Cassese was awarded the Man for Peace Award in 1995, the Robert G. Storey Award for Leadership in 1997, and numerous honorary doctorates. Found at www.icj.org/article.php3?id_article=17&id_rubrique=13

By: _____
M.D. MORI
Major, U.S. Marine Corps

Professor Antonio Cassese

Born Italy, 1937

Education

Academic Activities

PHD (Law), *honoris causa*, University of Geneva (2000)
PHD (Law), *honoris causa*, University of Paris X (1999)
PHD (Law), *honoris causa*, Erasmus University of Rotterdam (1998)
Member of the Institut de droit Internationale

Lecturing

Paris (Collège de France, Paris-I-Sorbonne, Paris II, Paris XIII)
Cambridge (Sir Hersch Lauterpacht Lectures)
Oxford (Sir Isahia Berlin Lectures)
Gröningen (B.V.A. Röling Lectures)
Brussels and Louvain (Henri Rolin Lectures)
New York (Columbia University)
Boston (Harvard Law School)
London (London School of Economics, Chorley Lecture)

Research and Prizes

Distinguished Global Fellow, New York University School of Law (2004)

Winner of the 2002 International Prize granted by the "Académie Universelle des Cultures" presided over by the Nobel Peace Prize Elie Wiesel "for exceptional contribution to the protection of human rights in Europe and the World"

Holder of the International Research Chair "Blaise Pascal" (University of Paris-Sorbonne), 2001-02

Robert G. Storey Award for Leadership, South-Western Legal Foundation, Dallas, Texas (1997)

Certificate of Merit, American Society of International Law (1996) for the book "Self-determination of Peoples - A Legal Reappraisal"

Co-founder and Co-editor, European Journal of International Law (Oxford University Press)
Founder and Editor-in-Chief, Journal of International Criminal Justice (Oxford University Press)

Professional Experience

Chairman, UN International Commission of Inquiry into Genocide in Darfur (Sudan) (appointed by the UN Secretary Kofi Annan on 7 October 2004)

Director (Ethics Project), a three-year project financed by the European Commission and managed by the European University Institute, for high-level training of national judges and prosecutors in international criminal law, with particular reference to the International Criminal Court (2003-06)

Judge of the UN International Criminal Tribunal for the former Yugoslavia (1993-2000)

President of the UN International Criminal Tribunal for the former Yugoslavia (1993-1997)

Member and President, Council of Europe Committee against Torture (1989-93)

Member and Chairman, Council of Europe Steering Committee on Human Rights (1984-88)

Member of the Italian Delegation to the Geneva Diplomatic Conference on International Humanitarian Law (1974-77)

Member of the Italian Delegation to the UN General Assembly (1974, 1975, 1978)

Member of the Italian Delegation to the UN Commission on Human Rights (1972-75)

Professor of International Law, University of Florence (1975-present)

Visiting Fellow, All Souls College, Oxford University (1979-80)

Professor of Law, European University Institute (1987-93)

Professor of International Law, University of Pisa (1972-74)

Private Practice

Consultant, European Union Parliament (2003)
Consultant, Council of Europe (2001-02)
Counsel, Chad, Libyan-Chad dispute on the Aouzou Strip, brought before the International Court of Justice (1989-93)
Advisor and Counsel, Iran, US-Iran International Claims Tribunal (1986-93)
Consultant, Tunisia Government, Libyan-Tunisian dispute on the Continental Shelf, brought before the International Court of Justice (1979-81)

Principal Publications

Violence and Law in the Modern Age (Cambridge, Polity Press, 1986), trans. into French and Japanese

International Law in a Divided World (Oxford, Oxford University Press, 1986), trans. French and Italian

Terrorism, Politics and Law (Cambridge, Polity Press, 1989)

Human Rights in a Changing World (Cambridge, Polity Press, 1990), trans. Spanish and Indonesian

The Tokyo Trial and Beyond (with B.V.A. Röling) (Cambridge, Polity Press, 1993), trans. Japanese

Self-determination of Peoples - A Legal Reappraisal (Cambridge, Cambridge University Press, 1995)

Inhuman States - Imprisonment, Detention and Torture in Europe Today (Cambridge, Polity Press, 1996)

International Law (Oxford University Press, 2001); second edition currently being printed

Crimes internationaux et jurisdictions internationals (editor with M. Delmas-Marty) (Paris, Presses Universitaires de France, 2002)

Juridictions nationals et crimes internationaux (editor with M. Delmas-Marty) (Paris, Presses Universitaires de France, 2002)

The Rome Statute of the International Criminal Court: A Commentary, 3 vols. (editor in chief) (Oxford, Oxford University Press, 2002)

International Criminal Law (Oxford University Press, 2003); currently being translated into Persian, Serbo-Croatian and Italian

From: [redacted]
Sent: Thursday, October 28, 2004 1:55 PM
To: 'Mori, Michael, MAJ, DoD OGC'; [redacted] Will Col DoD OGC Gunn (Gunn, Will, Col, DoD OGC); [redacted] Lippert, Jeffery MAJ Bamberg Law Center; [redacted] Brownback, Peter E. COL (L)
Subject: United States v. Hicks, Decision of the Presiding Officer, D25

United States v. Hicks

Decision of the Presiding Officer, D25

The Presiding Officer has denied the request for production of Antonio Cassese as a witness. The Presiding Officer did not find that he is necessary. See Military Commission Order 1, section 5H. Accordingly, this request has been moved from the active to the inactive section of the filings inventory in accordance with POM 12. See also paragraph 8, POM 12.

By Direction of the Presiding Officer

[redacted]
Assistant to the Presiding Officers
[redacted]

D25 (Hicks) Decision of PO

NOTE: The Detailed Defense Counsel advises this witness request is a substitute for the one filed 8 Oct 04. APO. (D24)

UNITED STATES OF AMERICA	)	**DEFENSE REQUEST FOR WITNESS**
v.	)	**(Professor Jordan Paust)**
DAVID M. HICKS	)	8 October 2004 (Supplement 26 Oct 04)

The Defense in the case of the *United States v. David M. Hicks* requests the following witness for the 01 November 2004 motion hearing at Guantanamo Bay and in support of this request the defense states:

1. **Witness information**:

Professor Jordan Paust
Professor of Law, University of Houston Law Center

Office Phone: 713-743-2177
JPaust@Central.UH.edu

2. **Need for translator**: None

2. **Synopsis of testimony**: (Supplement) It is anticipated the Mr. Paust will testify as an expert in international law, including but not limited to, the following: Mr. Paust will testify that the jurisdiction of this military commission does not extend to Mr. Hicks because the United States is not involved in an armed conflict with al Qaida. He will further testify that this commission has been improperly appointed by a civilian who is not a military commander. He will further testify that the commission has no jurisdiction to try Mr. Hicks in Guantanamo Bay as it is too distant from the theater of war. He will further compare the jurisdiction of this commission with past commissions and explain that this military commission has no jurisdiction to try Mr. Hicks for the non-law of war "offenses" listed in MCI 2 because they are not set forth by statute, and thus are not "triable by military commission

3. **Source of knowledge**: I have spoken to him previously.

4. **Use of testimony**: This witness will testify on for the motion hearing scheduled to begin 1 November 2004.

5. **Reasonable availability of witness**: Mr. Paust has other commitments which will not allow him to travel to GTMO but he is willing to testify by phone.

6. **Alternative to live testimony**: (Supplement) The defense believes that a stipulation of expected testimony is not a viable option for this witness. Much of the expected testimony is intended to educate the commission on relevant areas of law, some of which will include opinion. Further, a stipulation of expected testimony would take away the commission's opportunity to question this witness regarding

complex issues of the LOAC and its implications for Mr. Hicks case. Moreover, some of the facts and opinions the witness will testify about are in direct contravention of opinions the prosecution has cited in its responses to defense motions. Alternatives to testimony such as written opinions, briefs, telephonic testimony, or affidavits will not be sufficient to adequately convey to the commission the complex concepts of LOAC and its application to Mr. Hicks' continued detention, trial by military commission for certain offenses, the implications of the existence of an armed conflict with al Qaida and/or the Taliban regime and/or its remnants. Moreover, using such alternatives to testimony would deprive the commission of the important opportunity to question Professor Paust regarding the topics on which he would testify, and others topics in to which the commission desired to inquire.

7. **Is the witness cumulative with other witnesses**: No.

8. **Attachments**: Mr. Paust's CV is attached.

By: _____
M.D. MORI
Major, U.S. Marine Corps

From: [redacted]
Sent: Thursday, October 28, 2004 1:54 PM
To: 'Mori, Michael, MAJ, DoD OGC'; [redacted] Lippert, Jeffery MAJ Bamberg Law Center; [redacted] Brownback, Peter E. COL (L)
Subject: United States v. Hicks, Decision of the Presiding Officer, D24

United States v. Hicks

Decision of the Presiding Officer, D24

The Presiding Officer has denied the request for production of Jordan Paust as a witness. The Presiding Officer did not find that he is necessary. See Military Commission Order 1, section 5H. Accordingly, this request has been moved from the active to the inactive section of the filings inventory in accordance with POM 12. See also paragraph 8, POM 12.

By Direction of the Presiding Officer

[redacted]
Assistant to the Presiding Officers
[redacted]

Decision of PO D24

CURRICULUM VITAE

JORDAN J. PAUST Phone: (713) 743-2177
Fax: (713) 743-2238
email: jpaust@central.uh.edu

Education

University of California at Los Angeles
A.B. (1965) (History, Honors)
U.C.L.A. Debate Team

University of California at Los Angeles
J.D. (1968)
#1 Torts
#1 Labor Collective Agreements

University of Virginia
LL.M. (1972)

Yale University
J.S.D. Candidate
--Ford Foundation Fellowship, in residence 1973-1975
BArticles Editor, 3 *Yale Studies in World Public Order* (1976-1977), now *Yale Journal of International Law*

Teaching Positions

Law Foundation Professor, University of Houston Law Center (1996-)
Co-Director, International Law Institute (1997-)
Professor of Law (1979-1996)
Associate Professor of Law (1975-1978)
(teaching: International Law; International Criminal Law; Seminar: Foreign Affairs and the Constitution; Seminar: Human Rights; Seminar: Use of Force, Terrorism, Laws of War). UH Law Alumni Association Faculty Distinction Award (2003)

Edward Ball Eminent Scholar University Chair in International Law, Florida State University College of Law (spring 1997)
(taught: International Law, Human Rights)

Fulbright Professor, University of Salzburg (Austria)
Institut fur Volkerrecht und Auslandisches Offentliches Recht (1978-1979)
(taught: faculty seminar in American Jurisprudence and International Law,

attended by international law and philosophy faculty from the Universities of Salzburg and Graz)

Visiting Associate Professor, Indiana University School of Law (Bloomington) (1976-1977) (taught: Human Rights, Jurisprudence, Property)

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Publications

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27. paper delivered at the Fourth Sokol Colloquium, University of Virginia, on the Unconstitutional Detention of Prisoners by the United States Under the Exchange of Prisoner Treaties, in *International Aspects of Criminal Law: Enforcing United States Law in the World Community* 204-227 (R. Lillich ed. (1981)
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29. comment, AForeign Affairs Are Foreign to Me,@ I.L.A. International Practitioner's Notebook 11 (June 1980)
30. remarks, 75 *Proceedings, American Society of International Law* 20, 97 (1981)
31. paper, Litigating Human Rights Under U.S. Domestic Law, A.B.A. Human Rights panel, Mid-year meeting, Houston (Feb. 8, 1981), printed at 4 *Houston Journal of International Law* 137-148 (1982), and 10 *Human Rights* 40-43, 56 (Winter 1982)
32. panel member, terrorism inside and outside armed conflict, American Branch of the International Law Association (N.Y. City Bar Association 1981)
33. member of panels, National Security Claims and Minority Rights, and International Human Rights in Domestic Courts, Lowenstein Symposium on International Human Rights Law, Yale Law School (Apr. 16-18, 1982)
34. remarks, 76 *Proceedings, American Society of International Law* 263-264, 265 (1982)
35. panel member, Applicability of Humanitarian Law in Internal Conflicts, A.B.A. Law Professor Workshop, School of Law, University of Georgia (May 7-8, 1982), Conflicting Norms of Intervention: More Variables for the Equation, printed at 13 *Georgia Journal of International and Comparative Law* 305-312 (Supp. 1983); remarks, *id.* at 233-234, 320, 411-412

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37. comment, Incorporating Customary International Law in U.S. Jurisprudence, I.L.A. International Practitioner's Notebook 18-19 (Jan. 1983)
38. panel-workshop, Customary Norms Reflected in the 1977 Protocols to the Geneva Conventions, regional meeting of the American Society of International Law, Hawaii (Feb. 16-17, 1983)
39. reporter, Int'l Law Assoc. Committee on Armed Conflict, draft report on the question of nuclear weapons (1983)
40. panel member, The Control of Violence in a Lebanese Context, 77 *Proceedings, American Society of International Law* 186-189, 191 (1983); remarks, *id.* at 345, 406
41. comment, When Customary International Law Clashes With a Domestic Statute, I.L.A. International Practitioner's Notebook 10-12 (July 1983)
42. speech, Application of International Human Rights Standards by United States Courts, A.A.L.L. Institute on International Law and Business, University of Texas (June 22, 1983), printed at 76 *Law Library Journal* 496-502 (1983)
43. paper, The Incorporation of Human Rights into Domestic Law, 11th World Congress on Philosophy of Law and Social Philosophy, Helsinki, Finland (Aug. 15-19, 1983), printed at *Rechtstheorie--Juristische Logik, Rationalitat und Irrationalitat im Recht* 367-374 (Verlag Duncker & Humblot, Berlin 1985)
44. reporter, Int'l Law Assoc. Committee on Human Rights, Report on Human Rights Law, the U.S. Constitution and Methods of Judicial Incorporation, *Proceedings* 56-65 (1984)
45. panel member, The United Nations Charter and the Use of Force: Is Article 2(4) Still Workable?, 78 *Proceedings, American Society of International Law* 92-94 (1984); remarks, *id.* at 102, 106-107, 360-361
46. consultant to plaintiffs in Siderman v. Republic of Argentina, U.S. Dist. Ct., C.D. Cal. 1985
47. help to plaintiffs in: Tel-Oren v. Libyan Arab Republic, *cert. denied*, 469 U.S. 811 (1985); Jean v. Nelson, 472 U.S. 846 (1985); Handel v. Artukovic, 601 F. Supp. 1421 (C.D.Cal. 1985)
48. panel member, Jurisdiction in Human Rights Cases, 79 *Proceedings, American Society of International Law* 362-366, 374, 375, 378 (1985); remarks, *id.* at 32, 123-124
49. paper, The Illegality of Apartheid and the Present Government of South Africa, A.B.A. Seminar on the Legal Aspects of Apartheid, annual meeting of the A.B.A., Washington, D.C. (July 6-7, 1985), printed at 131 *Congressional Record*, no. 166, at S16855-S16857 (Dec. 4, 1985), extract reprinted at 11 International Law Perspective, no. 11, at 11-12 (Nov. 1985)
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Houston Journal of International Law 49-73 (1985) (initial brief for the American Society of International Law Human Rights Advocacy Interest Group), cited in Amerada Hess Shipping Corp. v. Argentine Republic, 830 F. 2d 421, 428 (2d Cir. 1987)

51. panel member, Deterrence, Defense or Demilitarization, U of H International Year of Peace Symposium (Feb. 27, 1986)
52. chair, panel on Forty Years After Nuremberg and the Tokyo Tribunals; chair, panel on Human Rights: the 1966 Covenants Twenty Years Later, 80 *Proceedings, American Society of International Law* 56-7, 408 (1986); panel member, Permissible Measures and Obligations for Outside States and Internal Peoples Toward Minority Rule in South Africa, *id.* at 318-20, 323-25; remarks, *id.* at 68, 72, 230-31, 306, 425-26
53. participant, International Legal Conference on Anti-Semitism, Anti-Zionism and the United Nations, New York University School of Law, April 13-15, 1986
54. panel member, paper, Responding Lawfully to International Terrorism: The Use of Force Abroad, regional meeting of the American Society of International Law, Whittier College of Law, April 18, 1986, printed at 8 *Whittier Law Review* 711-733 (1986)
55. dinner speech, The Link Between Human Rights and Terrorism and Its Implications Concerning the Law of State Responsibility, Conference on Human Rights and Terrorism, regional meeting of the American Society of International Law, University of Southern California Law Center, March 20, 1987, printed at 11 *Hastings International and Comparative Law Review* 41-54 (1987)
56. paper, Extradition and United States Prosecution of the *Achille Lauro* Hostage-Takers: Navigating the Hazards, Conference on State-Sponsored International Terrorism, regional meeting of the American Society of International Law, Vanderbilt University School of Law, March 27, 1987, printed at 20 *Vanderbilt Journal of Transnational Law* 235-257 (1987); remarks, *id.* at 346-48, 354, 357-60, 362-63
57. chair and paper, Conference on Terrorism and the Law: Protecting Americans Abroad, University of Connecticut School of Law, April 8, 1987, An Introduction to and Commentary on Terrorism and the Law, printed at 19 *Connecticut Law Review* 697-749 (1987), extract reprinted at *International Law Anthology* 243 (A. D'Amato ed. 1994)
58. panel member, International Human Rights and U.S. Courts: Might Congress and Other Legislatures Nurture Needed Progress?, 81 *Proceedings, American Society of International Law* 456-59, 465 (1987); remarks, *id.* at 39-40, 404
59. foreword, in *Research Methods of International Custom in States' Practice* (D. Wade ed. 1987)
60. human rights classes for Central American refugees at CARECEN, Houston, Texas, June 16 & 23, 1987
61. help to plaintiffs in DeNegri v. Republic of Chile, Civ. No. 86-3085 (D.D.C.

1987)

62. affidavit filed in Aidi v. Yaron, 672 F. Supp. 516 (D.D.C. 1987), addressed *id.* at 519 n.4, reprinted at 5 *The Palestine Yearbook of International Law* 277-286 (1989)
63. help to plaintiffs in Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987)
64. national report, AIncorporating Human Rights Into Domestic Constitutional Law,@ presented at Second World Congress, International Association of Constitutional Law, Paris & Aix-en-Provence, France, Aug. 31 - Sept. 5, 1987
65. class on nature and sources of international law at University of St. Thomas, Houston, Texas, Sept. 17, 1987
66. panel member, The U.S. Constitution and Human Rights, Amnesty International-University of Houston Human Rights Week, University of Houston, Sept. 30, 1987
67. chair, panel on the Bork nomination, University of Houston Law Center, October 6, 1987
68. prepared draft petition for World Habeas Corpus to the U.N. Commission on Human Rights with respect to political prisoners in South Africa
69. panel member, Extraterritorial Jurisdiction Over Persecutors, Third Annual International Conference on Holocaust and Human Rights Law, Boston College Law School, April 11, 1988, printed at AUniversality and the Responsibility to Enforce International Criminal Law: No U.S. Sanctuary for Alleged Nazi War Criminals,@ 11 *Houston Journal of International Law* 337-344 (1989)
70. panel member, History of International Law, 82 *Proceedings, American Society of International Law* 26-30, 39-40 (1988); remarks, *id.* at 394, 475-476
71. advice and commentary on portions of the Draft Convention on the Rights of the Child, AHuman Dignity, Remedies, and Limitations in the Convention,@ in *Independent Commentary: United Nations Convention on the Rights of the Child* 54-56 (C. Cohen ed. 1988), reprinted at 7 *New York Law School Journal of Human Rights* 116-122 (1989)
72. affidavit filed in 1988 in Linder, *et al.* v. Calero Portocarrero, *et al.*, 747 F. Supp. 1452 (S.D. Fla. 1990)
73. panel member, International Law Section, panel on Human Rights and U.S. Foreign Policy, at A.A.L.S. Annual Meeting (1989), printed at AIn the Name of Foreign Affairs,@ I.L.A. International Practitioner's Notebook 13-16 (April 1989)
74. panel member, Genocide: The Convention, Domestic Laws and State Responsibility, 83 *Proceedings, American Society of International Law* 316-320, 329-332 (1989)
75. member, Mission of the International Commission of Jurists (Geneva) to Study the Military Justice System in the West Bank and Gaza (June 25-July 9, 1989), Report printed by the I.C.J. (Geneva 1989), reprinted at 14 *Hastings International and Comparative Law Review* 1-66 (1990)

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78. comment, Food As A Weapon, I.L.A. International Practitioner's Notebook 22 (Feb. 1991)

79. panel member, Special Capitol Hill Session on AThe Gulf War: Collective Security, War Powers and Laws of War@; panel member, ARights of Self-Determination of Peoples in Established States: Southern Africa and the Middle East,@ 85 *Proceedings, American Society of International Law* 13-16, 19-23, 25-26, 28-29, 551-553, 555-556, 560 (1991); remarks, *id.* at 100-101, 208-209

80. concurring and dissenting paper on the Universal Declaration of Human Rights, Human Rights Committee, in *Proceedings and Committee Reports of the American Branch of the I.L.A.* 92-95 (1991-1992)

81. panel member, ADemocracy and Legitimacy: Is There an Emerging Duty to Ensure a Democratic Government in General or Customary International Law?,@ Joint Conference of the American Society of International Law/Nederlandse Vereniging voor International Recht (July 4-6, 1991, The Hague), printed at *Contemporary International Law Issues: Sharing Pan-European and American Perspectives* 126-130, 139, 140, 178-179 (Holland 1991)

82. paper, AInterpreting Our Constitution,@ annual meeting of the Policy Sciences Center at Yale Law School (Oct. 18-20, 1991)

83. chair, panel, After the Gulf War: Critical Issues Regarding International Criminal Law, Human Rights and Peace, at A.A.L.S. Annual Meeting (1992)

84. panel member, AInternational War Crimes & the Gulf War@; panel member, AShould/Can the U.S. Prosecute Nazi and Future War Criminals?@; panel member, ACan the United States Assert Extraterritorial Jurisdiction Over Terrorists and Drug Traffickers?,@ ILSA Regional Meeting, Albany Law School, February 27-28, 1992 (on CSPAN)

85. participant (with prepared commentary) in the working group, International Association of Penal Law & International Scientific and Professional Advisory Council of the Crime Prevention and Criminal Justice Branch of the United Nations meeting with certain members of the U.N. International Law Commission on the I.L.C.'s Draft Code of Crimes Against the Peace and Security of Mankind and an International Criminal Court, Courmayeur, Italy,

March 25-28, 1992

86. panel member, International Human Rights in American Courts, 86 *Proceedings, American Society of International Law* 325-28, 347, 348 (1992); remarks, *id.* at 131-32, 602

87. participant in human rights class for lawyers and paralegals at CARECEN, Houston, in connection with their investigative mission to El Salvador in May, 1992, as part of a U.N. inquiry into human rights violations

88. lecture on human rights and U.S. law to U.S. Dep't of Justice I.N.S. class for Asylum Trainees, Dallas, Texas, May 5, 1992

89. participant and Rapporteur for the Session on the Legal Dimension, World Conference on the Establishment of an International Criminal Tribunal to Enforce International Criminal Law and Human Rights, Siracusa, Italy (Dec. 2-5, 1992), a Satellite Conference to the 1993 U.N. World Human Rights Conference

90. entry on AMayaguez: Capture,@ in *Encyclopedia of the American Presidency* (L. Levy & L. Fisher eds., Simon & Schuster 1993)

91. chair, panel, Litigating and Judging International Law Claims in the 1990s, at A.A.L.S. Annual Meeting (1993)

92. panel member, DePaul College of Law, February 25, 1993, printed at AAvoiding 'Fraudulent' Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights,@ 42 *DePaul Law Review* 1257-1285 (1993)

93. Reporter, The U.S. Constitution and Judicial Competence to Incorporate International Law, in American Branch of the I.L.A. Report of the Committee on International Law in Domestic Courts (1993)

94. panel member, UHLC Federalist Society panel on the Convention on the Elimination of All Forms of Discrimination Against Women, University of Houston, March 10, 1993

95. panel member, St. John's School of Law, March 12, 1993, printed at AAfter Alvarez-Machain: Abductions, Standing, Denials of Justice, and Unaddressed Human Rights Claims,@ 67 *St. John's Law Review* 551-580 (1993)

96. panel member, Perspectives on War Crimes in Yugoslavia, Marshall-Wythe School of Law, William and Mary, March 30, 1993

97. panel member, An Overview of Applicable Legal Systems: International Criminal Law, Humanitarian Law and Human Rights Law, The Eleanor Roosevelt Institute for Justice and Peace Workshop on Yugoslavia and Beyond, April 3, 1993, regional meeting of the American Society of International Law in Washington, D.C., printed at AApplicability of International Criminal Laws to Events in the Former Yugoslavia,@ 9 *The American University Journal of International Law and Policy* 499-523 (1994)

98. remarks, 87 *Proceedings, American Society of International Law* 222, 243-44 (1993)

99. Reporter, Resolution on Congressional Legislation Concerning Transnational

Abductions, American Branch of the I.L.A., Human Rights Committee, June 8, 1993, printed at *Proceedings, American Branch of the I.L.A.* 65-66 (1993-1994)

100. speech on Sovereign Immunity at I.C.A. Certification Course for International Arbitrators, Houston, June 12, 1993

101. speech on State Sponsored Abductions for Trial, during a conference at the Permanent Mission of Mexico to the United Nations, June 24, 1993, cosponsored by the New York Regional Committee of the ASIL, with a draft Declaration on Principles of International Law Concerning State Sponsored Abductions (draft printed at 67 *St. John's Law Review* 579-580 (1993))

102. affidavit filed in Jane Doe I & Jane Doe II v. Radovan Karadzic, (S.D.N.Y. 1993)

103. AResponse to President's Notes on Missile Attack on Baghdad,@ ASIL Newsletter, Sept. - Oct. 1993, at 4

104. an Advocate and Counsel for Applicant in Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), International Court of Justice (1993-1994)

105. commentary prepared for Senator Christopher Dodd on the U.N. Draft Statute for an International Criminal Tribunal (Nov. 1993), printed at 140 *Congressional Record* No. 2, at S107-S109 (Jan. 26, 1994)

106. panel member, The Significance and Determination of Customary International Human Rights Law, University of Georgia School of Law, March 4, 1994, printed at AThe Complex Nature, Sources and Evidences of Customary Human Rights,@ 25 *Georgia Journal of International and Comparative Law* 147-164 (1995/96)

107. paper, APeace-Making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions,@ presented at Conference on the U.S. Role in U.N. Peacekeeping Missions, Southern Illinois University School of Law, March 25, 1994, printed at 19 *Southern Illinois University Law Journal* 131-151 (1994)

108. panel member, Prosecuting and Defending Violations of Genocide and Humanitarian Law: The International Tribunal for the Former Yugoslavia, 88 *Proceedings, American Society of International Law* 241-243, 254-255, 257 (1994); remarks, *id.* at 172, 347, 437, 481

109. participant on InterAmicus brief before the Supreme Court of Canada on a rehearing of Her Majesty the Queen v. Imre Finta (1994)

110. expert testimony before Canadian Immigration and Refugee Board re: *In re* Mahmoud M. Isa Mohammed, June 30, 1994, Toronto

111. help to plaintiffs in Smith v. The Socialist People's Libyan Arab Jamahiriya, *et al.*, C.A. No. 93-2568 (D.D.C.)

112. prepared Law Professors' Amici Brief in Kadic, *et al.* v. Karadzic, No. 94-9069 (2d Cir. 1994) (70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996))

113. participated in Law Professors' Amici Brief on petition for a Writ of Certiorari in Princz v. Federal Republic of Germany, No. 94-909 (1994)
114. panel member, The Role of the United Nations in the Maintenance of Peace, University of Georgia School of Law, March 3, 1995, printed at AU.N. Peace and Security Powers and Related Presidential Powers,@ 26 *Georgia Journal of International and Comparative Law* 15-28 (1996)
115. panel member, 1945-1995: Critical Perspectives on the Nuremberg Trials and State Accountability, New York Law School, April 4, 1995, printed at AThreats to Accountability After Nuremberg: Crimes Against Humanity, Leader Responsibility and National Fora,@ 12 *New York Law School Journal of Human Rights* 547-569 (1995), cited in The Prosecutor v. Akayesu, ICTR-96-4-T (2 Sept. 1998), at para. 566
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117. essay, Global Treaties Demand War Criminals= Arrest, The National Law Journal, March 11, 1996, at A18, col. 3, reprinted in expanded version in ASIL International Criminal Law Interest Group Newsletter no.1, at 6-7 (1996)
118. expert testimony in the Federal Court of Canada, In the Matter of M. Suresh, DES-3-95, March 19, 1996, Toronto
119. remarks, 90 *Proceedings, American Society of International Law* 273, 544, 611 (1996)
120. visiting lectures on international law and the domestic legal process at the Mexican Ministry of Foreign Relations (Polanco and Tlatelolco), the Instituto Matias Romero de Estudios Diplomaticos, and the Universidad Nacional Autonoma de Mexico, Mexico City, May 20-21, 1996
121. presentations on international criminal law, Institute of the American Association of Law Libraries, Contemporary Practice of Public International Law, Indiana University, Bloomington, July 18, 1996, paper, International Criminal Law: Introductory Themes, in *Contemporary Practice of Public International Law* 165-188 (E.G. Schaffer & R. Snyder eds. 1997)
122. chair, panel, International Human Rights and Humanitarian Law After Bosnia, annual meeting of the International Law Association, New York, Nov.1, 1996
123. paper, Alt=s No Defense: *Nullum Crimen*, International Crime and the Gingerbread Man,@ Albany Law School, November 7, 1996, printed at 60 *Albany Law Review* 657-679 (1997), extract reprinted at The International Criminal Court, 13 *Nouvelles Estudes Penales* 275-288 (1997) and 25 *Denver Journal of International Law and Policy* 321-332 (1997)
124. chair, panel, Effectuating International Criminal Law through International and Domestic Fora: Realities, Needs and Prospects, annual meeting of the American Society of International Law, April 11, 1997, printed at 91 *Proceedings, American Society of International Law* 259 (1997)
125. paper, ADomestic Influence of the International Court of Justice,@ University

of Denver College of Law, April 19, 1997, printed at 26 *Denver Journal of International Law and Policy* 787-805 (1999)

126. organized special networking session on Affirmative Action, International Law and Law School Admissions, annual meeting of the Association of American Law Schools, Jan. 9, 1998
127. affidavit filed in United States v. Corey, Cr. No. 96-01019 DAE (D. Haw. 1998)
128. affidavit filed in United States v. Haywood, No. 97-945-CR-MOORE (S.D. Fla. 1998)
129. moderator, Third Annual Houston Law Review Frankel Lecture panel on Obedience to International Law, April 9, 1998
130. panel member, paper, AThe Permissibility of Affirmative Action in Higher Education Under Human Rights Law,@ CUNY School of Law, May 2, 1998, printed at 3 *New York City Law Review* 91-103 (1998)
131. revised the Am. Branch, I.L.A. Committee on a Permanent International Criminal Court Draft Statute for the ICC sections on crimes, leader responsibility, and superior orders (May 1998), printed at 13 ter *Nouvelles Etudes Penales* 4-24 (1998)
132. prepared portions of plaintiffs=-respondents= brief in *Dubai Petroleum Company, et al. v. Kazi, et al.,* before the Texas Supreme Court (May 18, 1998), and argued before the Court, Sept. 10, 1998B8-0 decision reported at 12 S.W.3d 71 (Tex. 2000)
133. panel member and moderator, panels on International Humanitarian Law, Third Pan-European International Relations Conference and Meeting with the International Studies Association, Vienna, Austria, Sept. 18-19, 1998; ACrimes Within the Limited Jurisdiction of the International Criminal Court,@ printed at *International Humanitarian Law: Origins and Prospects* (J. Carey & R.J. Pritchard eds. 2002)
134. speech, Human Rights Treaties in the U.S., UNA-USA United Nations Day celebration, Oct. 24, 1998, Albuquerque, New Mexico
135. speech, Use of the U.N. Charter, the Universal Declaration, and Human Rights Treaties as Law of the United States, UNA-USA and Southern Illinois University U.N. Day celebration, Nov. 2, 1998
136. chair, panel, The 50th Anniversary of the Genocide Convention, annual meeting of the American Branch of the International Law Association, New York, Nov. 14, 1998
137. United Nations Consultative Expert Group meeting on International Norms and Standards Relating to Disability, U.C. Berkeley School of Law, Dec. 8-12, 1998; Report of the Expert Group located at www.un.org/esa/socdev/disberk0.htm
138. moderator, Coif Lecture and Conference on Legal Responses to International Terrorism, University of Houston, March 12, 1999
139. speech, Incorporation of International Law, Cornell Law School, March 16,

1999

140. panel member, International Criminal Court: Views from Rome, annual meeting of the American Society of International Law, March 25, 1999, remarks in 93 *Proceedings, American Society of International Law* 73-74 (1999)

141. short essay, NATO=s Use of Force in Yugoslavia, 33 *U.N. Law Reports* no. 9, at 114-16 (J. Carey ed. May 1999), also at 2 Translex, Transnational Law Exchange, special supp. 2-3 (May 1999)

142. participant re: Report on Proposed Guiding Principles for Combating Impunity for International Crimes (1999)

143. participant in creation of Draft Provisions for an International Protocol on Rights of Persons With Disabilities, Human Rights Committee, American Branch, International Law Association, June 1999Brevised as Draft Convention on Rights of Persons With Disabilities, March, 2000

144. speaker, laws of armed conflict, genocide, and Kosovo, American Red Cross, Austin, Texas, May 24, 1999

145. panel member, United Nations International Meeting on the Convening of a Conference on Measures to Enforce the Geneva Conventions in the Occupied Palestinian Territory, Cairo, Egypt, June 14-15, 1999; paper AApplicability of Geneva Law and Other Laws of Armed Conflict to Protection of Civilians in the West Bank, Gaza and East Jerusalem,@ extracts printed in UN Press Release GA/PAL/806 (June 1999) and 33 *U.N. Law Reports* no. 11, at 163-164 (1 July 1999)

146. lectures and seminar, Protection of Civilians in Times of Armed Conflict, 27th Annual Session: The Law of Armed Conflict, Institute of International Public Law and International Relations, at Aristotle University, Thessaloniki, Greece, Sept. 13-17, 1999, to be printed in the Institute=s *Thesaurus Acroasium* (2000); speech on NATO and Intervention in Kosovo, at the U.S. Consulate, Thessaloniki, Greece, Sept. 16, 1999

147. guest editorial, Questions Concerning the Final Report to the Prosecutor Regarding NATO Bombings, 34 *U.N. Law Reports* no. 11, at 132-134 (1 July 2000)

148. keynote speech, International Law as Law of the United States: Trends and Prospects, Japanese American Society for Legal Studies symposium, Sept. 17, 2000, University of Tokyo, Japan, printed in Japanese at *Journal of the Japanese American Society for Legal Studies* 13-38 (2001), reprinted in English at 2 *Chinese Journal of International Law* 615-646 (2002)

149. speech, Problematic U.S. Sanctions Efforts in Response to Genocide, Crimes Against Humanity, War Crimes, and Other Human Rights Violations, Sept. 18, 2000, Waseda University, Japan, printed at 3 (2000) *Waseda Proceedings of Comparative Law* 95-119 (2001)

150. speech, Sept. 22, 2000, Law Faculty Colloquium, University of Tokyo, Japan

151. panel member, Economic and International Institutions, and discussion leader, AALS Workshop on Human Rights, Washington, D.C., Oct. 28, 2000

152. paper, Universal Jurisdiction, Universal Responsibility, and Related Principles of International Law, Princeton Project on Universal Jurisdiction, Princeton University, Nov. 9-11, 2000, printed at (Princeton University Press 2001)

153. key note speech, U.S. Dep=t of State sponsored conference with the Iraqi National Congress on Transitional Justice and the Practical Application of Human Rights Advocacy in Iraq, London, England, March 23-24, 2001

154. panel member, The U.S. Lawyer-Statesman at Times of Crisis: Francis Lieber, and panel member, Universal Jurisdiction Under International Criminal Law: Trends and Prospects, annual meeting of the American Society of International Law, Washington, D.C., April 6-7, 2001, first paper printed at 95 *Proceedings, American Society of International Law* 112-115 (2001)

155. panel member, Transnational Corporations and Human Rights in Africa, A.B.A. Section of International Law and Practice meeting, Washington, D.C., April 27, 2001

156. panel member, Addressing Violations of International Law by Non-State Actors, annual meeting of the American Branch of the International Law Association, New York, Oct. 27, 2001; paper ASanctions Against Non-State Actors for Violations of International Law,@ printed at 8 *ILSA Journal of International & Comparative Law* 417-429 (2002)

157. panel member, paper, AThe Right to Life in Human Rights Law and the Law of War,@ University of Saskatchewan College of Law, Nov. 3, 2001, printed at 65 *Saskatchewan Law Review* 411-425 (2002)

158. presenter, National Workshop for District Judges II, sponsored by the Federal Judicial Center, San Diego, California, Dec. 3-5, 2001

159. panel member, Use of Force in the Aftermath of September 11th, Cornell Law School, Feb. 14, 2002; paper AUse of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond,@ printed at 35 *Cornell International Law Journal* 533-557 (2002)

160. panel member, Inside the International Criminal Court, University of Houston Law Center, Feb. 22, 2002

161. panel member, The Definition of Aggression and the ICC, and moderator, panel on The Judicial Response to Terror, annual meeting of the American Society of International Law, Washington, D.C., March 15, 2002, remarks printed at 96 *Proceedings, American Society of International Law* 190-92, 250 (2002)

162. speech on antiterrorism military commissions, Penn State University Dickinson School of Law, March 28, 2002

163. prepared Memorandum *Amicus Curiae* of Law Professors in United States v. John Walker Lindh, 212 F. Supp.2d 541 (E.D. Va. 2002)

164. affidavit filed in Jane Doe I, Jane Doe II, Petit, *et al.* v. Liu Qi, *et al.*, F. Supp.2d (N.D. Cal. 2002)

165. affidavit prepared in People of the State of California v. Romero Vasquez, Sup. Ct., Santa Barbara, July 2002

166. participated in *Amici* brief, Habib v. Bush (No. 02-5284), decided with Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003)

167. lecture, Use of Military Force Against Iraq, Coférence D=Actualité, University of Paris X, France, Nov. 12, 2002

168. panel member, Detention and Due Process Under International Law, Conference on Terrorism and the Military: International Legal Implications, Societe Internationale de Droit Militaire et de Droit de la Guerre, sponsored by the Netherlands Ministry of Defense, The Hague, Netherlands, Nov. 14-15, 2002, paper printed at Terrorism and the Military: International Legal Implications 181-196 (W.P. Heere ed. 2003)

169. co-speaker, Civil Liberties: From Nuremberg to Houston, Holocaust Museum Houston, Nov. 19, 2002

170. panel member, 9-11 and Its Aftermath, International Law Weekend West, at Loyola Law School, Los Angeles, Feb. 7, 2003

171. panel member, symposium on The Judiciary and the War on Terror, at Tulane University School of Law, Feb. 21, 2003

172. presenter, CLE program of the Louisiana Trial Lawyers Association on 9/11: the War at Home, Civil Rights and Civil Liberties in the U.S. Post 9/11, at Loyola University School of Law, Mar. 21, 2003

173. panel member, Legal Responses to Terrorism: Security, Prosecution and Rights, annual meeting of the American Society of International Law, Apr. 3, 2003, paper ADetention, Judicial Review of Detention, and Due Process During Prosecution, 97 *Proceedings, American Society of International Law* 13-18 (2003)

174. prepared Memorandum *Amicus Curiae* of Law Professors in Padilla v. Rumsfeld, Second Circuit Court of Appeals (July 2003)

175. panel member, International Terrorism and International and European Criminal Law, Hague Joint Conference on Contemporary Issues of International Law - 2003, The Hague,

Netherlands, Jul. 5, 2003; paper, AInternational Law Concerning Domestic Prosecutions of al Qaeda Attacks,@ *From Government to Governance* 360-369 (2003)

176. panel member, International Conference on the United Nations and Taiwan, New York, N.Y., Sept. 5, 2003, paper, AU.N. Principles in Theory and Practice: Time for Taiwanese Self-Determination to Ripen into More Widely Recognized Statehood Status and Membership in the U.N.?,@ to be printed in a book

177. panel member, International Criminal Justice and Asia, Japanese Society of International Law International Symposium, Unity in Diversity: Asian Perspectives on International Law in the 21st Century, Nagoya, Japan, Oct. 11-12, 2003, paper, AU.S. Schizophrenia With Respect to Prosecution of Core International Crimes,@ to be published in a book; updated version at *Japanese Society of International Law Journal* (2004)

178. panel member, History of International Tribunals, ILSA Conference on International Criminal Law: The Expansion of Individual Rights and Responsibilities for Human Rights Violations, Loyola Law School, New Orleans, Oct. 18, 2003, paper, ASelective History of International Tribunals and Efforts Prior to Nuremberg,@ printed in 10 *ILSA Journal of International & Comparative Law* 207-213 (2004)

179. panel member, Civil Liberties and the War on Terrorism, Conference on International Justice, Wayne State University Law School, Oct. 27, 2003, paper, AAfter 9/11, >No Neutral Ground= With Respect to Human Rights: Executive Claims and Actions of Special Concern and International Law Regarding the Disappearance of Detainees,@ to be printed in 50 *Wayne Law Review* (2004)

180. panel member, International Law panel, Symposium: Do We Need a New Legal Regime After September 11th?, University of Notre Dame Law School, Dec. 5, 2003, paper APost 9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions,@ to be printed in 79 *Notre Dame Law Review* 1335-1364 (2004)

181. panel member, panel on Contemporary Trends in International Human Rights, and Implementation of Human Rights Domestically, International Human Rights Roundtable, Taipei, Taiwan, Dec. 10, 2003, and suggestions concerning the draft Human Rights Act and the laws concerning Taiwan=s Human Rights Commission; meeting with President Chen Dec. 11, 2003

182. panel member, The New Architecture of International Law After Iraq, annual meeting of the Association of American Law Schools, Atlanta, Georgia, Jan. 4, 2004, paper AThe U.S. as Occupying Power Over Portions of Iraq and Special Responsibilities,@ printed in 27 *Suffolk Transnational Law Review* 1 (2004)

183. panel member, International Tort Litigation, International Law Section of the State Bar of Texas, Feb. 27, 2004

184. moderator, Conference on Civil Litigation of International Law Violations in U.S. Courts, University of Houston Law Center, Mar. 1, 2004

185. panel member, Non-State Actors and the Contemporary Legal Order, University of Michigan Law School, Mar. 20, 2004, paper AThe Reality of Private Rights, Duties, and Participation in the International Legal Process@ to be printed in 25 *Michigan Journal of International Law* (2004)

186. helped prepare Brief of *Amici Curiae* International Law Professors in Hamdi v. Rumsfeld, Supreme Court of the United States, Feb. 23, 2004

187. prepared Brief of *Amici Curiae* International Law Professors in Rumsfeld v. Padilla, Supreme Court of the United States, April 2004

188. on-line essay AAbuse of Iraqi Detainees at Abu Ghraib: Will Prosecution and Cashiering of a Few Soldiers Comply with International Law?,@ available at http://jurist.law.pitt.edu/forum/paust1.php and reprinted on-line at www.nimj.org/commentary

189. on-line essay AThe Common Plan to Violate the Geneva Conventions,@ available at http://jurist.law.pitt.edu/forum/paust2.php
190. panel member, Terrorism as an International Crime, Conference on International Cooperation and Counterterrorism, Universita Degli Studi di Trento, Italy, May 27-28, 2004
191. panel member, Military Commissions, Conference on International Law Challenges: Homeland Security and Combating Terrorism, U.S. Naval War College, June 24, 2004

Other Activities

Fulbright lectures, University of Leiden, the Netherlands, June 12-13, 1979
Fulbright lectures, University of Florence, Italy, March 26-27, 1979
Faculty Advisor, *Houston Journal of International Law* (since its inception, 1978 -)
Board of Editors, on-line International Law Journal (2003-)
Board of Advisors, *Austrian Journal of Public and International Law* (1990 -)
U.S. Dep't of State Scholar-Diplomat Seminars (1973 & 1975)
National War College Conference on the Law of War (Dec. 1974)
Judge, 1972, 1978, 1980, 1981, 1985 ASIL Regional Jessup International Moot Court; Memorial Judge, 1986 ASIL Jessup Regional International Moot Court; Judge, 1996 ASIL Quarterfinals; Judge, 1998 ASIL rounds and Quarterfinals; Judge, 2001 ASIL Regional International Moot Court, final round; Judge, 2001 ASIL World final round; Judge, 2002 ASIL Regional International Moot Court, final round; Judge, 2003 ASIL Regional International Moot Court, final round; Judge, 2004 ASIL Regional International Moot Court, final round
Research and writing for J.L. Paust & R. Upp, Business Law (West Publishing, 1st ed. 1969) (in 4th ed. 1984)
Interviews: several local, national, and international television (including CNN, CNN Int=l), radio (including NPR), and newspaper interviews over the years

Summer Teaching:
University of Houston (1978) (1980) (1982) (1986)
International Legal Studies, Salzburg, Austria (1979)

Other Teaching:
International Legal Studies, Salzburg, Austria (1978)
(short course on U.S. Contracts Law for European attorneys)
guest lectures, UH Graduate School of Social Work (1994, 1995)

Faculty Committees:
Graduate Legal Studies (1995-1996, 1997-), Chair (2001- 2003); Promotion and Tenure (2003 -); Faculty Appointments (2001-); Executive Committee (1998-2000); Library (2000-2001); Admissions (1996); Promotion & Tenure (1994-1995); Faculty Development (1993-1994); Educational Policies Committee (1994); Self-Study (1991-1992); Chair Subcommittee, Personnel (1990-1992); First Year (1991-1993); Admissions (1987-1991); Graduate Studies (1987-1988); Leave Committee (1989-1990); Curriculum (1985-1986); Self-Study & Planning (1985-1986 & 1991-1992); Personnel (1983-1985); Promotion & Tenure (1981-1983); previously: Curriculum; Chair, Library; Chair, Library-sub-committee on faculty teaching and research
University Faculty Senate (1994); University Limited Grants Committee (1993-1994); University Research Council (1983-1986)
Co-Director, International Law Institute

Member:

American Society of International Law
Executive (President=s) Committee (1990-1991)
Executive Council (1989-1992)
Organizing Committee: Joint Conference of the ASIL and the Netherlands Society of International Law (1991)
Annual Meeting Program Committee (1985-1986, 1989)
Program Chair (1988-1989)
Human Rights Advocacy Interest Group (founding member, 1985-)
International Criminal Law Interest Group (founding member, 1992-)
Co-Chair (1992-)
Lieber Society on the Law of Armed Conflict
Executive Committee (2004-)
Working Group on International Terrorism (1975-1977)
American Branch, International Law Association
Working Group on U.S. Ratification of Geneva Weapons Protocol (1980-1982)
Working Group on U.S. Ratification of Geneva Protocols (1979-1980)
Committee on Human Rights (1983-)
Committee on International Law in Domestic Courts (1992-1999)
Committee on a Permanent International Criminal Court (1996-1999)
Committee on International Terrorism (1983-1990)
Committee on Armed Conflict (1978-1983)
American Bar Association, Section on International Law
Committee on International Law and the Use of Force (1975-1978)
Chair (1975-1978)
Human Rights Committee (1974)
Task Force on Teaching International Criminal Law (1993-1994)
Task Force on Proposed Protocols of Evidence and Procedure for Future War Crimes Tribunals (1994-1996)
American Section, Association Internationale de Droit Penal
Board of Director (1993-)
Association of American Law Schools
Chair, Section on International Law (1991-1993)
Chair-elect, Section on International Law (1990)
Secretary, Section on International Law (1989)
executive committee, Section on International Law (1982-1985, 1987, 2001, 2003, 2004)
nominating committee, Section on International Law (1980)
Center for Human Rights and Constitutional Law
Legal Advisory Committee, South Africa Constitution Watch Commission (1991-1992)
Human Rights Advocates, International, Board of Directors (1979-)
Human Rights Law Group
Co-Director, Houston Affiliate (1980-1984)

Independent Commission on Respect for International Law (1985-1988)
Legal Scholars for Human Rights (Venice, Italy)
Advisory Board
Transnational Publishers Advisory Board for the International and Comparative Law Series (2000-)
United Nations Association-USA
Board of Directors, Houston Chapter (1978-1981)
adviser on Houston Area Model U.N. I.C.J. program for high school students (since its inception, 1980-1995) and resource speaker most years

International Arbitrator

Panel Member, International Centers for Arbitration
I.C.A. Certification Course for International Arbitrators (May-June 1993)

Admitted to the Bar

Supreme Court of California (1969)
Federal District Court, Central District of California (1969)
United States Court of Military Appeals (1969)
United States Court of Appeals for the District of Columbia (1980)
United States Court of Appeals for the Fifth Circuit (1998)
United States Court of Appeals for the Seventh Circuit (2003)
United States Supreme Court (1980)
International Court of Justice (1994) (see misc. #104)

UNITED STATES OF AMERICA	)	
	)	**DEFENSE MOTION - THE ENTIRE COMMISSION TO GRANT PRODUCTION OF WITNESS DENIED IN D 26**
v.	)	
DAVID HICKS	)	**(Tim McCormack)**
	)	29 October 2004

The Defense previously requested that name of witness be produced. The request was denied by the Presiding Officer under the provisions of Military Commission Order 1, section 5H.

The Defense requests the Commission direct the production of the witness, and that the Commission consider the following previously made filings, and the attachments thereto, per the Filings Inventory D26, in making its determination.

a. Motion by the defense requesting Mr. McCormack.
b. Decision of the Presiding Officer denying the witness.
c. The government response to D26, if any.

By: _____
M.D. MORI
Major, U.S. Marine Corps

Review Exhibit 38

Page 1 **Of** 1

NOTE: The Detailed Defense Counsel advises this witness request is a substitute for the one filed 8 Oct 04. APO. (D26)

UNITED STATES OF AMERICA	)	
	)	**DEFENSE REQUEST FOR WITNESS**
v.	)	
	)	**(Professor Tim McCormack)**
DAVID M. HICKS	)	8 October 2004 (Supplement 26 Oct 04)

The Defense in the case of the *United States v. David M. Hicks* requests the following witness for the 01 November 2004 motion hearing at Guantanamo Bay and in support of this request the defense states:

1. **Witness information**:

Professor Tim McCormack (Australian National)
Australian Red Cross Professor of International Humanitarian Law
Faculty of Law, University of Melbourne
Victoria 3010
Australia

Office Phone: 61-3-8344-6595
Office Fax: 61-3-8344-0054
t.mccormack@unimelb.edu.au

2. **Need for translator**: None

3. **Synopsis of testimony**: (Supplement) It is anticipated the Mr. McCormack will testify as an expert in international humanitarian law (law of war), including but not limited to, the following:

Mr. McCormack will testify that Charges 2 and 3 the government has filed against Mr. Hicks do not represent violations of the law of war or offenses triable by military commission, and therefore would be dismissed. He will testify that the U.S. is not involved in an international armed conflict with al Qaida, and that the LOAC does not apply to military operations against al Qaida. He will explain that an international armed conflict did not begin until 7 Oct 04 when the U.S. began military operations against the Taliban government and ended when the Karzi government took power.

Specifically relating to Charge 2, he will explain that the law of war protects certain people from attack during an armed conflict and prohibit certain means and methods from being employed during an armed conflict. He will describe what conditions must occur before a solider may be protected under the law of war such as when a solider is wounded or surrenders. He will testify that these principles invalidate the charge of murder by an unprivileged belligerent.

He will testify that under U.S. and Australian law, Mr. Hicks had no duty of allegiance to the U.S., or any coalition partner. He will testify that Mr. Hicks could not, therefore be guilty of "aiding

the enemy." He will further testify that Australian law imposed no duty of allegiance on Mr. Hicks during his time in Afghanistan as it relates to the armed conflict in Afghanistan. He will explain that Australia did have a similar offense to the UCMJ offense of aiding the enemy. Yet, the Australian law did not apply to Mr. Hicks. He will describe the Australian crime of treason and describe how that offense was not violated by Mr. Hicks conduct. He will further testify that Mr. Hicks did not violate Australian law through his conduct in Afghanistan. He will testify that the charge of aiding the enemy does not state an offense against Mr. Hicks because he did not have any allegiance to the United States.

He will further testify that the charges against Mr. Hicks should be altered to reflect only conduct of Mr. Hicks during the international armed conflict between the U.S. and the former Taliban regime in Afghanistan. He will describe how an armed conflict is defined under the laws of war and when the laws of war become operable. In the case of the conflict in Afghanistan, he will relate that the laws of wars became operable on 7 October 2001. He will opine that the commission only has jurisdiction over events that took place between 7 October 2001 and the end of the international armed conflict.

4. **Source of knowledge**: I have spoken to him previously.

5. **Use of testimony**: This witness will testify on for the motion hearing scheduled to begin 1 November 2004.

6. **Reasonable availability of witness**: Mr. McCormack says he is available and willing to come to GTMO for the hearing

8. **Alternative to live testimony**: (Supplement) The defense believes that a stipulation of expected testimony is not a viable option for this witness. Much of the expected testimony is intended to educate the commission on relevant areas of law, some of which will include opinion. Further, a stipulation of expected testimony would take away the commission's opportunity to question this witness regarding complex issues of the LOAC and its implications for Mr. Hicks case. Moreover, some of the facts and opinions the witness will testify about are in direct contravention of opinions the prosecution has cited in its responses to defense motions. Alternatives to testimony such as written opinions, briefs, telephonic testimony, or affidavits will not be sufficient to adequately convey to the commission the complex concepts of LOAC and its application to Mr. Hicks' continued detention, trial by military commission for certain offenses, the implications of the existence of an armed conflict with al Qaida and/or the Taliban regime and/or its remnants. Moreover, using such alternatives to testimony would deprive the commission of the important opportunity to question Mr. McCormack regarding the topics on which he would testify, and others topics in to which the commission desired to inquire.

9. **Is the witness cumulative with other witnesses**: No.

10. **Attachments**: CV of Professor Tim McCormack

By: _____
M.D. MORI
Major, U.S. Marine Corps

CURRICULUM VITAE

Timothy L.H. McCormack

PERSONAL DETAILS:

Full Name:	Timothy Lloyd Hearnden McCormack
Current Appointments:	Foundation Australian Red Cross Professor of International Humanitarian Law University of Melbourne Law School Foundation Director, Asia-Pacific Centre for Military Law University of Melbourne Law School Director of Studies, Graduate Program in Military Law and Graduate Program in International Law University of Melbourne Law School *Amicus Curiae* on International Law Matters to the Judges of Trial Chamber III of the International Criminal Tribunal for the Former Yugoslavia for the trial of Slobodan Milošević
Contact Details:	Faculty of Law University of Melbourne Vic. 3010 Australia Tel: +61-3-8344 6595 Fax: +61-3-8344 0054 email: t.mccormack@unimelb.edu.au

ACADEMIC QUALIFICATIONS:

Ph.D., Monash University, 1990. Title of thesis: 'Israel's Bombing of the Iraqi Nuclear Reactor and Self-Defence in International Law'

LL.B. with Second Class (Upper Division) Honours, University of Tasmania, 1982.

HONOURS and AWARDS:

Mar 2003	University of Tasmania Foundation Distinguished Graduate Award for Outstanding Achievement Since Graduation;
Nov 2001	Australian Red Cross Volunteer Medal for Outstanding Service to the Organisation as Chair of the National Advisory Committee on International Humanitarian Law and as National Vice President;
Nov 1988	Inaugural Australian Recipient of the Golda Meir Postdoctoral Fellowship to the Hebrew University of Jerusalem;
Aug 1980	University of Tasmania Half Blue in Athletics.

ACADEMIC and PROFESSIONAL APPOINTMENTS:

Sep 2003 - Jan 2004	Visiting Professor, The University of Tasmania Law School, Hobart, Tasmania;
Feb 2003	Visiting Professor, University of Virginia Law School, Charlottesville, Virginia;
Nov 2002 – present	*Amicus Curiae* on International Law matters to Trial Chamber III of the International Criminal Tribunal for the Former Yugoslavia in the trial of Slobodan Milošević;
Aug 2002 – present	Senior Academic Fellow, Ridley College, The University of Melbourne;
July 2002 – present	International Advisory Board Member, Institute for International Law of Peace and Armed Conflict, Ruhr Universität, Bochum, Germany;
June 2002 – present	International Advisory Board Member, CONCORD Centre, Law School, The College of Management Academic Studies, Rishon LeZion, Israel;
July 2001 – present	Foundation Director, Asia-Pacific Centre for Military Law, The University of Melbourne;
Jun 2000 - present	Director of Studies, Graduate Program in Military Law, The University of Melbourne;
Nov 99 – Nov 02	Vice-President, Australian Red Cross;
Jan 1999 – present	Member, Australian Foreign Minister's National Consultative Group on a Verification Protocol for the Biological Weapons Convention;

Jan 1998 – present	Member, Australian Foreign Minister's National Consultative Committee on Peace and Disarmament;
Jan 1997 – Dec 1999 Jan 2002 – Dec 2002	Associate Dean – Research, Faculty of Law, The University of Melbourne
Aug 1996 - present	Foundation Australian Red Cross Professor of International Humanitarian Law, The University of Melbourne;
Jan 1995 - present	Director of Studies, Graduate Program in International Law, The University of Melbourne;
April 1994 – Nov 02	Chair, Australian Red Cross National Advisory Committee on International Humanitarian Law;
Jan 1994	Visiting Scholar, Faculty of Law, The Hebrew University of Jerusalem;
Jul 1993 – Dec 1993	Visiting Scholar, Faculty of Law, Australian National University;
Jan 1993 - July 1996	Senior Lecturer in Law, The University of Melbourne;
Oct 1991 - Mar 1994	Member, Australian Red Cross Society National Committee on International Humanitarian Law;
Jan 1991 - Dec 1992	Lecturer in Law, The University of Melbourne;
Feb - Dec 1990	Lecturer in Law, The University of Tasmania;
Dec 1989 - Jan 1990	Visiting Lecturer in Law, Monash University;
Dec 1988 - Nov 1989	Golda Meir Postdoctoral Fellow in International Law, The Hebrew University of Jerusalem;
Jan 1987 - Nov 1988	Tutor in Law, Monash University;
Feb 1984 - Dec 1986	Ph.D. candidate, Monash University;
Feb 1983 - Jan 1984	Vice-Principal, Jane Franklin Hall, The University of Tasmania;
Feb 1982 - Jan 1983	Resident Tutor in Law, Jane Franklin Hall, The University of Tasmania.

PARTICIPATION in INTERGOVERNMENTAL CONFERENCES:

2002:

June: Annual Plenary Meeting of the InterAction Council (supporting former Prime Minister Rt Hon Malcolm Fraser AC) hosted by former Chancellor Helmut Schmidt;

2001:

Dec: NGO member of Australian Government Delegation to the Second Review Conference of the Certain Conventional Weapons Convention, United Nations, Geneva;

Jan: Independent Expert, ICRC Meeting of Governmental Experts on the 'SIrUS Project', Jogny-sur-Vevey, Switzerland;

1999:

Nov: Member of Australian Red Cross Delegation to the XXVIIth International Red Cross Conference (4 yearly conference involving The International Committee of the Red Cross, States Parties to the Geneva Conventions, The International Federation of Red Cross and Red Crescent National Societies and The National Societies themselves), International Conference Centre, Geneva;

May: Chair of Expert Working Group on International Humanitarian Law at the Inter-Governmental Centenary Commemoration of the First Hague International Peace Conference of 1899, The Peace Palace, The Hague;

1998:

Oct: Member of the International Committee of the Red Cross Delegation to the Annual Pacific Islands Law Officers' Meeting, Travelodge Hotel, Canberra;

June: Member of Australian Government Delegation to the Rome Diplomatic Conference for the Establishment of an International Criminal Court, Food and Agricultural Organisation, Rome;

April: Member of Australian Red Cross Delegation to the Asia-Pacific Regional Seminar on the Draft Statute for an International Criminal Court (jointly organised by the Australian Government, ICRC and Australian Red Cross), Department of Foreign Affairs and Trade, Canberra;

Jan: Member of Australian Government Delegation to the First Interim Conference of States Parties to the Geneva Conventions, International Conference Centre, Geneva;

1997:

Nov: Member of Australian Government Delegation to the 6th (Legal) Committee of the UN General Assembly for the discussion of the Draft Statute for an International Criminal Court, UN, New York;

Oct: Member of International Committee of the Red Cross Delegation to the Annual Pacific Islands Law Officers' Meeting, International Dateline Hotel, Nuku'Alofa;

1996:

Nov: Member of Australian Government Delegation to the 6th (Legal) Committee of the UN General Assembly for the discussion of the Draft Statute for an International Criminal Court, UN, New York;

May: Member of Australian Government Delegation to the First Conference of States Parties to the Chemical Weapons Convention, Congresgebouw, The Hague;

1994:

Nov: Member of the Australian Government Delegation to the 4th Asia-Pacific Regional Seminar on the Chemical Weapons Convention (organised jointly by the Indonesian Government, the Australian Government and the Provisional Technical Secretariat of the Organisation for the Prohibition of Chemical Weapons), Jakarta;

May: Member of the Australian Government Delegation to the 3rd Asia-Pacific Regional Seminar on the Chemical Weapons Convention (organised jointly by the Thai Government, the Australian Government and the Provisional Technical Secretariat of the Organisation for the Prohibition of Chemical Weapons), Bangkok;

1993:

Dec: Member of the Australian Government Delegation to the Inter-Governmental Seminar on National Implementation of the Chemical Weapons Convention, Congresgebouw, The Hague;

April: Member of the Australian Government Delegation to the 2nd Asia-Pacific Regional Seminar on the Chemical Weapons Convention, Sydney;

1992:

June: Member of the Australian Government Delegation to the 1st Asia-Pacific Regional Seminar on the Chemical Weapons Convention, Sydney.

PARTICIPATION IN EDITORIAL ADVISORY BOARDS:

Co-editor in Chief (with Professor Christopher Greenwood), International Humanitarian Law Series, Kluwer Law International, The Hague;

Member of Editorial Advisory Board, *Yearbook of International Humanitarian Law*, TMC Asser Instituut, The Hague;

Member of Editorial Advisory Board, *Melbourne Journal of International Law*, Faculty of Law, The University of Melbourne;

Member of Editorial Advisory Board, *International Criminal Law Review*, Kluwer Law International, The Hague;

Member of Editorial Advisory Board, *Journal of Conflict and Security Law,* Oxford University Press, Oxford;

Member of Editorial Advisory Board, *Pacifica Review,* Institute for Peace Research, La Trobe University, Melbourne.

OTHER PROFESSIONAL AFFILIATIONS:

Member, Australian and New Zealand Society of International Law

Member, American Society of International Law

PUBLICATIONS:

Books (authored and edited):

McCormack, T.L.H. and Saunders, C.A. (eds) *A Remarkable Public Life: Essays in Honour of Sir Ninian Stephen,* Melbourne University Press: Melbourne (forthcoming 2005);

McCormack, T.L.H., Tilbury, M. and Triggs, G.T. (eds) *A Century of War and Peace: Asia-Pacific Perspectives on the Centenary of the 1899 Hague Peace Conference,* Kluwer Law International: The Hague (2001) pp. 292 + xiv;

Durham, H. and McCormack, T.L.H. (eds) *The Changing Face of Conflict and the Efficacy of International Humanitarian Law,* Kluwer Law International: The Hague (1999) pp. 225 + xxvi;

McCormack, T.L.H. and Simpson, G.J. (eds) *The Law of War Crimes: National and International Approaches,* Kluwer Law International: The Hague (1997) pp. 262 + xxvii;

McCormack, T.L.H. *Self-Defence in International Law: The Israeli Raid on the Iraqi Nuclear Reactor,* Magnes Press: Jerusalem with St. Martin's Press: New York (1996) pp. 339 + viii.

Chapters in Books:

Howard, J. and McCormack T.L.H., 'Australia's Implementation of the *Rome Statute*' in M. du Plessis (ed), *Commonwealth Guide to International Criminal Law,* Commonwealth Secretariat: London (in press);

McCormack, T.L.H. 'Use of Force' in S. Blay, R. Piotrowicz and B. Martin Tsamenyi (eds) *Public International Law: An Australian Perspective (2nd ed.),* Oxford University Press: Oxford (in press);

McCormack, T.L.H., 'The Importance of Effective Enforcement of International Humanitarian Law' in Liesbeth Ljinzaad, Johanna van Sambeek and Bahia Tahzib-Lie (eds), *Making the Voice of Humanity Heard: Essays on Humanitarian Assistance and International Humanitarian Law in Honour of HRH Princess Margriet of The Netherlands,* Martinus Nijhoff Publishers: Leiden (2004) 319-338;

McCormack, T.L.H., 'Crimes Against Humanity' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing: Oxford (2004) 179-202;

McCormack, T.L.H. 'Their Atrocities and Our Misdemeanours: The Reticence Of States to Try Their Own Nationals for International Crimes' in Mark Lattimer and Philippe Sands (eds) *Justice for Crimes Against Humanity*, Hart Publishing: Oxford (2003), 107-42;

McCormack, T.L.H., 'Reply to Louise Arbour' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law*, The Federation Press: Sydney (2003), 136-142;

McCormack, T.L.H., 'Australia's Legislation for the Implementation of the *Rome Statute*' in Matthias Neuner (ed), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries*, Berliner Wissenschafts-Verlag: Berlin (2003) 65-82;

Kelly, M.J. and McCormack, T.L.H., 'International and Regional Action with Regard to Conflicts in Multicultural Societies' in R. Blindenbacher and A. Koller (eds) *Federalism in a Changing World – Learning From Each Other*, McGill-Queen's University Press: Montreal (2003), 278-307;

McCormack, T.L.H. 'War Crimes' in Valerie Tomaselli and Sonja Matanovic (eds.) *World at Risk: A Global Issues Sourcebook*, CQ Press: Washington DC (2002) 585-603;

Mathews, R.J. and McCormack, T.L.H. 'The Relationship Between International Humanitarian Law and Arms Control' in Durham H. and McCormack, T.L.H. (eds) *The Changing Face of Conflict and the Efficacy of International Humanitarian Law*, Kluwer Law International: The Hague (1999) 65-98;

McCormack, T.L.H. 'Use of Force' in S. Blay, R. Piotrowicz and B. Martin Tsamenyi (eds) *Public International Law: An Australian Perspective*, Oxford University Press: Melbourne (1997) 238-270;

Mathews, R.J. and McCormack, T.L.H. 'Australian Security, Weapons of Mass Destruction and International Law' in A. Bergin and S. Scott (eds) *International Law and Australian Security*, Australian Defence Studies Centre: Canberra (1997) 125-146;

McCormack T.L.H. and Simpson, G.J. 'Achieving the Promise of Nuremberg: A New International Criminal Law Regime?' in *The Law of War Crimes: National and International Approaches*, Kluwer Law International: The Hague (1997) 229-254;

McCormack, T.L.H. 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime' in McCormack and Simpson (eds) *The Law of War Crimes: National and International Approaches*, Kluwer Law International: The Hague (1997) 31-64;

McCormack, T.L.H. and Reicher H. 'International Legal Personality' in H. Reicher (ed.) *Australian International Law: Cases and Materials*, Law Book Co. Sydney (1995) 116-201;

McCormack, T.L.H. 'The Use of Force' in H. Reicher (ed.) *Australian International Law: Cases and Materials,* Law Book Co.: Sydney (1995) 1028-1072;

Mathews, R.J. and McCormack, T.L.H. 'Verification of the Chemical Weapons Convention: National Implementation Requirements' in J.B. Poole and R. Guthrie (eds), *Verification 1995: Arms Control, Peacekeeping and the Environment,* Westview Press: Boulder (1995) 180-192.

Articles in Refereed Journals:

Kelly, M.J., McCormack, T.L.H., Muggleton, P. and Oswald, B.M. 'Legal Aspects of Australia's Involvement in the International Force for East Timor' (2001) 83 *International Review of the Red Cross* 101-140;

McCormack, T.L.H., 'What's in an Emblem?: Humanitarian Assistance Under Any Other Banner Would be as Comforting' (2000) 1 *Melbourne Journal of International Law* 175-184;

McCormack, T.L.H. and Robertson, S. 'Jurisdictional Aspects of the Rome Statute for a New International Criminal Court' (1999) 23 *Melbourne University Law Review* 635-667;

McCormack, T.L.H. and Simpson, G.J. 'Simulating Multilateral Treaty Making in the Teaching of the Law of International Organisations' (1999) 8 *Legal Education Review* 61-82;

Doherty, K.L. and McCormack, T.L.H. 'Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation' (1999) 5 *University of California, Davis Journal of International Law and Policy* 147-180;

Mathews, R.J. and McCormack, T.L.H. 'The Influence of Humanitarian Principles in the Negotiation of Arms Control Regimes' (1999) 81 *International Review of the Red Cross* 331-352;

McCormack, T.L.H. 'The 'Sandline Affair': Papua New Guinea Resorts to Mercenarism to End the Bougainville Conflict' (1998) 1 *Yearbook of International Humanitarian Law* 292-300;

McCormack, T.L.H. 'From Solferino to Sarajevo: A Continuing Role for International Humanitarian Law?' (1997) 21 *Melbourne University Law Review* 621-649;

McCormack, T.L.H. 'Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law' (1997) 60 *Albany Law Review* 681-732;

McCormack, T.L.H. 'A *Non-Liquet* on Nuclear Weapons: The ICJ Avoids the Application of General Principles of International Humanitarian Law' (1997) 316 *International Review of the Red Cross* 76-91;

Mathews, R.J. and McCormack, T.L.H. 'The Resolution of Disputes Under the Chemical Weapons Convention (1995) 16 *Contemporary Security Policy* 396-420;

McCormack, T.L.H. and Simpson, G.J. 'A New International Criminal Law Regime?: The Sixth Committee Debates The International Law

Commission's Draft Statute for an International Criminal Court' (1995) XLII *Netherlands International Law Review* 177-206;

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McCormack, T.L.H. 'Australia' in 'Correspondents' Reports', (1999)2 *Yearbook of International Humanitarian Law* 329-331;

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From: [redacted]
Sent: Thursday, October 28, 2004 1:56 PM
[redacted]
Will Col DoD OGC Gunn (Gunn, Will, Col, DoD OGC); [redacted] Lippert, Jeffery
MAJ Bamberg Law Center; [redacted]
[redacted] Brownback, Peter E. COL (L)
Subject: United States v. Hicks, Decision of the Presiding Officer, D26

United States v. Hicks

Decision of the Presiding Officer, D26

The Presiding Officer has denied the request for production of Tim McCormick as a witness. The Presiding Officer did not find that he is necessary. See Military Commission Order 1, section 5H. Accordingly, this request has been moved from the active to the inactive section of the filings inventory in accordance with POM 12. See also paragraph 8, POM 12.

By Direction of the Presiding Officer

[redacted]
Assistant to the Presiding Officers
[redacted]

Decision of the PO, D26

UNITED STATES OF AMERICA	)	
	)	**DEFENSE MOTION - THE ENTIRE COMMISSION TO GRANT PRODUCTION OF WITNESS DENIED IN D 27**
v.	)	
DAVID HICKS	)	**(George Edwards)**
	)	29 October 2004

The Defense previously requested that name of witness be produced. The request was denied by the Presiding Officer under the provisions of Military Commission Order 1, section 5H.

The Defense requests the Commission direct the production of the witness, and that the Commission consider the following previously made filings, and the attachments thereto, per the Filings Inventory D27, in making its determination.

a. Motion by the defense requesting Mr. Edwards.
b. Decision of the Presiding Officer denying the witness.
c. The government response to D27, if any.

By: _____
M.D. MORI
Major, U.S. Marine Corps

Review Exhibit 39

Page 1 **Of** 1

NOTE: The Detailed Defense Counsel advises this witness request is a substitute for the one filed 8 Oct 04. APO. (D27)

UNITED STATES OF AMERICA	)	
	)	**DEFENSE REQUEST FOR WITNESS**
v.	)	
	)	**(Professor George Edwards)**
DAVID M. HICKS	)	8 October 2004 (Supplemented 26 Oct 04)

The Defense in the case of the *United States v. David M. Hicks* requests the following witness for the 01 November 2004 motion hearing at Guantanamo Bay and in support of this request the defense states:

1. **Witness information**:

Professor George Edwards
Professor of Law, Indiana University School of Law at Indianapolis

Office Phone: (317) 278-2359
GEDWARDS@indiana.edu

2. **Need for translator**: None

3. **Synopsis of testimony**: (Supplement) It is anticipated the Professor Edwards will testify as an expert in international law, including but not limited to, the following:

Professor Edwards will testify that all human beings have the right to a fair trial. The right to a fair trial on a criminal charge begins to run at the date that State activities 'substantially affect the situation of the person concerned'. Irrespective of how the accused David M. Hicks might be classified, he retains the right to a fair trial under international human rights law, international humanitarian law (also known as the law of armed conflict (the LOAC)), international criminal law, general U.S. law, and the law of the Military Commissions whether or not the tribunal is convened under the LOAC or not.

Professor Edwards will further testify that the provisions of the International Convention on Civil and Political Rights is part of U.S. law, and the its fair trial provisions apply to Mr. Hicks case.

Professor Edwards will further testify that even if the military commission finds that an armed conflict exists in the U.S. military operations against al Qaida, and that international humanitarian law is relevant to the disposition of *United States v. David M. Hicks*, then the fair trail provisions of Additional Protocol I of the Geneva Conventions would apply because of the nature of the armed conflict and occupation involving Afghanistan. He will further testify that Article 45 of Additional Protocol I concerns protection of persons who have taken part in hostilities, like Mr. Hicks. Article 45(3) provides that:

"[a]ny person who has taken part in hostilities, who is not entitled to prisoner of war status and who does not benefit from more favorable treatment in accordance with the Fourth Geneva Convention shall have the right at all times to protection of Article 75 of this Protocol'. Therefore, any person, such as David Hicks, who took part in the hostilities in Afghanistan and was captured by US forces, is entitled to the rights provided for in article 75."

Professor Edwards will testify that U.S. treatment of Mr. Hicks violated Art. 75 and Specific remedies available to Mr. Hicks could include dismissal of the charges against Mr. Hicks, restoration of his liberty, compensation, exclusion of evidence used against him at trial. Furthermore, criminal investigations and prosecutions could be commenced against individuals who participated in the perpetration of international human rights law and international humanitarian law violations, including individuals responsible for failure to ensure that Mr. Hicks receives a full and fair trial under international human rights law, international humanitarian law, and U.S. domestic law.

Professor Edwards will also testify that the protections Mr. Hicks is afforded under international human rights law such as the ICCPR are not trumped in situation where international humanitarian law, the LOAC, are in play. He will testify that the military commission process, and Mr. Hicks' prolonged detention, conditions of detention, etc. violated Mr. Hick's rights under the ICCPR and that these violations can and should be remedied by the commission.

Professor Edwards will testify about the U.S. government's condemnation of the use of military commissions with procedures strikingly similar to those used by this military commission. He will testify that the U.S. government has condemned the use of military commissions in the Sudan, Peru, Nigeria, Burundi, Egypt, Congo, and Israel. He will compare the procedures and handling of accused persons in those countries' military commissions with the procedures the government is using in Mr. Hicks' case.

The above is merely a synopsis of Professor Edwards expected testimony. He may, of course, testify regarding other relevant issues during the course of direct examination.

4. **Source of knowledge**: I have spoken to him previously.

5. **Use of testimony**: This witness will testify on for the motion hearing scheduled to begin 1 November 2004.

6. **Reasonable availability of witness**: Mr. Edwards says he is available and willing to come to GTMO for the hearing

7. **Alternative to live testimony**: (Supplement) The defense believes that a stipulation of expected testimony is not a viable option for this witness. Much of the expected testimony is intended to educate the commission on relevant areas of law, some of which will include opinion. Further, a stipulation of expected testimony would take away the commission's opportunity to question this witness regarding complex issues of the LOAC and its implications for Mr. Hicks case. Moreover, some of the facts and opinions the witness will testify about are in direct contravention of opinions the prosecution has cited in its responses to defense motions. Alternatives to testimony such as written opinions, briefs, telephonic testimony, or affidavits will not be sufficient to adequately convey to the commission the complex concepts of LOAC and its application to Mr. Hicks' continued detention, trial by military

commission for certain offenses, the implications of the existence of an armed conflict with al Qaida and/or the Taliban regime and/or its remnants. Moreover, using such alternatives to testimony would deprive the commission of the important opportunity to question Professor Edwards regarding the topics on which he would testify, and others topics in to which the commission desired to inquire.

8. **Is the witness cumulative with other witnesses**: No.

9. **Attachments**: CV of Professor George Edwards

By: _____
M.D. MORI
Major, U.S. Marine Corps

GEORGE E. EDWARDS

PROFESSOR OF LAW
DIRECTOR, PROGRAM IN INTERNATIONAL HUMAN RIGHTS LAW
INDIANA UNIVERSITY SCHOOL OF LAW AT INDIANAPOLIS (INDIANA)

EXPERIENCE

INDIANA UNIVERSITY SCHOOL OF LAW AT INDIANAPOLIS. January 1997 - Present

- **PROFESSOR OF LAW (WITH TENURE) (ASSOCIATE PROFESSOR OF LAW -- 1997-2002)**
- **FACULTY DIRECTOR/ADVISOR (*FOUNDING*), Master in Laws (LL.M.) in International Human Rights Law Track**
- **DIRECTOR (*FOUNDING*), Program in International Human Rights Law**
- **DIRECTOR (*FOUNDING*), Overseas International Human Rights Law Internship Program**
- **EDITOR (*FOUNDING*), *Indiana International Human Rights Law Bulletin***
- **FACULTY ADVISOR FOR:**
  - **International Human Rights Law Society (*INAUGURAL*)**
  - **Amnesty International Student Chapter (*INAUGURAL*)**
  - **International Law Society (Int'l Law Students Assoc. Chapter – ILSA)**
  - **Jessup International Moot Court Competition**
  - **Indiana International & Comparative Law Review**
- **COURSES: International Human Rights Law; International Criminal Law; Public International Law; Criminal Procedure; Advanced LL.M. Writing & Research; International Legal Transactions**
- **AWARDS HONORS: George W. Pinnell Award for Outstanding Service – Indiana University** (SPRING 2004)
  Trustees Teaching Award – Indiana University (SPRING 2002)
  Fulbright Lecturer Grant Recipient – PERU (AUTUMN 2001)
  John Morton-Finney/Brenda Elise Bowles BLSA Award (SPRING 2001; SPRING 2003)
  Glenn W. Irwin Experience Excellence Award (SPRING 1999)
  Law School Executive Committee (Elected by Full Faculty – 2004-2005)

UNIVERSITY OF CAMBRIDGE, FACULTY OF LAW. LAUTERPACHT RESEARCH CENTRE FOR INTERNATIONAL LAW, CAMBRIDGE, UNITED KINGDOM. VISITING FELLOW. (Michaelmas Term) Autumn 2001

UNIVERSIDAD PRIVADA SAN PEDRO. CHIMBOTE, PERU. FULBRIGHT LECTURER. FULBRIGHT SENIOR SPECIALIST GRANT RECIPIENT. Lectured in International Legal Transactions & International Human Rights Law. Chimbote & Trujillo, Peru. Sept.–Oct. 2001

DEPAUL UNIVERSITY COLLEGE OF LAW. CHICAGO, ILLINOIS. August 1999 – January 2000

- **LAW PROFESSOR (VISITING). COURSES: Int'l Human Rights Law; Int'l Legal Transactions**

FACULTIES OF LAW, UNIVERSITY OF HONG KONG & CITY UNIVERSITY OF HONG KONG; LAW SOCIETY OF HONG KONG. 1992-1996

- **ASSOCIATE DIRECTOR.** *Centre for Comparative and Public Law* (University of HK Faculty of Law).
- **CO-EDITOR, HONG KONG PUBLIC LAW REPORTS.** Reported & edited Hong Kong judgments (HKU)
- **DIRECTOR (HONG KONG).** *Santa Clara University School of Law Summer Programme* (HKU)
  Programme Focus: Comparative Commercial, Investment, & Public Law.
- **LAW LECTURER (ADJUNCT).** Taught postgraduate students & practicing solicitors. Subjects inc. Hong Kong Bill of Rights, Legal Writing/Drafting, Legal Practice, & International Human Rights Law (CU, LS – 94-96)
- Local/overseas lectures. Assisted *Student Law Review & Jessup Moot Court.* Tutor. Co-convened int'l human rights law Colloquia; Assisted - UN advocacy human rights training; Rapporteur; Prepared submissions to 5 UN *Treaty Bodies* (New York/Geneva); Hosted Special Rapporteur Hong Kong visits. (HKU)

CRAVATH SWAINE & MOORE, New York. Attorney. 1984, 1987-91

- Handled contentious/non-contentious contractual and corporate matters, including drafting.

JUDGE CEDARBAUM, U.S. DISTRICT COURT JUDGE, SOUTHERN DISTRICT OF NEW YORK. Law Clerk 1986-87

- Researched legal issues before, during and after trial; drafted and edited judgments. Civil/Criminal Law.

LEGAL EDUCATION

HARVARD LAW SCHOOL, Cambridge, Massachusetts. Juris Doctor. 1986

Harvard Law Review (Editor) International Law Journal (Associate Editor)

Harvard Human Rights Program
Black Law Students Association
Prof's Assistant for Legal Writing

HLS Forum (Board of Directors)
Human Rights Internet – Volunteer
Prof's Assistant – Researched and Edited Book

Other Education

NORTH CAROLINA STATE UNIVERSITY, Raleigh, North Carolina.
B.A. Economics/Business Management (Magna Cum Laude). 1981

Messenheimer Scholarship, 3 years; Dean's List, 7 of 8 Semesters; Economics Honor Society; Outstanding Senior Award; Scholastic Achievement Certificates; Prof's Assistant – Speech Comm.

UNIVERSITY OF NEW MEXICO, Albuquerque, New Mexico. National Student Exchange Scholar. 1979-80

CARDINAL GIBBONS HIGH SCHOOL, Raleigh, North Carolina. (Grades 9-12) 1974-77
Second World Black and African Festival of Arts and Culture (FESTAC), Nigeria.
National essay contest winner. Represented African-American youth at FESTAC in Nigeria. (1977)

Other Law Employment (Summer/Autumn Internships)

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, LEGAL PROTECTION DIVISION,
Geneva, Switzerland. Law Intern. Helped plan workshops for UNHCR legal officers. (Autumn 1986)

FORD FOUNDATION, INTERNATIONAL AFFAIRS PROGRAM, New York. Intern. Reviewed grant proposals, monitored work of grantees, assessed completed projects. (Summer 1986)

INTERFAM: INTERAGENCY FAMINE INFORMATION PROJECT, Sudan and Ethiopia.
Researcher. Gathered and reported famine and refugee data in Africa. (Summer 1985)

ARNOLD & PORTER, Washington, D.C. Summer/Autumn Law Associate.
Researched international and domestic legal matters. (1985)

RUSSIN KAPLAN & VECCHI, INTERNATIONAL LEGAL COUNSELORS, Bangkok, Thailand.
Summer Law Associate. Researched corporate legal issues; drafted contracts. (Summer 1983)

CLEVELAND MUNICIPAL COURTS, Cleveland, Ohio. Law Clerk. Researched and drafted memoranda for Judges for use in rendering final rulings. (Summer 1982)

BAR ADMISSIONS

New York State and New York Federal Bars. 1988

PROFESSIONAL & OTHER ACTIVITIES & MEMBERSHIPS

- **UNITED NATIONS, NEW YORK & GENEVA, SWITZERLAND.** Accredited Representative to the United Nations, Representing National Bar Association. Appointment – 1999 – present. Also accredited to United Nations Affiliates in Amman, Jordan; Bangkok, Thailand; & Vienna, Austria.
- **FIRE MERIT BOARD, CITY OF INDIANAPOLIS, MARION COUNTY, INDIANA U.S.A.** Appointed by Indianapolis Mayor Bart Peterson to serve term commencing October 2003.
- **FULBRIGHT ASSOCIATION.** Member.
- **AFRICA JUDICIAL NETWORK.** Member.
- **EXTERNAL EXAMINER - SJD ORAL EXAM AND DISSERTATION COMMITTEE MEMBER: DOCTORAL CANDIDATE MR. EDWARD WU, FACULTY OF LAW, UNIVERSITY OF TORONTO, SPRING 2001.**
- **AMERICAN SOCIETY OF INTERNATIONAL LAW ("ASIL"), INTERNATIONAL ORGANIZATIONS INTEREST GROUP.** Member. Chair Elect (2001-2002); Chair (2002-2003); Co-Chair (2004-2005)
- **AMERICAN SOCIETY OF INTERNATIONAL LAW ("ASIL"), INTERNATIONAL ORGANIZATIONS INTEREST GROUP, NGO SUB-SECTION,** Co-Chair. (1998-Present); Vice-Chair (2001 - present)
- **AMERICAN ASSOCIATION OF LAW SCHOOLS ("AALS"), SECTION ON INTERNATIONAL HUMAN RIGHTS LAW,** Chair-Elect (2001-2002); First Regularly Elected Chair (2002-2003); Executive Committee Member (2001 – present)
- **AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE (AAAS) COMMITTEE FOR SCIENTIFIC FREEDOM.** Member (3-year appointment commenced January 1999).
- **ASSOCIATION INTERNATIONALE DE DROIT PÉNAL, AMERICAN NATIONAL SECTION.** Member.
- **INTERNATIONAL CRIMINAL LAW NETWORK (THE HAGUE).** Member (2003 – present).
- **INTERNATIONAL LAW STUDENTS ASSOCIATION. MEMBER, BOARD OF DIRECTORS.** (Elected 2002; 3-yr Term)
- **INTERNATIONAL BAR ASSOCIATION.** Member.
- **INTERNATIONAL CRIMINAL BAR.** Member.
- **INTERNATIONAL LAW ASSOCIATION.** Member.
- **NATIONAL BAR ASSOCIATION.** Member. International Law Section Vice-Chair for Public International Law; International Law Section Advisor for Public International Law
- **CAMBRIDGE SOCIETY (UK).** Member.
- **CAMBRIDGE IN AMERICA.** Member.
- **COMMONWEALTH LEGAL EDUCATION ASSOCIATION.** Member (2003 - present)
- **MID-WEST COALITION FOR HUMAN RIGHTS.** Member.
- **UNIVERSITY OF CAMBRIDGE, WOLFSON COLLEGE,** Senior Member (2001)
- **ASSOCIATION OF NIGERIANS IN INDIANAPOLIS, HONORARY MEMBER.** (Honor presented by Diplomats of the Nigerian Consulate General in New York, on behalf of the Nigerian Consul General)(18 October 2003)
- **SOCIETY OF PROFESSIONAL JOURNALISTS.** Member (1999 –).
- **SOCIETY OF PROFESSIONAL JOURNALISTS, INT'L JOURNALISM COMMITTEE.** Member (1999-)
- **HONG KONG HUMAN RIGHTS MONITOR.** Member; Washington DC & Mid-West U.S. Rep (1996-)
- **HONG KONG TELEVISION AND ENTERTAINMENT LICENSING AUTHORITY (TELA).** Appointed Member, Panel of Film Censorship Advisers. (Hong Kong; 1992-1993)
- **AMNESTY INTERNATIONAL - HONG KONG SECTION; INDIANAPOLIS CHAPTER.** Member (former).
- **CENTRE OF AMERICAN STUDIES, DEPARTMENT OF HISTORY, UNIVERSITY OF HONG KONG.** Fellow. (Appointment 1996-98)
- **AMERICAN COMMUNITY THEATRE.** Elected Member, Board of Governors; Actor. (Hong Kong; 1991-1994)
- **INDIANA UNIVERSITY MUSIC ACADEMY.** Piano Accompanist for Violin Class; Piano Student. (1998 -)
- **NATIONAL INSTITUTE FOR FITNESS & SPORTS.** Member; Athletic Training Program Participant.

- HONG KONG (LEGISLATIVE COUNCIL) AD HOC COMMITTEE ON EQUAL OPPORTUNITIES. Member (1995-96)

PUBLICATIONS

Law Reports & Other Books

HONG KONG PUBLIC LAW REPORTS (Vols 1, 2, 3, 4, 5 & 6). (Butterworths Asia; University of Hong Kong Press) (co-editor with A Byrnes & J Chan) (1993, 1994, 1995, 1996)

HONG KONG'S BILL OF RIGHTS: THE FIRST YEAR (co-editor with A Byrnes) (Problems & Prospects Series, Volume 5, University of Hong Kong, Faculty of Law) (1993)

HONG KONG'S BILL OF RIGHTS: THE SECOND YEAR (co-editor with A Byrnes & W Fong) (Problems & Prospects Series, Volume 8, University of Hong Kong, Faculty of Law) (1994)

HONG KONG'S BILL OF RIGHTS: 1991-1994 AND BEYOND (co-editor with A Byrnes) (Problems & Prospects Series, Vol 10, University of Hong Kong, Faculty of Law) (1995)

HONG KONG'S BILL OF RIGHTS: TWO YEARS BEFORE 1997 (co-editor with J Chan) (Problems & Prospects Series, Vol 13, Univ of Hong Kong: Faculty of Law & Centre for Comparative and Public Law) (1995)

HONG KONG'S BILL OF RIGHTS: THE FINAL YEAR? (co-editor with J Chan) (Problems & Prospects Series, Centre for Comparative and Public Law, University of Hong Kong, Faculty of Law)

Law Review Publications & Other

HUMAN RIGHTS CHALLENGES TO THE NEW INTERNATIONAL CRIMINAL COURT: THE SEARCH AND SEIZURE RIGHT TO PRIVACY, YALE JOURNAL OF INTERNATIONAL LAW, VOL. 26, SUMMER 2001, PP. 323-412

APPLICABILITY OF THE "ONE COUNTRY, TWO SYSTEMS" HONG KONG MODEL TO TAIWAN: WILL HONG KONG'S POST-REVERSION AUTONOMY, ACCOUNTABILITY, & HUMAN RIGHTS RECORD DISCOURAGE TAIWAN'S REUNIFICATION WITH THE PEOPLE'S REPUBLIC OF CHINA?, NEW ENGLAND LAW REVIEW, SPRING 1998, PP. 751-778.

THE BELGIAN ARREST WARRANT CASE (DEMOCRATIC REPUBLIC OF CONGO V. BELGIUM): IMPACT ON HUMAN RIGHTS AND THE STRUGGLE AGAINST IMPUNITY, AMERICAN SOCIETY OF INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS NEWSLETTER, PP. 16-23 (SPRING 2002)

WILL HONG KONG HUMAN RIGHTS NON-GOVERNMENTAL ORGANIZATIONS (NGOS) SURVIVE AFTER THE PEOPLE'S REPUBLIC OF CHINA RECLAIMS SOVEREIGNTY OVER HONG KONG ON 1 JULY 1997?, American University Journal of International Law & Policy, Vol 12, No. 3, pp 407-444 (Summer 1997) (Symposium – Hong Kong: Preserving Human & the Rule of Law)

COPYRIGHT PROTECTION IN THAILAND – THAILAND'S ROYAL DECREE PRESCRIBING THE CONDITIONS FOR THE PROTECTION OF INTERNATIONAL COPYRIGHTS, 25 HARVARD INT'L LAW JOURNAL 205 (1984)

HUMAN RIGHTS EDUCATION FOR THE TWENTY-FIRST CENTURY. REVIEW OF BOOK BY GEORGE J. ANDREOPOULOS & RICHARD PIERRE CLAUDE, EDS. (PHILADELPHIA: UNIVERSITY OF PENNSYLVANIA

PRESS, 1997, 636 PP.). NETHERLANDS QUARTERLY OF HUMAN RIGHTS, pp. 565-569 (VOL. 18, NO. 4) (DEC 2000)

DISCRIMINATION ON THE LAW'S MARGINS– THE "FORGOTTEN" FORMS OF DISCRIMINATION IN HONG KONG: SEXUALITY, RACE AND AGE (Book Chapter forthcoming)(University of Hong Kong Press) (49 pp)

HONG KONG AND THE UNITED NATIONS TREATY BODIES: A LOOK BEYOND 1997, (co-author with Mark Zuckerman), *Human Rights in China Journal* (Autumn 1996)

TIGHTENING THE LEASH: THREATS TO FREEDOM OF ASSOCIATION AND INDEPENDENT HUMAN RIGHTS ADVOCACY IN THE NEW HONG KONG (with G. Black) (New York and Hong Kong; Lawyers Committee for Human Rights & Hong Kong Human Rights Monitor) (June 1997) (65 pages)

Other Publications

Law Bulletins, Newsletters & Other

THE INTERNATIONAL CRIMINAL COURT: JUSTICE V. HUMAN RIGHTS PROTECTIONS IN AN AGE OF TERRORISM, *International Organizations Bulletin*, Spring 2003, pp 4 – 8

HUMAN RIGHTS VIOLATIONS AT INDIANA UNIVERSITY: SEVERING TIES WITH THE BOY SCOUTS AND THE UNITED WAY, (The Sagamore, page 7) (16 October 2000)

INDIANA INTERNATIONAL HUMAN RIGHTS LAW BULLETIN. Editor; Publisher. (5 Issues) (1997, 1998, 1999-2000, 2000-2001; 2001-2002; 2002-2003)

FIVE-YEAR REVIEW OF THE VIENNA DECLARATION & PROGRAM OF ACTION: THE OTTAWA GLOBAL NGO FORUM, American Society of Int'l Law Interest Group on International Organizations Newsletter, pp 19-21 (Fall 1998)

ADVOCACY IN THE ACADEMY: HUMAN RIGHTS CONFERENCES , (American Society of International Law, Human Rights Section Newsletter) (Winter 1998)

FREEDOM OF EXPRESSION IN MALAYSIA, *Human Rights Solidarity*, (Asia Human Rights Commission, Hong Kong), Volume 11, (Autumn 1996)

HUMAN RIGHTS REVIEW, The Newsletter of the International Human Rights Law Section of the American Association of Law Schools, Contributions (2002)

Magazine and Newspaper Articles; Miscellaneous Publications

INDIANA UNIVERSITY LAW STUDENTS RECEIVE SCHOLARSHIPS FOR OVERSEAS HUMAN RIGHTS INTERNSHIPS – *The Dictum*, pp 6-7 (September 1998)

AMERICAN SOCIETY OF INTERNATIONAL LAW – HUMAN RIGHTS SECTION – ANNUAL MEETING MINUTES, (American Society of International Law, Human Rights Section Newsletter) (Summer 1998; 2001; 2002; 2003) (co-author Cynthia Price Cohen)

LOADING UP IN INDIANAPOLIS – INTERNATIONAL CUISINE FOR INDIANAPOLIS RUNNERS – *Momentum – A Newsletter From The Running Company PLC* (Fall 2003)

INDIANA UNIVERSITY AT INDIANAPOLIS LAW GRADUATE NOMINATED FOR NOBEL PEACE PRIZE – *The Dictum*, p 8 (10 September 1999)

INTERNATIONAL HUMAN RIGHTS LAW BRIEFS – *The Dictum*, (September, October, November 1999)

PROGRAM IN INTERNATIONAL HUMAN RIGHTS LAW: OVERSEAS OPPORTUNITIES FOR LAW STUDENTS – SUMMER OVERSEAS INTERNSHIPS, *The Dictum*, pp 8-11 (August 1998)

ANTI-DISCRIMINATION LEGISLATION IN HONG KONG, *Contacts Magazine* (February 1996)

COMMERCIAL EXPRESSION AND HUMAN RIGHTS, *Hong Kong Lawyer* (August 1996)

IN HAEC VERBA: CUM GRANO SALIS, *Hong Kong Lawyer*, pp 19-21 (January 1995)

COMMERCIAL EXPRESSION AND HUMAN RIGHTS: TOBACCO ADVERTISING UNDER ARTICLE 16 OF THE HONG KONG BILL OF RIGHTS (co-author with Yash Ghai) (Centre for Comparative and Public Law, University of Hong Kong) (1996)

PUTTING UP A SMOKE SCREEN? (COMMERCIAL EXPRESSION IN HONG KONG – THE CASE OF TOBACCO ADVERTISING), *The New Gazette*, p 11 (January 1996)

EQUAL OPPORTUNITIES AND SEXUALITY: CIVIC EDUCATION V. LEGISLATION, *The New Gazette* (May 1996)

FILIPINA FOREIGN DOMESTIC HELPERS IN HONG KONG: A SURVEY OF LITERATURE (Centre for Comparative and Public Law, University of Hong Kong, Faculty of Law) (1996)

HONG KONG AND THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL & CULTURAL RIGHTS (co-editor with A Byrnes) (Centre for Comparative & Public Law, Faculty of Law, Univ of Hong Kong) (Electronic Pub) (1996)

DPP OF MALAYSIA V IRENE FERNANDEZ: MALICIOUSLY PUBLISHING FALSE NEWS CONTRARY TO THE MALAYSIAN PRINTING PRESSES AND PUBLICATIONS ACT 1984 (AS REV'D 1987), (ACT 301) (OBSERVER'S REPORT) (Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong) (1996)

ASSISTED IN REPORT PREPARATION FOR THE HONG KONG HUMAN RIGHTS MONITOR, THE HONG KONG JOURNALISTS ASSOCIATION (1997 ANNUAL REPORT), & OTHER HUMAN RIGHTS GROUPS.

ORAL TESTIMONY, CONFERENCE PAPERS DELIVERED, & OTHER PRESENTATIONS

INTERNATIONAL HUMAN RIGHTS LAW, U.S. LAW, & INDIANA LAW: GLOBAL & DOMESTIC PERSPECTIVE ON HUMAN RIGHTS ISSUES RAISED IN INDIANA COURTS. Taught a one-week course to 30+ trial and appellate

court judges from throughout Indiana. The training course was taught at the Brown County Inn, Nashville, Indiana, 6 – 11 June 2004. The course as sponsored by the Indiana Judicial Center.

INTERNATIONAL LAW, INTERNATIONAL HUMAN RIGHTS LAW & THE INTERNATIONAL CRIMINAL COURT: UNITED STATES AND THE REPUBLIC OF KOREA – COMPLIANCE CHALLENGES OF THE 21ST CENTURY A lecture at Seoul National University, in Seoul Korea, in the Human Rights, NGO and Global Civil Society Class taught by Professor Sang-Jin Han (9 December 2003) (Seoul, Republic of Korea)

THE INTERNATIONAL CRIMINAL COURT: PROSPECTS FOR THE QUEST TO ERADICATE IMPUNITY A Presentation at Stetson University College of Law, Gulfport, Florida in the International Human Rights Law Seminar conducted by Professor Dorothea Beane (16 February 2004) (Gulfport, Florida)

INTERNATIONAL HUMAN RIGHTS LAW AND THE CONVERGENCE OF PRIVATE & PUBLIC INTERNATIONAL LAW: PEDAGOGY, PRINCIPLES, AND PRACTICE A Colloquium presented to the Faculty of the Stetson University College of Law, Gulfport, Florida (17 February 2004) (Gulfport, Florida)

THE INTERNATIONAL CRIMINAL COURT: THE RELEVANCE OF UNITED STATES OPPOSITION, A Presentation at The John Marshall School of Law in the International Criminal Law Seminar conducted by Professor Mark Wojcik (17 November 2003) (Chicago, Illinois)

CONTEMPORARY ISSUES IN INTERNATIONAL HUMAN RIGHTS LAW ISSUES: STATES OBLIGATIONS UNDER THE TORTURE CONVENTION AND THE ECONOMIC COVENANT; THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT; AND, UNITED NATIONS ADVOCACY FROM WITHIN THE ACADEMY. A Presentation in conjunction with the 14th Consecutive Study Trip on United Nations Human Rights Treaty Procedures in Geneva for Members of Birkbeck College, University of London at the United Nations European Headquarters, (***Geneva, Switzerland***) (Monday, 10 November 2003)

THE UNITED NATIONS AND THE ADMINISTRATION OF TERRITORY: LESSONS FROM THE FRONTLINE. Panel Chair–Panel at the American Society of International Law Annual Meeting. 4 April 2003. Washington, D.C. Panel Participants – **Ambassador Peter Galbraith,** National War College, Washington DC; former Head of Political Affairs, UN Transitional Administration in East Timor (UNTAET); former Ambassador to Croatia; Ambassador **Jacques Paul Klein**, former Head, UN Transitional Administration in Eastern Slavonia (UNTAES) and UN Mission in Bosnia & Herzegovina (UNMIBH); **Ralph Wilde**, Law Lecturer, University College London, Univ. London. (Chaired in place of **H.E. Rosalyn Higgins DBE,** Judge of the International Court of Justice.)

COMPARATIVE DOMESTIC AND OVERSEAS PERSPECTIVES ON INTERNATIONAL HUMAN RIGHTS LAW PROTECTIONS IN THE U.S.A. AND KUWAIT. Guest Lecturer in International Human Rights Law course at University of Kuwait School of Law, (***Kuwait City, Kuwait***) (14 July 2003)

JOURNALISM, THE MEDIA, AND FREEDOM OF EXPRESSION: THE RELEVANCE OF INTERNATIONAL HUMAN RIGHTS LAW. Guest Professor in International Human rights and Media Class (J-460), taught by Professor Sherry Ricchiardi-Folwell, Indiana University School of Journalism (28 October 2003)

PROMOTION OF CIVIL SOCIETY AND DEMOCRATIC INSTITUTIONS IN LATIN AMERICA AND IN THE UNITED STATES. Panel Chair for U.S. Department of State Latin American Visitors Forum. Sponsored by State Department Office of International Visitors, Bureau of Educational and Cultural Affairs. Visitors to the U.S. were lawyers, government officials, human rights workers, academics, and others from Argentina, Bolivia, Chile, Colombia, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, and Venezuela. (Indianapolis, 22 September 2003)

INTRODUCTION TO INTERNATIONAL LAW AND A SURVEY OF UNITED STATES AND OVERSEAS INTERNATIONAL

LEGAL EDUCATION AND INTERNATIONAL LAW CAREER OPPORTUNITIES. Panel presentation sponsored by the International Law Section of the National Bar Association. Presentation at the National Bar Association's 78th Annual Convention, (***New Orleans***), Louisiana, August 2003.

TRAFFICKING IN HUMANS: A MODERN FORM OF SLAVERY. Panel Chair – Panel at the Association of American Law Schools Annual Meeting. Panel sponsored by the Section on International Human Rights Law. Annual Meeting held in Washington, D.C., January 2003

INTERNATIONAL HUMAN RIGHTS LAW IN THE DOMESTIC U.S.A. CONTEXT – REFOCUS & RECOMMITMENT TO RIGHTS BASED ADVOCACY, Presentation at the Second Annual Norman Amaker Public Interest Law Retreat Building Community: Finding Support and Resources for Social Change. Retreat held 28 February – 2 March 2003 at the Bradford Woods Retreat Center, Indiana (Presentation on Saturday, 1 March 2003)

FROM NUREMBERG TO ROME: THE DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW & THE ROME STATUTE FOR THE INTERNATIONAL CRIMINAL COURT. Presentation at the East Asian Workshop on the International Criminal Court. Held in (***Hong Kong***), August 2001.

INTERNATIONAL HUMAN RIGHTS LAW: THE RELEVANCE TO PERU. Several lectures to lawyers, judges, and graduate and undergraduate students in ***Chimbote and Trujillo, Peru***. Presentations at local University Campus, and at Court House in Trujillo. The lectures were sponsored by the ***Fulbright Senior Specialist Grant*** I received to teach at the Universidad Privada San Pedro, in *Chimbote, Peru*. September & October, 2001.

RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, & RELATED INTOLERANCE: INTERNATIONAL ATTEMPTS TO ERADICATE GLOBAL EVILS IN THE NEW MILLENNIUM – THE 2001 WORLD CONFERENCE AGAINST RACISM. Presentation at Indiana University School of Law at Indianapolis, sponsored by the Black Law Students Association during Black History Month. 22 February 2001.

THE INTERNATIONAL CRIMINAL COURT, SEARCH AND SEIZURE, & THE RIGHT TO PRIVACY: HUMAN RIGHTS FOR WRONGDOERS. Presentation at the North-East People of Color Legal Scholarship Conference, City University of New York, March 2001. (Presenter – work in progress).

THE INTERNATIONAL CRIMINAL COURT, SEARCH AND SEIZURE, & THE RIGHT TO PRIVACY: HUMAN RIGHTS FOR WRONGDOERS. Presentation at the Mid West People of Color Legal Scholarship Conference, University of Nebraska School of Law, ***Lincoln, Nebraska***, March 2001. (Presenter – work in progress).

THE UNITED NATIONS' & EUROPE'S SYSTEMS FOR THE PROTECTION OF HUMAN RIGHTS: GUIDANCE FOR CASES WITHIN THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS? Presentation for Latin American attorneys from Honduras, Guatemala, Costa Rica, and El Salvador in conjunction with training before the Inter-American Court of Human Rights. Training Program conducted by International Human Rights Law Institute, DePaul University College of Law. January 2000. ***San Jose, Costa Rica.***

"HUMAN RIGHTS IN INDIANA, THE NATION & THE WORLD – A PANEL DISCUSSION WITH CONGRESSIONAL & GUBERNATORIAL CANDIDATES." Panel Moderator & Discussant. Panelists: Congresswoman Julia Carson, Democrat from 10th Congressional District – Indiana (represented by Mr. Richard Allen, Legislative Ass't); Dr. Marvin Scott (Republican Challenger from 10th Congressional District); and Mr. Andrew Horning (Libertarian

Gubernatorial Candidate). Panel at Indiana University School of Law at Indianapolis. 23 October 2000.

GLOBAL STATUS OF WOMEN'S HUMAN RIGHTS: UNITED NATIONS INITIATIVES 1945 – 2000. Presentation at the Midwest Women in the Law Conference 2000. 28 April 2000. Indianapolis, Indiana.

ROLE OF THE UNIVERSITY IN THE HUMAN RIGHTS MOVEMENT: SCHOLARS & ACTIVISTS (Presentation at *Harvard Law School – Human Rights Program – 15th Anniversary)*, 17 – 19 Sept. 1999, ***Cambridge, Massachusetts***.

INNOVATIONS IN TEACHING INTERNATIONAL LAW: INTERNATIONAL HUMAN RIGHTS LAW PROGRAMS (Presentation at International Law Weekend, '99, sponsored by International Law Society) (***New York***, November 1999)

BRIEFINGS ON INTERNATIONAL CRIMINAL LAW, THE UNITED NATIONS SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS, AND OTHER INTERNATIONAL HUMAN RIGHTS LAW TOPICS (Briefings held in ***Lome, Togo; Accra, Ghana; and Katmandu, Nepal***) (1999)

BRIEFINGS ON OTTAWA VIENNA + 5 NGO FORUM & ROME INTERNATIONAL CRIMINAL COURT NEGOTIATIONS (***Canberra, Australia***; Australian Dep't of Foreign Affairs & Trade, & Amnesty International, 30-31 July, 1999)

BRIEFINGS, IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL & POLITICAL RIGHTS IN HONG KONG. (Briefing United Nations Human Rights Committee Members, & other UN officials) (Briefings on behalf of and in conjunction with the Hong Kong Human Rights Monitor, the Hong Kong Human Rights Commission, et al) (***Geneva, Switzerland***, November 1999)

CAREERS IN INTERNATIONAL HUMAN RIGHTS LAW: AN ACADEMIC'S PERSPECTIVE (Presentation at DePaul University College of Law) (sponsored by the National Lawyers' Guild) (***Chicago***, October 1999)

HUMAN RIGHTS BEGINS AT HOME; HUMAN RIGHTS END AT HOME : BRINGING INTERNATIONAL HUMAN RIGHTS LAW INTO THE UNITED STATES DOMESTIC ARENA (Keynote Banquet Speaker, 16th Annual Human Rights Banquet of Xi Rho Omega Chapter of Alpha Kappa Alpha, Inc., 6 March 1999, ***Ahoskie, North Carolina***) (Presented with Honor "In Recognition of Dedication to International Human Rights")

RIGHT TO ADEQUATE HOUSING & HOMELESSNESS – RELEVANCE OF INTERNATIONAL HUMAN RIGHTS LAW. Comment at "First Monday 1999", sponsored by Alliance for Justice, Indiana University Law School Clinic & Program in International Human Rights Law (4 October 1999)

A CAREER IN INTERNATIONAL HUMAN RIGHTS LAW (***Indianapolis***: Presentation at "International Law Indy" sponsored by Indiana University School of Law International Law Society) (24 March 1998)

BRINGING HUMAN RIGHTS HOME: DO U.S. IMMIGRATION & DEATH PENALTY LAW, POLICIES & PRACTICES VIOLATE INTERNATIONAL HUMAN RIGHTS LAW ? Comment at "First Monday 1998: Human Rights -- American Wrongs", sponsored by Alliance for Justice & Indiana University Law School Clinic & Program in International Human Rights Law (5 October 1998)

HUMAN RIGHTS, DEMOCRACY & THE RULE OF LAW: LESSONS FROM THE UNITED STATES EXPERIENCE WITH THE UNIVERSAL DECLARATION OF HUMAN RIGHTS & OTHER INTERNATIONAL HUMAN RIGHTS LAW

INSTRUMENTS , (Featured overseas presentation at Constitutional Court of Lithuania, in ***Vilnius, Lithuania***. Conference sponsored by Lithuanian Constitutional Court, Lithuanian Human Rights Centre, & USIS America Center. Received United States Information Agency travel grant to lecture in Lithuania.) (December 1998).

REFLECTIONS ON THE OTTAWA/VIENNA + 5 NGO FORUM & FINAL DOCUMENT, (Presentation at Australian National University Law Faculty, Centre for Public & Int'l Law, 31 July 1998, ***Canberra, Australia***)

BRINGING HUMAN RIGHTS HOME: THE INTERNATIONAL HUMAN RIGHTS RECORD OF THE UNITED STATES – SHOULD WE CELEBRATE? (Lecture at Wake Forest University Law School – ***Winston Salem, North Carolina***) (29 October 1998) (Invited presentation by Wake Law Civil Liberties Union & National Lawyers Guild)

RELEVANCE OF INTERNATIONAL HUMAN RIGHTS LAW TO EUROPEAN HUMAN RIGHTS LAW (Lecture to law students attending summer law study program at Lille II University in ***Lille, France***, 12 June 1998)

THE ROME STATUTE ON THE ESTABLISHMENT OF A PERMANENT INTERNATIONAL CRIMINAL COURT: A COMPROMISE OF VICTORY OR DISASTER? (Presentation & Workshop for Amnesty International Midwest Regional Conference, 31 October 1998, University of Cincinnati College of Law, ***Cincinnati, Ohio***)

COMMENTS ON INTERNATIONAL HUMAN RIGHTS LAW (Studio Special Guest on "Consider This" for airing on PBS) (6 November 1998 taping, ***Indianapolis, Indiana***)

THE UNITED NATIONS UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR): A HALF CENTURY QUEST FOR GLOBAL COMPLIANCE (10 DECEMBER 1948 – 10 DECEMBER 1998 & Beyond) (Presentation & Workshop for Amnesty International – Student Activism Day 1998, 14 February 1998, Butler University, ***Indianapolis***.)

THE UNITED NATIONS AS A PLATFORM FOR ACTION FOR WOMEN & HUMAN RIGHTS, (Presentation at Second International Conference on Women in Africa and the African Diaspora: Health & Human Rights) (26 October 1998, Indiana University) (Co-sponsored by the IU-I Law School Program in International Human Rights Law)

LABOR AND HUMAN RIGHTS: THE UNITED NATIONS AT WORK IN ASIA (Guest Professor Lecture, Human Rights and Labor Senior Undergraduate Seminar, Indiana University at Indianapolis (April 1997))

GLOBAL GLANCE AT INTERNATIONAL HUMAN RIGHTS LAW, & HUMAN RIGHTS IN HONG KONG (Lectures for Santa Clara Law School Summer Program in ***Hong Kong***, Faculty of Law, Hong Kong Univ.) (1995, 1996, 1997, 1998)

FIFTY YEARS WITH THE UNITED NATIONS UNIVERSAL DECLARATION ON HUMAN RIGHTS: 10 DECEMBER 1948 - 10 DECEMBER 1998 & Beyond (Presentation for Amnesty International Indianapolis Chapter, 14 Dec. 1997)

APPLICABILITY OF ONE COUNTRY, TWO SYSTEMS HONG KONG MODEL TO TAIWAN: WILL HONG KONG'S POST-REVERSION AUTONOMY, ACCOUNTABILITY, AND HUMAN RIGHTS RECORD DISCOURAGE A TAIWAN REUNIFICATION? (Paper presented at "Bridging the Taiwan Strait". Conference sponsored by New England School of Law, Carnegie Endowment for Int'l Peace, American Society of Int'l Law, Int'l Law Assoc., Boston Bar Assoc., & the UN Assoc. of America) (***Boston, Massachusetts***; 17 October 1997)

DISCRIMINATION ON THE MARGINS OF THE LAW - THE "FORGOTTEN" FORMS OF DISCRIMINATION IN HONG KONG: SEXUALITY, RACE AND AGE (Paper presented at "Hong Kong Equal Opportunities Law in Int'l & Comparative Perspective." Conference sponsored by European Commission, Hong Kong Equal Opportunities Commission, Univ. of Hong Kong Faculty of Law, & Centre for Comparative & Public Law) (***Hong Kong***, 10-12 Nov. 1997)

HONG KONG AND THE RULE OF LAW: ARTICLE 23 OF THE BASIC LAW, THE SOCIETIES ORDINANCE, AND PROSPECTS FOR HONG KONG HUMAN RIGHTS NGOS POST 1 JULY 1997 (Paper presented at Conference sponsored by American University School of Law, Lawyers Committee for Human Rights, and Human Rights Watch; Video-linked -- ***Washington, DC & Hong Kong***, 18-19 March 1997)

HONG KONG, HUMAN RIGHTS AND FREEDOM OF THE PRESS (***Indianapolis***: Presentation at Indiana University International House; Sponsors – Society of Professional Journalists & International House) (26 September 1997)

HONG KONG MEDIA FREEDOM POST-1997 (***Indianapolis***; Presentation at Indianapolis Star & News; Sponsored by Society of Professional Journalists and International House) (30 September 1997)

UNITED STATES IMMIGRATION AND REFUGEE LAW & INTERNATIONAL HUMAN RIGHTS. (***Indianapolis;*** Comment at "First Monday 1997", sponsored by Alliance for Justice & Indiana Univ. Law School Clinic) (6 October 1997)

COMMENT ON HUMAN RIGHTS AND HONG KONG'S REVERSION TO THE PRC (Studio Guest on WABS; Aired live from ***Hong Kong***) (1 July 1997)

HONG KONG'S SUPPLEMENTARY REPORT TO UNITED NATIONS HUMAN RIGHTS COMMITTEE (Oral Presentation; Chaired UN Human Rights Committee meeting with Hong Kong NGOs; ***Geneva, Switzerland***) (October 1996)

TESTIMONY ON A BILL TO AMEND SECTION 13D OF THE HONG KONG IMMIGRATION ORDINANCE, CHAPTER 115 OF THE LAWS OF HONG KONG (Oral Testimony before Hong Kong Legislative Council Committee) (Represented Amnesty International ***Hong Kong***) (29 April 1996)

REPORT ON FREEDOM OF EXPRESSION IN MALAYSIA & IRENE FERNANDEZ (Delivered to Working Group on the Human Rights of Women) (***Washington, DC***) (September 1996)

BRIEFINGS ON HUMAN RIGHTS IN HONG KONG (***Washington, DC***; Oral briefings to U.S. State Department; Office of Vice-President Gore; U.S. National Security Advisor Office; U.S. Congressional Committee Staff; NGOs; & International Media) (United States Representative of Hong Kong Human Rights Monitor) (Autumn 1996)

BRIEFINGS ON HUMAN RIGHTS IN MALAYSIA (***Washington, DC***; Oral briefings to State Department; U.S. Labour Department; NGOs & International Media) (Autumn, 1996)

TREATY SUCCESSION AND HONG KONG: WILL THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS SURVIVE 1997? (Guest Professor, Saint Mary's School of Law, ***San Antonio, Texas***, 10 December 1996)

COMMENT ON MALAYSIA "FALSE NEWS" CRIMINAL TRIAL OF IRENE FERNANDEZ: FREEDOM OF EXPRESSION (Studio Guest on CNN World News Asia; ***Hong Kong***) (June 1996)

HONG KONG & EQUAL OPPORTUNITIES – DISCRIMINATION BASED ON SEXUAL ORIENTATION: OPINION. Consultative Document on Equal Opportunities: Discrimination on the Grounds of Family Status & Sexual Orientation: Compendium of Submissions (Home Affairs Branch, Hong Kong Government) (June 1996) pp C188-C192

COMMENT ON THE NEW SOUTH AFRICAN CONSTITUTION: THE NEW BILL OF RIGHTS (Registry of Submissions, Constitutional Assembly, ***Cape Town, South Africa)*** (May 1996)

TOBACCO ADVERTISING & HUMAN RIGHTS: COMMERCIAL EXPRESSION UNDER ARTICLE 16 OF THE HONG KONG BILL OF RIGHTS (Delivered at Hong Kong Council on Smoking and Health/ University of Hong Kong Department of Medicine Forum) (16 April 1996)

HONG KONG, THE UNITED NATIONS, AND INTERNATIONAL HUMAN RIGHTS LAW: EFFECTIVE DOMESTIC IMPLEMENTATION PRE- AND POST-1997 (Delivered for Amnesty International Hong Kong) (May 1996)

COMMENT ON THE HONG KONG GOVERNMENT'S 4TH PERIODIC REPORT TO THE UN HUMAN RIGHTS COMMITTEE (Oral presentation -- United Nations Human Rights Committee, ***Geneva, Switzerland***) (October 1995)

METHODOLOGY, INFORMATION AND SENSITIVITIES: RIGHTS & DUTIES OF FOREIGN DOMESTIC HELPERS & HONG KONG EMPLOYERS. Delivered - 34th Int'l Congress on Asian & North African Studies (ICANAS) (1993)

INTERNATIONAL & DOMESTIC TV, RADIO, & PRINT MEDIA INTERVIEWS ON VARIED LEGAL TOPICS. MEDIA INCLUDES CNN, ABC, BBC, VOICE OF AMERICA (VOA), SCMP, RTHK, AMERICAN UNIVERSITY TV, & NATIONAL PUBLIC RADIO (NPR).

SELECTED INVITED CONFERENCES, COLLOQUIA, CO-SPONSORED CONFERENCES, EXPERT GROUPS, GRANTS, AWARDS, OTHER APPOINTMENTS, & PRESS CREDENTIALS

DELEGATE (NGO), ***UNITED NATIONS INTERNATIONAL CRIMINAL COURT ASSEMBLY OF STATES PARTIES MEETING,*** 2003 (***New York***)

DELEGATE (NGO), ***UNITED NATIONS INTERNATIONAL CRIMINAL COURT PREPARATORY COMMITTEE AND PREPARATORY COMMISSION MEETINGS,*** 1998, 1999, 2000 (***New York***)

DELEGATE (NGO), ***2001 UNITED NATIONS WORLD CONFERENCE AGAINST RACISM, RACIAL DISCRIMINATION, XENOPHOBIA & RELATED INTOLERANCE (AND THE NGO WORLD CONFERENCE),*** August – September 2001 (***Durban, South Africa***)

DELEGATE (NGO), ***2000 UNITED NATIONS WORLD CONFERENCE AGAINST RACISM, RACIAL DISCRIMINATION XENOPHOBIA & RELATED INTOLERANCE REGIONAL PREPARATORY COMMITTEE MEETINGS FOR THE AMERICAS (AND THE NGO CONFERENCE OF CITIZENS),*** December, 2000 (***Santiago, Chile***)

PARTICIPANT/OBSERVER, ATTORNEY TRAINING – INTER-AMERICAN COURT OF HUMAN. Training Program, for 25 Latin American attorneys from El Salvador, Guatemala, Honduras and Costa Rica conducted by the International Human Rights Law Institute, DePaul University College of Law. Phase III. January 2000. ***San Jose, Costa Rica.***

PARTICIPANT, INTERNATIONAL CRIMINAL COURT TRAINING PROGRAM, INTERNATIONAL CRIMINAL COURT NETWORK, THE HAGUE, THE NETHERLANDS, JUNE 2003

GRANT RECIPIENT, INDIANA UNIVERSITY INTERNATIONAL PROGRAMS (BLOOMINGTON) RESEARCH Grant (for Research on Yale Journal of International Law Article) (2000)

UNITED STATES INFORMATION AGENCY GRANT RECIPIENT, *LITHUANIA HUMAN RIGHTS SPEAKER'S PROGRAM* (December 1998) (Awarded United States Information Agency travel grant to Vilnius, Lithuania to deliver human rights lectures, & participate in human rights, democracy & rule of law meetings. Local sponsors: Lithuanian Constitutional Court, Lithuanian Human Rights Center, & USIS America Center. Meetings with Human Rights Committee of the Seimas (Parliament), Constitutional Court Judges, professors & students of Law Academy, Vilnius University Law Faculty, & the Law School of Vytautas Magnus University in Kaunas.) (***Lithuania)***

EXPERT CONSULTANT, *EDUCATION FOR ACTION: A SYMPOSIUM ON HUMAN RIGHTS EDUCATION (ENHANCEMENT OF UNDERGRADUATE HUMAN RIGHTS EDUCATION AT UNIV OF DAYTON & IN NORTH AMERICA)* (INVITED BY UNIV. OF DAYTON ADVISORY COMMITTEE ON HUMAN RIGHTS) (9-11 April 1999) (Dayton, Ohio)

PARTICIPANT, *SOCIETY FOR PROFESSIONAL JOURNALISTS NATIONAL CONVENTION,* Oct. 1999, (Indianapolis, Indiana)

DELEGATE, *VIENNA + 5 GLOBAL NGO FORUM ON THE 5-YEAR REVIEW OF THE VIENNA DECLARATION AND PLATFORM OF ACTION,* 22-24 June 1998, (***Ottawa, Canada***) (Co-Sponsor: Human Rights Internet)

DELEGATE (NGO), *UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT,* 15 June to 17 July 1998, (***Rome, Italy***)

PARTICIPANT, *INTERNATIONAL HUMANITARIAN LAW TRAINING SEMINAR FOR UNIVERSITY (LAW SCHOOL) TEACHERS,* 9-15 August 1998, (***Geneva, Switzerland***) (Co-Sponsored Scholarship from: International Committee of the Red Cross & Geneva Graduate Institute of International Law)

MODERATOR/CHAIR/CO-SPONSOR, *HUMAN RIGHTS & THE INTERNATIONAL COMMUNITY: THE UNITED NATIONS AS PLATFORM FOR ACTION,* (Roundtable at Second International Conference on Women in Africa & the African Diaspora: Health & Human Rights) (26 Oct 1998, Indiana University) (Co-sponsor: Indiana University School of Law Program in International Human Rights Law)

PARTICIPANT, *UNITED STATES MEETING OF EXPERTS ON REINING IN IMPUNITY FOR INTERNATIONAL CRIMES & SERIOUS VIOLATIONS OF HUMAN RIGHTS,* 13 April 1997. (***Washington, D.C.)***

PARTICIPANT, *REINING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS,* 17-21 September 1997. (***Siracusa, Italy***)

DISCUSSANT, *LILLICH/NEWMAN COLLOQUIUM ON HUMAN RIGHTS,* 4 October 1997, (***Cincinnati, Ohio***) (Urban Morgan Institute; University of Cincinnati School of Law)

PARTICIPANT & CO-SPONSOR, *ADVANCING CHILDREN'S FUTURES: THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS IN SUPPORTING CHILDREN'S RIGHTS,* 20-22 Nov. 1997, (Indianapolis, Indiana) (Co-Sponsored by Program in International Human Rights Law, Indiana University School of Law at Indianapolis)

INVITED PARTICIPANT, *United Nations/52 Annual DPI/NGO Conference: Meeting the Challenges of a Globalized World,* (United Nations, New York, 15-17 September 1999)

MODERATOR & DISCUSSANT, ***HUMAN RIGHTS IN LATIN AMERICA,*** 4 November 2000, Panel Discussion featuring Ms. Marisol Lopez-Mendoza (Mexico Solidarity Network – Chiapas, Mexico) and Jose Rivero, Greg Loyd, & Dan Foote (Indianapolis, Indiana)

INVITED PARTICIPANT, *Intellectual Property & Human Rights* (American Association for the Advancement of Science, 14 September 1999, Washington, DC)

TRIAL OBSERVER, *DPP OF MALAYSIA V IRENE FERNANDEZ.* Trial Observer in Kuala Lumpur, Malaysia (1996 & 1998). Trial commenced Summer 1996 and ended in 2003. (Criminal Charges of Maliciously Publishing False News Contrary to the Malaysian Printing Presses and Publications Act 1984 (as rev'd 1987), (Act 301)). (On Mission for Human Rights Watch/Asia).

PARTICIPANT, ***LEADERSHIP CONFERENCE – HARVARD UNIVERSITY,*** 16–18 Sept. 1999, Cambridge, Massachusetts.

PRESS ACCREDITATION

- ***Hong Kong/People's Republic of China Government*** – Transition/Change of Sovereignty Hand-Over Ceremonies & Other UK/PRC Events (June/July 1997)
- ***North Atlantic Treaty Organization – NATO*** – Kosovo Forces (KFOR) (June 1999)
- ***United Nations General Assembly*** (New York) (September 1999)

From: [redacted]
Sent: Thursday, October 28, 2004 1:57 PM
To: 'Mori, Michael, MAJ, DoD OGC'; [redacted], Lippert, Jeffery MAJ Bamberg Law Center; [redacted] Brownback, Peter E. COL (L)
Subject: United States v. Hicks, Decision of the Presiding Officer, D27

United States v. Hicks

Decision of the Presiding Officer, D27

The Presiding Officer has denied the request for production of George Edwards as a witness. The Presiding Officer did not find that he is necessary. See Military Commission Order 1, section 5H Accordingly, this request has been moved from the active to the inactive section of the filings inventory in accordance with POM 12. See also paragraph 8, POM 12.

By Direction of the Presiding Officer

[redacted]
Assistant to the Presiding Officers
[redacted]

Decision of the PO, D27

UNITED STATES OF AMERICA	)	
	)	**DEFENSE MOTION - THE ENTIRE COMMISSION TO GRANT PRODUCTION OF WITNESS DENIED IN D 30**
v.	)	
DAVID HICKS	)	**(Michael Schmitt)**
	)	29 October 2004

The Defense previously requested that name of witness be produced. The request was denied by the Presiding Officer under the provisions of Military Commission Order 1, section 5H.

The Defense requests the Commission direct the production of the witness, and that the Commission consider the following previously made filings, and the attachments thereto, per the Filings Inventory D30, in making its determination.

a. Motion by the defense requesting Mr. Schmitt.
b. Decision of the Presiding Officer denying the witness.
c. The government response to D30, if any.

By: _____
M.D. MORI
Major, U.S. Marine Corps

Review Exhibit 40

Page 1 **Of** 1

UNITED STATES OF AMERICA	)	
	)	**DEFENSE REQUEST FOR WITNESS**
v.	)	
	)	**(Professor Michael Schmitt)**
DAVID M. HICKS	)	20 October 2004

The Defense in the case of the *United States v. David M. Hicks* requests the following witness for the 01 November 2004 motion hearing at Guantanamo Bay and in support of this request the defense states:

1. **Witness information**:

Professor Michael Schmitt
Professor of International Law and Director, Program in Advanced Security Studies
George C. Marshall European Center for Security Studies
Garmisch-Partenkirchen, Germany

Office Phone: 49-8821-750-617
schmittm@marshallcenter.org

2. **Need for translator**: None

2. **Synopsis of testimony**: It is anticipated the Mr. Schmitt will testify as an expert in the law of armed conflict (law of war), including but not limited to, the following:

a. Professor Schmitt will testify regarding the applicability of the Law of Armed Conflict (LOAC) to hostilities prior to the commencement, during, and following active U.S. and coalition military operations in Afghanistan. He will explain that an international armed conflict did not begin until October 7, 2001, because before that date there were was no armed conflict between States; therefore, the law of armed conflict did not apply until that date. This testimony will demonstrate the erroneous nature of the time period contained in charge 1.

He will further testify that the international armed conflict between the United States and the former government of Afghanistan, the Taliban regime, likely ended in 2002 when the new interim government of Afghanistan, headed by Mr. Karzai, took power in Afghanistan. He will further testify that the only portion of the LOAC currently applicable to ongoing U.S. military operations in Afghanistan would be the provisions of Common Article 3 of the Geneva Conventions because the military operations taking place in Afghanistan against the remnants of the former Taliban regime constitute, at most, a non-international armed conflict. He will further testify that the ongoing military operations against al Qaida in Afghanistan do not trigger the LOAC because al Qaida is neither a state entity, nor a rebel group operating in the United States.

Professor Schmitt will also testify that the assertions by the prosecution that al Qaida is a "virtual state" are unsupported by any reasonable interpretation of international law and/or the LOAC.

He will further testify that the prosecutions assertions that the President's statements that the United States is at war with the al Qaida, or is engaged in an armed conflict with al Qaida, have no bearing on the application of the LOAC, and that prosecution assertions that such statements trigger the application of the LOAC as it applies to Mr. Hicks continued detention as an enemy combatant by the United States are incorrect.

Professor Schmitt will also testify regarding the requirements under the LOAC for an individual to be considered a lawful combatant. He will testify that under the LOAC, Mr. Hicks should have been granted an Article 5 tribunal soon after he was taken into custody by the United States. He will further testify regarding the implications of Mr. Hicks' attempts to comply with the LOAC as it pertains to lawful combatants.

Professor Schmitt will also testify regarding the implications of Mr. Hicks' alleged status as an unprivileged belligerent, and the implications of that status. Specifically, he will testify that the offense of "murder by an unprivileged belligerent" is not a war crime as contained in charge 2 and one of the objects of Charge 1. He will testify Mr. Hicks' that the mere status of unprivileged belligerent is not an offense under the LOAC, and that if, in fact, he aided in a murder, attempted to murder, or in fact participated in the murder of American personnel and/or coalition partner personnel, Mr. Hicks could only be tried under the domestic law of a state with domestic jurisdiction over Mr. Hicks.

The above testimony is relevant to the defense motions to dismiss or for appropriate relief for imposition of improper pretrial detention; the international armed conflict in Afghanistan has ended; for failure to state an offense of "murder by an unprivileged belligerent;" for failure to state an offense of "destruction of property by an unprivileged belligerent; and other defense motions.

It should be noted the defense may ask Professor Schmitt to testify regarding other concepts relevant to the LOAC that are implicated by Mr. Hicks' case. This synopsis is not intended to convey every possible point, opinion, or relevant fact that Professor Schmitt has to offer as part of his testimony. Please refer to the arguments in the defense motions. The motion documents contain additional cites to relevant legal concepts about which Professor Schmitt may testify.

3. **Source of knowledge**: I have spoken to him previously.

4. **Use of testimony**: This witness will testify on for the motion hearing scheduled to begin 1 November 2004.

5. **Reasonable availability of witness**: Mr. Schmitt is available to testify by telephone.

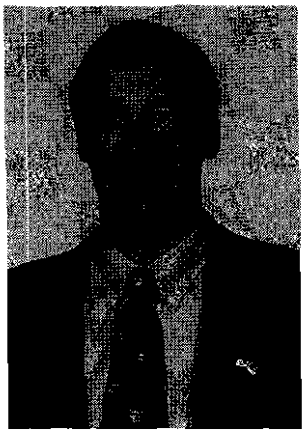
6. **Alternative to live testimony**: The defense believes that a stipulation of expected testimony is not a viable option for this witness. Much of the expected testimony is intended to educate the commission on relevant areas of law, some of which will include opinion. Further, a stipulation of expected testimony would take away the commission's opportunity to question this witness regarding complex issues of the LOAC and its implications for Mr. Hicks case. Moreover, some of the facts and opinions the witness will testify about are in direct contravention of opinions the prosecution has cited in its responses to defense motions. Alternatives to testimony such as written opinions, briefs, telephonic testimony, or affidavits will not be sufficient to adequately convey to the commission the complex concepts of LOAC and its application to Mr. Hicks' continued detention, trial by military commission for certain offenses, the implications of the existence of an armed conflict with al Qaida and/or the Taliban regime and/or its remnants. Moreover, using such alternatives to testimony would deprive the

commission of the important opportunity to question Professor Schmitt regarding the topics on which he would testify, and others topics in to which the commission desired to inquire.

7. **Is the witnesses cumulative with other witnesses**: No.

8. **Attachments**: CV of Mr. Schmitt

By: _____
M.D. MORI
Major, U.S. Marine Corps



Professor Michael N. Schmitt

Current Position

Director, Leaders of the 21st Century Program and Professor of International Law, College of International Security Studies, George C. Marshall European Center for Security Studies, Garmisch-Partenkirchen, Germany

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Education

Academic

LL.M, Yale Law School
JD, University of Texas
MA (National Security and Strategic Studies), Naval War College
MA (Political Science/History), Southwest Texas State University
BA (Political Science/History), Southwest Texas State University

Professional

Naval War College
Air War College
Air Command and Staff College
Marine Command and Staff College
Air Force Squadron Officers School

Professional Affiliations

Member, Institute of International Humanitarian Law
Member, International Law Association (British Branch)
NATO School, Adjunct Faculty
American Society of International Law (ASIL)
Société Internationale de Droit Militaire et Droit de la Guerre, UK Branch
Editorial Board, International Law Studies Series
Executive Committee, Lieber Society, ASIL

Professional Experience

2003-Present: Director, Leaders of the 21st Century Program and Professor of International Law, George C. Marshall European Center for Security Studies.
1999-2003: Director, Executive Program in International and Security Studies, George C. Marshall European Center for Security Studies
1998-1999: Professor and Deputy Head, Department Of Law, United States Air Force Academy
1997-1998: Visiting Scholar, Yale Law School
1996-1998: Professor of International Law, Naval War College
1997: Staff Judge Advocate, Operation Northern Watch (No-Fly Zone Over Iraq)

1995-1996: Student, United States Naval War College
1993-1995: Staff Judge Advocate, Incirlik Air Base, Turkey
1991-1993: Staff Judge Advocate, Iraklion Air Station, Greece
1990-1991: Student, Yale Law School
1988-1990: Assistant Professor of Law, United States Air Force Academy
1987-88: Defense Counsel, Florennes Air Base, Belgium
1986-87: Deputy Staff Judge Advocate, Florennes Air Base, Belgium
1984-1986: Assistant Staff Judge Advocate, Incirlik Air Base, Turkey
1981-1984: Student, University Of Texas Law School
1979-1981: Chief, Operational and Targeting Intelligence, Incirlik Air Base, Turkey

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Awards

Scholarship

Annual Waldemar Solf Lecture, U.S. Army Judge Advocate General's School, 2003
Elected Member, International Institute of Humanitarian Law, 2002
Klaus Kuhn Prize, International Institute of Humanitarian Law, 2000
Hugh Nott Prize, Naval War College, 1999
Military Operations and Law Prize, Naval War College, 1996
Society for Strategic Air Command Award, Best Air Force Law Review Article, 1994
Ambrose Gherini Prize for International Law, Yale Law School

Professional

American Bar Association, Special Commendation for Exemplary
Commitment to Public Service, 39th Wing Law Center, 1995
American Bar Association, Outstanding Air Force Lawyer Award, 1991-92
Outstanding Judge Advocate, U.S. Air Forces, Europe, 1991
New York Bar Association Award for Trial Advocacy, USAF Judge Advocate General's School, 1987
Outstanding Judge Advocate, U.S. Air Forces, Southern Europe, 1985
Joint Meritorious Service Medal
Meritorious Service Medal (eight)
Air Force Achievement Medal (Specific Accomplishment)
Humanitarian Service Medal
Southwest Asia Service Medal (with Battle Star)
Armed Forces Expeditionary Medal

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82467 Garmisch-Partenkirchen
Germany
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Michael Schmitt
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APO AE 09053

E-mail: schmittm@marshallcenter.org

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

October 22, 2004

MEMORANDUM FOR DETAILED DEFENSE COUNSEL ICO DAVID MATTHEW HICKS

SUBJECT: Witness Request for Professor Michael Schmitt

1. On October 20, 2004, the Defense Counsel in U.S. v. Hicks requested the above-named witness be produced for live testimony at Guantanamo Bay, Cuba. For the reasons laid in our Motion to Exclude Attorney and Legal Commentator Opinion Testimony of October 13, 2004 and Reply thereto of October 22, 2004, we object to this form of testimony. Accordingly, your request is denied.

[redacted]
Lieutenant Colonel, U.S. Marine Corps
Prosecutor
Office of Military Commissions

Attachment:
As stated

GOVT DENIAL OF SCHMITT WITNESS REQUEST (D30)

From: [redacted]
Sent: Thursday, October 28, 2004 4:54 PM
To: [redacted] Mori, Michael, MAJ, DoD OGC'; [redacted]; 'Will Col DoD OGC Gunn (Gunn, Will, Col, DoD OGC)'; [redacted] 'Lippert, Jeffery MAJ Bamberg Law Center'; [redacted] Brownback, Peter E. COL (L)
Subject: United States v. Hicks, Decision of the Presiding Officer, D30

United States v. Hicks

Decision of the Presiding Officer, D30

The Presiding Officer has denied the request for production of Mr. Schmidt as a witness. The Presiding Officer did not find that he is necessary. See Military Commission Order 1, section 5H. Accordingly, this request has been moved from the active to the inactive section of the filings inventory in accordance with POM 12. See also paragraph 8, POM 12.

By Direction of the Presiding Officer

[redacted]
Assistant to the Presiding Officers
[redacted]

PO Decision D 30 (Hicks)

Office of the Presiding Officer
Military Commission

August 31, 2004

MEMORANDUM FOR APPOINTING AUTHORITY, MILITARY COMMISSIONS

SUBJECT: Interlocutory Question 1 – Location of Closed Sessions

1. This Interlocutory Question is presented under the provisions of Military Commission Order 1, paragraph 4A(5)(d), as one the undersigned Presiding Officer "deems appropriate." "Closed sessions" as used in this document are those sessions of the Commission in which the accused does not have the right to be present because of the nature of the information presented.

2. An accused is not allowed to be present during closed sessions making it unnecessary to hold such sessions at GTMO. The Presiding Officer does not believe that any Commission Law requires that a closed session be held in the same general locale that the accused is located. The Commission is considering scheduling and holding – when and if possible – closed sessions in CONUS with the following arrangements:

a. All necessary parties will be assembled at a facility where the necessary security arrangements can be made.

b. No other business may be conducted or addressed other than the presentation of closed session evidence which the accused is not permitted to hear, or arguments on motions or objections based solely on closed session matters.

3. May the Commission proceed as indicated in paragraph 2 above?

Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

CF: All Trial and Defense Counsel:
US v. Hamdan
US v. Hicks
US v. Al Bahul
US v. Al Qosi

Review Exhibit 41

Page 1 **Of** 2

OFFICE OF THE SECRETARY OF DEFENSE
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

October 5, 2004

MEMORANDUM FOR Colonel Peter E. Brownback III, Presiding Officer for *United States v. Hamdan, United States v. Hicks, United States v. al Qosi, United States v. Bahlul*

SUBJECT: Request for Authority Submitted as "Interlocutory Question 1"

On August 31, 2004 you forwarded "Interlocutory Question 1" to me for decision, requesting authority to hold closed sessions of the Commission, from which the accused has been properly excluded, at a location within the Continental United States.

This issue is not properly raised as an Interlocutory Question. I view the requirement of MCI Number 8, paragraph 4(A) that "the full commission shall adjudicate all issues of fact and law" as a prerequisite to your exercise of discretionary authority to certify an interlocutory question to me. Until such time as the full commission has ruled on a question of fact or law, certification as an interlocutory question for an advisory opinion is not authorized. Accordingly, your request is denied in the form of an interlocutory question.

I will consider your question as a request for me to exercise the authority vested in the Appointing Authority by MCO Number 1, Section 6(B)(4), to authorize holding closed sessions of the Commission at a place other than Guantanamo Bay, Cuba. The request is denied. All sessions of the Commission shall be conducted at Guantanamo Bay.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Review Exhibit 4

Page 2 Of 2

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

September 9, 2004

MEMORANDUM FOR Appointing Authority for Military Commissions

SUBJECT: Interlocutory Question # 1 and # 2

In response to the Presiding Officer's Interlocutory Question #1, the defense in U.S. v. Hicks objects to closed sessions of the commission occurring outside of Guantanamo Bay unless Mr. Hicks is available for consultation in the immediate area of the closed session.

This proposal appears to justify closed sessions for the sake of convenience, and would encourage more business to be conducted within a closed session. Such action is contrary to our client's right to a trial open to the public mandated in MCO No. 1, and the U.S. and Australian agreement that the prosecution does not intend to rely on evidence in its case-in-chief requiring closed proceedings from which Mr. Hicks could be excluded.

Assuming that Mr. Hicks must be excluded from closed sessions (a proposition we object to generally, and which will be the subject of a subsequent formal motion), Mr. Hicks still has a right to consult with counsel in person before any closed session and during any recesses. Because Mr. Hicks is confined at Guantanamo Bay, we would lose the opportunity for necessary face-to-face consultation if the Presiding Officer's proposal for CONUS closed sessions were put in place. This would unfairly interfere with the attorney-client relationship, and impair our ability to represent Mr. Hicks zealously.

I will note that prior closed sessions included little, if any, classified information being presented. I am concerned that closed sessions are not functioning to protect any classified information. The closed sessions have, however, already resulted in Mr. Hicks being unnecessarily excluded from the proceedings, and have unnecessarily limited the public's access to information. Thus, it is clear that any procedural change that would facilitate the holding of more closed sessions will have the effect of more commission business being conducted – most likely unnecessarily to some, if not a considerable extent – in secret, a development contrary to the explicit directives of MCO No. 1.

In response to the Presiding Officer's Interlocutory Question #2, the defense in *U.S. v. Hicks* objects to closed conferences where the members are not meeting face to face. The commission as a whole is to decide issues of law and fact. A full and thorough discussion must take place on all issues. A comprehensive exchange of ideas and positions can not be accomplished effectively via e-mail or phone. Allowing Commission conferences to be conducted by the means proposed in Interlocutory Question #2 will only undermine the integrity and legitimacy of the military commission process as a whole.

Review Exhibit 42

Page 1 **Of** 2

Indeed, the procedures proposed in IQ #2 would be unprecedented even in an ordinary case. Juries do not meet outside the courthouse to decide cases; nor do they do so by e-mail or teleconference. Also, there are so many mixed issues of fact and law that even the judicial function of the Commission cannot be separated from its fact finding obligations. Moreover, given the nature of the proceedings, their importance, their unique context, and the fact that the world is watching carefully, it would b entirely inappropriate to treat the Commission's deliberations so cavalierly as to reduce them to ordinary civilian or corporate decision-making. Besides, the participation of particular members might well be circumscribed or otherwise limited by resort to other means of deliberation and/or decision-making. Deliberation by telephone or e-mail will invariably stunt discussion and full participation by all Commission members.

Furthermore, as a threshold matter, we do not believe any amendments should be made to MCO's or MCI's (upon which IQ's #1 & 2 are based) that adversely affect any detainee. Such changes not only constitute *ex post facto* provisions, but also further aggravate a critical defect in the commission system: that there is an absence of the notice and/or continuity that are hallmarks of a fair adjudicative system. The prospect of further amendments to MCO's and MCI's, without any symmetrical procedure for doing so (or contesting them beforehand) merely enhances the intractable problems inherent in the commission system as presently constituted.

If you have any questions regarding the memorandum, please contact me at (703) 607-1521.

M. D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel

Review Exhibit 42

Page 2 Of 2

Office of the Presiding Officer
Military Commission

September 1, 2004

MEMORANDUM FOR APPOINTING AUTHORITY, MILITARY COMMISSIONS

SUBJECT: Interlocutory Question 2 - Closed Conferences

1. These Interlocutory Questions are presented under the provisions of Military Commission Order 1, paragraph 4A(5)(d), as one the undersigned Presiding Officer "deems appropriate." In presenting these questions, the Presiding Officer presumes that the proposed modification to paragraphs 4 and 5 of Military Commission Instruction # 8, forwarded by email on 23 August 2004, is in effect.

2. Military Commission Order #1, paragraph 6B(4) provides that "Members of the Commission may meet in closed conference at any time."

a. Is there any reason why the members can not meet together to hold a closed conference in CONUS to discuss and decide motions, questions, and other matters that do not require the presence of counsel or the accused?

b. Can the closed conference be done by conference call with all members - given a situation where all the members have the necessary documents to resolve a motion or question?

c. Can the closed conference be done by email - given a situation where all the members have the necessary documents to resolve a motion or question ensuring that all members receive and respond to all emails?

Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

CF: All Trial and Defense Counsel:
US v. Hamdan
US v. Hicks
US v. Al Bahul
US v. Al Qosi

Review Exhibit 43

Page 1 Of 2

OFFICE OF THE SECRETARY OF DEFENSE
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

October 5, 2004

MEMORANDUM FOR Colonel Peter E. Brownback III, Presiding Officer for *United States v. Hamdan, United States v. Hicks, United States v. al Qosi, United States v. Bahlul*

SUBJECT: Request for Authority Submitted as "Interlocutory Question 2"

On September 1, 2004 you forwarded "Interlocutory Question 2" to me for decision, requesting authority to hold closed conferences of the Commission, to discuss and decide motions, questions, and other matters that do not require the presence of counsel or the accused, at either (1) a location within the Continental United States, (2) by telephonic conference call or (3) by electronic mail.

This issue is not properly raised as an Interlocutory Question. I view the requirement of MCI Number 8, paragraph 4(A) that "the full commission shall adjudicate all issues of fact and law" as a prerequisite to your exercise of discretionary authority to certify an interlocutory question to me. Until such time as the full commission has ruled on a question of fact or law, certification as an interlocutory question for an advisory opinion is not authorized. Accordingly, your request is denied in the form of an interlocutory question.

I will consider your question as a request for me to exercise the authority vested in the Appointing Authority by MCO Number 1, Section 6(B)(4), to authorize holding closed deliberations of the Commission at a place other than Guantanamo Bay, Cuba, and by a means other than direct face-to face discussion. The request is denied. All deliberations of the Commission shall be conducted at Guantanamo Bay, and all members and alternates shall be physically present.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Review Exhibit 43

Page 2 of 2

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

September 9, 2004

MEMORANDUM FOR Appointing Authority for Military Commissions

SUBJECT: Interlocutory Question # 1 and # 2

In response to the Presiding Officer's Interlocutory Question #1, the defense in U.S. v. Hicks objects to closed sessions of the commission occurring outside of Guantanamo Bay unless Mr. Hicks is available for consultation in the immediate area of the closed session.

This proposal appears to justify closed sessions for the sake of convenience, and would encourage more business to be conducted within a closed session. Such action is contrary to our client's right to a trial open to the public mandated in MCO No. 1, and the U.S. and Australian agreement that the prosecution does not intend to rely on evidence in its case-in-chief requiring closed proceedings from which Mr. Hicks could be excluded.

Assuming that Mr. Hicks must be excluded from closed sessions (a proposition we object to generally, and which will be the subject of a subsequent formal motion), Mr. Hicks still has a right to consult with counsel in person before any closed session and during any recesses. Because Mr. Hicks is confined at Guantanamo Bay, we would lose the opportunity for necessary face-to-face consultation if the Presiding Officer's proposal for CONUS closed sessions were put in place. This would unfairly interfere with the attorney-client relationship, and impair our ability to represent Mr. Hicks zealously.

I will note that prior closed sessions included little, if any, classified information being presented. I am concerned that closed sessions are not functioning to protect any classified information. The closed sessions have, however, already resulted in Mr. Hicks being unnecessarily excluded from the proceedings, and have unnecessarily limited the public's access to information. Thus, it is clear that any procedural change that would facilitate the holding of more closed sessions will have the effect of more commission business being conducted – most likely unnecessarily to some, if not a considerable extent – in secret, a development contrary to the explicit directives of MCO No. 1.

In response to the Presiding Officer's Interlocutory Question #2, the defense in *U.S. v. Hicks* objects to closed conferences where the members are not meeting face to face. The commission as a whole is to decide issues of law and fact. A full and thorough discussion must take place on all issues. A comprehensive exchange of ideas and positions can not be accomplished effectively via e-mail or phone. Allowing Commission conferences to be conducted by the means proposed in Interlocutory Question #2 will only undermine the integrity and legitimacy of the military commission process as a whole.

Review Exhibit 44

Page 1 **Of** 2

Indeed, the procedures proposed in IQ #2 would be unprecedented even in an ordinary case. Juries do not meet outside the courthouse to decide cases; nor do they do so by e-mail or teleconference. Also, there are so many mixed issues of fact and law that even the judicial function of the Commission cannot be separated from its fact finding obligations. Moreover, given the nature of the proceedings, their importance, their unique context, and the fact that the world is watching carefully, it would b entirely inappropriate to treat the Commission's deliberations so cavalierly as to reduce them to ordinary civilian or corporate decision-making. Besides, the participation of particular members might well be circumscribed or otherwise limited by resort to other means of deliberation and/or decision-making. Deliberation by telephone or e-mail will invariably stunt discussion and full participation by all Commission members.

Furthermore, as a threshold matter, we do not believe any amendments should be made to MCO's or MCI's (upon which IQ's #1 & 2 are based) that adversely affect any detainee. Such changes not only constitute *ex post facto* provisions, but also further aggravate a critical defect in the commission system: that there is an absence of the notice and/or continuity that are hallmarks of a fair adjudicative system. The prospect of further amendments to MCO's and MCI's, without any symmetrical procedure for doing so (or contesting them beforehand) merely enhances the intractable problems inherent in the commission system as presently constituted.

If you have any questions regarding the memorandum, please contact me at (703) 607-1521.

M. D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel

Review Exhibit 44

Page 2 **Of** 2

Office of the Presiding Officer
Military Commission

September 2, 2004

MEMORANDUM FOR APPOINTING AUTHORITY, MILITARY COMMISSIONS

SUBJECT: Interlocutory Question - #3 - Process for Deciding Motions and the Procedure for Forwarding Mandatory/Discretionary Interlocutory Questions

1. This Interlocutory Question is presented under the provisions of Military Commission Order 1, paragraph 4A(5)(d), as one the undersigned Presiding Officer "deems appropriate." In presenting this question, the Presiding Officer presumes that the proposed modification to paragraphs 4 and 5 of Military Commission Instruction # 8, forwarded by email on 23 August 2004, is in effect.

2. If a motion or question is presented to the Commission that **would** effect the termination of the proceedings with respect to a charge **if granted**, is the below procedure correct?

a. The motion or question is heard by the Commission and evidence is gathered. The Commission hears oral argument, if requested and necessary. The Commission does not make any findings of fact, does not rule on the motion, and does not make any recommendation on the disposition of the motion.

b. The Presiding Officer will determine what documentary or other materials shall be forwarded to the appointing authority - counsel for either side may forward any other materials NLT than a specific announced date.

c. If the members will not decide or recommend a decision on a motion, and no evidence is required to decide the question, is it necessary for the members to be meet in open session or closed conference, or may the Commission simply arrange to send the motions and written argument to the Appointing Authority?

3. If a motion or question is presented to the Commission that **would not** effect the termination of the proceedings with respect to a charge **if granted**, is the below procedure correct?

a. The motion is received by the Commission and evidence is gathered. The Commission hears oral argument, if requested and necessary.

Review Exhibit 45

Page 1 of 3

b. In a closed conference, the members decide the motion or question, and the decision is announced in an open session, or, if classified or protected, a closed session, or by a published decision in writing or email.

c. The Presiding Officer may, in his or her discretion, certify the question to the Appointing Authority and if that is done, will determine what documentary or other materials shall be forwarded to the appointing authority. He will only forward the question after the Commission has completed the process in 3a and 3b above.

4. If a motion or question is presented to the Commission that **would not** effect the termination of the proceedings with respect to a charge, whether **granted or not,** is the Commission required to prepare formal and written findings of fact and/or conclusions of law?

Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

CF: All Trial and Defense Counsel:
US v. Hamdan
US v. Hicks
US v. Al Bahul
US v. Al Qosi

Review Exhibit 45

Page 2 Of 3

OFFICE OF THE SECRETARY OF DEFENSE
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

October 6, 2004

MEMORANDUM FOR Colonel Peter E. Brownback III, Presiding Officer for *United States v. Hamdan, United States v. Hicks, United States v. al Qosi, United States v. Bahlul*

SUBJECT: Request for Guidance Submitted as "Interlocutory Question 3"

On September 3, 2004 you forwarded "Interlocutory Question 3" to me for decision, requesting approval of proposed procedures for certifying interlocutory questions to me.

This issue is not properly raised as an Interlocutory Question. I view the requirement of MCI Number 8, paragraph 4(A) that "the full commission shall adjudicate all issues of fact and law" as a prerequisite to your exercise of discretionary authority to certify an interlocutory question to me. Until such time as the full commission has ruled on a question of fact or law, certification as an interlocutory question for an advisory opinion is not authorized. Accordingly, your request is denied in the form of an interlocutory question.

I recognize that guidance is necessary regarding the procedure for certifying interlocutory questions to me. Such guidance will be promulgated by the appropriate authorities.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Review Exhibit 45

Page 3 **Of** 3

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

September 9, 2004

MEMORANDUM FOR Appointing Authority for Military Commissions

SUBJECT: Interlocutory Question # 3 and the power of the Appointing Authority to decide Interlocutory questions

In response to the Presiding Officer's Interlocutory Question #3, the defense in *U.S. v. Hicks* objects to the Appointing Authority being connected in any way with any decision of law in the military commission assigned to Mr. Hicks's pending case.

The President's Military Order of 13 November 2001 is clear; the military commission sits "as the triers of both law and fact." As for the procedures outlined in ¶ 2 of IQ #3, there is not any basis in the PMO for such procedures. They are, just like so much else in the Commission system, merely a creature of the PO or Appointing Authority, and not part of any codified, predictable, or viable legal system. As such, they are *ultra vires*.

All language found in any Military Commission Order or Instruction attempting to authorize interlocutory questions of law to be forwarded to and decided by the Appointing Authority violates the President's Military Order and denies Mr. Hicks the fundamental guarantees of due process. The Appointing Authority is not an independent judicial officer, and referring matters to him as if he were only further de-legitimizes the entire commission system. It also, of course, further illustrates a fundamental problem with the commission system: the absence of independent review, appellate or otherwise.

More specifically,

(a) regarding the procedures in ¶ 3(b), we restate our objections to publishing official Commission decisions via e-mail;

(b) regarding the procedures proposed in ¶ 3(c), there should not be any editing with respect to what "documentary or other materials" are forwarded to the Appointing Authority once the PO has certified a question. All materials either presented by a party, or generated at a hearing, or deliberative session of the Commission, should be forwarded to the Appointing Authority in the event of certification of a particular issue or motion; and

(c) regarding ¶ 4, all formal findings of fact and/or conclusions of law should, as a requirement, be made in writing by the Commission.

Furthermore, as a threshold matter, we do not believe any amendments should be made to MCO's or MCI's (upon which IQ's #1 & 2 are based) that adversely affect any detainee. Such

Review Exhibit 46

changes not only constitute *ex post facto* provisions, but also further aggravate a critical defect in the commission system: that there is an absence of the notice and/or continuity that are hallmarks of a fair adjudicative system. The prospect of further amendments to MCO's and MCI's, without any symmetrical procedure for doing so (or contesting them beforehand) merely enhances the intractable problems inherent in the commission system as presently constituted.

If you have any questions regarding the memorandum, please contact me at (703) 607-1521.

M. D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel

Review Exhibit 46

Page 2 **Of** 2

Office of the Presiding Officer
Military Commission

September 02, 2004

MEMORANDUM FOR APPOINTING AUTHORITY, MILITARY COMMISSIONS

SUBJECT: Interlocutory Question 4 – Necessary Instructions

1. This Interlocutory Question is presented under the provisions of Military Commission Order 1, paragraph 4A(5)(d), as one the undersigned Presiding Officer "deems appropriate."

2. Paragraph 5, MCI #8 states that the implied duties of the Presiding Officer includes the function of "providing necessary instructions to other commission members."

3. Thus far, I have provided the members with instructions on the record during open sessions of the Commission. I have also provided members, as indicated in Review Exhibits, certain preliminary instructions in writing before the Commission met or assembled. In my opinion those instructions were necessary -- so the members could understand their role, could understand various matters which occurred on the record (e.g., voir dire), could prevent being unnecessarily tainted by contact or publicity, and could foresee, generally, how the process was going to work.

4. In the Commission process, the members have the unique role of deciding questions of both fact and law. In this situation, the question of which instructions are necessary may appear to some to be unclear. The basic problem is should the Presiding Officer instruct the members on what the law is when the members are empowered to decide the law for themselves? Another way of phrasing the question is, does the Presiding Officer provide necessary instructions to the members, or does he provide the members advice on his opinion of what the law is?

5. Instructions on Merits.

a. Is the Presiding Officer expected to instruct the members on the merits with respect to the elements of the offenses, defenses, evidentiary matters, and the like as would a Military Judge in a courts-martial?

b. If the Presiding Officer is to instruct on the merits as indicated above:

(1). Must the instructions be provided in open court in the presence of the parties? If so, may they be provided to the members in writing or must they be given orally?

Review Exhibit 47

Page 1 **Of** 5

(2). If instructions on the matter are to be given in open court, and counsel objects to the instructions, is the "conflict" resolved by the members or the Presiding Officer?

(3). If counsel for either side do not agree to an instruction, are the members *legally* required or forbidden to give any more weight to the Presiding Officer's instructions than they give to the views of the parties?

(4). Could the instructions be provided in closed conference when only the members are present? If not, could the instructions be provided in closed conference if the instructions are in writing and provided to counsel for both sides prior to counsel arguing on the merits?

(5). If instructing in closed session is permissible, must the instructions that are or will be given to be made known to counsel and the accused before or after, if at all, they are given?

(6). If instructions are not to be provided in either an open session or a closed conference, may the Presiding Officer advise the members of his *legal* opinion on the law on the matter in issue (recognizing that the members may choose to vote contrary to the Presiding Officer's opinion)?

6. Instructions on Motions

a. Is the Presiding Officer expected to instruct the members on the law associated with a motion?

b. If the Presiding Officer is to instruct on the law of a motion:

(1). Must the instructions be provided in open court in the presence of the parties? If so, can they be provided in writing?

(2). If instructions on the motion are to be given in open court, and counsel objects to the instructions, is the "conflict" resolved by the members or the Presiding Officer?

(3). If counsel for either side do not agree to an instruction, are the members *legally* required or forbidden to give any more weight to the Presiding Officer's instructions than they give to the views of the parties?

(4). Could the instructions be provided in closed conference when only the members are present? If not, could the instructions be provided in closed conference if the instructions are in writing and provided to counsel for both sides prior to counsel arguing on the merits?

(5). If instructing in closed session is permissible, must the instructions that are or will be given to be made known to counsel and the accused before or after, if at all, they are given?

(6). If instructions are not to be provided in either an open session or a closed conference, may the Presiding Officer advise the members of his *legal* opinion on the law on the matter in issue (recognizing that the members may choose to vote contrary to the Presiding Officer's opinion)?

(7). In the case involving a motion which would effect a termination of the proceedings, are instructions in any form necessary?

7. Instructions on sentencing.

a. Is the Presiding Officer expected to instruct the members on the law associated with sentencing?

b. If the Presiding Officer is to instruct on the law in sentencing?

(1). Must the instructions be provided in open court in the presence of the parties? If so, may they be provided to the members in writing or must they be given orally?

(2). If instructions on sentencing are to be given in open court, and counsel objects to the instructions, is the "conflict" resolved by the members or the Presiding Officer?

(3). If counsel for either side do not agree to an instruction, are the members *legally* required or forbidden to give any more weight to the Presiding Officer's instructions than they give to the views of the parties?

(4). Could the instructions be provided in closed conference when only the members are present? If not, could the instructions be provided in closed conference if the instructions are in writing and provided to counsel for both sides prior to counsel arguing on the merits?

(5). If instructing in closed session is permissible, must the instructions that are or will be given to be made known to counsel and the accused before or after, if at all, they are given?

(6). If instructions are not to be provided in either an open session or a closed conference, may the Presiding Officer advise the members of his *legal* opinion on the law on the matter in issue (recognizing that the members may choose to vote contrary to the Presiding Officer's opinion)?

Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

CF: All Trial and Defense Counsel:
US v. Hamdan
US v. Hicks
US v. Al Bahul
US v. Al Qosi

Review Exhibit 47

Page 4 Of 5

OFFICE OF THE SECRETARY OF DEFENSE
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

October 6, 2004

MEMORANDUM FOR Colonel Peter E. Brownback III, Presiding Officer for *United States v. Hamdan, United States v. Hicks, United States v. al Qosi, United States v. Bahlul*

SUBJECT: Request for Guidance Submitted as "Interlocutory Question 4"

On September 2, 2004 you forwarded "Interlocutory Question 3" to me for decision, requesting approval of proposed parameters for the Presiding Officer instructing Commission Members during motions, on the merits of the case, and at sentencing.

This issue is not properly raised as an Interlocutory Question. I view the requirement of MCI Number 8, paragraph 4(A) that "the full commission shall adjudicate all issues of fact and law" as a prerequisite to your exercise of discretionary authority to certify an interlocutory question to me. Until such time as the full commission has ruled on a question of fact or law, certification as an interlocutory question for an advisory opinion is not authorized. Accordingly, your request is denied in the form of an interlocutory question.

I recognize that guidance is necessary regarding trial procedures and rules of evidence. Such guidance will be promulgated by the appropriate authorities.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Review Exhibit 47

Page 5 of 5

Office of the Presiding Officer
Military Commission

September 02, 2004

MEMORANDUM FOR APPOINTING AUTHORITY, MILITARY COMMISSIONS

SUBJECT: Interlocutory Question 5 – Role of the Alternate Member

1. This Interlocutory Question is presented under the provisions of Military Commission Order 1, paragraph 4A(5)(d), as one the undersigned Presiding Officer "deems appropriate."

2. Is the instruction at enclosure 1, concerning the participation of the alternate member, correct?

3. Is the instruction (in bold and underlined) at enclosure 2, concerning whether an alternate member may ask questions, correct?

4. Is the law in the instruction at enclosure 3, concerning an alternate member who becomes a member, correct?

5. If an alternate member is not permitted to ask questions or have others do so on his behalf, and the alternate later becomes a member, may this member then recall previous witnesses for the sole purpose of asking questions he could have, but was not allowed to, ask while an alternate member?

Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

CF: All Trial and Defense Counsel:
US v. Hamdan
US v. Hicks
US v. Al Bahul
US v. Al Qosi

3 Encls
1. Participation of an Alternate Member
2. Questions by an Alternate Member
3. Alternate Member Becomes Member

Review Exhibit 48

Page 1 Of 5

Enclosure 1

Note 1: Military Commission Order #1, Paragraph 4A(1) provides in pertinent part: "The alternate member or members shall attend all sessions of the Commission, but the absence of an alternate member shall not preclude the Commission from conducting proceedings. In case of incapacity, resignation, or removal of any member, an alternate member shall take the place of that member. Any vacancy among the members or alternate members occurring after a trial has begun may be filled by the appointing authority, but the substance of all prior proceedings and evidence taken in that case shall be made known to that new member or alternate member before the trial proceeds."

Note 2: Federal Rule of Criminal Procedure Rule 24 (c)(3) provides: "Retaining Alternate Jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew."

(Name of alternate member(s)), you have been designated an alternate member of this Commission, and will become a member should there become a vacancy on the Commission that needs to be filled. As an alternate member, you will attend all open and closed sessions, however you will not be present for any closed conferences or deliberations, and you may not vote on any matter unless your status changes from member to alternate member. Should your status change from alternate member to member, you will be given further instructions.

Review Exhibit 48

Page 2 Of 5

Enclosure 2

Members of the Commission, when counsel have finished asking questions of any witness, there may be questions which you want asked. However, please keep two things in mind:

First, you cannot attempt to help either the government or the defense.

Second, counsel have interviewed the witnesses and know more about the case than we do. Very often they do not ask what may appear to us to be an obvious question because they are aware that this particular witness has no knowledge on the subject.

If you do want questions asked, we'll proceed in one of two ways:

a. You may question the witness by yourself. In so doing, you must remember that your questions are subject to objection, or,

b. I will question the witness for you. If you want me to do so, you will either write the general nature of your question on one of the Member Question Sheets which you have been given or say to me out loud something such as, "Does this witness know what happened?" I will ask the question of the witness until your question is answered or until we discover that it cannot be answered by the witness.

(Name of alternate member), you may not ask questions yourself. If, however, you have a question, you may use one of the printed forms to write your question, and if any member of the Commission wishes to ask that question, that member may ask it.

Review Exhibit 48

Page 3 Of 5

Enclosure 3

(Name of former alternate member), you have been designated as a member by (the Appointing Authority) (me) under the provisions of MCO #1 and MCI #8. As such, you will now take full part in all closed conferences and deliberations. No current member of the Commission will reveal to you what occurred or was said in past deliberations, and Commission deliberations about issues or charges that have not yet been decided will begin anew. You will have a full voice and vote along with all other members in all questions which are put to a vote in the future or have yet to be decided.

Members, we will NOT put to a vote or revote any matter which has already been decided by a vote of the Commission.

Review Exhibit 48

Page 4 Of 5

OFFICE OF THE SECRETARY OF DEFENSE
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

October 6, 2004

MEMORANDUM FOR Colonel Peter E. Brownback III, Presiding Officer for *United States v. Hamdan, United States v. Hicks, United States v. al Qosi, United States v. Bahlul*

SUBJECT: Request for Guidance Submitted as "Interlocutory Question 5"

On September 2, 2004 you forwarded "Interlocutory Question 3" to me for decision, requesting approval of proposed instructions to alternate members of the Commission.

This issue is not properly raised as an Interlocutory Question. I view the requirement of MCI Number 8, paragraph 4(A) that "the full commission shall adjudicate all issues of fact and law" as a prerequisite to your exercise of discretionary authority to certify an interlocutory question to me. Until such time as the full commission has ruled on a question of fact or law, certification as an interlocutory question for an advisory opinion is not authorized. Accordingly, your request is denied in the form of an interlocutory question.

I recognize that guidance is necessary regarding trial procedures and rules of evidence. Such guidance will be promulgated by the appropriate authorities.

John D. Altenburg Jr.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Review Exhibit 48

Page 5 Of 5

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

September 9, 2004

MEMORANDUM FOR Appointing Authority for Military Commissions

SUBJECT: Interlocutory Question # 5

In response to the Presiding Officer's Interlocutory Question #5, the defense in U.S. v. Hicks objects to the alternate member procedure proposed by the Presiding Officer.

Under the procedure proposed by interlocutory question #5, should an alternate member become part of the Commission, any issue previously decide by the Commission will not be subject to a re-vote.

The Presiding Officer cites Rule 24(c)(3) of the Federal Rules of Criminal Procedure, which requires the jury to begin its deliberations anew if an alternate juror is placed on the panel. While a jury is focused only on issues of fact, the Commission must decide all issues of law and fact, and therefore should have to begin its deliberations anew on all issues of law and fact once it includes an alternate member. Excluding the alternate member from reconsidering past Commission decisions would involve multiple decisions on the same case by different judges and juries. Juries do not render partial verdicts, and then replace one juror with an alternate to decide the remaining counts. Nor does Rule 24(c)(3) provide otherwise.

If an alternate member fills a vacancy on the commission, all issues previously decide by the commission should be re-deliberated and re-voted. Otherwise, the proposals in IQ #5 would violate the President's Military Order. If that may seem cumbersome, that is nevertheless what is required under a fair system, and it is yet another defect resulting from the piecemeal incorporation of different elements from different systems (to fit the desired result), without a coherent whole, rather than the adoption of a pre-existing recognized system of international and/or military justice. This unorthodox and unfair commissions system is the consequence of that fatally flawed process.

Another, threshold, problem with the commission system, illuminated by IQ #5 (and other IQ's), is that MCO's or MCI's should not be amended in any fashion that adversely affects any detainee and/or accused. Any such changes (and IQ #5 is premised upon just such a change) not only constitute *ex post facto* provisions, but also further aggravate a critical defect in the commission system: that there is an absence of the notice and/or continuity that are hallmarks of a fair adjudicative system. The prospect of further amendments to MCO's and MCI's, without any symmetrical procedure for doing so (or contesting them beforehand) merely enhances the intractable problems inherent in the commission system as presently constituted.

If you have any questions regarding the memorandum, please contact me at (703) 607-1521.

M. D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel

49 KA
Review Exhibit 56

Page 1 **Of** 1

UNITED STATES v. SALIM AHMED HAMDAN – Case No. 04-0004	**Appointing Authority Decision on Challenges for Cause**
UNITED STATES v. DAVID MATTHEWS HICKS – Case No. 04-0001	Decision No. 2004-001 October 19, 2004

Initial hearings were held in each of the above cases at Guantanamo Bay, Cuba, on August 24 and 25, 2004, respectively, during which voir dire was conducted.[1] In both cases, counsel for both sides reviewed detailed written questionnaires completed by each commission member, conducted voir dire of the commission as a whole, and then conducted extensive individual voir dire of the presiding officer, each of the four commission members, and the one alternate member.[2] Some of the commission members were also individually questioned by counsel in closed session so that classified matters could be examined.[3] In both the *Hamdan* and *Hicks* cases, defense counsel challenged the Presiding Officer, three of the four commission members, and the alternate commission member. During the hearings, the prosecution opposed all the challenges in both cases. However, in a subsequent brief filed by the Chief Prosecutor, the prosecution modified their position and no longer opposes the challenges for cause against Colonel (COL) B (a Marine),[4] Lieutenant Colonel (LTC) T, and LTC C.

[1] The initial hearing in *United States v. al Bahlul*, Case No. 04-0003, was held on August 26, 2004, at Guantanamo Bay, Cuba. The proceedings in that case were suspended prior to voir dire to resolve the accused's request to represent himself. The initial hearing in *United States v. al Qosi*, Case No. 04-0002, was held on August 27, 2004, at Guantanamo Bay, Cuba. Voir dire in that case is scheduled to be conducted in November 2004.

[2] By comparison, in the Nazi Saboteur Military Commission conducted during World War II, defense counsel asked only two questions of the commission as a whole and conducted no individual voir dire. There were no challenges for cause. *See* Transcript of Proceedings before the Military Commissions to Try Persons Charged with Offenses Against the Law of War and the Articles of War, Washington D.C., July 8-31, 1942, transcribed by the University of Minnesota, 2004, *available at* http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm at pp. 13-14.

[3] To what extent voir dire is conducted during any military commission is a matter within the discretion of the Presiding Officer. "The Presiding Officer shall determine if it is necessary to conduct or permit questioning of members (including the Presiding Officer) on issues of whether there is good cause for their removal. The Presiding Officer may permit questioning in any manner he deems appropriate . . . [and shall ensure that] any such questioning shall be narrowly focused on issues pertaining to whether good cause may exist for the removal of any member." DoD Military Commission Instruction No. 8, "Administrative Procedures," paragraph 3A(2) (Aug. 31, 2004) [hereinafter MCI No. 8]. The Presiding Officer permitted extensive, wide-ranging voir dire in both of these cases. There was no objection by any counsel that the Presiding Officer impeded in any way their ability to conduct full and extensive voir dire of all the members, including the Presiding Officer.

[4] The final commission member, COL B (an Air Force officer), was not challenged by either side in either case. All further references to COL B herein refer to COL B, the Marine.

In each case, the Appointing Authority considered the trial transcript, the written briefs of the parties, the written questionnaires completed by the members, and the written recommendations of the Presiding Officer. While each case is decided on the record of trial in that case, this joint decision is provided because of the close similarities in the voir dire of the members and the arguments of counsel in both cases. Additionally, defense counsel from the *al Qosi* case has also filed a brief concerning the proper standard for the Appointing Authority to apply when deciding challenges for cause.

Military Commission Procedural Provisions on Challenges for Cause

The Appointing Authority appoints military commission members "based on competence to perform the duties involved" and may remove members for "good cause." DoD Directive No. 5105.70, "Appointing Authority for Military Commissions," paragraph 4.1.2 (Feb. 10, 2004) [hereinafter DoD Dir. 5105.70]. *See also* DoD Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," Section 4A(3) (Mar. 21, 2002) [hereinafter MCO No. 1]; MCI No. 8 at paragraph 3A(1). To be qualified to serve as a member or an alternate member of a military commission, each person "shall be a commissioned officer of the United States armed forces ("Military Officer"), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty." MCO No. 1 at Section 4A(3). *Compare* Article 25(a), Uniform Code of Military Justice, 10 U.S.C. § 825(a) [hereinafter UCMJ].

The Presiding Officer may not decide challenges for cause but must "forward to the Appointing Authority information and, if appropriate, a recommendation relevant to the question of whether a member (including the Presiding Officer) should be removed for good cause. While awaiting the Appointing Authority's decision on such matter, the Presiding Officer may elect either to hold proceedings in abeyance or to continue."[5] MCI No. 8 at paragraph 3A(3). In the *Hamdan* and *Hicks* cases, consistent with this authority, the Presiding Officer has scheduled due dates for motions, motion hearing dates, and tentative trial dates pending the Appointing Authority's decision on these challenges.

"In the event a member (or alternate member) is removed for good cause, the Appointing Authority may replace the member, direct that an alternate member serve in the place of the original member, direct that proceedings simply continue without the member, or convene a new commission." MCI No. 8 at paragraph 3A(1).

The term "good cause" is not defined in any of these provisions but is defined in the Review Panel instruction as including, but not limited to, "physical disability, military exigency, or other circumstances that render the member unable to perform his duties."

[5] On September 15, 2004, the Appointing Authority sent the following email to the Presiding Officer: "Please forward your observations and recommendations relating to challenges for cause." That same day, the Presiding Officer provided written recommendations concerning the recommended standard for deciding challenges for cause and his recommendations on the challenges against each member in the *Hamdan* and *Hicks* cases.

DoD Military Commission Instruction No. 9, "Review of Military Commission Proceedings," paragraph 4B(2) (Dec. 26, 2003). This is the same definition of good cause that a convening authority or a military judge uses to excuse a court-martial member after assembly of the court. *See* Manual for Courts-Martial, United States, Rules for Courts-Martial 505 (2002) [hereinafter RCM].

Parties' Positions Concerning the Standard for Determining Challenges for Good Cause

At the request of the Presiding Officer, defense counsel in *Hamdan*, *Hicks*, and *al Qosi*, as well as the Chief Prosecutor, filed briefs concerning the appropriate standard for the Appointing Authority to apply when deciding challenges for "good cause." The defense briefs in *Hicks* and *al Qosi* advocate the adoption of the standard set forth in RCM 912(f) including the "implied bias" provision which states that a member shall be excused for cause whenever it appears that the member "[s]hould not sit as a member in the interest of having the [military commission] free from substantial doubt as to legality, fairness, and impartiality." RCM 912(f)(1)(N). While making some different arguments in support of their position, defense counsel in *Hicks* and *al Qosi* advocate that the RCM 912(f)(1)(N) court-martial standard should be applied without change in military commissions. Under this standard, implied bias is determined via a supposedly objective standard, the test being whether a reasonable member of the public would have substantial doubt as to the legality, fairness, and impartiality of the proceeding. *See United States v. Strand*, 59 M.J. 455, 458-59 (2004). Defense counsel in *Hamdan* agree that the RCM 912(f)(1)(N) court-martial standard should be applied to military commissions, but argue that the reasonable member of the public must be taken from the international community.

The brief filed by the Chief Prosecutor recommends the following standard be adopted: "A member shall be disqualified when there is good cause to believe that the member cannot provide the accused a full and fair trial, or the member's impartiality might reasonably be questioned based upon articulable facts."

The Presiding Officer recommends that a challenge for cause should be granted "if there is good cause to believe that the person could not provide a full and fair trial, impartially and expeditiously, of the cases brought before the Commission. I do not believe that there is an 'implied bias' standard in the relevant documents establishing the Commissions." (Mem. for Appointing Authority, Military Commissions at paragraph 2, Sept. 15, 2004.)

The parties cite no controlling standard for deciding challenges for cause before military commissions. Nevertheless, it is helpful to examine the challenge standards in courts-martial, United States federal practice, and under international practice when deciding the appropriate challenge standard for military commissions.

Applicability of the Uniform Code of Military Justice and the Manual for Courts-Martial to Military Commissions

As explained below, while some of the provisions of the UCMJ expressly apply to military commissions, none of the provisions of the Manual for Courts-Martial, including the implied bias standard endorsed by defense counsel, apply to military commissions. Article 21 of the UCMJ provides:

> § 821. Art. 21 Jurisdiction of courts-martial not exclusive
>
> The provisions of this chapter conferring jurisdiction upon courts-marital do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.[6]

UCMJ art. 21. Article 36 of the UCMJ states:

> § 836. Art. 36 President may prescribe rules
>
> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, *military commissions* and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, *but which may not be contrary to or inconsistent with this chapter* [10 U.S.C. §§ 801-946].
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable.

UCMJ art. 36 (emphasis added). In 1990, the phrase "and shall be reported to Congress" was deleted from the end of subsection (b). *See* National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, Section 1301, 104 Stat. 1301 (1990).

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[6] As recently as November 22, 2000, less than one year before the 9/11 attacks, Congress again recognized the independent jurisdiction of military commissions. *See* Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523 (adding a section entitled "Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States," 18 U.S.C. § 3261 (2000)). 18 U.S.C. § 3261(c) states that "[n]othing in this chapter [18 U.S.C. §§ 3261 et seq.] may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal." *Id.*

Consistent with this Congressional authority, on November 13, 2001, the President entered the following finding:

> Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833, Section 1(f) (Nov. 16, 2001) [hereinafter President's Military Order].

Accordingly, the Manual for Courts-Martial does not apply to trials by military commissions because of the congressionally authorized finding in the President's Military Order. However, the President's statutory authority to promulgate different trial rules for military commissions is not unlimited. Military commission trial procedures must comply with two statutory conditions contained in the Uniform Code of Military Justice. First, all such rules and regulations shall be "uniform insofar as practicable." UCMJ art. 36(b).

Second, any such rule or regulation "may not be contrary to or inconsistent with" the Uniform Code of Military Justice. UCMJ art. 36(a). Most of the UCMJ's provisions specifically apply to courts-marital only, but some also expressly apply to military commissions as well. For example, Articles 21 (jurisdiction), 28 (court reporters and interpreters), 37(a) (unlawful command influence), 47 (refusal to appear or testify), 48 (contempts), 50 (admissibility of records of courts of inquiry), 104 (aiding the enemy), and 106 (spies) all expressly apply to military commissions.

Article 41 of the UCMJ discusses challenges for cause, but is expressly applicable only to trials by court-martial and does not prescribe the standard to use when deciding a challenge for "cause." *See* UCMJ art. 41(a)(1). Article 29 of the UCMJ provides that no member of a court-martial may be excused after the court has been assembled "unless excused as a result of a challenge, excused by the military judge *for physical disability or other good cause*, or excused by order of the convening authority for good cause." UCMJ art. 29(a) (emphasis added).

In historical military jurisprudence, a general statement or assertion of bias was not a proper challenge. The challenge had to allege specific facts and circumstances demonstrating the basis of the alleged bias. *See generally* William Winthrop, *Military Law and Precedents* 207 (Government Printing Office 1920 reprint) (1896). Challenges

"for favor," as implied bias challenges were historically known, did not, by themselves, imply bias.

> [T]he question of their sufficiency in law being wholly contingent upon the testimony, *which may or may not, according to the character and significance of all the circumstances raise a presumption of partiality.* Such are challenges founded upon the personal relations of the juror and one of the parties to the case; their relationship, when not so near as to constitute [actual bias]; the entertaining by the juror of a qualified opinion or impression in regard to the merits of the case; his having an unfavorable opinion of the character or conduct of the prisoner; his having taken part in a previous trial of the prisoner for a different offence, or of another person for the same or a similar offence; or some other incident, no matter what . . . which, alone or in combination with other incidents, may have so acted upon the juror that his mind is not 'in a state of neutrality' between the parties.

Id. at 216 (emphasis added). In such cases, the question of whether the member is or is not biased "is a question of *fact* to be determined by the particular circumstances in evidence." *Id.* at 216-17 (emphasis in original).

Challenges for Cause in United States Federal Courts

In federal practice, the seminal case on implied bias is *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (boldface added):

> [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury **capable and willing to decide the case solely on the evidence before it**, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

In an often cited concurring opinion, Justice O'Connor writes that:

> While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the

> juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.

Id. at 222.

The doctrine of implied bias is "limited in application to those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *Brown v. Warden*, No. 03-2619, 2004 U.S. App. LEXIS 13944, at 3 (3rd Cir. July 6, 2004 unpublished) (quoting *Person v. Miller,* 854 F.2d 656, 664 (4th Cir. 1988)). "The implied bias doctrine is not to be lightly invoked, but 'must be reserved for those extreme and exceptional circumstances that leave serious question whether the trial court subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice.'" *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1261 (2d Cir. 2000) (quoting *Gonzales v. Thomas*, 99 F.3d 978, 987 (10th Cir. 1996)).

Military courts-martial practice also purports to follow the *Smith* Supreme Court precedent, with the highest military appellate court concluding that "implied bias should be invoked rarely." *See United States v. Warden*, 51 M.J. 78, 81 (2000); *see also United States v. Lavender*, 46 M.J. 485, 488 (1997) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). In practice, however, the U. S. Court of Appeals for the Armed Forces has been more liberal in granting implied bias challenges than the various U.S. Federal Circuit Courts of Appeals. But even in courts-martial, military appellate courts look at the "totality of the factual circumstances" when reviewing implied bias challenges. *See United States v. Strand*, 59 M.J. 455, 459 (2004).

The American Bar Association recently proposed a minimum standard for deciding challenges for good cause:

> At a minimum, a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by law to serve on a jury, or may be unable or unwilling to hear the subject case fairly and impartially. . . . In ruling on a challenge for cause, the court should evaluate the juror's demeanor and substantive responses to questions. If the court determines that there is a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from the trial. The court should make a record of the reasons for the ruling including whatever factual findings are appropriate.

American Bar Association, Standards Relating to Jury Trials, Draft, September 2004.

International Standards for Challenges for Cause

International law generally provides for the right of an accused to an impartial tribunal. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) statutorily establish impartiality as a judicial requirement. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 13, U.N. Doc. S/25704, 32 ILM 1159, 1195 (May 3, 1993); Statute of the International Criminal Tribunal for Rwanda, art. 12, U.N. Doc. S/Res/955, U.N. SCOR 3453, 33 ILM 1598, 1607 (Nov. 8, 1994). The Rules of Evidence and Procedure of both the ICTY and ICTR state that "[a] judge may not sit on a trial . . . in which he has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality." Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia, Rule 15, U.N. Doc. IT/32/Rev. 32 (Aug. 12, 2004); Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, Rule 15, U.N. Doc. ITR/3/REV. 1 (June 29, 1995).

Several international treaties and conventions recognize the right to an impartial tribunal. The European Convention on Human Rights and the International Covenant on Political and Civil Rights guarantee the accused a fair trial and recognize the right to an impartial tribunal. In nearly identical language, the standards in both documents require a criminal tribunal to be fair, public, independent, and competent. *See* European Convention on the Protection of Human Rights and Fundamental Freedoms, art. 6, Section 1, *opened for signature*, 213 UNTS 221 (Nov. 4, 1950); International Covenant on Political and Civil Rights, art. 14, Section 1, 999 UNTS 171 (Dec. 16, 1966).

The European Court of Human Rights has reviewed numerous cases for alleged violations of the right to an impartial tribunal or judge. In evaluating impartiality, the Court consistently emphasizes that judges and tribunals must appear to be impartial. *Piersack v. Belgium*, Series A, No. 53 (Oct. 1, 1982). In *Piersack v. Belgium*, the Court noted that a tribunal, including a jury, must be impartial from a subjective as well as an objective point of view. *Id.* at para. 30(a). The European Court of Human Rights affirmed this consideration in *Gregory v. United Kingdom*, stating that "[t]he Court notes at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public . . . ." *Gregory v. United Kingdom*, 25 Eur. H.R. Rep. 577, para. 43 (Feb. 25, 1997). As a result of an overriding need to maintain an appearance of impartiality, national legislation often establishes specific relationships or perceived conflicts that disqualify a judge on the basis of appearances rather than an objective finding that a judge is indeed impartial.

In evaluating whether there is an appearance of impartiality that gives rise to a challenge of a judge or juror, the European Court of Human Rights noted that lack of impartiality includes situations where there is a "legitimate doubt" that a juror or judge can act impartially. *Piersack*, Series A, No. 53 at para. 30. Further, it is necessary to "examine whether in the circumstances there were sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the jury . . . ." *Gregory*, 25 Eur. H.R. Rep. at para. 45. Despite this seemingly expansive approach, the European

Court of Human Rights has ruled consistently that a judge is presumed to be impartial unless proven otherwise. *LeCompte, van Leuven and De Meyeres v. Belgium*, Series A, No. 43 (June 23, 1981). Thus, as a practical matter, it is the rare case in which the impartiality of a judge is successfully challenged on the basis of a judge's relationship to others when such relationship is not specifically enumerated as a disqualifying factor under national legislation.

The Appeals Chamber for the International Criminal Tribunal for Rwanda has exhaustively analyzed the European Court of Human Rights cases, as well as cases from common law states, and developed the following standard to interpret and apply the concept of impartiality:

> [A] Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:
>
> > A. A judge is not impartial if shown that actual bias exists.
> > B. There is an unacceptable appearance of bias if:
> > i. a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties . . . ; or
> > ii. the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

Prosecutor v. Furundzija, para. 189, Case No. I IT-95-17/1-A, Judgment, (July 21, 2000).

The Appeals Chamber noted that an informed observer is one who takes into account the oath, as well as any training and experience of the juror. On the basis of this test, the Appeals Chamber found no violation, holding that the judge's membership in an international organization was one of the very factors that qualified her as a judge at the Tribunal and thus such membership could not be the basis for a claim of bias. The Chamber also noted that judges may have personal convictions that do not amount to bias absent other factors. *Id.* at para. 203.

Appointing Authority Standard for Deciding Challenges for Cause

The President's Military Order establishes the trial standard that military commissions will provide "a full and fair trial, with the military commission sitting as the triers of both fact and law." President's Military Order at Section 4(c)(2). Considering all of the above, the Appointing Authority will apply the following standard, which includes a limited implied bias component, when deciding challenges for cause against any member of a military commission:

> Based on the totality of the factual circumstances, a challenge for cause will be sustained if the member has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by commission law to serve on the commission, or may be unable or unwilling to hear the case fairly and impartially considering only evidence and arguments presented in the accused's trial.

In applying this standard, a member should be excused if the record establishes a reasonable and significant doubt concerning his or her ability to act fairly and impartially. Additionally, the following factors will be considered, although the existence of any one of these factors is not necessarily an independent ground warranting the granting of a challenge and no one factor necessarily carries more weight than another. In each case the challenge will be decided based upon the above standard, taking into account any of these factors that may be applicable and considering the totality of the factual circumstances in the case.

(1) Has the moving party established a factual basis to support the challenge?

(2) Does the non-moving party oppose the challenge?

(3) What recommendation, if any, did the Presiding Officer make concerning the challenge? *See* MCI No. 8 at paragraph 3A(3).

(4) Does the record demonstrate that the challenged member possesses sufficient age, education, training, experience, length of service, judicial temperament, independence, integrity, intelligence, candor, and security clearances, and is otherwise competent to serve as a member of a military commission? *See* MCO No. 1 at Sections 4A(3)-(4); DoD Dir. 5105.70 at paragraph 4.1.2; UCMJ art. 25(d)(2).

(5) Does the record establish that the challenged member is able to lay aside any outside knowledge, association, or inclination, and decide the case fairly and impartially based upon the evidence presented to the commission? *See Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961) (citations omitted).

Examples of good cause that would normally warrant a member's removal from a military commission include situations where the member does not meet the qualifications to sit on or has not been properly appointed to a military commission; has formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged; has become physically disabled; or has intentionally disclosed protected information from a referred military commission case without proper authorization.

Consideration of Individual Challenges

LTC C

The defense challenges to LTC C are based upon his ongoing strong emotions and anger because of 9/11 and his real and present apprehension that his family may be harmed if he participates in these commissions. At trial, the prosecution opposed this challenge. However, the post-hearing brief filed by the Chief Prosecutor does not oppose this challenge. The Presiding Officer believes that there is "some cause" to grant a challenge against LTC C because his responses would provide a reasonable person cause to doubt his ability to provide an impartial trial.

During his voir dire in *Hamdan*, LTC C acknowledged that he indicated in his written questionnaire that he had a desire to seek justice for those who perished at the hands of the terrorists, that he was very angry about the events of 9/11, and that he still had strong emotions about what happened. LTC C further stated that he believed terrorist organizations would seek out both he and his family for revenge simply because of his participation in these commissions. He also stated that at one point he held the opinion that the persons being detained at Guantanamo Bay were terrorists.

During his voir dire in *Hicks*, LTC C stated that he would try to put his emotions aside and look at the case objectively. He reaffirmed that he had participated in discussions with other soldiers where he probably stated that all of the detainees at Guantanamo Bay were terrorists, but that in retrospect that was no longer his opinion.

LTC C's past statements concerning the detainees at Guantanamo, coupled with his ongoing strong emotions concerning the 9/11 attacks, create a reasonable and significant doubt as to whether he could lay aside his emotions and judge the evidence presented in these cases in a fair and impartial manner. Accordingly, based on the totality of the factual circumstances, the challenge for cause against LTC C will be granted.

COL S

On 9/11, COL S [redacted] COL S

attended his funeral and met with his family. COL S also visited Ground Zero about two weeks after the attack[redacted]

The defense challenges to COL S are based upon his emotional reaction when visiting Ground Zero as well as his attendance at the funeral[redacted] The prosecution opposed this challenge at trial. The post-hearing brief filed by the Chief Prosecutor also opposes this challenge, without elaboration.

The Presiding Officer's written recommendation is that there is no cause to grant a challenge against COL S:

> His voir dire did not reveal any information which might cause a reasonable person to believe that he could not provide a full and fair trial, impartially and expeditiously. His method of speaking, his deliberation when responding, his ability to understand not only the question but the subtext of the question - all of these show that he is a bright attentive officer who will be able to provide the unbiased perspective which is required by the President for this trial. Even if one were to accept an "implied bias" standard, there was nothing in the voir dire to cause a reasonable person to believe that he is in any way biased in these cases. Based on my personal observations of COL S [] while he was discussing the death of[redacted] he was not unduly affected by the individual death - he regretted the death, but he has had a long career during which he has had occasion to see many Marines die.

In the *Hamdan* record, COL S described his reaction to attending the funeral of[redacted]

> I have been a battalion commander. I have been a regimental commander. I have been in the Marine Corps 28 years. It is not the first Marine that, unfortunately, that I have seen die, whether he was on or off duty in the Marine Corps. The death of every Marine I have known or served with has a deep affect on me, but it is no different that -- that Marine's worth is no more or less than the other Marines, unfortunately, that I have served with who have been killed.

In the *Hamdan* record, COL S described his emotions while visiting Ground Zero: "It is a sad sight. A lot of destruction there. Hard to fathom what was there and what

was left. . . . I would imagine that everyone who saw it was angry." COL S stated that he did not still think about his visit to Ground Zero.

In the *Hicks* record, COL S described his emotions while visiting Ground Zero as sadness rather than anger, again noting that there was a lot of destruction and loss of life. COL S responded as follows when asked how he would separate his 9/11 feelings and personal experiences from the evidence presented at trial:

> COL S: It's separate things.
> DC: Can you just explain for us how you go about doing that. Because we -- you understand that we need to know and be confident that you can be a fair commissioner, separate those things out, and give Mr. Hicks the fair trial that he's due and that we understand that you understand is your responsibility.
> COL S : I understand. I've read these charges. I understand that the fact that anybody's charged with anything doesn't [im]ply more than that they're charged with it. And I make no connection in my mind between those charges and my visit to the World Trade Center.
> DC: Nothing further, thank you.

COL S's written questionnaire and his voir dire in *Hicks* both indicate that, for a non-attorney, COL S has considerable prior military legal experience. COL S stated that he had previously served as both a witness and a member (juror) in courts-martial; that he has served as a special court-martial convening authority on [redacted] different occasions; and has attended specialized military legal training in the form of Senior Officer's Legal Courses and a Law of Land Warfare Course. He also conducted numerous summary courts-marital where he made determinations of both law and fact, just as members of military commissions are required to do.

As the defense stated in their brief in the *Hicks* case, "most Americans, and possibly all military personnel, are gripped by strong emotion, whether sadness, anger, confusion, frustration, fear, or revenge, at the memory of the September 11th attacks . . . ." The issue, however, is not whether a potential military commission member experienced a strong emotional reaction to events that happened over three years ago, or even whether that person candidly acknowledged such feelings, but rather is the member still experiencing those emotions such that he is unable to lay aside those feelings and render a verdict based solely on the evidence presented to the military commission. As the United States Supreme Court has stated:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best

> qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. *It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.*

Irvin, 366 U.S. at 722-23 (citations omitted) (emphasis added).

Unlike LTC C, nothing in either record demonstrates that COL S is experiencing any ongoing emotions as a result of his 9/11 experiences. The Presiding Officer's recommendation states that there was nothing in COL S's demeanor during voir dire that indicated that he was unduly affected by the death of [redacted] COL S, who has considerable legal training and experience, clearly stated that he can and will try these cases without reference to his 9/11 experiences. Nothing in either record creates a reasonable and significant doubt as to COL S's ability to decide these cases fairly and impartially, considering only evidence and arguments presented to the commissions. Accordingly, the challenge for cause against COL S will be denied.

LTC T and COL B

The defense challenged both LTC T and COL B based upon their involvement with [redacted] at the time Mr. Hamdan and Mr. Hicks were apprehended.

The defense challenged LTC T based upon his role as an [redacted] officer on the ground in [redacted] from approximately [redacted] the period during which both Mr. Hamdan and Mr. Hicks were captured and detained. At trial, the prosecution opposed this challenge. The post-hearing brief filed by the Chief Prosecutor does not oppose this challenge.

The Presiding Officer concluded that there is cause to grant a challenge against LTC T because:

> "his activities [redacted] make his participation problematic in regards to his knowledge of activities in the [redacted] - thereby possibly impacting on his impartiality. He, in fact, was a person who could legitimately be viewed as a possible victim in this case. Removing LTC T [] would insure [redacted] and the

> modus operandi of both sides would not have an undue influence upon the deliberations of the panel."

During his voir dire in *Hamdan*, LTC T stated that he is an [redacted] officer who was assigned to a [redacted] that deployed both to [redacted] as part of [redacted] and to [redacted] as part of [redacted] with the mission to capture enemy personnel, but that he was not involved with the capture of Mr. Hamdan. He stated that it is possible that he may have seen [redacted] on Mr. Hamdan, but he has no memory of Hamdan's case. During his voir dire in *Hicks*, LTC T stated he was attached to a [redacted] as an [redacted] while deployed to [redacted]

During a closed session of trial, the *Hamdan* defense counsel challenged COL B based upon his role in transporting [redacted] In the open session, defense challenged COL B based on the appearance of unfairness because of his prior duty [redacted] During both open and closed sessions of trial, the *Hicks* defense counsel challenged COL B because his knowledge of [redacted] specifically his knowledge of the transportation of detainees, is such that he would be better suited to be a witness than a commission member, and further that his links with personnel in theater were such that he could be characterized as a victim.

At trial, the prosecution opposed the challenge against COL B. The post-hearing brief filed by the Chief Prosecutor does not oppose this challenge. The Presiding Officer's opinion is that there is no cause to grant a challenge against COL B.

In his written questionnaire, COL B indicated that on 9/11 he was newly assigned as the [redacted] As a result of 9/11, he was involved in developing and executing war plans [redacted] He also indicated that he was intimately familiar with [redacted] He was physically deployed to [redacted]

During voir dire, COL B stated that he was not involved in making the determinations of what detainees were eligible for transfer to Guantanamo [redacted] He specifically remembered Mr. Hicks' name and that he was Australian. He stated that he probably knew which U.S. forces captured Mr. Hicks, but cannot currently recall that information. He also stated that in his role [redacted]

Based on the totality of the factual circumstances, including the classified voir dire of LTC T and COL B which were reviewed but not discussed herein, the challenges for cause against both LTC T and COL B will be granted. Both officers were actively involved in planning or executing sensitive [redacted] in both [redacted] and [redacted] and are intimately familiar with the operations and deployments in [redacted] These experiences create a reasonable and significant doubt as to the ability of these two members to decide these cases fairly and impartially.

Presiding Officer

Hamdan's defense counsel challenged the Presiding Officer on four grounds:

(1) He is not qualified as a judge advocate based on being recalled from retired service and not being an active member of any Bar Association at the time he was recalled;

(2) As an attorney, he will exert improper influence over the other non-attorney members;

(3) Multiple contacts, in person or through his assistant, with the Appointing Authority thus creating the appearance of unfairness; and

(4) Previously formed an opinion on the accused's right to a speedy trial as expressed in a July 15, 2004, meeting with counsel from both the prosecution and the defense.

Hicks' defense counsel challenged the Presiding Officer on the same four general grounds. At trial, the prosecution in both cases opposed the challenge against the Presiding Officer. In a subsequent brief, the Chief Prosecutor recommended the Presiding Officer evaluate whether he should remain on the commission in light of the implied bias standard proposed by the prosecution as previously described herein.

Presiding Officer's Judge Advocate Status

Military Commission Order No. 1 requires that the "Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force." MCO No. 1 at Section 4A(4). The Presiding Officer's written questionnaire, dated August 18, 2004, indicates that he currently is, and has been, an associate member of the Virginia State Bar since 1977 and that he has never practiced law in the civilian sector.

In a written brief, Hamdan's defense counsel asserts the following:

1) All Army judge advocates are required to remain in good standing in the bar of the highest court of a state of the United States, the District of Columbia, or a Federal Court. U.S. Dep't of Army Reg. 27-1, "Judge Advocate Legal Services," para. 13-2h(2) (Sept. 30, 1996) [hereinafter AR 27-1].

2) The Virginia State Bar maintains four classes of membership: active, associate, judicial, and retired. Associate members are entitled to all the privileges of active members except that they may not practice law (in Virginia).

3) Because the Presiding Officer is only an associate member of the Virginia Bar, he is not authorized to practice law in the Army Judge Advocate General's Corps.

In Virginia, the term "good standing" applies to both associate and active members and refers to whether or not the requirements to maintain that specific level of membership have been met. *Unauthorized Practice of Law*, Virginia UPL Opinion 133 (Apr. 20, 1989), *available at* http://www.vsb.org/profguides/upl/opinions/upl_ops/upl_Op133. "Good standing" generally means that the attorney has not been suspended or disbarred for disciplinary reasons and has complied with any applicable rules concerning payment of bar membership dues and completion of continuing legal education requirements.

As the proponent of AR 27-1, The Judge Advocate General (TJAG) of the Army is the appropriate authority to determine whether associate membership in the Virginia Bar constitutes "good standing" as contemplated in that regulation. The record establishes that the Presiding Officer's status with the Virginia Bar has not changed since he was admitted to the Virginia Bar in 1977. The record also shows that, as an associate member of the Virginia Bar, he practiced as an Army judge advocate for twenty-two years, including ten years as a military judge. Prior to his service as a military judge, the Army TJAG personally certified the Presiding Officer's qualifications to be a military judge as required by the Uniform Code of Military Justice. *See* UCMJ art. 26(b). Accordingly, this challenge is without merit.

Undue Influence over Non-attorney Members of the Commission

Under the President's Military Order, the commission members sit as "triers of both fact and law." President's Military Order at Section 4(c)(2). The defense asserts that this particular Presiding Officer will use his experience as a military trial judge and attorney to exert undue influence over the non-attorney members of the commission when deciding questions of law. In *Hamdan*, the Presiding Officer addressed this issue with the members as follows:

> Members, later I am going to instruct you as follows: As I am the only lawyer appointed to the commission, I will instruct you and advise you on the law. However, the President has directed that the commission, meaning all of us, will decide all questions of law and fact. So you are not bound to accept the law as given to you by me. You are free to accept the law as argued to you by counsel either in

> court, or in motions. In closed conferences, and during deliberations, my vote and voice will count no more than that of any other member. Can each member follow that instruction?
> Apparently so.
>
> Is there any member who believes that he would be required to accept, without question, my instruction on the law?
> Apparently not.

The exceptional difficulty and pressure with being the first Presiding Officer to serve on a military commission in over 60 years cannot be overstated. The Presiding Officer must conduct the proceedings with independent and impartial guidance and direction in a trial-judge-like manner. At the same time, the Presiding Officer must ensure that the other non-attorney members of the commission fully exercise their responsibilities to have an equal vote in all questions of law and fact. There is nothing in either record that remotely suggests that this Presiding Officer does not understand the delicate balance that his responsibilities require. Accordingly, the challenge on this basis is without merit.

Relationship with the Appointing Authority Creates Appearance of Unfairness

The precise factual basis for challenge on this ground was not very well articulated by counsel in either *Hamdan* or *Hicks*. In *Hamdan*, the defense counsel's entire oral argument on this ground was as follows:

> We are also challenging based on the multiple contacts that you have had, either through your assistant, or through yourself, with the [A]ppointing [A]uthority. I understand that you said that this is not going to influence you in any way. We believe that it creates the appearance of unfairness, and at least at that level, we challenge on that.

Defense counsel in *Hamdan* did not further articulate a factual basis for this challenge in their post-hearing brief.

In *Hicks*, defense counsel orally adopted the same challenge grounds as *Hamdan* including "the relationship with the appointing authority" and the "perception of the public" under the implied bias standard in RCM 912(f)(1)(N). Defense counsel in *Hicks* did not further articulate a factual basis for this challenge in their post-hearing brief, even though they individually and rather extensively discussed the factual basis for their challenges against the other four challenged members.

The gist of this challenge appears to be that defense counsel perceive that a close personal friendship exists between the Presiding Officer and the Appointing Authority,

and that the Presiding Officer will be viewed as, or act as, an agent of the Appointing Authority rather than an independent, impartial Presiding Officer. Alternately stated, the Appointing Authority will somehow appear to influence the performance of the Presiding Officer. To evaluate this challenge, it is necessary to understand the traditional social and professional relationships between a convening authority and officer members of courts-martial under the Uniform Code of Military Justice, as well as the criminal sanctions against unlawfully influencing the action of a member of a court-martial or a military commission.

In addition to duty or professional responsibilities, military officers of all grades, and often their spouses, are expected by custom and tradition to participate in a wide variety of social functions hosted by senior commanding officers or general officers. Such functions include formal New Year's Day receptions, formal Dining Ins (dinners for officers only), formal Dining Outs (dinners for officers and spouses/dates), formal Dinner Dances, Change of Command ceremonies, promotion ceremonies, award ceremonies, informal Hail and Farewell dinners (welcoming new officers and "roasting" departing officers), retirement ceremonies, and funerals of members of the unit. Because attendance at all such social functions is customary, traditional, and expected, such attendance is not indicative of close personal friendships among the participants.

In most cases, commanders who are authorized to convene general courts-martial under the UCMJ are high-ranking general or flag officers. *See generally* UCMJ art. 22. The eligible "jury pool" of officers for a general court-martial includes officers assigned or attached to the convening authority's command or courts-martial jurisdiction. The convening authority is required to select officers for courts-martial duty, who, in his personal opinion, are "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." UCMJ art. 25(d)(2). Consequently, convening authorities frequently select as court members officers who they know well and whose judgment they trust.

To ensure that these professional and social relationships between convening authorities and court members do not affect the impartiality or fairness of trials by courts-martial or military commissions, and to maintain the neutrality of the convening authority, Congress enacted Article 37(a), UCMJ, "Unlawfully influencing action of court."[7] This is one of the UCMJ articles that expressly applies to military commissions. This statute prohibits any "attempt to coerce, or by any authorized means, influence the

[7] UCMJ art. 37(a) states in pertinent part (emphasis added):

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial *or any other military tribunal or any member thereof*, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

action of [a] . . . military tribunal or any member thereof, in reaching the findings or sentence in any case." UCMJ art. 37(a). Additionally, the knowing and intentional violation of the procedural protection afforded by Article 37(a), UCMJ, is a criminal offense in that any person subject to the UCMJ who "knowingly and intentionally fails to enforce or comply with any provision of this chapter [10 U.S.C. §§ 801-946] regulating the proceedings before, during, or after trial of an accused" may be punished as directed by a court-martial. UCMJ art. 98(2). The Presiding Officer, as a retired Regular Army officer recalled to active duty, and the Appointing Authority, as a retired member of the Regular Army, are both persons subject to trial by court-martial under the UCMJ. *See* UCMJ art. 2(a)(1),(4).

Article 37(a), UCMJ, protects not only the impartiality of courts-martial and military commissions, but also the judicial acts of a convening authority (appointing authority). "A convening authority must be impartial and independent in exercising his authority . . . . The very perception that a person exercising this awesome power is dispensing justice in an unequal manner or is being influenced by unseen superiors is wrong." *United States v. Hagen*, 25 M.J. 78, 86-87 (C.M.A., 1987) (Sullivan, J., concurring) (citations omitted). Even though a convening authority decides which cases go to trial, he or she must remain neutral throughout the trial process. *See, e.g. United States v. Davis*, 58 M.J. 100, 101, 103 (C.A.A.F. 2003) (stating that a convicted servicemember is entitled to individualized consideration of his case post-trial by a neutral convening authority). The Appointing Authority for Military Commissions, as an officer of the United States appointed by the Secretary of Defense pursuant to the Constitution and Title 10, United States Code, has a legal and moral obligation to execute the President's Military Order in a fair and impartial manner, consistent with existing statutory and regulatory guidance.

In his written questionnaire for counsel, the Presiding Officer stated the following about his relationship with the Appointing Authority (emphasis added):

> b. Mr. Altenburg:
>
> 1. I first met (then) CPT Altenburg in the period 1977-1978, while he was assigned to Fort Bragg. My only specific recollection of talking to him was when we discussed utilization of courtrooms to try cases.
>
> 2. To the best of my knowledge and belief, I did not see or talk to Mr. Altenburg again until sometime in the spring of 1989 at the Judge Advocate Ball in Heidelberg. Later, in November-December 1990, (then) LTC Altenburg obtained Desert Camouflage Uniforms for [another judge] and me so that we would be properly outfitted for trials in Saudi Arabia.

3. During the period 1992 to 1995, (then) COL Altenburg was the Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg while I was the Chief Circuit Judge, 2nd Judicial Circuit, with duty station at Fort Bragg. Our offices were in the same building. My wife, (then) MAJ M [], was the Chief of Administrative Law in the SJA office from 1992 to 1994. During this period, Mr. Altenburg and I became friends. We saw each other about twice a week and sometimes more than that. We generally attended all of the SJA social functions. He and his wife (and children – depending upon which of his children were in residence at the time) had dinner at our house at least three times in the three years we served at Fort Bragg. I attended several social functions at his quarters on post. *Though he was a convening authority and I was a trial judge, we were both disciplined enough to not discuss cases. I am sure there were times when he was not pleased with my rulings.*

4. From summer 1995 to summer 1996 when Mr. Altenburg was in Washington and I was at Fort Bragg, he and I probably talked on the telephone three or four times. I believe that he stayed at my house one night during a TDY to Fort Bragg (but I am not certain).

5. During the period June 1996 to May 1999, I was stationed at Mannheim, Germany and Mr. Altenburg was in Washington. Other than the World-Wide JAG Conferences in October of 1996, 1997, and 1998, I did not see nor talk to MG Altenburg except once--in May of 1997, I attended a farewell [ceremony] hosted by MG Altenburg for COL John Smith. In May 1999, MG Altenburg presided over my retirement ceremony at The Judge Advocate General's School and was a primary speaker at a "roast" in my honor that evening.

6. *Since my retirement from the Army on 1 July 1999, Mr. Altenburg has never been to our house and we have never been to his.* From the time of my retirement until the week of 12 July 2004, I have had the occasion to speak to him on the phone about five to ten times. I had two meetings or personal contacts with him during that period. First, in July or August 2001 when I was a primary speaker at a "roast" in MG Altenburg's honor at Fort Belvoir upon the occasion of his retirement. Second, in November (I believe) 2002, I attended his son's wedding in Orlando, Florida [near the Presiding Officer's home].

7. I sent him an email in December 2003 when he was appointed as the Appointing Authority to congratulate him. I also sent him an email in the spring of 2004 when I heard that he had named a Presiding Officer. Sometime in the spring of 2004, I called his house to speak to his wife. After we talked, she handed the phone to Mr. Altenburg. He explained that setting up the office and office procedures was tough. I suggested that he hire a former JA Warrant Officer whom we both knew.

8. *To the best of my memory, Mr. Altenburg and I have never discussed anything about the Commissions or how they should function. Without doubt, we have never discussed any case specifically or any of the cases in general. I am certain that since being appointed a Presiding Officer we have had no discussions about my duties or the Commission Trials.*

The voir dire in *Hamdan* did not pursue the nature of any personal relationship between the Presiding Officer and the Appointing Authority. During his voir dire in *Hicks*, the Presiding Officer stated the following concerning his relationship with the Appointing Authority (emphasis added):

DC: Now, I want to explore your relationship with the appointing authority.
PO: Okay.
DC: You have known Mr. Altenburg [since] 1977, 1978?
PO: Yes, sometime in that frame.
DC: And you had a professional affiliation for a period of time?
PO: As I said before my knowledge of Mr. Altenburg up until 1992 was minimal, I mean, really. Now he was the SJA of the 1AD, the 1st Armored Division, and I was over on the other side of Germany. We were at Bragg at the same time, but like I said I maybe talked to him once, I think. You see people on post, but that is about it. He and I were on the same promotion list to major, but he had already left Bragg by then. In 92 he came to Bragg as the SJA and I was the chief circuit judge with my offices right there at Bragg in his building, and my wife was his chief of [Administrative Law]. So from 92 to 96 you could say that we had a close professional relationship and within, I don't know, a couple months it became a personal relationship.
DC: And when you retired in May of 1999, Mr. Altenburg presided over your retirement ceremony?
PO: Right, at the JAG school.
DC: And he was also the primary speaker at a roast in your honor that evening?
PO: Yes.
DC: And, in fact, when Mr. Altenburg retired in the summer of 2001 you were the primary speaker at his roast?

PO: No, there were three speakers. I was the only one who was retired and could say bad things about him.
DC: And you also attended his son's wedding in sometime in the fall of 2002?
PO: In Orlando, yeah.
DC: And you also contacted Mr. Altenburg when you learned that he became the appointing authority for these commissions?
PO: Right, I did.
DC: And you are aware that there were other candidates for the position of presiding officer?
PO: Yeah, uh-huh.
DC: Thirty-three others, in fact?
PO: Okay. No. What I know about the selection process I wrote. I don't know who else was considered and who else was nominated. Knowing the Department of Defense I imagine that all four services sent in -- excuse me, that there were lots of nominations and they went somewhere and they got to Mr. Altenburg somehow. I don't know how many other people were nominated.
DC: So the ultimate question is how would you answer the concerns of a reasonable person who might say based on this close relationship with Mr. Altenburg that there is an appearance of a bias, or impartiality -- or partiality rather and that you were chosen not because of independence or qualifications, but rather because of your close relationship with Mr. Altenburg, and how would you answer that concern?
PO: Well, *I would say first of all that a person who were to examine my record as a military judge -- and all of it is open source. All of my cases are up on file at the Judge Advocate General's office in DC -- could see at the time when I was the judge at Bragg, sitting as a judge alone, acquitted about six or seven of the people he referred to a court-martial. They could look at the record of trial and see that in several cases I reversed his personal rulings. They could look at my record as a judge and see that I really don't care who the SJA was in how I acted. So a reasonable person who took the time to examine my record would say, no, it doesn't matter.*

. . . .

P: *Sir, do you care what Mr. Altenburg thinks about any ruling or decision you might make?*
PO: *No.* You want to ask what I think Mr. Altenburg wants from me?
P: Do you know, sir?
PO: No, I asked would you like to ask me what I think he wants?
P: Yes, sir.
PO: Okay. *I think John Altenburg, based on the time that I have known him, wants me to provide a full and fair trial of these people. That's what he wants. And I base that on really four years of close observation of him and my knowledge of him. That's what I think he wants.*
P: Do you think there would be any repercussions for you if he disagreed with a ruling of yours or a vote of yours?
PO: You all went to law school; right?
P: Yes, sir.

PO: Remember that first semester of law school and everyone is really scared?
P: Yes, sir.
PO: Well, I went on the funded program and all the people around me were really scared, but I said to myself, hey the worst that can happen is I can go back to being an infantry officer, which I really liked. Well the worse thing that can happen here, from you all's viewpoint, if you think about that, is I go back to sitting on the beach. *I don't have a professional career. Mr. Altenburg is not going to hurt me.* Okay.
P: Yes, sir. Nothing further, sir.

There is no factual basis in either record to support granting a challenge against the Presiding Officer on this ground. The records establish no actual bias by the Presiding Officer as a result of his former, routine, social and professional relationships with the Appointing Authority, nor do the parties advocate any such actual bias. Even on an implied bias basis, no well-informed member of the public who understands the traditional social relationships among military officers and the criminal prohibitions against the Appointing Authority attempting to influence the Presiding Officer's actions would have any reasonable or significant doubt that this Presiding Officer's fairness or impartiality will be affected by his prior social contacts with the Appointing Authority.

Such a finding is consistent with federal cases reflecting that the mere fact that a judge is a friend, or even a close friend, of a lawyer involved in the litigation does not, by that fact alone, require disqualification of the judge. *See, e.g., Bailey v. Broder*, No. 94 Civ. 2394 (S.D.N.Y. Feb. 20, 1997) (holding that a showing of a friendship between a judge and a party appearing before him, without a factual allegation of bias or prejudice, is insufficient to warrant recusal); *In re Cooke*, 160 B.R. 701, 706-08 (Bankr. D. Conn. 1993) (stating that a "judge's friendship with counsel appearing before him or her does not alone mandate disqualification."); *United States v. Kehlbeck*, 766 F. Supp. 707, 712 (S.D. Ind. 1990) (stating "judges may have friends without having to recuse themselves from every case in which a friend appears as counsel, party, or witness."); *United States v. Murphy*, 768 F. 2d 1518, 1537 (7th Cir. 1985, cert. denied, 475 U.S. 1012 (1986) ("In today's legal culture friendships among judges and lawyers are common. They are more than common; they are desirable."); *In re United States*, 666 F.2d 690 (1st Cir. 1981) (holding that recusal was not required in extortion trial of former democratic state senator whose committee, fifteen years ago, had investigated former republican governor when the judge had been chief legal counsel for the governor); and *Parrish v. Board of Commissioners*, 524 F.2d. 98 (5th Cir. 1975) (en banc) (holding that recusal was not required in class action case where judge was friends with some of the defendants and where judge stated his friendship would not affect his handing of the case).

Predisposition on Speedy Trial Motion

The fourth basis for challenge is that the Presiding Officer has formed an opinion, which he expressed at a July 15, 2004, meeting with counsel, that an accused has no right to a speedy trial in a military commission. Below are the pertinent portions of the voir dire in *Hamdan* on this issue (emphasis added).

DC: During that meeting on 15 July, did you express an opinion regarding speedy -- the right of any detainee to a speedy trial?
PO: No, I didn't.
DC: I wasn't at the meeting, but I was told that you did. I don't --
PO: Thank you.
DC: Did you mention speedy trial at all?
PO: Speedy trial was mentioned. Article 10 was mentioned, and there was some general conversation. I didn't take notes at the meeting. It was a meeting to tell people who I was and asking them to get -- start on motions and things.
DC: But you didn't expect -- while those things were mentioned, you don't recall expressing an opinion yourself?
PO: No. I didn't have any motions or anything.

. . . .

P: *Sir, the issue of speedy trial was brought up and we have, in fact, have notice of motions provided concerning speedy trial. Is there anything as you sit here right now which will impact your ability to fairly decide those motions?*
PO: *No.*

The following exchange occurred in the *Hamdan* commission after all voir dire had been completed and challenges made and the Presiding Officer was about to recess the commission until the Appointing Authority made a decision on the challenges:

DC: Yes, sir. It came to my attention after the voir dire that there was a tape made regarding the 15 July meeting between yourself and counsel. I'd like permission to send that tape along with the other matters that I'm submitting on your voir dire regarding your qualifications.
PO: And why would you like that?
DC: To go toward the idea of whether you have an opinion or not, sir.
PO: On the questions of?
DC: Speedy trial, sir.
PO: Okay. And the tape goes to show what?
DC: Your opinion at the time, sir. I have not yet transcribed it. If it doesn't show anything -- I am proceeding here based on what I've been told by other counsel.
PO: Okay. I would be -- let me think about this. Okay, let me think about this. I am reopening the voir dire of me. Explain to me -- ask me what you want about what I said or may have said on the 15th.
DC: Yes, sir. It's my understanding, sir, that on the 15th you expressed an opinion as to whether the accused have -- whether any detainee had a right to a speedy trial.
PO: Do you think that's correct or do you think that's in reference to Article 10?
DC: My understanding from counsel was that it referenced whether they would have a right to a speedy trial under Article 10 or rights, generally. I confess, sir, I have not heard the tape.
PO: Okay. Why don't you ask me if I am predisposed on that.
DC: Are you predisposed towards those issues, sir?

PO: I believe in the meeting -- I don't remember speedy trial, I remember Article 10 being mentioned, and I believe I said something to the effect of, Article 10, how does that come into play, or words to that effect. I did not know that my words were being taped, and I must confess that when I walked into the room that day I had no idea that Article 10 would come into play because I hadn't had an occasion to review Article 10. It is not something that usually comes up in military justice prudence -- jurisprudence. *So I'm telling you right now that I don't have a predisposition towards speedy trial.* However, although the tape was made without my permission, without the permission of anyone in the room, I do give you permission to send it to the appointing authority with the other matters.
DC: Sir, what I would like to ask, if I transcribe it, that I send it to you first.
PO: I don't want to see it.
DC: Yes, sir.
PO: Okay. Well, wait a second. Do you want to change -- do you want to add on anything to your challenge or stick with it?
DC: No, sir.
PO: How about you?
P: No objection to the tape being sent, sir.

Neither defense counsel nor the prosecution in the *Hicks* case asked any questions of the Presiding Officer concerning a possible predisposition on speedy trial.

In support of this challenge, Hamdan's defense counsel provided an edited transcript of the pertinent portions of the tape recording[8] of the July 15, 2004, meeting, which provides in part:

PO: Hicks has been referred to trial, right. There's no procedure that I've seen that requires an arraignment, has anyone seen anything like that? It requires [Hicks] be informed of the nature of the charges in front of the commission. Okay, uh, there's no such thing as a speedy trial clock in this thing. Right, has anybody seen a speedy trial?
Chief Prosecutor: Sir, I wouldn't even be commenting on that in light of the fact that I think [named defense counsel] believe Article 10 [UCMJ] applies to these proceedings so we ought to stay away from that issue.
DC (al Qosi): I don't think it is appropriate either sir.
Chief Prosecutor: We need to stay away from that.
DC (al Qosi): These are the subjects of motions that are going to be filed and your comments--
PO: I'm asking a question and you can all voir dire me on that, but how are we going to try Mr. Hicks?

[8] Counsel are reminded that audio recording of Commission proceedings is prohibited unless authorized by the Presiding Officer and that compliance with the Military Commission Orders and Instructions is a professional responsibility obligation for the practice of law within the Department of Defense. *See* MCO No. 1 at Section 6B(3); MCI No. 1 at paragraphs 4B,C.

Neither defense team cited any case law from any jurisdiction to support their argument that these facts warrant removal of the Presiding Officer. Generally speaking, "[a] predisposition acquired by a judge during the course of the proceedings will only constitute impermissible bias when 'it is so extreme as to display clear inability to render fair judgment.'" *United States v. Howard*, 218 F.3d 556, 566 (6th Cir. 2000) (quoting *United States v. Liteky*, 510 U.S. 540, 551 (1994)). Furthermore, "the mere fact that a judge has previously expressed himself on a particular point of law is not sufficient to show personal bias or prejudice." *United States v. Bray*, 546 F.2d 851, 857 (10th Cir., 1976) (citing *Antonello v. Wunsch*, 500 F.2d 1260 (10th Cir. 1974)).

The transcripts reveal that on occasion, as in this instance, the Presiding Officer was too casual with his remarks. Some of the detainees at Guantanamo have been there for almost three years. Understandably, they and their attorneys recognize that the determination of what, if any, speedy trial rules apply to military commissions is an important preliminary matter that must be resolved by the members of the military commissions after considering evidence and arguments presented by the parties.

Although not artfully done, the Presiding Officer was trying to tell counsel at the July 15, 2004, meeting that there are gaps in the commission trial procedures that he and counsel will have to address. Prior to the Presiding Officer's comments about arraignment and speedy trial, counsel were advised that the Presiding Officer would be issuing written guidance addressing how to handle some of the gaps in the commission procedures. As the Presiding Officer stated at that meeting, there are no published commission procedures concerning the subjects of arraignment or speedy trial. He was using arraignment and speedy trial as examples of traditional military procedures that were not mentioned in military commission orders or instructions, and that he and the parties would have to address. In fact, just four days after this meeting, the Presiding Officer issued the first three memoranda in a series of Presiding Officer Memoranda, in the nature of rules of court, to address issues not fully covered by military commission orders or instructions.[9] There are currently ten Presiding Officer Memoranda addressing topics such as motions practice, judicial notice, access to evidence and notice provisions, trial exhibits, obtaining protective orders and requests for limited disclosure, witness requests, requests to depose a witness, alternatives to live witnesses, and spectators to military commissions.

During voir dire, the Presiding Officer expressly stated that he had formed no predisposition concerning how he would rule on speedy trial motions. Considering all of the above, the record fails to establish that the Presiding Officer's spontaneous remarks in an informal meeting demonstrates a clear inability to render a fair and impartial ruling on speedy trial motions or otherwise disqualifies him from performing duties as a Presiding Officer.

[9] Current versions of all Presiding Officer Memoranda may be found on the Military Commission web site, *available at* http://www.defenselink.mil/news/commissions.html.

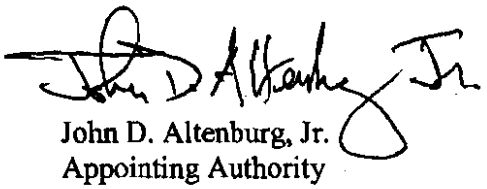
DECISION

The challenges for cause against the Presiding Officer and COL S are denied. Effective immediately, the challenges for cause against COL B (the Marine), LTC T, and LTC C are granted and each of these members is hereby permanently excused from all future proceedings for all military commissions. The country is grateful for the professional, dedicated, and selfless service of these exceptional officers in this sensitive and important matter.

A military commission composed of the Presiding Officer, COL S, and COL B (the Air Force officer) will proceed, at the call of the Presiding Officer, in the cases of *United States v. Hamdan* and *United States v. Hicks*. No additional members or alternate members will be appointed. *See* MCO No. 1 at Section 4A(1) and MCI No. 8 at paragraph 3A(1).

Official orders appointing replacement commission members for the cases of *United States v. al Qosi* and *United States v. al Bahlul* will be issued at a future date. *See* MCO No. 1 at Section 4A(1) and MCI No. 8 at paragraph 3A(1).

There is no classified annex to this decision.



John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Filings Inventory - US v. Hicks ver. 15, 1 Nov 2004

Issued in accordance with POM #12. See POM 12 as to counsel responsibilities.

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status / Disposition Notes	RE
No pending Prosecution Motions					

Defense (D Designations)

Name	Motion Filed	Response	Reply	Status / Disposition Notes	RE
D 3 Defense Motion To Dismiss for Lack of Jurisdiction: The Armed Conflict in Afghanistan has ended	1 Oct 04 Yes - Sep file w/ motion	15 Oct 04 0 attch	26 Oct 04		
D 4 Defense Motion for Appropriate Relief: Improper Imposition of Improper Pre-Trial Detention under International Law	1 Oct 04 Yes - no file provided	15 Oct 04 0 attch	27 Oct 04		
D 5 Defense Motion to Dismiss all Charges as the Commission has no Jurisdiction at Guantanamo Bay, Cuba	1 Oct 04 Yes -but contained in Comm Linbrary	15 Oct 04 Yes - included in file			

Name	Motion Filed	Response	Reply	Status / Disposition Notes	RE
D 6 Defense Motion for a Bill or Particulars	20 Sep 04 0 attch	4 Oct 04 0 attch	31 Oct 04	Note: Typographical error in style. As written, the filing was a Notice of motions. Should have been a motion.	
D 7 Defense Motion - to Dismiss for Denial of the Right to a Speedy Trial	4 Oct 04 10 attch included	18 Oct 04 1 attch included			
D 8 Defense Motion - to Dismiss for Denial of Fundamental Rights in Criminal Proceedings	4 Oct 04 20 attchs sep file	18 Oct 04 0 attch	26 Oct 04		
D 9 Defense Motion to Dismiss Charge I of "Destruction of Property by an Unprivileged Belligerent"	4 Oct 04 2 attch included	18 Oct 04 0 attch			
D 10 Defense Motion to Dismiss all Charges as the Commission is Improperly Constituted: AA lacks the Power to Appoint a Military Commission	4 Oct 04 2 attch included	18 Oct 04 0 attch			

Name	Motion Filed	Response	Reply	Status / Disposition Notes	RE
D 11 Defense Motion - to Dismiss Charge I for failure to state an offense triable by military commission	4 Oct 04 4 attchs incl	18 Oct 04 0 attch	26 Oct 04		
D12 Motion to Dismiss Charge 2 for failure to state an offense triable by military Commission	4 Oct 04 0 attch	18 Oct 04 0 attch	27 Oct 04	On 26 Oct, the defense filed a reply to this motion but the caption was different than the original motion. The APO did not place this reply on the motions inventory and requested a new filing to ensure the reply was filed against the proper series of filings. On 27 Oct, the defense filed a reply to D12 that was correctly styled.	
D 13 Motion to Dismiss Chg 3 for failure to state an offense	4 Oct 04 0 attch	18 Oct 04 0 attch	26 Oct 04		
D 17 Motion to Modify Charges Lack of Subject Matter Juris - Offenses must be Committed during Armed Conflict	4 Oct 04 1 attch incl	18 Oct 04 0 attch	26 Oct 04		

Name	Motion Filed	Response	Reply	Status / Disposition Notes	RE
D 18 Defense Motion to Dismiss for Lack of jurisdiction as Presidents Military Order of 13 Nov 2001 is invalid under US and International Law	4 Oct 04 1 attch incl	18 Oct 04 0 attch			
D 19 Defense Motion to Dismiss - Lack of Jurisdiction - President's Military Order Violates Equal Protection Clause	4 Oct 04 5 attchs incl	18 Oct 04 0 attchs	26 Oct 04		
D 20 Defense Motion Strike "Terrorism" from Chg 1	4 Oct 04 6 attch incl	18 Oct 04 0 attch	27 Oct 04		
D 21 Defense Motion to Dismiss - Lack of Jurisdiction: Commission System will not afford a full and fair trial	4 Oct 04 1 attch incl	18 Oct 04 0 attch			

Name	Motion Filed	Response	Reply	Status / Disposition Notes	RE
D 22 Defense Objection to the Structure and Composition of the Commission	9 Sep 04 0 attch	13 Oct 04 0 attch		This motion was originally filed with the Appointing Authority. On 22 Sep, the Appointing Authority declined to hear the motion.	

PO and C designations

None

Inactive Section

Name	Motion Filed	Response	Reply	Status / Disposition Notes	RE
~~P1~~. Protective Order (various)	23 July 04 (notice)	NA	NA	This notice was an alert that other motions would be forthcoming as Protected Information Issues were resolved. No action required	
~~P2~~. Conclusive Notice (various)	23 July 04 (notice)	NA	NA	Status: Prosecution and defense advised to use draft procedures in POM 6-1 to request Conclusive Notice. Disposition: Prosecution to request conclusive notice as needed. No action required	
~~P3~~. Pre-admission of Evidence (various)	23 July 04 (notice)	NA	NA	This notice was an alert that other motions would be forthcoming. No action required.	
~~P4~~. Protective Order: Motion of 30 July- Order 1. 1. Unclassified, Sensitive Materials. 2. Classified materials. 3. Books, articles, speeches.	30 July			Order issued at GTMO, Aug 2004 No action required.	

Name	Motion Filed	Response	Reply	Status / Disposition Notes	RE
~~P5~~. Protective Order: Motion of 30 July- Order 2. Protective Order: Names or other identifying information of investigators or interrogators.	30 July			Order issued at GTMO, Aug 2004 No action required.	
~~P6~~ Motion To Exclude Attorney And Legal Commentator Opinion Testimony	13 Oct 04 0 attch	19 Oct 04 0 attch	22 Oct 04 0 attch		
~~D-2~~ Defense Objection - to the Presiding Officer or his Assistant Providing Advice to the Commission	7 Sep 04 0 attch	13 Oct 04 0 attch		Per representatives from AA legal staff, the AA's answer to IQ#4 is being treated as the AA will not decide this matter at this time. Withdrawn by the defense. 31 Oct 04.	
~~D14~~ Motion for Appropriate relief Imposition of Improper pre-trial Detention under International Law	4 Oct 04			Erroneous double entry with D4. No action required on D14.	
D15 Improper Panel Selection procedures	4 Oct 04 4 attchs sep file	18 Oct 04 0 attch	26 Oct 04	Denied by the Commission, 2 Nov.	
~~D16~~ Motion to Dismiss The Armed Conflict in	4 Oct			Erroneous double entry with D3. No action required on D16.	

Afghanistan has Ended					
~~**D23**~~ Witness Request Cherif Bassiouni	27 Oct 04 CV is sep file			This motion was temporarily placed on the Filing Inventory temporarily until the defense provided a supplement. The defense instead filed a new motion containing the supplement on the date indicated. The motion filed on the date indicated is the one before the Commission. **Denied by PO as witness not necessary, 28 Oct 04.** **Resubmitted as motion for the Commission, D31.**	
~~**D24**~~ Witness Request Jordan Paust	27 Oct 04 CV is sep file			This motion was temporarily placed on the Filing Inventory temporarily until the defense provided a supplement. The defense instead filed a new motion containing the supplement on the date indicated. The motion filed on the date indicated is the one before the Commission. **Denied by PO as witness not necessary, 28 Oct 04.** **Resubmitted as motion for the Commission, D32.**	
~~**D25**~~ Witness Request Antonio Cassese	27 Oct 04 CV added 28 Oct as sep file			This motion was temporarily placed on the Filing Inventory temporarily until the defense provided a supplement. The defense instead filed a new motion containing the supplement on the date indicated. The motion filed on the date indicated is the one before the Commission. **Denied by PO as witness not necessary, 28 Oct 04.** **Resubmitted as motion for the Commission, D33.**	
~~**D26**~~ Witness Request Tim McCormick	27 Oct 04 CV is sep file			This motion was temporarily placed on the Filing Inventory temporarily until the defense provided a supplement. The defense instead filed a new motion containing the supplement on the date indicated. The motion filed on the date indicated is the one before the Commission. **Denied by PO as witness not necessary, 28 Oct 04.** **Resubmitted as motion for the Commission, D34.**	
~~**D27**~~ Witness Request George Edwards	27 Oct 04 CV is sep file			This motion was temporarily placed on the Filing Inventory temporarily until the defense provided a supplement. The defense instead filed a new motion containing the supplement on the date indicated. The motion filed on the date indicated is the one before the Commission. **Denied by PO as witness not necessary, 28 Oct 04.** **Resubmitted as motion for the Commission, D35.**	

~~**D28**~~ **Motion for Continuance** until the agreement between the U.S. government and U.K. government regarding the trial of British citizens before military commissions is completed.	25 Aug 04 (in session of ct)	24 Aug 04 (in session of ct)		Denied by the Presiding Officer, 29 Oct 04. Motion denied by the Commission 1 Nov 04.	
~~**D29**~~ Request continuance _ Appearance of Schmidt	28 Oct 04 Attch in sep file	28 Oct 04		Denied by the Presiding Officer, 29 Oct 04. Motion denied by the Commission 1 Nov 04.	
~~**D30**~~ Witness Request - Schmidt	28 Oct 04 CV and prior denial in sep file			**Denied by PO as witness not necessary, 28 Oct 04.** **Resubmitted as motion for the Commission, D36** Motion denied by the Commission 1 Nov 04.	
~~**D31**~~ Witness Request for Commission Consideration of Witness Cherif Bassiouni (Previously D23)	29 Oct 04	29 Oct 04 (See note)	**xxx**	Note: Government adopts their previous response to the previous motion as their response to this motion. APO, 29 Oct Motion denied by the Commission 1 Nov 04.	
~~**D32**~~ Witness Request for Commission Consideration of Witness Jordan Paust (Previously D24)	29 Oct 04	29 Oct 04 (See note)	**xxx**	Note: Government adopts their previous response to the previous motion as their response to this motion. APO, 29 Oct Motion denied by the Commission 1 Nov 04.	
~~**D33**~~ Witness Request for Commission Consideration of Antonio Cassese (Previously D25)	29 Oct 04	29 Oct 04 (See note)	**xxx**	Note: Government adopts their previous response to the previous motion as their response to this motion. APO, 29 Oct Motion denied by the Commission 1 Nov 04.	

~~**D34**~~ Witness Request for Commission Consideration of Witness Tim McCormick (Previously D26)	29 Oct 04	29 Oct 04 (See note)	**xxx**	Note: Government adopts their previous response to the previous motion as their response to this motion. APO, 29 Oct Motion denied by the Commission 1 Nov 04.	
~~**D35**~~ Witness Request for Commission Consideration of Witness George Edwards (Previously D27)	29 Oct 04	29 Oct 04 (See note)	**xxx**	Note: Government adopts their previous response to the previous motion as their response to this motion. APO, 29 Oct Motion denied by the Commission 1 Nov 04.	
~~**D36**~~ Witness Request for Commission Consideration of Witness Michael Schmidt (Previously D30)	29 Oct 04	29 Oct 04 (See note)	**xxx**	Note: Government adopts their previous response to the previous motion as their response to this motion. APO, 29 Oct Motion denied by the Commission 1 Nov 04.	
~~**D37**~~ Motion to Declare the Commission Improperly Constituted	1 Nov 04			Motion denied by the Commission 2 Nov 04.	
~~**D38**~~ Motion to Dismiss: Improper Referral of Charges (associated with D28)	1 Nov 04			Motion denied by the Commission 2 Nov 04.	

Military Commissions
Office of the Presiding Officer

October 24, 2004

Official Copies of all Presiding Officer Memoranda

This document contains the official, record copies of all current Presiding Officer Memoranda approved by Colonel Peter E. Brownback, III.

Number	Title	Dated
1	Presiding Officers Memoranda	19 Jul 2004
2-1	Appointment and Role of the Assistant to the Presiding Officers	16 Sep 2004
3	Communications, Contact, and Problem Solving	19 Jul 2004
4-2	Motions Practice*	7 Oct 2004
5	Spectators to Military Commissions	2 Aug 04
6-1	Requesting Conclusive Notice to be Taken	31 Aug 04
7	Access to Evidence and Notice Provisions	12 Aug 04
8	Trial Exhibits	12 Aug 04
9	Obtaining Protective Orders and Requests for Limited Disclosure	4 Oct 04
10	Witness Requests, Requests to Depose a Witness, and Alternatives to Live Testimony	4 Oct 04
[11]	*In development:* Qualifications of Translators/Interpreters and Detecting Possible Errors of Incorrect Translation/Interpretation during Commission Trials	Not Issued
12	Filings Inventory	24 Oct 04

** A typographical error in the previous POM 4-2 has been corrected; the correction is noted in the official copy included herein.*

[redacted]
Assistant to the Presiding Officers

Review Exhibit 52

Office of the Presiding Officer
Military Commission

12 August 2004

SUBJECT: Presiding Officers Memorandum (POM) # 1-1 - Presiding Officers Memoranda

This POM supercedes POM # 1 dated 19 July 2004

1. From time to time, this Presiding Officer will, and other Presiding Officers may, feel the need to advise counsel on matters which might affect the preparation for and trial of cases before a Military Commission. To this end, the Presiding Officer is establishing Presiding Officers Memoranda (POM). These memoranda will be furnished to all counsel and the Assistant to the Appointing Authority. In general, these POMs are issued to assist the Commission, to include the Presiding Officer, in preparing for and providing a full and fair trial under the provisions of Military Commission Order No. 1, 21 March 2002, paragraph 4A(5), 6A(5), and 6B, and Military Commission Instruction No. 8, paragraph 5.

2. Presiding Officer Memoranda (POMs) will also serve as interim Rules of Commission Trial. POMs will be cancelled when the substance of the POM is incorporated into the Rules.

3. If a counsel objects to a procedure established in any POM, such objections should be made within 7 calendar days directly to the Presiding Officer (with a CC to Mr. [redacted]

4. Future POMs, the Rules of Commission Trials, and communications with counsel may refer to "Commission Law." Commission Law refers collectively to the President's Military Order of November 13, 2001, DoD Directive 5105.70, Military Commission Orders, Military Commission Instructions, and Appointing Authority/Military Commission Regulations in their current form and as they may be later issued, amended, modified, or supplemented. POMs shall be interpreted to be consistent with Commission Law and should there be a conflict, Commission Law shall control.

5. POMs are not intended to and do not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. No POM provision shall be construed to be a requirement of the United States Constitution. Failure to meet a time period specified in a POM shall not create a right to relief for the Accused or any other person.

Original signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

Review Exhibit 52
Page 2 **of** 40

Office of the Presiding Officer
Military Commission

SEP 16, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 2-1 Appointment and Role of the Assistant to the Presiding Officers

This POM supersedes POM # 2, dated July 19, 2004

1. Pursuant to Section 4(D), Military Commission Order No. 1, and Paragraph 3(B)(11), Military Commission Instruction No. 6, an Assistant to the Presiding Officers has been detailed and shall report to the Presiding Officer and work under his supervision to provide advice in the performance of the Presiding Officer's adjudicative functions. The Assistant may act on behalf of the Presiding Officer. The Assistant does not act, and does not have authority to act, on any matter or in any manner, on behalf of the Appointing Authority. (See Appointing Authority Memorandum, SUBJECT Reporting Relationships and Authority of the Assistant to the Presiding Officer, Military Commissions, 19 Aug 2004.)

2. Mr. Keith [redacted] has been detailed to be the Assistant. His duties are:

a. Serve as an attorney-assistant providing all necessary support to the Presiding Officers of Military Commissions in a broad array of legal issues, to include functional responsibility for legal and other advice on procedural, logistical, and administrative matters and services to the Presiding Officers, Military Commissions.

b. Responsible for handling significant, complex matters assigned by the Presiding Officer of the Military Commissions, which may require legal or other analysis of procedural, logistical, and administrative matters outside of normally assigned areas of responsibility.

c. Work under the supervision of the Presiding Officers to provide advice in the performance of adjudicative functions, *ex parte* if required, with respect to administrative, logistical, and procedural matters. (See ABA Model Code of Judicial Conduct Canon 3B(7)).

d. Act on the Presiding Officer's behalf to make logistical and administrative arrangements.

e. Draft, coordinate, staff, and publish guidelines for Commission Proceedings to include Presiding Officer Memoranda.

Review Exhibit 52
Page 3 **of** 40

f. Process and manage policy, procedure, and similar actions and activities designed to contribute to the efficient operation of the Commission - both current and future operations.

g. Coordinate the integration of operations that affect in-court proceedings with OMC and JTF and other support personnel - to include the bailiff, security personnel, and court reporters - in providing services to the Commission.

h. To sign FOR THE PRESIDING OFFICER, or send emails in that capacity, concerning any matter that the Presiding Officer could direct, or does direct, except those that under Commission Law can only be performed personally by the Presiding Officer or involve the vote or decision of the Commission.

i. Other duties not listed above which are consistent with improving the processes, procedures, administration, and logistics of the Office of the Presiding Officer and the Commissions and which are not inconsistent with paragraph 3 below.

3. The Assistant is *not* authorized to:

a. Communicate or discuss any matter with any Commission member or alternate member (except the Presiding Officer) other than to arrange for their administrative and logistical needs.

b. Be present during any closed conference of the members.

c. Advise the Presiding Officer concerning the decision of any matter that requires the vote of the Commission; however, the Assistant may prepare those documents and drafts necessary or required to *process, record, and disseminate* any decision by the Commission.

d. Provide any substantive advice to the Presiding Officer on any matter that would require a vote or decision by the entire Commission. This prohibition includes any advice on findings, sentence, or motions or requests which require a vote by the Commission.

4. Except as approved in advance in writing by the Presiding Officer, Mr. [redacted] is not permitted to perform any duties for the [redacted] that involve: advice to law enforcement concerning an active case or investigation; advice on how to detect, investigate, or prosecute alleged acts of terrorism or violations of international law; or any other matter that would create a perception in the minds of a reasonable person that the Assistant's home agency (the [redacted] has any part in the Commission process through the actions of the Assistant.

Review Exhibit 52
Page 4 of 40

5. **Any** email which is sent to the Presiding Officer will be CC Mr. [redacted] If counsel believe there is a legal reason not to CC [redacted] counsel shall include that reason in the email to the Presiding Officer.

Original signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

Review Exhibit 52
Page 5 **of** 40

Office of the Presiding Officer
Military Commission

July 19, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 3 - Communications, Contact, and Problem Solving

1. This POM establishes procedures concerning how counsel are to communicate with the Presiding Officer and the Assistant to the Presiding Officer (Mr [redacted] The Presiding Officer desires not only to avoid ex parte communications, but to ensure the accused receives a full and fair trial, that procedural matters leading to trial be handled efficiently, and that when counsel need to communicate with the Presiding Officer, it can be done efficiently and expeditiously.

2. The preferred method of communication with the Presiding Officer is email with CCs to opposing counsel and the Assistant. The following email protocols will be followed.

a. Do not send classified information or Protected Information in the body of an email or as an attachment.

b. Keep emails to a single subject whenever possible.

c. Identify, in the body of the email, each attachment being sent.

d. Text attachments will be in Microsoft Word. If a recipient does not have this program, text attachments will be saved and sent as RTF (rich text format) that can be opened by almost any word processing program. If an electronic version of a text attachment is not available, it will be sent in Adobe (PDF). Save the email you send in the event there is an issue as to the version of attachments being referred to.

e. If it is necessary to send images, JPG, BMP, or TIFF may be used. Consult the Assistant if you need to send other file formats.

f. Be attentive to the size of attachments. Send multiple emails with fewer attachments if necessary. Avoid archiving (WinZip) when possible.

g. If the Presiding Officer will need to know classified information to resolve the matter, advise him of that fact in the email and the location of the materials that he will need to review (if such facts or locations are not classified or Protected).

f. If any addressee notices an email was not CC'd to a person who needs to have a copy, forward a copy to the person who needs that email.

Review Exhibit 52
Page 6 **of** 40

3. When telephonic conferences are necessary, the Presiding Officer will designate the person to arrange the conference call.

4. The Presiding Officer is responsible to insure that each accused receives a full and fair trial. As part of this responsibility, the Presiding Officer is available not only to resolve motions and make rulings, but also to insure that counsel have a place to go to get their problems resolved. Any counsel who has an issue which is not being, in her/his opinion, satisfactorily addressed by opposing counsel or by the Appointing Authority must present the problem to the Presiding Officer.

Original signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

Review Exhibit 52
Page 7 **of** 40

Office of the Presiding Officer
Military Commission

7 October 2004

SUBJECT: Presiding Officers Memorandum (POM) # 4-2: Motions Practice
(Corrected 24 Oct 04 to change the second para 7c to para 7d.)

This POM supercedes POM # 4-1 issued 12 Aug 2004

1. This POM establishes the procedures for motions practice. A "motion," as used in this POM, is a request to the Presiding Officer, either in his capacity as the Presiding Officer or for action by the full commission, for any type of relief, or for the Presiding Officer, either in his capacity as the Presiding Officer or for action by the full commission, to direct another to perform, or not perform, a specific act. This POM does not address or establish procedures concerning Protection of Information as referenced in Section 6D(5), Military Commission Order No. 1, and requests to obtain access to evidence. This POM is issued UP DOD MCO No. 1, paragraphs 4A(5)(a)-(d) and 6A(5), and MCI No. 8, paragraph 5. The following definitions apply.

a. A "filing" includes a motion, response, reply, supplement, notice of a motion, request for special relief, or other communication involved in resolving a motion.

b. A "motion" is the original request from the moving party - the party requesting the relief.

c. A "response" is the opponent's answer to a motion.

d. A "reply" is the moving party's answer to a response.

e. A "supplement" is a filing in regard to a motion other than a motion, response, or reply.

f. A filing is "sent" or "filed" when the sender sends it via email to the correct email address of the recipients. If there is a legitimate question whether the email system worked correctly (bounced email notification for example,) the sender shall again send the filing until satisfied the email went through or an email receipt is received.

g. A filing is "received" when it is sent to the proper parties per paragraph 3 below - with the following exceptions:

(1) The recipient was OCONUS when the email was sent in which case the filing is received on the first duty day following return from OCONUS.

Review Exhibit 52
Page 8 **of** 40

(2) The filing was sent on a Friday, Saturday, or Sunday when the recipient was not OCONUS, in which case the filing is received the following Monday. If the following Monday is a Federal holiday, the filing is received on the following Tuesday.

(3) Upon request by the receiving party or the Chief Prosecutor or Defense Counsel or their Deputies on behalf of their counsel, the Presiding Officer establishes a different "received date" to account for unusual circumstances. Requests to extend the time a filing was received shall be in the form of a special request for relief.

2. The Assistant to the Presiding Officer may not resolve motions, but is authorized to manage the processing of motions and other filings directing compliance with this POM to include form and content. Only the Presiding Officer may grant a delay or departure from the time required for a filing.

3. All filings will be sent to the Presiding Officer, the Assistant, opposing counsel on the case, and the Chief Prosecutor and Defense Counsel and their deputies. The guidance in POM #3 (Communications, Filings, and Contact, and Problem Solving with the Presiding Officer) applies to motions practice.

4. All filings will address only one topic with a helpfully descriptive subject line. For example, if a counsel were working on more than one motion, each notice of motion, each motion, each response, each reply, and each supplement, if any, would be contained in a separate email.

5. Notice of motions. As soon as a counsel becomes aware that they will or intend to file a motion or other request for relief, they shall file a Notice of Motion to those listed in paragraph 3 above stating the name of the accused, specific nature of the relief that shall be sought, and when they intend to file the motion. This requirement to file a Notice of Motions shall not serve to delay filing requirements, or other notice of motions requirements, established by the Presiding Officer, Commission Law, or POMs.

6. Acknowledgements and receipts. When opposing counsel receives a filing to which they have a responsibility to reply, respond, or act, they will immediately send an email to the sender acknowledging that the filing was received.

7. Format for motions:

a. Each motion will be styled United States of America v [Name of accused as per the charge sheet.] Listing of a/k/a is not required.

b. The name of the motion will be descriptive. (EX: [(Government) (Defense)] Motion to Exclude the Statement of Fred Smith.) Generic names such as "Motion for Appropriate Relief" are not helpful and will not be used.

c. Motions will contain the following information in the following order in a numbered paragraph. Use Arabic numbers.

Review Exhibit 52
Page 9 **of** 40

(1) A statement that the motion is being filed within the time frames and other guidance established by this POM or other direction of the Presiding officer, or a statement of the reason why it is not.

(2) A concise statement of the relief sought.

(3) (Optional): An overview of the substance of the motion.

(4) The facts, and the source of those facts (witness, document, physical exhibit, etc.) As much as possible, each factual assertion should be in a separate, lettered paragraph. This will permit responses to succinctly admit or deny the existence of facts alleged by the moving party. If the facts or identity of the source is Protected or classified, that status will be noted.

(5) Why the law requires the relief sought in light of the facts alleged including proper citations to authority relied upon.

(6) The name(s) of the file(s) attached to the email that are included in support of the motion.

(7) Whether oral argument is *required* by law, and if so, citations to that authority, and how the position of the party cannot be fully known by filings in accordance with this POM.

(8) A list of the legal authority cited, and if the authority is available on the Internet, the URL (www.address) shall be included. A URL is not required for cases decided by any United States court available through on-line reference services such as Lexis or WestLaw. When the full Commission is assembled, counsel are responsible for providing one printed copy of any authority cited to the Commission. (Note also paragraph 12 below as to required attachments.)

(9) The identity of witnesses that will be required to testify on the matter in person, and/or evidentiary matters that will be required.

(10) Additional information not required to be set forth as above.

e d. The subject line of the email that sends the motion will be usefully descriptive. (EX: Defense Motion to Exclude the Statement of Fred Smith - US v Jones.) If the motion is contained in the body of an email, the sending email address shall be sufficient authentication. If the motion is in the form of an attachment, the attached file shall be given a usefully descriptive name, and the attachment shall contain the typed name and email address of the moving party as authentication.

8. Responses and other filings shall be filed not later 7 calendar days from the date received. Relief from this requirement may be granted by the Presiding Officer. Requests to extend the time for filing a response shall be in the form of a special request for relief.

Review Exhibit 52
Page 10 **of** 40

9. Form of responses:

a. Each response will be styled the same as a motion.

b. The name of the response shall be "[(Government) (Defense)] Response to [(Government) (Defense)] Motion to (Name of motion as assigned by moving party.)

c. Responses will contain the following information in the following order in a numbered paragraph. Use Arabic numbers.

(1) A statement that the response is being filed within the time frames and other guidance established by this POM or other direction of the Presiding Officer, or a statement of the reason why it is not.

(2) Whether the responding party believes that the motion should be granted, denied, or granted in part. In the later case, the response shall be explicit what relief, if any, the responding party believes should be granted.

(3) Those facts cited in the motion which the responding party agrees are correct. When a party agrees to a fact in motions practice, it shall constitute a good faith belief that the fact will be stipulated to for purposes of resolving a motion.

(4) The responding party's statement of the facts, and the source of those facts (witness, document, physical exhibit, etc.), as they may differ from the motion. As much as possible, each factual assertion should be in a separate, lettered paragraph. If the facts or identity of the source is Protected or classified, that status will be noted.

(5) A list of the legal authority cited, and if the authority is available on the Internet, the URL (www.address) shall be included. A URL is not required for cases decided by any United States court available through on-line reference services such as Lexis or WestLaw. When the full Commission is assembled, counsel are responsible for providing one printed copy of any authority cited. (Note also paragraph 11 below as to required attachments.)

(6) How the motion should be resolved.

(7) The name(s) of the file(s) attached to the email that is included in support of the filing.

(8) Whether oral argument is *required* by law, and if so, citations to that authority, and how the position of the party cannot be fully known by filings in accordance with this POM.

(9) The identity of witnesses that will be required to testify on the matter for the responding party in person, and/or evidentiary matters that will be required.

Review Exhibit 52
Page 11 **of** 40

(10) Additional facts containing information not required to be set forth as above.

d. The subject line of the email that sends the response should be usefully descriptive. (EX: Response to Motion to Exclude the Statement of Fred Smith - US v Jones.) If the response is contained in the body of an email, the sending email address shall be sufficient authentication. If the response is in the form of an attachment, the attached file shall be given a usefully descriptive name, and the attachment shall contain the typed name and email address of the responding party as authentication.

10. Replies.

a. Counsel may submit a reply to a response being careful that matters that should have been raised in the original motion are not being presented for the first time as a reply. Replies are unnecessary to simply state the party disagrees with a response.

b. Replies shall be filed within three days of receiving a response.

c. Replies shall:

(1) Be styled the same as the motion except designated a reply.

(2) Be generally in the format set forth above for responses with the information required for responses.

11. Supplements to filings.

a. Counsel may submit supplements to filings, but supplements should be reserved for those cases when the law has recently changed, or if material facts only recently became known.

b. Supplements shall be filed within 3 days of receiving the filing to which a supplement is desired, the new facts learned, or discovery of the law that has recently changed, *provided however*, that the party wishing to file a supplement has first obtained permission from the Presiding Officer briefly stating the reason why a supplement is necessary, and sending copies of the request as provided in paragraph 3.

c. Supplements may be filed for any reason *provided however*, that the party wishing to file a supplement has first obtained permission from the Presiding Officer briefly stating the reason why a supplement is necessary, and sending copies of the request as provided in paragraph 3.

d. Supplements shall contain those facts, and that law, necessary to supplement a previous filing generally following the format for replies or responses.

Review Exhibit 52
Page 12 of 40

12. Required attachments to all filings. Any filing that contains citations to legal or other authority shall contain that authority as a separate attachment with the following exceptions:

a. The authority is available in full form on the Internet in which case the URL (www.address) shall be provided in the filing. Those providing a URL will confirm that the URL is still valid before filing.

b. The authority is a case decided by a United States court in which case the proper citation should be contained in the filing.

c. The authority has been previously been provided in the form of an attachment by either party in any filing with respect to the motion to which a response, reply, or supplement is being filed. Attachments filed in different motions shall be attached again. In the case of large attachments previously provided to the Presiding Officer in a different motion, a party may request an exception to the attachment requirement from the Assistant.

d. When the full Commission is assembled, counsel are responsible for providing one printed copy of any authority cited that was not previously provided in printed form to the Commission.

13. Voluminous attachments not in electronic form. If a filing requires an attachment that is not in electronic form, counsel may make a special request for relief suggesting how the attachment shall be provided. The request shall be filed with those persons indicated in paragraph 3 of this POM.

14. Special requests for relief.

a. Counsel may at times have requests for relief that do not involve lengthy facts or citations to authority. A motion in the form of a special request for relief relieves counsel of the specialized format for motions generally. For example, a counsel may make a special request for relief using the abbreviated format below to request: an extension of a time set by a POM or direction of the Presiding Officer; an exception to a requirement to digitize attachments; or like matters that do not require involved questions of law or fact.

b. Either the Presiding Officer or the Assistant to the Presiding Officers may direct that a special request for relief be resubmitted as a motion.

c. Counsel must not attempt to file a motion in the form of a special request for relief to avoid submitting a notice of motions, or because the time for a notice of motion or other filing has passed.

Review Exhibit 52
Page 13 of 40

d. The content of a special request of relief will contain the style of the case, the precise nature of the relief requested, those facts necessary to decide the request, citations to authority, and why the relief is necessary.

e. The special request for relief will include counsel's statement and rationale concerning whether the Presiding Officer may grant the relief on his own or if the relief sought can be granted solely by the full commission.

15. The Chief Prosecutor or Defense Counsel, or their Deputies, should request that the Presiding Officer set a time for a reply or other filing when their respective prosecutor or defense counsel is unavailable in situations not addressed in this POM. Requests to extend the time shall be in the form of a special request for relief.

16. Time for filing motions and other filings. The Presiding Officer will ordinarily set the schedule for the time to file notice of motions, motions, and other filings. If no specific schedule is set, the following applies:

a. Notice of motions shall be filed within 5 calendar days of the day that the Presiding Officer *announces* the date of the first open session with the accused. (Note this is not the same as the date *of* the first open session with the accused.)

b. Motions shall be filed within 7 calendar days after the notice of motions is due as per paragraph 16a above.

c. Responses shall be filed not later than 7 calendar days after receiving a motion.

d. Replies shall be filed not later than 5 calendar days after receiving a response.

17. Filings that are substantially or entirely comprised of classified information. In the event that a motion or filing is comprised entirely or substantially of classified information, the person preparing the filing will send a notice of motion sufficiently detailed - consistent with not revealing classified information - to assist the Presiding Officer in scheduling resolution of the matter. Counsel will then provide a complete filing in written form with opposing counsel following the format described in this POM. Counsel preparing the filing will make two additional copies for the Presiding Officer and Assistant to review when security considerations can be met.

18. Rulings. The Presiding Officer shall make final rulings on all motions submitted to him based upon the written filings of the parties submitted in accordance with this POM, and the facts and law as determined by the Presiding Officer, unless:

a. Material facts are in dispute that are necessary to resolution of the motion requiring the taking of evidence, or

b. A party states in a filing that the law does not permit a ruling on filings alone accompanied by authority why the Presiding Officer cannot rule on the filings alone, or

Review Exhibit 52
Page 14 **of** 40

c. The motion requires action by the full commission.

19. Nothing in this POM should be construed to dissuade counsel from sharing that information, to include motions and other filings, to ensure a full and fair trial.

20. A notice of motion is not a motion, and it does not place an issue or matter before the Commission for decision. If a party files a notice of motion but does not file a motion, the Commission will not take any action on the underlying issue.

21. Various matters have been presented to the Appointing Authority for his decision and/or action. A request to the Appointing Authority is not a request for the Commission to take action or grant relief.

a. If a party wishes the Commission to grant relief or take action on a matter which has been raised with, or is currently before, the Appointing Authority the party must file a motion or request for other relief in accordance with this POM.

b. If a party has requested the Appointing Authority to grant relief or take action, and that request is denied, the party may request the Commission grant the same or different relief by filing a motion or request for other relief in accordance with this POM. All filings and other matters exchanged between the party and the Appointing Authority will be forward with the motion or request for other relief.

Original Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

Review Exhibit 52
Page 15 **of** 40

Office of the Presiding Officer
Military Commission

August 2, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 5 - Spectators to Military Commissions

1. Commission Law provides for open Commission proceedings except when the Presiding Officer determines otherwise. Commission Law also charges the Presiding Officer to maintain the decorum and dignity of all Commission proceedings.

2. The attached document, "Decorum for Spectators Attending Military Commissions," shall be in force whenever the Commission holds proceedings open to spectators. The attachment may be used by bailiffs, security personnel, those with Public Affairs responsibilities, and other Commission personnel to inform spectators and potential spectators of the conduct and attire expected.

3. There are other rules that pertain to media personnel that have been prepared and disseminated by Public Affairs representatives. The attachment does not limit or change rules that are applicable to the media.

Original Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

Review Exhibit 52
Page 16 **of** 40

Decorum for Spectators Attending Military Commissions

The decorum and dignity to be observed by all at the proceedings of this Military Commission will be the same as that observed in federal courts of the United States.

Spectators, including members of the media, are encouraged to attend all open Commission proceedings. The proceedings may be closed by the Presiding Officer for security or other reasons.

The following rules apply to all military commission observers in the courtroom. Failure to follow these rules may result in being denied access to the courtroom, and could result in a charge of contempt of court and expulsion from commission-related activities at Guantanamo Bay, Cuba.

a. All military commission observers must wear appropriate attire. Generally, casual business attire is appropriate for civilians. Examples of acceptable casual business attire include: long-pants, knee-length skirts, collared shirts with sleeves, and covered-toe shoes. Inappropriate attire would include, but is not limited to, the following: shorts, sleeve-less shirts (tank tops, halter tops, etc.), denim jeans, T-shirts, mini skirts, any accessories or other clothing attire with political slogans, sneakers or tennis shoes, and sandals. Individuals wearing inappropriate attire will not be permitted to observe courtroom proceedings in the courtroom.

b. No distractions are permitted during active court sessions to include, but not limited to: talking, eating, drinking, chewing gum, standing and stretching, sleeping, using tobacco products, or other disruptions. Due to the hot and humid environment in Guantanamo Bay, bottled water with a re-closable lid will be permitted in the courtroom. No other beverages are permitted in the courtroom while commissions are in active session.

c. Entering and exiting the courtroom will be limited to extreme emergencies, and every attempt should be made to take bathroom breaks during court recesses.

d. Military commission observers are not permitted to interact with trial participants either during active sessions or breaks in the proceedings. Trial participants include: the Presiding Officer, panel members, prosecutors, defense counsel, the accused, witnesses, guards, court reporters, translators, and other personnel assisting in the conduct of military commissions. Military commission observers are also expected to respect the privacy of other military commission observers during trial recesses and not press for unsolicited interactions.

e. Computers, laptops, PDIs, PDAs, pagers, cell phones, Walkmans, audio recorders, video recorders, cameras, and any and all other types of electronic or battery operated devices are not permitted in the courtroom during sessions. Not only can these devices be distracting to others in the courtroom, but they pose a substantial

Review Exhibit 52
Page 17 **of** 40

security risk. Notebooks, pens, pencils, and paper are permitted for note taking, but not sketching or artistic renditions of observations.

g. It is improper for anyone to visibly or audibly display approval or disapproval with testimony, rulings, counsel, witnesses, or the procedures of the Commission during the proceedings. For the same reason, signs, placards, leaflets, brochures, clothing, or similar items that could convey a message about the proceedings are also not allowed in the courtroom or in the courtroom's vicinity.

h. As is customary in courts, spectators will rise when the Commission as a whole, or the Presiding Officer alone, enters or depart the courtroom.

i. Members of the media are reminded they have agreed to certain rules established by the Public Affairs staff.

Commission officials know that spectators appreciate the need for security in any public building, and we ask that you cooperate with security personnel when they screen spectators and their property.

BY DIRECTION OF THE PRESIDING OFFICER, MILITARY COMMISSION

Review Exhibit 52
Page 18 **of** 40

Office of the Presiding Officer
Military Commission

August 31, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 6-1, Requesting Conclusive Notice to be Taken

1. This POM supersedes POM 6 dated 12 August 2004.

2. Military Commission Order 1 permits the Commission to take conclusive notice. This POM establishes the process for such requests. This POM is issued under the provisions of MCO No. 1, paragraphs 4A(5)(a) and (c) and paragraph 6D(4).

3. When Counsel are aware they will request the Commission to take conclusive notice, they are encouraged to work with opposing counsel. Counsel may agree - in writing - that they do not, and will not, object at trial to the Commission's taking conclusive notice of a certain fact. It is unnecessary to involve the Presiding Officer, the Assistant, or the Commission while Counsel work these issues with each other. Counsel may also agree to stipulations of fact in lieu of requesting that conclusive notice be taken.

4. The matter/fact(s) to which conclusive notice is to be taken must be precisely set out. Any agreement or stipulation shall specify whether the facts shall be utilized by the Commission on merits, sentencing (if such proceedings are required,) or both.

5. If counsel have agreed to take conclusive notice (or enter into a stipulation of fact,) the writing encompassing that agreement shall be emailed by the Counsel who requested the notice (or, if jointly requested, both counsel) to opposing counsel, Chief and Deputies of the Prosecution and the Defense, the Presiding Officer, and the Assistant. At the trial where the conclusive notice or a stipulation is to be used, the counsel offering the stipulation or conclusive notice is responsible for presenting the conclusive notice or stipulation to the Commission.

6. If Counsel desires that the Commission take conclusive notice, but s/he is unable to obtain the agreement of opposing Counsel, the Counsel desiring that conclusive notice be taken shall:

a. Send an email to the Presiding Officer, and the Assistant, with copies furnished to opposing counsel, and Chief and Deputies of the Prosecution and the Defense.

b. The body of the email, or an attachment, shall be styled in the name of the case and be titled "Request to Take Conclusive Notice - [Subject] [Us v. last name of Accused]." The subject line of the email shall be the same as the title.

Review Exhibit 52
Page 19 of 40

c. The content of the email, whether in the body or an attachment, shall contain the following matters in separate numbered paragraphs as follows:

(1). The precise nature of the facts to which conclusive notice is requested. See paragraph 4 above as to the content of this portion of the request.

(2). The source of information that makes the fact generally known or that cannot reasonably be contested.

(3). Other information to assist the Commission in resolving the matter.

7. The counsel receiving a request as stated in paragraph 6 shall:

a. Within three duty days of receiving the email in paragraph 6 above (the definition of "received" shall be as provided in POM #4-1), the Opposing party shall "reply all" to the email set out in paragraph 6 above and answer in the following, separately numbered paragraphs:

(1). That the responding Counsel (agrees) (disagrees) that conclusive notice shall be taken.

(2). If the Counsel disagrees:
(a). The reasons therefore.
(b). Any contrary sources not cited by the requesting Counsel.
(c). Other information to assist the Commission in resolving the matter.

b. The response provided by the responding party as described in this paragraph shall be the party's opportunity to be heard, unless there is a legal basis why the Commission should reserve decision on the matter until oral argument can be heard.

8. Replies by the requesting party. Counsel who originally requested the conclusive notice is not required to reply to the email sent in accordance with paragraph 7 above unless it is to withdraw the request for conclusive notice. If additional information is needed, the Commission, acting thru the Presiding Officer for administrative ease, will request it.

9. Timing.

a. Counsel shall attempt to obtain agreement on conclusive notice or stipulations of fact at the earliest opportunity to assist in trial preparation for all.

b. As soon as it appears to Counsel that a party will not agree to a request that conclusive notice be taken, that Counsel shall send a request as provided in paragraph 6 above.

c. If Counsel have not resolved a request to take conclusive notice within 20 duty days of the date for the session, they shall send the request as provided in paragraph 6 above.

Review Exhibit 52
Page 20 **of** 40

10. Stipulations of fact. While Counsel are free to use stipulations of fact in lieu of agreeing on the taking of conclusive notice, the Commission has no authority, and shall not be asked, to require a party to enter into a stipulation of fact.

Original Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

Review Exhibit 52
Page 21 **of** 40

Office of the Presiding Officer
Military Commission

12 August 2004

SUBJECT: Presiding Officers Memorandum (POM) # 7 - Access to Evidence and Notice Provisions

1. One of the many components of a fair, full, and efficient trial is that the parties are able to obtain access to evidence. Failure to provide access to evidence as provided for by Commission Law can result in parties not being able to properly prepare their cases, unnecessary delays in the trial, and sanctions by the Presiding Officer. This POM is issued under the provisions of MCO No. 1: paragraph 4A(5)(a), (b), and (c); paragraph 6A(5), including subparagraphs (a), (c), and (d); and paragraph 6B(1) and (2).

2. Commission Law contains many provisions concerning access to evidence, time frames, notice, and the like. This POM is not intended to restate Commission Law, and parties are responsible for complying with Commission Law requirements. This POM:

a. Establishes procedures for counsel to obtain a ruling from the Presiding Officer if they believe the opposing has not complied with an access to evidence requirement.

b. Establishes time frames for providing access or notifications when modification of the time frames is within the discretion of the Presiding Officer.

c. Does not address requests for witnesses or "investigative or other resources." (MCO #1, Section 5H.)

d. Does not modify those procedures established by Commission Law with respect to Protected Information.

e. Does not modify, circumvent, or otherwise alter any law, rules, directives, or regulations concerning the handling of classified information.

3. Basic principles:

a. When parties comply with access to evidence requirements and the parties provide what Commission Law requires at the time stated by Commission Law, POMs, or orders of the Presiding Officer, the access to evidence process will not ordinarily require involvement by the Presiding Officer or the Assistant.

b. The Presiding Officer and the Assistant should NOT be involved in the routine process of a party's compliance with access to evidence requirements. The parties should provide that access in the manner required, and at the time required, as set out in Commission Law, POMs, orders of the Presiding Officer, or otherwise by direction of the Presiding Officer. There is

Review Exhibit 52
Page 22 of 40

ordinarily no reason for the Presiding Officer or the Assistant to receive copies or access to that information that is the subject of complying with access to evidence requirements unless a dispute arises as to whether a party is entitled to access to evidence.

c. To avoid unnecessary disputes at trial concerning whether access has been given to certain information, the parties should have procedures to ensure they are able to demonstrate that access has been given to evidence. Because much access to evidence has probably been given before the publication of this POM, it is advisable for the parties to prepare lists of what has already been provided - and how and when that was done - if this has not been done already. Such lists, if any, should not be provided to the Presiding Officer or the Assistant unless specifically requested. Such lists should be brought to any session of the Commission.

4. Time frames. The time frames for access to evidence and notice shall be as prescribed by the Presiding Officer through POMs, Docketing Request ORDERS, other ORDERS, or other direction. In the absence of direction by the Presiding Officer, Commission Law shall govern.

5. Presiding Officer availability to resolve access to evidence issues.

a. The Presiding Officer is available to resolve access to evidence issues. This POM should not, however, be interpreted as a replacement for the usual professional courtesy of working with opposing counsel to resolve issues. For example in the case of a missed notification, it is professionally courteous to ask opposing counsel to provide the notice before requesting the Presiding Officer for relief. When such attempts have been tried without success, or counsel believes that a further request will be unproductive, this POM provides the procedure that should be used.

b. Counsel should immediately request the Presiding Officer's assistance in the following situations as soon as it appears to counsel that any of the following occurred and working with opposing counsel has been reasonably tried and has failed:

(1). A notice requirement was due, and the notice has not been given, despite a reminder.

(2). Access to evidence was required, and the access was not given, despite a reminder.

(3). Access was requested and denied by the opposing party.

c. When any of the situations listed in paragraph 7b, or other issues involving access to evidence arise, the party will prepare a *special request for relief* using the format generally as provided in POM #4. The email request to the Presiding Officer, Assistant, opposing counsel, and the Chief Prosecution and Defense and their deputies shall contain the information below. Each request shall be the subject of a single email with a helpfully descriptive subject line and contain the following as a minimum:

(1). Style of the case.

Review Exhibit 52
Page 23 **of** 40

(2). One of the following as the case may be:

(a). If notice was due and not given, cite the requirement for the notice, when it was due, efforts to obtain notice, and that notice has not been received as of the date of the request to the Presiding Officer.

(b). If a party was required to give access and did not, cite the requirement for the access, when it was due, efforts to have opposing counsel to provide the access, and that access has not been provided as of the date of the request to the Presiding Officer.

(c). If counsel requested access and access was denied, cite the authority that requires opposing counsel to provide access, when it was requested, efforts to have opposing counsel to provide the access, and that access has not been provided as of the date of the request to the Presiding Officer.

(d). In every case of required access, or a request for access that was denied, how the documents are necessary and why the requesting party believes the requested evidence is reasonably available. (MCO #1, Section 5H.)

Original Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

Review Exhibit 52
Page 24 **of** 40

Office of the Presiding Officer
Military Commission

12 August 2004

SUBJECT: Presiding Officers Memorandum (POM) # 8 - Trial Exhibits

1. This POM establishes guidelines for marking, handling, and accounting for trial exhibits in Military Commission Trials. This POM is issued under the provisions of MCO No. 1, paragraphs 4A(5)(a) and (c).

2. Definitions:

a. Exhibit:

(1). A document or object, appropriately marked, that is presented, given, or shown to the Presiding Officer, other Commission Members, or a witness during a session of the Commission.

(2). A document or object, appropriately marked, that is offered or received into evidence during a session of the Commission, or referred to during a Commission session as an exhibit.

(3). Other documents or objects that the Presiding Officer directs be marked as an exhibit.

b. Prosecution or Defense Exhibits for identification are exhibits sponsored by a party and (1) intended to be considered on the merits or sentencing, if sentencing proceedings are required, but either not yet offered into evidence, or offered into evidence and not received, or (2) not intended to be considered on the merits or sentencing, but used in some other manner during the trial such as in the case of a statement used to refresh the recollection of a witness with no intent to offer the statement.

c. Prosecution or Defense Exhibits are exhibits that have been offered and received into evidence on the merits or sentencing if sentencing proceedings are required.

d. Review Exhibits are those exhibits:

(1). Presented to the Presiding Officer or other Commission members for consideration on a matter other than the issue of guilt or innocence, or a sentence if there are sentencing proceedings. Motions, briefs, responses, replies, checklists, and other writings used during motions practice are among the most common form of Review Exhibits.

(2). The Presiding Officer may decline, in the interests of economy, to have lengthy publications or documents marked as Review Exhibits when the precise nature of the document can be readily identified at the session and later on Review. Examples would be well-known directives, rules, cases, regulations, and the like.

Review Exhibit 52
Page 25 of 40

e. Attachments are documents referred in, and attached to, a Review Exhibit. Prosecution and Defense exhibits shall not have pages marked as attachments unless so marked in the original form of the exhibit.

f. Dual use exhibits. An exhibit identified on the record that is needed for a purpose other than the reason for which it was originally marked. A dual purpose exhibit allows an exhibit to be used for more than one purpose without having to make additional copies for the record. Example 1: A Review Exhibit that a counsel wants the Commission to consider on the merits. Example 2: A counsel marks an exhibit for identification but does not offer it, and opposing counsel desires to offer that exhibit.

3. Rules pertaining to the marking, handling, and referring to exhibits.

a. Any exhibit provided to the Presiding Officer, a Commission member, or a witness during a session of the Commission shall be properly marked.

b. Any exhibit referred to in a session before the Commission as an exhibit shall be properly marked.

c. Any exhibit that is displayed during an open session for viewing by a witness, the Presiding Officer, or a Commission member during a session of the Commission shall be properly marked. In the case of an electronic presentation (slides, PowerPoint, video, audio or the like,) the Presiding Officer shall direct the form of the exhibit to be marked for inclusion into the record.

e. Parties that mark or offer exhibits that cannot be included into the record or photocopied - such as an item of physical evidence - shall inquire of the Presiding Officer the form in which the exhibit shall be included in the record.

d. Before an exhibit is referred to by a counsel for the first time, or handed to a witness, the Presiding Officer, or a member of the Commission, during a session of the Commission, it shall be first shown to the opposing counsel so opposing counsel knows the item and its marking.

4. How exhibits are to be marked. See attachment B.

5. Marking the exhibits - when and whom.

a. Before trial. Counsel are encouraged to mark exhibits they intend to use at a session of the Commission in advance of that session. Pre-marking of Prosecution or Defense Exhibits may also include the appropriate numbers or letters. Numbers shall not be applied to Review Exhibits in advance of any session.

b. At trial. Counsel, the reporter, or the Presiding Officer may mark exhibits during trial, or may add numbers or letters to exhibits already marked.

Review Exhibit 52
Page 26 **of** 40

6. Marked exhibits not offered at trial and out of order exhibits.

a. Counsel are not required to mark, offer, or refer to exhibits in the numerical or alphabetical order in which they have been marked. Example: The Defense pre-marked Defense Exhibits A, B, and C all for identification. At trial, the Defense wishes to refer to or offer Defense Exhibit C for identification before Defense Exhibit A or B for identification has been offered or mentioned. That ***IS*** permissible.

b. If an exhibit is pre-marked but not mentioned on the record or offered, counsel are responsible for ensuring that the record properly reflects exhibits by letter or number that were marked but not mentioned or offered. This is ordinarily done at the close of the trial. Example: "Let the record reflect that the Prosecution marked, but did not offer or mention, the following Prosecution Exhibits: 3, 6, and 11."

c. Exhibit for identification marking as compared to the exhibit received. If an exhibit for identification is received into evidence, the received exhibit shall carry the same letter or number. Example: Offered into evidence are Prosecution exhibits 1, 2, and 3 for identification. PE 1 and 3 for ID are not received. PE 2 for ID is received. Once received, what was PE 2 for ID is PE 2.

7. How exhibits are offered.

a. Prosecution and defense exhibits. In the interests of economy, to offer an exhibit, it is only necessary for counsel to say, "[(We) (The Defense) (The Prosecution)] offers into evidence what has been marked as [(Prosecution Exhibit 2 for identification) (Defense Exhibit D for identification).]

b. Review exhibits. Review exhibits are not offered. They become part of the record once properly marked.

8. Confirming the status of an exhibit. The reporter and Presiding Officer together shall keep the official log of whether an exhibit has been offered or received. Counsel may, and are encouraged to, confirm with the reporter and the Presiding Officer of the status of an exhibit.

9. Control of exhibits. During trial, and unless being used by counsel, a witness, or the Commission, all exhibits that have been mentioned on the record, offered, or received, and all Review Exhibits, shall be placed on the evidence table in the courtroom consistent with regulations concerning the control of classified and Protected Information. After trial, the court reporter and the Security Officer shall secure all exhibits until the next session.

Review Exhibit 52
Page 27 **of** 40

8. Sample form. Counsel are welcome to use the form at attachment A to assist in marking and managing their exhibits.

Original Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

Review Exhibit 52
Page 28 **of** 40

Exhibit Log. US v. ______________________________ Page ___ of ___ Pages

# / Ltr	Description	Ref'd to on record	Offered	Received	Confirm with reporter

Attachment B, Presiding Officers Memorandum # 8, Trial Exhibits

I. Unclassified Exhibits and Exhibits that are not Protected Information		
Type of Exhibit	**Examples**	
	First Page - Single Page Exhibit	**Multiple Page Exhibits**
Prosecution Exhibits for Identification. Use Arabic numerals	Prosecution Exhibit 1 for Identification *OR* PE 1 for identification *OR* PE 1 for ID	*First page*: PE 1 for ID Page 1 of 24 *Subsequent pages*: 2 of 24, 3 of 24 etc.
Defense Exhibits for Identification. Use letters. After the letter Z is used, the next exhibit shall be AA.	Defense Exhibit A for Identification *OR* DE A for identification *OR* DE A for ID	*First page*: DE A for ID Page 1 of 24 *Subsequent pages*: 2 of 24, 3 of 24 etc.
Prosecution Exhibits and Defense Exhibits	Presiding Officer or Reporter will mark through ~~for Identification~~ *OR* ~~for ID~~.	*First page*: Mark through on first page. *Subsequent pages*: No markings necessary if properly marked as above.
Review Exhibits Use Arabic numbers	Review Exhibit 1 *OR* RE 1	*First page*: RE 1, Page 1 of 24 *Subsequent pages*: 2 of 24, 3 of 24 etc.
Attachments Letters or numbers depending on how indexed in the Review Exhibits	Attachment 1 to RE 3 *OR* Attachment A to RE 3	*First page*: Attachment 1 to RE 3, page 1 of 3 *Subsequent pages*: 2 of 3, 3 of 3.
II. Classified Exhibits Mark the same as I, and in addition, adhere to directives regarding the proper markings and cover sheets.		
III. Protected Information Mark the same as I, adding the words on the first page or cover sheet "Protected Information."		

Review Exhibit 30 Page 52 of 40

Office of the Presiding Officer
Military Commission

October 4, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 9 - Obtaining Protective Orders and Requests for Limited Disclosure

1. This POM addresses Protective Orders and Limited Disclosure pursuant to Section 6D(5), Military Commission Order No. 1. Whether a Protective Order is granted or disclosure is limited is a decision for the Presiding Officer without involvement of other Commission members. See Section 5, Military Commission Instruction # 8 dated 31 August 2004.

2. **Protective Orders - generally.** As soon as practicable, counsel for either side will notify the Presiding Officer of any intent to offer evidence involving Protected Information. When counsel are aware that a Protective Order is necessary, they are encouraged to work with opposing counsel on the wording and necessity of such an order.

3. **When counsel agree to a Protective Order**. Counsel may agree - in writing - that a Protective Order is necessary. In such instances, it is unnecessary to involve the Presiding Officer or the Assistant while counsel work these issues. When counsel agree that a Protective Order is necessary, the counsel requesting the order shall present the order to the Presiding Officer for approval and signature along with those necessary representations that opposing counsel does not object. This may be done by email, or if during the course of a Commission session, in writing.

4. **When counsel do not agree to a Protective Order**. If a party requests a Protective Order and the opposing counsel does not agree with the necessity of the Order or its wording, the counsel requesting the Order shall:

a. Present the requested order to the Presiding Officer for signature along with the below information in writing. The below information may be transmitted in any format convenient to include in the body of an email:

(1). Why the order is necessary.

(2). Efforts to obtain the agreement of opposing counsel.

b. The requesting counsel will CC or otherwise provide copies of the requested information to opposing counsel unless Commission law permits the matter to come to the Presiding Officer's attention *ex parte*. In the case of a prosecution requested Protective Order, only the detailed defense counsel must always be served. The Civilian Defense Counsel will be served if they are allowed access to the information sought to be protected. Foreign Attorney Consultants shall not be served unless they are authorized under Commission Law to receive the items.

Review Exhibit 52
Page 31 of 40

c. The Presiding Officer will, if time and distance permits, hold a conference with Prosecution counsel and the Detailed Defense Counsel, and if under circumstances that Commission Law permits, the Detailed civilian counsel, prior to signing a contested protective order. The objective of such conferences will be to have a contested protective order become an agreed upon protective order, consistent with security and other requirements, if possible and practical. Consequently, both sides will be prepared to explain their position on the proposed order.

5. **Limited disclosure requests**. When the prosecution requests that the Presiding Officer exercise his authority under Section 6D(5)(b), Military Commission Order No. 1, the prosecution shall provide to the Presiding Officer the following materials. An Order for the Presiding Officer's signature directing limited disclosure that contains the following information:

a. To whom the limitation shall apply (the accused, detailed defense counsel, civilian defense counsel.)

b. The method in which the limitation shall be implemented (which option under section 6D(5)(b)(i)-(iii)).

c. In the case of a limitation under section 6D(5)(b)(i), the information to be deleted.

d. In the case of a limitation under section 6D(5)(b)(ii), the nature of the information to be summarized and the summary to be substituted therefore.

e. In the case of a limitation under section 6D(5)(b)(iii), the nature of the information to be substituted, and the statement of the relevant facts that the limited information would tend to prove.

f. The reasons why it is necessary to limit disclosure of the information, and whether other methods of protecting information could be fashioned to avoid unnecessarily limiting disclosure.

g. Whether the prosecution intends to present the information whose disclosure is sought to be limited to the Commission.

h. If the request to the Presiding Officer was served on, or shared with, the detailed defense counsel, any submission by the detailed defense counsel. If the request was not served on or shared with the detailed defense counsel, the reasons why it was not.

Original Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

Review Exhibit 52
Page 32 **of** 40

Office of the Presiding Officer
Military Commission

October 4, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 10 - Witness Requests, Requests to Depose a Witness, and Alternatives to Live Testimony

1. This POM governs how counsel may obtain a decision from the Presiding Officer, or the Commission, to obtain witnesses or alternatives to live testimony. It also contains the procedure to request to depose a witness.

2. This POM establishes the procedures for requesting the Commission to produce a witness on motions, the merits, sentencing, or otherwise, that has been denied by the Prosecution or the Appointing Authority. While this POM does not stipulate the format *for an initial request to the Prosecution or the Appointing Authority,* it is strongly recommended that counsel use the format below. By so doing, if the initial request is denied, the Commission may make an efficient and speedy decision on the matter to assist counsel in preparing their cases. Failure to provide the necessary information when making a request for a witness often leads to requests being initially denied by the government, which can produce needless inefficiency when a challenge to that decision is taken to the Presiding Officer or the Commission.

3. A request, or noting that a particular witness is needed (or needs or should be deposed), in a motion or other filing is NOT a substitute for a witness request. If counsel are aware that a witness is necessary or should be deposed on a motion or other filing, not only should that be addressed in accordance with POM #4-1, but *the counsel is also required to file a request* in accordance with this POM.

4. If the defense requests, and the prosecution has denied, a defense request, the defense shall within 3 duty days of learning of the government's denial - or when there has been inaction by the government on the request for 3 duty days - submit a "Request for Witness (or a Request for a Deposition)" as outlined below to opposing counsel, the Presiding Officer, and the Assistant. Each request shall be separate, and each request shall be forwarded by a separate email with the subject line: Witness Request (or Request for a Deposition) - [Name of Witness] - US. v. [Name of Case]. Counsel may forward the request either by attachment or in the body of an email. Each of the below items shall be in a separate, numbered paragraph:

a. Paragraph 1: {Style.} A formal document is unnecessary. An attachment or email shall be styled: Witness Request (or Request for a deposition) - [Name of Witness] - US. v. [Name of Case].

b. Paragraph 2: {Identity of witness and translator needs.} The name of the witness to include alias, mailing address, residence if different than mailing address,

Review Exhibit 52
Page 33 of 40

telephone number, and email address. Also indicate the language and dialect the witness speaks (if not English) so translator services can be made available if necessary.

c. Paragraph 3: {Synopsis of witness' testimony}. What the requester believes the witness will say. *Note*: Unnecessary litigation often occurs because the synopsis is insufficiently detailed or is cryptic. A well-written synopsis is prepared as though the witness were speaking (first person), and demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered.

d. Paragraph 4: Source of the requestor's knowledge about the synopsis. In other words, how does counsel know that the witness will testify as stated?

e. Paragraph 5: Proposed use of the testimony - motions (specify the motion), case-in-chief, rebuttal, sentencing, other.

f. Paragraph 6: How and why the requestor believes the witness is reasonably available, and the date of the last communication with the witness and the form of that communication.

g. Paragraph 7: Whether the requestor would agree to an alternative to live testimony to present what is described in the synopsis to the Commission, or the reasons why such an alternative is NOT acceptable. (*Note*: It is unnecessary to state that live testimony is better than an alternative so the Commission can personally observe a witness' demeanor. State here reasons *other than* that basis.)

(1). Conclusive notice.

(2). Stipulation of fact.

(3). Stipulation of expected testimony.

(4). Telephonic.

(5). Audio-visual.

(6). Video taped deposition.

(7). Video-taped interview.

(8). Written statement.

h. Paragraph 8: Whether any witness requested by the defense, or being called by the government, could testify to substantially the same matters as the requested witness.

i. Paragraph 9 If the witness is to testify as an expert, the witness' qualifications to do so. This may be accomplished by appending a *curriculum vitae* to the request. This

Review Exhibit 52
Page 34 of 40

should also include a statement of law as to why the expert is necessary or allowable on the matter in question.

j. Paragraph 10: Other matters necessary to resolution of the request.

5. **Action by the government upon receipt of a request - government agreement**. If the government and defense agree that the witness should be produced or deposed, the government need not prepare a response to the request. If the parties agree to an alternative to the live testimony of a witness in the form of a writing (conclusive notice, stipulation, or statement), the parties will immediately prepare the agreed upon writing. Once agreement has been reached on the request (and the writing), the prosecution shall notify opposing counsel, the Presiding Officer, and the Assistant that agreement has been reached.

6. **Action by the government upon receipt of a request - government does not agree**. If the government will not produce the requested witness or does not agree to a deposition, or if the government and defense cannot agree on the wording of any writing that will be a substitute, the government will prepare a response within 3 duty days of receiving a request and file it with opposing counsel, the Presiding Officer, and the Assistant. The prosecution shall address, by paragraph number, each assertion in the defense request to which the government does not agree or wishes to supplement.

7. **Timing**. Requests for witnesses, unless otherwise directed by the Presiding Officer, shall be made to the prosecution by the defense not later than 30 business days before the session in which the witness is first needed to testify.

8. **Resolution by the Presiding Officer**. In accordance with paragraph MCO #1, section 5H, the Presiding Officer will approve those witness requests to the extent the witness is necessary and reasonably available. The decision will be communicated to the prosecution and the defense.

9. **If the Presiding Officer does not approve the request**, the defense shall give notice within 3 duty days if they intend to request the entire Commission to grant the request in accordance with MCO #1, Section 6D(2)(a).

Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

Review Exhibit 52
Page 35 **of** 40

POM 11, SUBJECT: "Qualifications of Translators/Interpreters and Detecting Possible Errors of Incorrect Translation/Interpretation during Commission Trials," is in developmental stages and has not been issued as of 24 Oct 2004.

Review Exhibit 52
Page 36 **of** 40

Office of the Presiding Officer
Military Commission

October 24, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 12 - Filings Inventory

Note -- On the effective date of this POM, POM 11 was in the developmental stage and had not yet been issued.

1. The Presiding Officer previously adopted a process so that documents (e.g., motions, witness request, other filings) could be filed by email. See POMs 3, 4-2, 6, 7, and 10. This process was adopted because:

a. Most items filed with the Commission are prepared in electronic form.

b. Documents not in electronic form can be easily converted into an electronic file.

c. The counsel, Assistant, members, court reporters, Presiding Officer and those who need to file and receive filings are often in geographically diverse locations.

d. Electronic filing enables counsel anywhere in the world with email access (to include web based accounts) to make and receive filings.

e. Service of filings by mail or courier is slow and expensive. Some filings are made to and from Guantanamo Bay, Cuba where service by mail is impractical.

f. Electronic filing is fast, reliable, efficient and creates an electronic file that can be efficiently and quickly shared with others.

g. Electronic filing creates and retains a precise record of dates and times on which filings and other actions took place.

2. A problem is that electronic filing enables parties to send emails or "CC" (carbon copy) emails to anyone. If a filing is sent to many, it is sometimes difficult to know who the intended or action recipient is. Similarly, those who receive large numbers of emails may overlook an email that was intended for them specifically.

3. This POM establishes a requirement for the Assistant to maintain a "Filings Inventory" (in progress, prior to the date of this POM, as a "Motions Inventory.") The purpose of the Filings Inventory is to make clear what filings (motions, responses, replies, attachments, and other filings) are before the Presiding Officer or the Commission. The *NOTES* section on previously issued Motions Inventory is superseded by this POM.

Review Exhibit 52
Page 37 **of** 40

4. Establishing the Filings Inventory. The Assistant shall establish a Filings Inventory for each case referred to the Commission reflecting those filings pending before the Presiding Officer or the Commission.

a. As soon as the first filing on an issue is received, the Assistant shall assign a *filing designation* with one of 4 below categories followed by a number:

P for a filing or series of filings initiated by the prosecution.
D for a filing or series of filings initiated by the defense.
PO for a filing or series of filings initiated/directed by the Presiding Officer.
C for a filing or series of filings initiated/directed by the Commission as a body.

Other categories may be added at a later time.

b. The number following the category designation shall be the next unused number for the category and case. The *filing designation* (category and number *EX:* PE2, D4, PO1, C1) shall be unique for each case and the designation shall not be reused.

c. To identify a specific document that was filed, the filing designation may add a simple description of the nature of the filing such as Motion, Response, Reply, Supplement, Answer, or other designation assigned by the Assistant.

d. The Filings Inventory shall also contain a listing of filings that had a designation but are no longer active before the Commission or the Presiding Officer. These items shall be placed in the inactive section of the Filings Inventory.

5. Filing designation and future communications or filings. Once a filing designation has been assigned, all future communications - written or by email - to that series of filings will use the filing designation as a reference. This includes adding the file designations to the style of all filings and the file names to ALL attachments. Examples:

* An email subject line forwarding a response to P2 in US v Jones should read: *"P2 Jones - Defense Response."*
* The filename of the attachment in the above email should read *"P2 Jones - Defense Response."*
* The filename of a document that is an attachment to the response should read *"P2 Jones - Defense Response - attachment - CV of Dr Smith."*

Each of the designations or filenames listed above may also include other descriptions or information (date, when filed, etc.) the parties may wish to add to assist in their management of filings.

Review Exhibit 52
Page 38 of 40

6. Distribution of the Filings Inventory.

a. As soon as practical after the Assistant receives a filing, the Assistant shall reply advising that the Filings Inventory has been annotated. In the case of a filing that initiates a new issue or motion, the Assistant shall also provide the filing designation.

b. At the request of any party, the Assistant shall provide a copy of the current Filings Inventory as soon as practical.

c. The Assistant shall from time to time, or when directed by the Presiding Officer, distribute copies of the Filings Inventory.

d. The Presiding Officer shall ensure that a copy of the current Filings Inventory is attached at the beginning of each session of the Commission as a Review Exhibit so that parties are free to refer to filings by the filing designation.

e. At sessions of the Commission, counsel shall, whenever possible, refer to a filing by the filing designation so the record is clear precisely which filing or issue is being addressed.

7. Counsel responsibility when receiving the Filings Inventory. The Filings Inventory is the only method by which counsel can be sure what filings have been received by the Presiding Officer or the Commission, and therefore what matters are pending before the Presiding Officer or the Commission.

a. Counsel will examine each Filings Inventory as it is received and notify the Assistant, Presiding Officer, and opposing counsel of any discrepancies within one duty day.

b. If counsel believe they have submitted a filing that is not reflected on the Filings Inventory, they shall immediately send that filing - with all attachments - to the Assistant, Presiding Officer, and opposing counsel noting the discrepancy.

c. If there is a discrepancy in the Filings Inventory and counsel fail to take the corrective action as indicated above, the Presiding Officer or the Commission may elect not to consider that filing before the Presiding Officer or the Commission.

8. Filings in the Inactive Section of the Filings Inventory. If a filing is moved to the inactive section of a Filings Inventory due to the decision of the Presiding Officer, and counsel wish that the full Commission review the decision as one that the full Commission is empowered to decide, that counsel shall file a motion to have the Commission consider the matter. (This motion shall receive a new filing designation.) The new filing:

a. Shall contain as an attachment ALL previous filings (and their attachments) by ALL parties on the matter as well as the decision of the Presiding Officer that moved the action to the inactive section of the Filings Inventory.

Review Exhibit 52
Page 39 of 40

b. Be styled and filed in accordance with POM 4-2.

c. Contain in the body of the motion that:

(1). The party wishes that the previous and attached (and listed) filings be considered by the entire Commission,

(2). The authority - to include the section of Commission Law if applicable - that indicates the matter is one that the full Commission must or may decide, and

(3). The reasons why the Presiding Officer's actions in moving the action to the inactive section were in error.

d. Responses and replies shall follow the procedure established in POM 4-2 except:

(1). Given the matter has been previously examined by counsel, the time to respond or reply shall be 2 duty days,

(2). Counsel may submit a response in the body of an email if only to say they adopt the matters they previously submitted on the matter before the matter was moved to the inactive section, and

(3). If the response is limited to only adopting matters previously submitted, no reply shall be allowed.

9. Objections to this POM. Counsel who object to the procedures in this POM must do so not later than 3 duty days after the effective date following the procedures in POM 4-2. A notice of motion is not required.

Original Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

Review Exhibit 52
Page 40 of 40

Office of the Presiding Officer
Military Commission

October 30, 2004

MEMORANDUM FOR COUNSEL in US v. HAMDAN and US v. HICKS

SUBJECT: Necessary Instructions by the Presiding Officer

1. References:
   a. The President's Military Order, 13 November 2001
   b. Military Commission Order # 1, 21 March 2002
   c. Military Commission Instruction #8, 31 August 2004
   d. Memorandum, Presiding Officer to Appointing Authority, Subject: Interlocutory Question #4, dated 2 September 2004
   e. Memorandum, Appointing Authority to Presiding Officer, Subject: Request for Guidance Submitted as "Interlocutory Question 4", dated 6 October 2004

2. Under the PMO, the Commission is charged with deciding all questions of law and fact. The PMO also stated that there would be a Presiding Officer and named functions for the Presiding Officer. One dictionary definition of presiding is "to exercise guidance, direction or control." I have used that definition in creating this memorandum.

3. The requirement to have a judge advocate on the Commission, which is not in conflict with the PMO, was added by the MCO. The MCO also established several other functions for the Presiding Officer, none of which seem to be in conflict with the PMO.

4. The referenced paragraph of MCI#8 requires the Presiding Officer to give necessary instructions to the Commission. The term necessary is not further defined.

5. The primary function of the Commission is to give a full and fair trial to the persons brought before it. The President stated that the military commission would sit as triers of law and fact. Consequently, I have decided that a proper interpretation of the term "necessary" is those instructions which the PMO would require of any commissioned officer, judge advocate or not, who was named the Presiding Officer.

6. I will not instruct the members on the law. Instructions in a prior session, which so stated, will be withdrawn on the record. The members will be asked on the record if they understand that I am not giving them instructions on the law - whether in open or closed sessions or during discussions and/or deliberations.

7. I will participate in all discussions, deliberations and decisions by the Commission on all questions of law and fact. During all discussions, deliberations, and decisions, I will certainly use my knowledge, skill, and training, as will the other members of the Commission.

Peter E. Brownback III
COL, JA
Presiding Officer

Review Exhibit 53

Page 1 Of 1

UNITED STATES OF AMERICA	)	**D37**
	)	**DEFENSE MOTION TO**
	)	**DECLARE THE COMMISSION**
v.	)	**IMPROPERLY CONSTITUTED**
	)	
	)	**1 November 2004**
DAVID M. HICKS	)	

The Defense in the case of the *United States v. David M. Hicks* moves this commission to either (1) certify this issue to the Appointing Authority for decision; and/or (2) dismiss the charges against Mr. Hicks on the ground that the commission is improperly constituted because (a) an alternate member has not been appointed; and (b) the members who were successfully challenged for cause have not been replaced:

1. **Synopsis**: By not appointing an alternate (after excusing the pre-existing alternate for cause), the Appointing Authority has violated the rules promulgated in Military Commission Order No. 1. In addition, by not replacing the two commission members who were excused for cause, the Appointing Authority has violated the directive, in the President's November 13, 2001, Military Order, that these commissions proceeding against Mr. Hicks be "full and fair."

2. **Facts**: The Appointing Authority, in an October 19, 2004, memorandum decision, granted three challenges for cause made by both the defense and prosecution (and endorsed by the Presiding Officer). Two of those excused were commission members; the third was the designated alternate. However, the Appointing Authority failed to appoint an alternate, and failed to replace the two excused commission members, leaving the currently constituted commission with three members, and without an alternate.

3. **Discussion**:

A. ***Military Commission Order No. 1 Requires Appointment of an Alternate***

In excusing two commission members and an alternate, and in declining to add an alternate member to the three-member commission for this case, the Appointing Authority has clearly violated §4(A)(2) of MCO No. 1, which directs that:

> [f]or each such Commission, there *shall* also be one or two alternate members, the number being determined by the Appointing Authority.

MCO No. 1, §4(A)(2) (emphasis added).

Thus, while the Appointing Authority maintains discretion with respect to whether there are one or two alternate members, he does not have the power to eliminate

Review Exhibit 54A

Page 1 of 4 1

alternates altogether – which is precisely what the Appointing Authority has done in this case.

Accordingly, since the failure to include an alternate member unmistakably violates the express and unambiguous terms of MCO No. 1, the commission as currently constituted is invalid, and cannot proceed to adjudicate any issues or motions in Mr. Hicks's case [unless and until it is properly constituted under §4(A)(2)].

B. ***A Three-Member Commission Will Not Afford Mr. Hicks a "Full and Fair" Commission***

The excusal of two commission members and the alternate has reduced the number of commission members to three, the minimum number set forth in MCO No. 1 §4(A)(2). Yet the Appointing Authority has authorized proceeding with just three members, rather than the originally constituted five. For the several reasons set forth below, that reduction in the size of this commission fails to provide Mr. Hicks with the "full and fair" proceedings mandated by the President's November 13, 2001, Military Order establishing this commission.

Under the Uniform Code of Military Justice (hereinafter the "UCMJ"), a general court-martial – which exposes a defendant to confinement of one year or more – requires a minimum of five members. Since Mr. Hicks faces a potential *life* sentence, that minimum number of members is appropriate here as well. Indeed, the initial commission included five members – a more than tacit concession that such number was the minimum necessary to afford a "full and fair" commission.

Also, the use of a three-member commission for Mr. Hicks creates a glaring inequity for him with respect to other persons facing commission proceedings, since the Appointing Authority has simultaneously announced that he will order the appointment of replacement members for the commissions involving two other defendants, al Qosi and al Bahlul. *See* Appointing Authority Decision on Challenges for Cause, dated October 19, 2004, at 28.

The Appointing Authority has failed to present any rationale distinguishing Mr. Hicks from either Mr. al Qosi or Mr. al Bahlul with regard to the number of members in their respective commissions; nor, for that matter, has the Appointing Authority offered any justification for retreating from the initial assignment of five members. If expedition of Mr. Hicks's case is the only basis, that is not a sufficient reason for denying Mr. Hicks the "full and fair" proceeding that is being provided to others whose cases are to follow.

In addition, the Appointing Authority's failure to appoint replacement members for Mr. Hicks's commission in effect punishes Mr. Hicks for exercising his right to challenge members whom the prosecution and the Presiding Officer agreed should not serve. Indeed, those members' credentials and service histories made it apparent that they would not be appropriate members of a commission considering this subject matter. Yet it is Mr. Hicks who suffers from his proper and vindicated challenge to their fitness.

That is unfair and unjust, since it effectively compelled Mr. Hicks (unwittingly) to choose between an appropriate number of members, forfeiting to right to challenge members who ought to be (and were, with the government's agreement) excused, and the equally intolerable alternative of an insufficient number of members.

Moreover, the diminution of the total members on the panel increases geometrically the undue influence of the Presiding Officer, the only member of the commission who is a lawyer (and formerly a military judge). Defense motion D22 challenges that composition – the commission should either be all lawyers, or none at all, since a mixture allows for the lawyers to exert, even unintentionally, undue influence on the other members with respect to legal issues and decisions – and in the current three-member commission the Presiding Officer's impact is unquestionably amplified: now there are but two other members who can offer opposing and/or independent views on the legal issues raised, rather than four. Thus, for all practical purposes, the possibility that the other members would muster sufficient dissent to outvote the Presiding Officer on issues of law has been eliminated.

C. *This Motion Presents a Threshold Issue for the Commission That Must Be Referred to the Appointing Authority and Decided By Him Before Any Other Motions Are Heard*

Under MCO No. 1, §4(A)(5)(d), the Presiding Officer

> shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. The Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

Thus, as a threshold matter, this issue, since it would invalidate the commission and all proceedings conducted subsequent (without first appointing and seating an alternate), must be certified to and decided by the Appointing Authority under either prong – the mandatory or permissive – of §4(A)(5)(d). Proceeding further without first obtaining a resolution from the Appointing Authority would, in the event that the motion is ultimately granted, irremediably taint any subsequent proceedings, and effectively disqualify the entire commission. As a result, continuing with argument on any other motions would be inefficient and counterproductive. Instead, the matter should be immediately certified to the Appointing Authority for decision.[1]

---

[1] The language of §4(A)(b)(d) is plain: it does not limit certification of charge-dispositive motions to only those that the Presiding Officer or commission might grant. Nor does it provide for an initial decision by the Presiding Officer or commission prior to certification. Rather, by its unambiguous language, the section directs certification – period. Any other interpretation would do violence to the plain language of the section, and involve not only a rewriting of the section, but also "interpretation" of language that is altogether clear.

4. **Relief Requested**: It is respectfully submitted that the Presiding Officer and/or the commission should refer this question to the Appointing Authority for the following resolution: dismissal of the charges on the grounds this commission has been improperly constituted because (a) an alternate has not been appointed; and (b) the failure to replace the excused commission members denies Mr. Hicks a full and fair proceeding. In the alternative, should the commission determine that it must decide the issue first, prior to certification, it is respectfully requested that the commission grant that relief and then certify the issue the Appointing Authority. Also, regardless whether or not the commission considers and/or grants this motion, it should be certified to the Appointing Authority.

By: _____

M.D. Mori
Major, U.S. Marine Corps
Detailed Defense Counsel

Joshua L. Dratel, Esq.
Law Offices of Joshua L. Dratel, P.C.
14 Wall Street
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New York, New York 10005

Jeffery D. Lippert
Major, U.S. Army
Detailed Defense Counsel

Review Exhibit 54A

Page 4 of 4

UNITED STATES OF AMERICA	)	
	)	**MOTION TO DISMISS: IMPROPER REFERRAL OF CHARGES**
v.	)	
	)	**1 November 2004**
DAVID M. HICKS	)	

The Defense in the case of the *United States v. David M. Hicks* requested a continuance (document reference number D28) of the proceedings based the failure of the U.S. government to respect its agreement with the Australian government regarding Mr. Hicks' trial by military commission. The presiding officer denied that motion. The defense hereby requests consideration of this motion to dismiss the charges for improper referral, and in so doing, incorporates the facts, arguments, and attachments the defense filed in D28 into this objection, and in addition states in support of this motion:

1. The referral of charges against the accused to a Military Commission was improper, and the charges should be dismissed because agreements between the United States Government and the Government of Australia preclude the referral of charges until the disposition of certain detainees with British citizenship has been decided.

2. Facts:

   a. Negotiations have taken or are taking place toward agreements between the United States and the governments of other countries, notably the United Kingdom (UK) and Spain, regarding the disposition of those countries' detainees held at Guantanamo Bay by the United States. (See encl. 1, PA News, 30 June 2004; encl. 2, press report dated 6 July 2004; encl. 3 press report dated 7 July 2004; encl. 4 Guardian Unlimited, 26 June 2004). The defense has requested, but not been given access to the documents outlining those agreements or the negotitations leading up to them. The defense hereby renews its request for discovery of the above documentation. (See encl. 5, Defense discovery request dated 17 August 2004).

   b. Under a confidential agreement between the United States and the Government of Australia regarding the disposition of the accused, if the outcome negotiated by the government of the UK regarding its detainees is more favorable than the agreement Australia has with the United States regarding the accused, the additional benefits granted to the UK detainees would also be given to the accused. (See encl. 6, Official Committee Hansard, Senate of the Commonwealth of Australia Legal and Constitutional Legislation Committee, 16 February 2004 at pages 6-7; encl. 7, Response dated 8 December 2003 to 3 December 2003 Defense Request for Discovery; DoD News Releases dated 23 July 2003 and 25 November 2003).

   c. To date pursuant to agreements with the United States government five (5) UK citizen detainees have been released from Guantanamo Bay. Negotiations continue between the UK and the United States government at the highest levels regarding the disposition of the remaining four (4) UK detainees. (See encls. 1-4).

Review Exhibit 58A

3. Discussion:

a. The accused may potentially benefit from agreements between the United States and the UK regarding UK detainees. Already five (5) UK detainees have been released without being subjected to Military Commission or other tribunal. Reports indicate the most likely disposition that the UK and United States will agree to is the remaining UK detainees will either be released, or certain fundamental changes to the Military Commission process will be made before UK citizens are tried in it. (See encls. 1-4, and encl. 9, AP report, 24 June 2004 (reporting that the Attorney General of the United Kingdom, Lord Peter Goldsmith, stated that using a military tribunal to prosecute the Guantanamo detainees would be unacceptable because it would not provide a fair trial by international standards); encl. 10 DoD New Release dated 23 July 2003; encls. 1, On 30 June 2004, Prime Minister Blair stated "We have concluded that the military commissions process does not provide guarantees to the standards we require.). Any such changes can be expected to enhance the rights of an accused in a Military Commission.

b. Because the United States' agreements with Australia grant the accused the same benefits that have been or will be granted to UK detainees, it is likely Australia will ask the United States to honor its agreement and pass those benefits on to the accused.

c. This should result in the accused being released, just as five (5) UK detainees being released. At a minimum, it could result in additional assurances regarding the charges or sentence the accused will face.

d. Instead, the government has taken away these potential benefits to the accused by referring the charges against the accused to trial by Military Commission in advance of the resolution of the United States negotiations with the UK regarding its detainees. This action has substantially prejudiced the accused. He is now facing a trial by Military Commission, and could be convicted and receive a significant prison sentence.

e. This action also potentially violates the United States' agreement with Australia.

3. Conclusion:

a. The accused requests the charges against him be dismissed because they have been improperly referred to this Commission. Until full and final disposition of negotiations between the UK and the United States are completed, and any benefits granted to the UK detainees granted to the accused, the Appointing Authority could not refer Mr. Hicks' case to a military

b. The governments' action in referring the charges against the accused to trial before completion of negotiations that could benefit the accused unfairly denies him significant rights derived from international agreements. This will deny Mr. Hicks a full and fair trial. Accordingly, the charges should be dismissed.

Review Exhibit 55A

By: _____

JEFFERY D. LIPPERT
Major, U.S. Army
Detailed Defense Counsel

Review Exhibit SSA

There is no review exhibit 56.

[redacted]
Assistant to the Presiding Officers

(Review Exhibit 56)

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

October 27, 2004

MEMORANDUM FOR LIEUTENANT COLONEL [redacted] USA
COMMANDER [redacted] USN

SUBJECT: Addendum to Detailed Prosecutors Memorandum of July 28, 2004

Consistent with my authority as Chief Prosecutor and the provisions of Sections 4B(2) of Military Commission Order No. 1, dated March 21, 2002, and Section 3B(9) of Military Commission Instruction No. 3, dated April 30, 2003, the above named counsel are detailed and designated, in addition to those prosecutors named in my July 28, 2004 memorandum, as follows:

United States v. Hicks
Additional Detailed Assistant Prosecutors: Lieutenant Colonel [redacted] Commander [redacted]

United States v. Hamdan
Additional Detailed Assistant Prosecutor: Lieutenant Colonel [redacted]

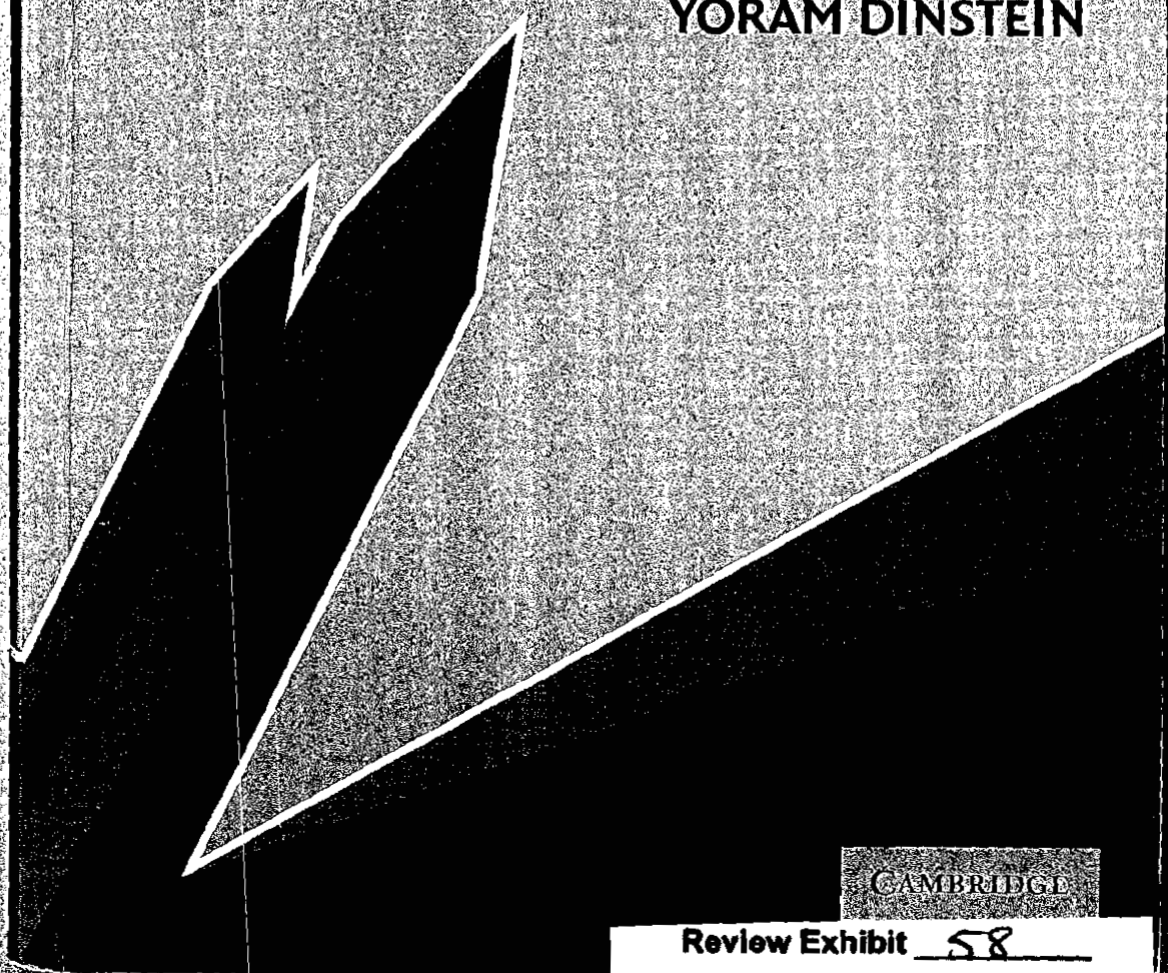
[redacted]
Colonel, U.S. Army
Chief Prosecutor
Office of Military Commissions

cc:
Deputy Chief Prosecutor
Mr. [redacted]

Review Exhibit 57
Page 1 Of 1

The Conduct of Hostilities under the Law of International Armed Conflict

YORAM DINSTEIN



CAMBRIDGE

Review Exhibit 58

Page 1 Of 10

The Conduct of Hostilities under the Law of International Armed Conflict

A companion volume to the author's seminal textbook *War, Aggression and Self-Defence*, Third Edition, Cambridge (2001), this book focuses on issues arising in the course of hostilities between States, with an emphasis on the most recent conflicts in Iraq and Afghanistan. The main themes considered by Yoram Dinstein are lawful and unlawful combatants, war crimes, including command responsibility and defences, prohibited weapons, the distinction between combatants and civilians, legitimate military objectives, and the protection of the environment and cultural property. Numerous specific topics that have attracted much interest in recent hostilities are addressed, such as human shields, feigned surrenders, collateral damage and proportionality, belligerent reprisals and weapons of mass destruction.

YORAM DINSTEIN is Professor of International Law at Tel Aviv University. He is a Member of the Institute of International Law, a former Stockton Professor of International Law at the US Naval War College and a former Humboldt Fellow at the Max Planck Institute for International Law. Professor Dinstein is editor of the *Israel Yearbook on Human Rights* and has published extensively in the field of international law.

While his liberty is temporarily denied, the decisive point is that the life, health and dignity of a prisoner of war are guaranteed. Detailed provisions to that end are incorporated in 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War.[11]

II. Lawful and unlawful combatants

Entitlement to the status of a prisoner of war – upon being captured by the enemy – is vouchsafed to every combatant, subject to the *conditio sine qua non* that he is a lawful combatant. The distinction between lawful and unlawful combatants is a corollary of the fundamental distinction between combatants and civilians: the paramount purpose of the former is to preserve the latter.[12] LOIAC can effectively protect civilians from being objects of attack in war only if and when they can be identified by the enemy as non-combatants. Combatants 'may try to become invisible *in the landscape, but not in the crowd*'.[13] Blurring the lines of division between combatants and civilians is bound to end in civilians suffering the consequences of being suspected as covert combatants. Hence, under customary international law, a sanction (deprivation of the privileges of a prisoner of war) is imposed on any combatant masquerading as a civilian in order to mislead the enemy and avoid detection.

An enemy civilian who does not take arms, and does not otherwise participate actively in the hostilities, is guaranteed by LOIAC not only his life, health and dignity (as is done with respect to prisoners of war), but even his personal liberty which cannot be withheld (through detention) without cause. However, a person is not allowed to wear simultaneously two caps: the hat of a civilian and the helmet of a soldier. A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant. He is a combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy. Nor does he enjoy the benefits of civilian status: Article 5 (first Paragraph) of the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War specifically permits

[11] Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, *Laws of Armed Conflicts* 423.

[12] See T. Meron, 'Some Legal Aspects of Arab Terrorists' Claims to Privileged Combatancy', 40 *NTIR* 47, 62 (1970).

[13] D. Bindschedler-Robert, 'A Reconsideration of the Law of Armed Conflicts', *The Law of Armed Conflicts: Report of the Conference on Contemporary Problems of the Law of Armed Conflict, 1969* 1, 43 (Carnegie Endowment, 1971).

RE 58

Page 3 of 10

derogation from the rights of such a person (the derogation being less extensive in occupied territories, pursuant to the second Paragraph of Article 5).[14]

The legal position re unlawful combatancy was summed up by the Supreme Court of the United States, in the *Quirin* case of 1942 (per Chief Justice Stone):

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[15]

With the exception of the last few words, this is an accurate reflection of LOIAC.

The gist of the *Quirin* decision is that, upon being captured by the enemy, an unlawful combatant – like a lawful combatant (and unlike a civilian) – is subject to automatic detention. Yet, in contradistinction to a lawful combatant, an unlawful combatant fails to reap the benefits of the status of a prisoner of war. Hence, although he cannot be executed without trial, he is susceptible to being prosecuted and punished by military tribunals.

What can unlawful combatants be prosecuted and punished for? The *Quirin* Judgment refers to trial and punishment 'for acts which render their belligerency unlawful'. It is true that sometimes the act which turns a person into an unlawful combatant constitutes by itself an offence (under either domestic or international law) and can be prosecuted and punished as such before a military tribunal. But the fulcrum of unlawful combatancy is that the judicial proceedings may be conducted before regular domestic (civil or military) courts and, significantly, they may relate to acts other than those that divested the person of the status of lawful combatant. Even when the act negating the status of a lawful combatant does not constitute a crime *per se* (under either domestic or international law), it can expose the perpetrator to ordinary penal sanctions (pursuant to the domestic legal system) for other acts committed by him that are branded as criminal. Unlawful combatants 'may be punished under the internal criminal legislation of the adversary for having committed hostile acts

[14] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, *Laws of Armed Conflicts* 495, 503.
[15] *Ex parte Quirin et al.* (1942), 317 US [Supreme Court Reports] 1, 30–1.

in violation of its provisions (e.g., for murder), even if these acts do not constitute war crimes under international law'.[16]

At bottom, warfare by its very nature consists of a series of acts of violence (like homicide, assault, battery and arson) ordinarily penalized by the criminal codes of all countries. When a combatant, John Doe, holds a rifle, aims it at Richard Roe (a soldier belonging to the enemy's armed forces) with an intent to kill, pulls the trigger, and causes Richard Roe's death, what we have is a premeditated homicide fitting the definition of murder in virtually all domestic penal codes. If, upon being captured by the enemy, John Doe is not prosecuted for murder, this is due to one reason only. LOIAC provides John Doe with a legal shield, protecting him from trial and punishment, by conferring upon him the status of a prisoner of war. That is not to say that the shield is available unconditionally. If John Doe acts beyond the pale of lawful combatancy, LOIAC removes the protective shield. Thereby, it subjects John Doe to the full rigour of the enemy's domestic legal system, and the ordinary penal sanctions provided by that law will become applicable to him.

There are several differences between prosecution of war criminals and that of unlawful combatants (see *infra*, Chapter 9, II). The principal distinction is derived from the active or passive role of LOIAC. War criminals are brought to trial for serious violations of LOIAC itself. With unlawful combatants, LOIAC 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 offence committed against the domestic legal system.

It is also noteworthy that, unlike war criminals (who must be brought to trial), unlawful combatants may be subjected to administrative detention without trial (and without the attendant privileges of prisoners of war). Detention of unlawful combatants without trial was specifically mentioned as an option in the *Quirin* case (as quoted above), and the option has indeed been used widely by the United States in the war in Afghanistan (see *infra*, V).

Detention of unlawful combatants is also the subject of special legislation of Israel, passed by the Knesset in 2002.[17] This Detention of Unlawful Combatants Law defines an unlawful combatant as anyone taking part – directly or indirectly – in hostilities against the State of Israel, who is not entitled to a prisoner of war status under Geneva Convention (III).[18] Detention is based on the decision of the Chief of General Staff of

[16] Rosas, *supra* note 10, at 305.
[17] See Detention of Unlawful Combatants Law, 2002, 1834 *Sefer Hahukim* [Laws of the State of Israel, Hebrew] 192.
[18] *Ibid.* (Section 2).

RE 58
Page 5 of 10

the Occupying Power of parts of its own civilian population into the territory it occupies. The prohibition of forcible transfers of population by the Occupying Power is contained in Article 49 of Geneva Convention (IV).[15] Nevertheless, Article 147 of the Convention[16] – while referring to transfers of protected persons out of an occupied territory as a grave breach – does not do so as regards a transfer of the Occupying Power's own population into the occupied territory.[17] The Rome Statute follows here Article 85(4)(a) of Additional Protocol I of 1977, which enumerates as a grave breach of the Protocol a transfer by the Occupying Power of its own civilian population into the territory it occupies.[18] But, apart from the fact that this is already a departure from customary international law, Article 8(2)(b)(viii) injects the phrase 'directly or indirectly' (appearing neither in Geneva Convention (IV) nor in the Protocol). The reason for going beyond the Geneva Conventions was political: to target Israel's settlement policy in the territories occupied by it.[19]

War crimes are not the only crimes against international law that can be committed in wartime. The war itself (if it is waged contrary to the *jus ad bellum*) may constitute a crime against peace.[20] In addition, acts committed in the course of war may amount to crimes against humanity[21] or to genocide.[22] However, these crimes – which can also be committed in peacetime – transcend the compass of LOIAC.

II. The distinction between war criminals and unlawful combatants

War criminals must be distinguished from unlawful combatants (a category examined *supra*, Chapter 2, II). There are eight respects in which the concepts of war crimes and unlawful combatancy diverge sharply:

(i) An unlawful combatant must be a combatant. A civilian, by definition, is a non-combatant and, as such, can be neither a lawful nor an unlawful combatant. On the other hand, a war criminal need not be a combatant. A civilian can also commit war crimes. For instance, a declaration that no quarter shall be given to the enemy

[15] Geneva Convention (IV), *supra* note 1, at 516. [16] *Ibid.*, 547.
[17] See O. Gross, 'The Grave Breaches System and the Armed Conflict in the Former Yugoslavia', 16 *MJIL* 783, 815 (1995).
[18] Protocol I, *supra* note 13, at 671–2 (Article 85(4)(a)).
[19] See M. Bothe, 'War Crimes', 1 *The Rome Statute of the International Criminal Court: A Commentary* 379, 413 (A. Cassese, P. Gaeta and J. R. W. D. Jones eds., 2002).
[20] See Y. Dinstein, 'The Distinctions between War Crimes and Crimes against Peace', 24 *IYHR* 1–17 (1994).
[21] See Y. Dinstein, 'Crimes against Humanity after Tadic', 13 *LJIL* 373–93 (2000).
[22] See Y. Dinstein, 'The Collective Human Rights of Religious Groups: Genocide and Humanitarian Intervention', 30 *IYHR* 227–41 (2000).

(a war crime under Article 8(2)(b)(xii) of the Rome Statute) can be issued by a civilian member of the cabinet.

(ii) As indicated (*supra*, Chapter 2, II), when LOIAC negates the status of lawful combatancy, it exposes the perpetrator to ordinary penal sanctions for acts criminalized by the domestic legal system. In other words, international law merely removes a shield otherwise available to (lawful) combatants as a means of protection. Conversely, when LOIAC directly labels an act a war crime, a sword is provided by international law against the accused. A war criminal is tried by virtue of international law (LOIAC), whereas an unlawful combatant is prosecuted under domestic law.

(iii) An unlawful combatant may simultaneously be a war criminal. That is the case if he intentionally commits a serious breach of LOIAC (in flagrant disregard of condition (iv) of lawful combatancy requiring respect for LOIAC). Since the same person is both an unlawful combatant and a war criminal, the enemy State has an option whether to proceed against him in one way (under international law) or the other (under domestic law).

(iv) As observed (*supra*, Chapter 8, II, B), a spy may be put on trial as an unlawful combatant only if he is captured in the act, before he has had an opportunity to rejoin the armed forces to which he belongs. The same legal regime is possibly applicable to some unlawful combatants other than spies.[23] Be it as it may, that is not the case when a war crime is committed, since the perpetrator is subject to prosecution and punishment at any future time. Once a war criminal, always a war criminal. The non-prescriptive character of war crimes is corroborated by Article 29 of the Rome Statute, whereby '[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations',[24] and by a 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[25] Admittedly, a 1974 European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes applies to offences committed before its entry into force only 'in those cases where the statutory limitation period had not expired at that time'.[26] The implication is that – absent an express treaty provision to the contrary – a domestic statute of limitations may cover war crimes. Even if this is

[23] See R. R. Baxter, 'The Municipal and International Law Basis of Jurisdiction over War Crimes', 28 *BYBIL* 382, 392–3 (1951).

[24] Rome Statute, *supra* note 5, at 1018.

[25] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968, [1968] *UNJY* 160, 161 (Article I).

[26] European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, 1974, 13 *ILM* 540, 541 (1974) (Article 2(2)).

RE 58

Page 7 of 10

the case, it must be appreciated that the prescription of war crimes for purposes of domestic prosecution in a given country does not affect the position within other domestic legal systems. It certainly leaves no impact on the non-prescribed nature of war crimes in compliance with international law.

(v) An unlawful combatant is disentitled to the privileges of a prisoner of war. Article 5 (second Paragraph) of Geneva Convention (III) proclaims that, '[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy,' are entitled to the status of prisoners of war, 'such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal'.[27] The question of when 'doubt' arises is itself not free from doubt.[28] Article 45 of Protocol I creates a presumption in favour of any person who claims a prisoner of war status or appears to be entitled to it.[29] Yet, '[d]espite the precautions taken by the drafters of this article', cases of doubt may arise: 'the doubt may concern the presumption itself', e.g., when an individual's claims are contradicted by his comrades.[30] In any event, the legal opportunity to prosecute an unlawful combatant for crimes under domestic law exists only if the status of a prisoner of war is denied to him.

The position of a war criminal is entirely different. The scenario relates to a combatant, otherwise entitled to a prisoner of war status, who is charged with a serious violation of LOIAC. Of course, culpability can only be determined in (civil or criminal) judicial proceedings. As long as the accused has not been convicted by a court of last resort, his entitlement to a prisoner of war status does not lapse.

What happens after conviction? Article 85 of Geneva Convention (III) enunciates:

> Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.[31]

The meaning of Article 85, in so far as the post-conviction timeframe is concerned, is extremely controversial.[32] The legislative history of this clause unequivocally demonstrates that it pertains to war

[27] Geneva Convention (III), *supra* note 1, at 432.
[28] See R. R. Baxter, 'The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)', *International Dimensions of Humanitarian Law* 93, 108–9 (UNESCO, 1988).
[29] Protocol I, *supra* note 13, at 648.
[30] See J. de Preux, 'Article 45', *Commentary on the Additional Protocols* 543, 550–1.
[31] Geneva Convention (III), *supra* note 1, at 459.
[32] See *Commentary, III Geneva Convention* 415–16, 423–5 (ICRC, J. de Preux ed., 1960).

criminals.[33] But the wording of the text – on the face of it – is apposite to prosecution under the laws of the Detaining Power, hence not to war crimes trials which are conducted in conformity with international law. For that reason, it was held by the Supreme Military Tribunal in Italy, in the *Kappler* case of 1952, that war crimes are excluded from the compass of Article 85.[34]

Even if prisoners of war convicted of war crimes retain the benefits of Geneva Convention (III), they may still be sentenced in a manner commensurate with the gravity of their offences. All that Article 85 seems to connote is that certain due process requirements prescribed in the Convention are to be satisfied.[35] It is clearly stated in Article 119 of the Convention that prisoners of war convicted of indictable offences need not be released at the time of general repatriation of prisoners of war.[36]

(vi) When an unlawful combatant is indicted for having committed a crime under the domestic penal code of the enemy, the prosecuting State must establish jurisdiction over the defendant by showing a legitimate linkage with either the crime or the criminal. In the case of an unlawful combatant, this legitimate linkage is likely to be territoriality, active personality (nationality of the perpetrator), passive personality (the nationality of the victim) or the protective principle.[37] When charges are preferred against a war criminal, the overriding consideration in the matter of jurisdiction is that the crimes at issue are defined by international law itself. The governing principle is then universality: all States are empowered to try and punish war criminals.[38] The upshot is that a belligerent State is allowed to institute penal proceedings against an enemy war criminal, irrespective of the territory where the crime was committed or the nationality of the victim. In all likelihood, a neutral State (despite the fact that it does not take part in the hostilities) can also prosecute war criminals.[39]

(vii) Assuming that an unlawful combatant commits crimes under its domestic penal code, the enemy State is at liberty to indict or not to

[33] See *ibid.*, 416.
[34] *Kappler* case (Italy, Supreme Military Tribunal, 1952), 49 *AJIL* 96, 97 (1955).
[35] See *Commentary*, *supra* note 32, at 423.
[36] Geneva Convention (III), *supra* note 1, at 470–1.
[37] On the protective principle, and its differentiation from the territoriality and passive personality principles, see Y. Dinstein, 'The Extra-Territorial Jurisdiction of States: The Protective Principle', 65 (II) *AIDI* 305, 306–11 (Milan, 1994).
[38] See Y. Dinstein, 'The Universality Principle and War Crimes', 71 *ILS* 17–37 (*The Law of Armed Conflict: Into the Next Millennium*, M. N. Schmitt and L. C. Green eds., 1998).
[39] See Baxter, *supra* note 23, at 392.

RE 58
Page 9 of 10

indict him. Since the punishable crimes *ex hypothesi* are committed only against its domestic legal system, the prosecutorial discretion of that State is unfettered by international law. As an antithesis, all States are bound by international law to suppress war crimes through prosecution or, alternatively, extradition (in harmony with the postulate of *aut dedere aut judicare*). Regarding grave breaches of the Geneva Conventions – which, as noted, constitute war crimes – the *aut dedere aut judicare* obligation is set out unambiguously in the text of the Conventions.[40] It stands to reason that some prosecutorial discretion is permitted on the merits of the individual case.[41] However, in principle, the duty of States to bring war criminals to justice is categorical.

(viii) As long as unlawful combatants do not commit any crime under international law, their prosecution can only take place before domestic courts. Contrarily, proceedings against war criminals may be conducted before an international tribunal, if vested with jurisdiction (see *supra*, I).

III. Command responsibility

Pursuant to provisions of the Geneva Conventions obligating the imposition of effective penal sanctions against the perpetrators of grave breaches, contracting Parties are required to bring to trial 'persons alleged to have committed, or to have ordered to be committed, such grave breaches'.[42] Similarly, Article 25(3)(b) of the Rome Statute promulgates that a person who orders the commission of any crime within the jurisdiction of the ICC is liable to punishment.[43] Undeniably, when a commander orders a subordinate to commit a war crime, the issuance of the order makes the commander at least equally responsible for the outcome as the perpetrator himself – at least, because, under certain exceptional circumstances, the subordinate may somehow benefit (especially in mitigation of punishment) from the fact of having acted in obedience to superior orders (see *infra*, IV, B, b). But the commander cannot enjoy any similar advantage.

The issuance of the order is an act of commission, and it is easy to perceive the commander's criminal liability for the ensuing war crime

[40] Geneva Convention (I), *supra* note 1, at 391 (Article 49, second Paragraph); Geneva Convention (II), *ibid.*, 418 (Article 50, second Paragraph); Geneva Convention (III), *ibid.*, 476 (Article 129, second Paragraph); Geneva Convention (IV), *ibid.*, 547 (Article 146, second Paragraph).

[41] See Anonymous, 'Punishment for War Crimes: Duty – or Discretion?', 69 *Mich.LR* 1312, 1330–4 (1970–1).

[42] *Supra* note 40. [43] Rome Statute, *supra* note 5, at 1016.

RE 58

Page 10 of 10

AFFIDAVIT

Of

Timothy L.H. McCormack[1]

The Military Commission Lacks Jurisdiction for Alleged Violations of the Laws of War Occurring Before October 2001

Determinations as to the existence or otherwise of an armed conflict, the time at which the armed conflict commenced and the time at which it ceased are all significant because violations of the Laws of War can only occur in an armed conflict. An individual cannot be tried for an alleged violation of the law of war if those alleged acts occurred before or after an armed conflict or in the context of civil strife, rioting or disturbances which did not constitute an armed conflict at the relevant time.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) has had cause to determine whether or not an armed conflict existed at the relevant time of alleged acts in a number of cases including, most recently, the trial of Slobodan Milošević.[2] The accepted test for determining the existence of an armed conflict remains that articulated by the Appeals Chamber in Duško Tadić's challenge to the Tribunal's jurisdiction over him:

> [A]n Armed conflict exists where there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[3]

It is axiomatic that an armed conflict requires at least two parties and that those parties must be engaged in a sustained exchange of military hostilities. An international armed

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[2] See, for example, *Prosecutor v. Slobodan Milošević,* Case No. IT-02-54-T, 'Decision on Motion for Judgement of Acquittal', 16 June 2004, paras. 14-40.

[3] *Prosecutor v. Duško Tadić,* Case No. IT-94-1-AR72, 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', 2 October 1995, para. 70.

Review Exhibit 59

Page 1 Of 6

conflict only exists where two or more sovereign independent States oppose each other. In such international armed conflicts the Four Geneva Conventions of 1949 apply – whether or not the international armed conflict has formally been declared a war and whether or not the existence of the armed conflict has been formally recognized by one or other party to the conflict. For all other armed conflicts not of an international character, the minimum legal standards which apply are those contained in Article 3 Common to all Four Geneva Conventions.

There is no question that the US and its coalition partners have been involved in two international armed conflicts post - 11 September 2001. The first against Afghanistan commenced in October 2001 and the second against Iraq commenced in March 2003.

The Military Commission Has No Jurisdiction to Try Charge 1 Because Conspiracy Does Not Exist as an Inchoate Crime in the Laws of War

Conspiracy was included as a separate count in its own right in both the Nuremberg and Tokyo Tribunal Indictments in the aftermath of World War II. However, both Tribunals were careful to limit the scope of the offence and Military Commission Instruction No. 2 extends the nature of the offence beyond anything acceptable to the two International Tribunals.

The conspiracy charge was included in Article 6(a) of the Nuremberg Charter as a Crime Against Peace[4] although the provision included no definition of the crime or any clarification of its precise elements.[5] The Prosecution argued that the reference to conspiracy in Article 6(c) was not limited to the category of Crimes Against Peace in Article 6(a) of the Charter and, consequently, that Count I of the Indictment ought to extend to conspiring to commit war crimes and crimes against humanity as well as crimes against peace. The Tribunal gave short shrift to this argument:

> In the opinion of the Tribunal these words [of Article 6(c)] do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit War Crimes and Crimes against Humanity, and will consider only the common plan to prepare, initiate and wage aggressive war.[6]

The judges of the International Military Tribunal were clearly concerned about convicting defendants for their involvement in a conspiracy as a substantive crime in and

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[4] Art. 6(a) *Charter of the International Military Tribunal*, (August 8, 1945), available at: http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm

[5] *Military Instruction No. 2, §(6)(C)(6)* does define these elements, though they are construed in a much broader manner than interpreted by the Tribunal.

[6] Nuremberg Trial Proceedings, reprinted in The Avalon Project at Yale Law School, vol. 22, 468: Judgment, http://www.yale.edu/lawweb/avalon/imt/proc/09-30-46.htm [hereinafter Nuremberg Trial Proceedings].

of itself rather than utilizing conspiracy as an alternative basis of individual criminal responsibility for a different substantive crime. Consequently, the judges read the first Count of the Indictment narrowly. Count I could only apply to participation in the Nazi conspiracy to wage aggressive war – considered by the Nuremberg Tribunal to be the most serious of the charges laid – and could not apply to participation in war crimes and/or crimes against humanity.

In its attempt to narrowly prescribe the conspiracy charge, the Tribunal did not stop at limiting the application of the charge to the category of crimes against peace. The Tribunal insisted upon linking its considerations of Counts I and II – that defendants charged with conspiring to wage aggressive war were also charged under Count II with participation in the substantive crime of initiating or waging aggressive war. The Tribunal stated that:

> Planning and preparation are essential to the making of war. In the opinion of the Tribunal aggressive war is a crime under international law. The Charter defines this offence as planning, preparation, initiation or waging of a war of aggression or "participation in a common plan or conspiracy for the accomplishment ... of the foregoing". The Indictment follows this distinction. *Count One charges the common plan or conspiracy. Count Two charges the planning and waging of war. The same evidence has been introduced to support both counts. We shall therefore discuss both counts together; as they are in substance the same.* The defendants have been charged under both counts, and their guilt under each count must be determined.[7] (emphasis added)

The Tribunal only convicted 8 of the 22 defendants under Count I of the Indictment but every single one of those defendants were also convicted under Count II of the Indictment. No defendant at Nuremberg was convicted of conspiracy as a substantive crime without also being convicted of the additional crime of carrying out the conspiracy to wage aggressive war. The notion of conspiracy adopted by the Nuremberg Tribunal allowed no room for spontaneity. The initiation of aggressive war requires detailed planning and preparation and the Tribunal was only willing to convict those defendants who had both planned and prepared for aggression in Europe and then actually participated in the implementation of that plan.

The Military Commission Cannot Try the Accused for Charges 2 and 3 Because They Are Based on a False Premise and Have No Basis in The Laws of War

It is important to note that the following two issues are separate and distinct:

- determining the legal status of an individual under the law of war;

- determining whether there has been a violation of the law of war.

[7] *Id.*, vol. 22, 466.

The first has no bearing on the second. The status of an individual under the law of war is only relevant to determining two things: (i) the protection that that individual deserves during armed conflict from attack; (ii) and the protections that individual is entitled to in detention if they are captured in the course of armed hostilities. The status of an individual under the law of war has **no impact** on a determination of whether that person has committed a violation of the law of war. The critical issue for the military commission when assessing whether Mr. Hicks has violated the law of war, is what acts he committed, and **not** his status under the law of war.

For this reason, the status of an individual as an 'unprivileged belligerent' cannot be an element of an offense under the law of war. The charges against Mr. Hicks which allege murder, destruction of property, and attempted murder simply by reference to Mr. Hicks' unprivileged belligerent status rather than to substantive acts in violation of the law of war are fundamentally flawed. If unlawful combatants do not commit belligerent acts which constitute war crimes (for example, the willful targeting of civilians or the murder of prisoners of war) their failure to satisfy the criteria for lawful combatant status – which may remove combatant immunity – does not render all their belligerent acts automatically unlawful under the laws of war, whether the acts violate the applicable domestic law is a separate issue.

Professor Jinks, writing in the most recent issue of the *Harvard International Law Journal* succinctly identifies the rationale for the law:

> If all captured combatants failing to satisfy the requirements for POW status are subject to prosecution for any warlike acts, the law provides irregular fighters with no incentive to comply with its dictates. [8]

This argument is surely correct. If, as the Prosecution alleges, all specific acts of belligerency committed by an unlawful combatant are rendered unlawful by the legal status of the individual – even if those acts otherwise conform to the law of war – there is absolutely no incentive for the individual combatant to conduct military operations consistently with the law.

The Specific Elements of Murder as a War Crime Have Not Been Alleged

A number of law of war instruments include murder in lists of those acts constituting war crimes for which individuals can be tried. However, in every case the reference to murder is to the killing of a 'protected person' (categories of those people taking no active part in hostilities – wounded combatants, prisoners of war and civilians). Any killing of a protected person is a war crime and punishable as such. Combatants – whether lawful or unlawful – are not considered 'protected persons' as such while they are actively engaged in armed conflict. Of course there are certain protections which apply to all combatants whether lawful or unlawful. For example, it is prohibited to

[8] Derek Jinks, 'The Declining Significance of POW Status' (2004) 45 *Harvard International Law Journal* 367, at 436.

deploy expanding bullets, poison, blinding lasers, chemical or biological weapons etcetera. But apart from such general limitations on the means and methods of warfare the killing of those taking an active part in hostilities is permitted under the law of war.

The Prosecution can produce no international law of war treaty or convention criminalising the shooting (or attempted shooting) of lawful combatants on one side of a conflict by unlawful combatants on the other. No such rule exists. The best that could be said is that such acts may be prosecutable under the domestic law[9] either of the State on whose territory the alleged conduct took place or of the State whose nationals were the victims (or attempted victims) of the alleged conduct.

As far as is discernible from the specific charges made against Mr. Hicks the accused is not alleged to have attempted to kill wounded coalition combatants no longer participating in the fighting; he is not alleged to have attempted to kill coalition prisoners of war; he is not alleged to have attempted to kill civilians not participating in the conflict. Instead, he is simply alleged to have attempted to engage in hostilities against coalition forces themselves actively engaged in the conflict. Such conduct does not constitute a violation of the law of war.

The Specific Elements of 'Aiding the Enemy' as a War Crime Have Not Been Alleged

The offence of 'aiding the enemy' can arise under domestic laws (not the law of war) of countries and has done so in two separate situations neither of which are present in the case against David Hicks. The first of the two situations arises in relation to acts of spying or espionage, as was the case in *Ex Parte Quirin.*[10] There the accused were German and U.S. citizens who infiltrated the United States during World War II and were attempting to destroy war industries and facilities in various cities around the nation. A military commission was established to try the accused and one of the charges involved the provision of intelligence to the enemy. When these individuals entered the U.S., they became subjected to the full range of U.S. laws.

The second situation in which 'aiding the enemy' can arise involves a betrayal by the accused of loyalty owed to the party to the conflict that has laid the charge. The offence of 'aiding the enemy' has never extended to all who support the war effort of one side of the conflict or the other. Otherwise every citizen of a state at war would be potentially liable for prosecution for aiding the enemy by merely offering some measure of support to their side of the conflict.

David Hicks is not alleged to have infiltrated the United States to undertake activities against the US. If an individual entered the U.S. to commit an offense can have 'aiding the enemy' laid against them for their acts carried out within US territory. However, no

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[9] George Aldrich, 'The Taliban, Al Qaeda, and the Determination of Illegal Combatants' (2002) 96 *American Journal of International Law* 891, at 893.
[10] 317 U.S. 1 (1942)

such factual situation is alleged against David Hicks. Secondly, David Hicks owes no allegiance to the United States and cannot be said to have betrayed any loyalty to the nation since he is a national of a foreign State. It happens that Hicks' nation, Australia, was a coalition partner with the United States in its military operations in Afghanistan. If Hicks owes allegiance to any State it is to Australia – an ally of the United States. However, the Australian Government has repeatedly stated that David Hicks could not be tried under Australian domestic criminal law because he has not violated any Australian legislation. In particular, the Australian offence of 'Aiding the Enemy' exists in Section 15 of the *Defence Force Discipline Act 1982*. That particular legislative enactment only applies to members of the Australian Defence Force (ADF) and David Hicks certainly was never a member of the ADF. It is untenable for the United States to charge him with an offence which requires some element of allegiance when the accused's own national Government concedes that he cannot be held responsible for a violation of the Australian domestic law equivalent.

Review Exhibit 59

Page 6 **Of** 6

Affidavit
of
Antonio Cassese

Conspiracy and Joint Criminal Enterprise under the Laws of War

I am the Chairman of the UN International Commission of Inquiry into Genocide in Darfur (Sudan), as well as a Professor of International Law at the University of Florence. I am a former President (1993-1997) and Judge (1993-2000) of the International Criminal Tribunal for the former Yugoslavia, a presiding judge of Trial Chamber III in 1997-2000, and author, among other things, of "*International Law*" (Oxford University Press, 2001) and "*International Criminal Law*" (Oxford University Press, 2003). I am also Editor-in-chief of "The Rome Statute of the International Criminal Court. A Commentary" 3 vols. (Oxford-New York: OUP: 2002) and Editor-in-chief of the *Journal of International Criminal Justice*. I have been asked to give my opinion of whether the first charge against Mr. Hicks: conspiracy constitutes a violation international humanitarian law (the law of war). In my opinion, it does not.

Under international criminal law conspiracy and joint criminal enterprise (or common criminal purpose) are two distinct notions. Joint criminal enterprise relates to a *form of participation* in a crime and is applicable to all international crimes. In contrast, conspiracy is a crime itself which customary international criminal law undisputedly recognizes only for the offenses of "conspiracy to commit genocide".

Military Commission Instruction No. 2 in its charge labeled. "Conspiracy" appears to join these two concepts into one offense. Such action is not supported in international criminal law. Each separate legal concept must be reviewed for support by international criminal law. While joint criminal enterprise is found within current international criminal law, conspiracy is not. Moreover, there is no crime of "joint criminal enterprise" with which someone can be charged. Rather "joint criminal enterprise" is a theory of liability by which someone charged with a particular substantive crime can be held responsible if he has helped perpetrate the crime, has the requisite *mens rea* and *actus reus*, which are not identical to those listed in Military Commission Instruction No. 2, and the crime has actually been carried out or attempted. But conspiracy -- delineated as a separate crime in Military Commission Instruction No. 2, does not exist.

Conspiracy under the Laws of War

The historical background of conspiracy charges in international criminal law is to be found in the Nuremberg precedent. Before that, conspiracy was not a part of international criminal law at all because conspiracy is not accepted in civil law systems. Article 6 of the Nuremberg Charter is the basis for a correct understanding of what is meant by conspiracy under international criminal law. At Nuremberg, some Nazi leaders were found guilty of conspiracy in reference to crimes against peace, but not of conspiracy to commit war crimes. Even with respect to crimes against peace, the

charges brought against Nazi leaders referred to specific crimes that had been consummated not an agreement to commit crimes that had yet to take place.

In particular, count one of the Nuremberg Indictment read: Conspiracy to Wage Aggressive War, which is a crime against peace. The "common plan" or "conspiracy" charge was designed to overcome the problem of how to deal with crimes committed before the war, which however were not covered by the provisions of the Laws of War. Some defendants were charged under count one for having agreed to commit crimes which then culminated in the war of aggression. But the indictment went beyond this to allege conspiracy to commit war crimes, a charge the tribunal rejected. The prosecution charges in the indictment, specifically stated that:

> [beginning] with the initiation of the aggressive war on 1 September 1939, and throughout its extension into wars involving almost the entire world, the Nazi conspirators carried out their common plan or conspiracy to wage war in ruthless and complete disregard and violation of the laws and customs of war. In the course of executing the common plan or conspiracy there were committed the War Crimes detailed hereinafter in Count Three of this indictment. Beginning with the initiation of their plan to seize and retain control of the German State, and thereafter throughout their utilization of that control for foreign aggression, the Nazi conspirators carried out their common plan or conspiracy in ruthless and complete disregard and violation of the laws of humanity. In the course of executing the common plan or conspiracy there were committed the Crimes against Humanity detailed hereinafter in Count Four of this indictment. By reason of all the foregoing, the defendants with divers other persons are guilty of a common plan or conspiracy for the accomplishment of Crimes against Peace; ***of a conspiracy to commit Crimes against Humanity*** in the course of preparation for war and in the course of prosecution of war; and ***of conspiracy to commit War Crimes*** not only against the armed forces of their enemies but also against non-belligerent civilian populations.

Nonetheless, the International Military Tribunal rejected the common plan or conspiracy doctrine in relation to war crimes and crimes against humanity. The IMT noted that the indictment charged conspiracy not only to commit aggressive war but also to commit war crimes and crimes against humanity. The Charter, however, did not define conspiracy as a separate crime except in the case of conspiracy to commit an act of aggression. Therefore the IMT disregarded the charges in count one of the indictment relating to conspiracy to commit war crimes and crimes against humanity. The charges were limited to crimes against peace, a different type of crime that occurs prior to and up to initiation of a war.

Since that time, conspiracy has not been charged even with respect to crimes against peace. The only crime under current international customary law for which there

is general understanding that the agreement to commit it is *per se* a criminal offense involves genocide. Conspiracy, distinct from joint criminal enterprise, to commit genocide, already provided for by the Genocide Convention, has been subsequently included in the subject matter jurisdiction of the ICTY and ICTR (Article 4 ICTY St. and Article 2 ICTR St.). However, given that the roots of this notion are too strongly tied to the common law system, and were not part of the civil law system of many countries in the international community, it eventually disappeared from the International Criminal Court Statute.

As for war crimes and crimes against humanity, conspiracy is not included in the Statutes of the ICTY, ICTR or ICC. No allowance is made under current international law for conspiracy to commit war crimes.

As such the conspiracy offense listed in MCI No. 2 and charged against Mr. Hicks is not a valid offense under international criminal law.

Definition of International Armed Conflict

In 1995 in *Tadic*[1] the International Criminal Tribunal of the former Yugoslavia, Appeals Chamber decision involved determining whether the armed conflict during which the accused *Tadic* had allegedly committed the crimes of which he stood accused was international or internal in nature. This determination was necessary for establishing which rules of international humanitarian law and international criminal law should apply to his case.

The Appeals Chamber, in paragraphs 66-70 of its decision, first held that an international armed conflict is a conflict between two or more States, and then went on to specify what is meant by internal armed conflict. To this end it held that normally such a conflict is a protracted armed confrontation, within a State, between the central authorities and insurgents, but may also include armed clashes between two or more armed factions within a State, with the central Government either siding with one of them or trying to quell the armed violence by fighting against all the rebels (see in particular para 70 of the decision).

Utilizing the above definition of an international armed conflict, it is impossible for the United States to be involved in an international armed conflict with a non-state entity (such as al-Qaida). The only war in which the United States was involved that would give rise to application of the laws of war was the war in Afghanistan, which began on 7 October 2001. Armed attacks that are not either international armed conflicts or internal conflicts are not armed conflicts under international humanitarian law and thus are not subject to the laws of war.

[1] Prosecutor v Dusko Tadic, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, International Criminal Tribunal for the Former Yugoslavia, 2 October 1995 (Cassese, J).

I swear the above information is true and correct to the best of my abilities.

Antonio Cassese

Done on this day 29 of October, 2004.

Review Exhibit 60
Page 4 of 4

UNITED STATES OF AMERICA **v.** **DAVID M. HICKS**	**EXPERT WITNESS AFFIDAVIT OF PROFESSOR GEORGE E. EDWARDS** **28 OCTOBER 2004** **U.S. MILITARY COMMISSIONS GUANTANAMO BAY, CUBA**

A. Introduction

a. This Affidavit identifies basic rules of public international law that are relevant to the case of *United States v. David M. Hicks*, and that are relevant to U.S. military commissions in general. It highlights the following branches of public international law: (i) international human rights law; (ii) international humanitarian law; and (iii) international criminal law. This Affidavit explains the traditional sources of international law (treaties, customary international law, and general principles of law), the relationship among these sources, and how these sources relate to domestic United States law. This Affidavit explains how United States courts deal with international law in a manner consistent with and in compliance with international obligations assumed by the United States through operation of treaties, customary international law and general principles of law in the areas of international human rights law, international humanitarian law, and international criminal law.

b. The military commissions are obligated to ensure that Mr. Hicks is afforded all rights and protections provided for under international human rights law, international humanitarian law, and international criminal law – the sources of which can be found in relevant treaties, customary international law, and general principles of law. Mr. Hicks is entitled to, *inter alia*, a full and fair trial under U.S. law and under international law.

c. International human rights law provides the relevant rules for assessing rights in this case, including the right to a full and fair trial, the right to be free from arbitrary detention, and other rights. The principal relevant international human rights law rules can be found in the International Covenant on Civil and Political Rights, which binds the United States because the U.S. signed and ratified that treaty. Relevant international human rights law norms also include customary international law norms of human rights and general principles of international human rights law. If this tribunal finds that international humanitarian law is relevant in determining the outlines of a full and fair trial in *United States v. Hicks*, then the relevant rules would include the customary international law norms that are codified in Article 75 of the Additional Protocol I to the Geneva Convention and other international humanitarian law norms.

B. General rules of international law

1. Public international law – generally

1.1. Public international law. "Public international law", which is also commonly known as "the law of nations" or simply as "international law", is the body of law that governs relationships principally between and among sovereign states as international actors. International law also governs relationships between and among sovereign states and other types of international actors, such as inter-governmental organizations and individual natural persons.

1.2. Distinguishing international comity. International law defines rights and obligations of international actors. International law is distinguished from "international comity", the latter being a general practice of an international actor that is not based on legal obligation, but is based on habit or general goodwill. International law, on the other hand, is based on international actors engaging in acts out of a sense of legal obligation.

1.3. International jurisprudence, foreign jurisprudence, and foreign law

1.3.1. "International jurisprudence" consists of judgments, rulings or other decisions of international judicial bodies, such as: the International Court of Justice (ICJ) (which is the judicial arm of the United Nations); the International Criminal Tribunal for the Former Yugoslavia (ICTY) (established by UN Security Council Resolution); the International Criminal Tribunal for Rwanda (ICTR) (established by UN Security Council Resolution); the European Court of Human Rights (ECHR) (established by multilateral treaty); the International Criminal Court (ICC) (established by multilateral treaty); the Inter-American Court of Human Rights (IACHR) (established by multilateral treaty); etc. International jurisprudence may also consist of judgments, rulings or other decisions of international quasi-judicial bodies, such as the United Nations Human Rights Committee (which is the body of experts that oversees implementation of the International Covenant on Civil and Political Rights), and the Inter-American Commission on Human Rights.

1.3.2. "Foreign jurisprudence" consists of judgments, rulings or other decisions of judicial bodies of non-U.S. nations or states.

1.3.3. "Foreign law" is the law of specific states other than the United States.

1.4. Subsets of public international law: International human rights law; international humanitarian law; international criminal law. Public international law has various subsets or branches that are or may be deemed to be highly relevant to this Affidavit and to the military commissions, including: (a) international human rights law; and (b) international humanitarian law. Also relevant to some degree is another branch of international law – (c) international criminal law – which will not be examined in depth in this Affidavit. These three areas of international law are distinct from each other, but are also related to each other.

2. **International law on the international plane and on the domestic plane**

2.1. Two planes. International law operates on two distinct yet interrelated planes: (a) the international plane; and (b) the domestic plane.

2.2. International plane. International law operates on the international plane when sovereign states negotiate treaties, states engage in proceedings before international tribunals, and when United Nations organs operate. On the international plane, international law is a distinct legal system, separate from domestic systems.

2.3. Domestic plane. International law operates on the domestic plane when sovereign states incorporate international law norms into domestic law, and when domestic courts interpret and apply international law. On the domestic plane, international law does not operate as a distinct legal system, but operates as a branch of domestic law. International law, as used by the military commissions, is an example of international law operating on the domestic plane.

2.4. Branch of U.S. law. In the United States, international law is a branch of U.S. domestic law.

3. **International law: Dualism v. Monism**

3.1. Dualism. In a dualist system, international law is a separate system from domestic law, as regards subject matter and procedure. Under this system, as regards procedure, a domestic court would look only to domestic law when resolving disputes, and an international court would look only to international law to resolve disputes. As regards substantive law, international law would be used only to resolve disputes that affect relations between and among states at the international level.

3.2. Monism. In a monist system, international law is a subset of domestic law. Substantive international law is used in resolving disputes in domestic courts.

3.3. U.S. as a monist state. The United States is essentially a monist system, since international law is "the law of the land" and "part of our law". Thus, international law can and should be considered by United States courts. The doctrine of non-self-executing treaties, though rendering some individuals unable effectively to sue to recover for breaches of rights under certain treaties, does not make the United States a dualist system. (These issues will be discussed *infra*.)

C. Foreign jurisprudence, foreign legislation, and international jurisprudence: Relevance to U.S. courts and military commissions

4. **Relevance to commissions.** International and foreign jurisprudence and law are relevant to the resolution of the issues in U.S. military commissions in general, and in the case of *United States v. David Hicks*. This is so for various reasons, including the following: (a) even the government prosecutors in *United States v. David Hicks* cite as relevant international and foreign jurisprudence; (b) U.S. Courts-Martial rules call for consideration of international law; (c) international and foreign jurisprudence was cited in the Nuremberg Trials; and (d) United States Supreme Court opinions cite international and foreign instruments and jurisprudence (as do Supreme Court Justices in speeches,

articles, etc). Following are examples of various instances in which foreign and international jurisprudence and law are relied upon in U.S. military and civilian fora:

4.1. Foreign and international jurisprudence use by the government in *United States v. David M. Hicks.* The government in *United States v. David M. Hicks*, the instant case, cites foreign and international jurisprudence and legislation in support of their arguments, and has thus recognized that international law standards are appropriately regarded in determining questions related to the rights of Mr. Hicks:

4.1.1. Hicks' prosecution cites international criminal law. The government in *United States v. David M. Hicks* extensively cites international criminal law jurisprudence, and even cites to the Statute of the International Criminal Court, which is a treaty that the United States signed (but then purported to unsign) and which the United States has expressly stated it will not ratify. In the *Prosecution Response to Defense Motion for a Bill of Particulars* (4 October 2004), the prosecution, in a section entitled "International Criminal Courts", contends:

> "The standard [for indictments] is identical in international criminal law. For instance, in the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), rules state that an indictment must be a 'concise statement of the facts and the crime or crimes with which the accused is charged under the statute.' ICTY Article 18(4); ICTR Article 17(4). *See also Prosecutor v Tadic*, IT-94-1-PT, *Decision on Defence Motion on Form of Indictment*, 14 Nov. 1995. Applying this rule and its companion rule ICTY Article 47(c), an ICTY Trial Chamber opined:
>
> > 'The indictment should articulate each charge specifically and separately, and identify the particular acts in a satisfactory manner in order to sufficiently inform the accused of the charges against which he has to defend himself.'"
>
> *"Prosecutor v. Delalic et al*, IT-96-21-A, *Decision on Defence Motion on Form of Indictment,* 15 Nov. 1996 (affirming its previous decision on the same motion). The same Chamber also stated that criminal indictments should be 'very succinct, [and should] demonstrate ... that the accused allegedly committed a crime.' *Delalic Indictment Decision, 2 Oct. 1996, p. 11 (quoting the Dukic Preliminary Motions Decision,* 16 Apr.1996, para. 14."
>
> "The International Criminal Court's (ICC) Rome Statute ('Rome Statute') provides a pretrial hearing procedure for confirming the charges before a special 'pre-trial chamber.' *See* Rome Statute Article 61. *See also Rome Statue* Articles 56 – 60 (explaining the role of the Pre-Trial Chamber)".

Review Exhibit 61

4.1.2. **Hicks' prosecution cites foreign legal system and international legal system standards regarding a fundamentally fair trial.** The government in *United States v. David Hicks* contends, regarding the right to a fair trial:

> "The real question is whether the present procedures afford the Accused with a fundamentally fair trial, which they do. Procedures accorded an accused under the Military Commission process match fundamental aspects of both the U.S. and international systems." (*United States v. Hicks, Prosecution Response To Defense Motion To Dismiss For lack Of Jurisdiction: System Will Not Afford A Full And Fair Trial,* page 4, part 5(a), 2nd paragraph (18 October 2004)).

Further, the last paragraph of that section reads:

> "All of the rights set forth above meet the requirements of fundamental fairness recognized in both national systems and international treaties."

4.2. **Use in Courts-Martial.** The Manual for Courts-Martial directs military commissions in the direction of international law, as follows:

> "Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions . . . shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial". (*Manual for Courts-Martial*, United States, preamble P 2(b)(2)(2000)) (*quoted by* Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Michigan Journal of International Law 1, n. 10 (2001) (further noting that federal statutes concerning jurisdiction and procedures of military commissions "must be interpreted consistently with the confluence of human rights, denial of justice, law of war, and other international law requirements".)

4.3. **International law use at Nuremberg.** Foreign and international jurisprudence was cited in the Nuremberg Trials and the Tokyo Trials. Mr. Justice Robert H. Jackson, who was the Chief Prosecutor at the IMT in Nuremberg, noted in his opening statement to the Tribunal:

> "This inquest represents the practical effort of four of the most mighty of nations, with the support of 17 more, to utilize international law to meet the greatest menace of our times – aggressive war." (reprinted in II TRIAL OF THE MAJOR WAR CRIMINAL BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946, *Second Day, Wednesday, 21 November 1945, Part 04, Morning Session,* at 99 (published at Nuremberg, 1947).

4.4. **United States courts usage of foreign and international law.** United States courts cite foreign jurisprudence and legislation and international jurisprudence when ruling on matters related to international human rights law, international humanitarian law, international criminal law, and even on matters related to "pure" domestic law. United States courts cite foreign legislation and

international and foreign jurisprudence when the courts seek to interpret treaty terms and applicability, rules of customary international law, and general principles of law.

4.4.1. U.S. Supreme Court – overseas jurisprudence cited in the 2002 juvenile execution case. In *Atkins v. Virginia*, 536 U.S. 304, 316, n. 21 (2002), the United States Supreme Court addressed the constitutionality of executing mentally retarded criminals. In finding that such executions constituted "cruel and unusual punishment" under the Eighth Amendment to the U.S. Constitution, the Court in a six-member majority, looking at law and jurisprudence outside the United States for guidance, noted that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved".

4.4.2. International and foreign law cited by the U.S. Supreme Court in the 2003 Texas sodomy case. In *Lawrence v. Texas*, the Supreme Court, in ruling as unconstitutional a Texas statute that prohibited two adults of the same sex from engaging in intimate sexual relations, cited international jurisprudence. The Court noted that:

> "The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries". The Court then cited a decision of the European Court of Human Rights – *Dudgeon v. United Kingdom* (45 Eur. Ct. H.R. (1981)) – and other European Court of Human Rights cases. 529 U.S. 558, 577 (2003).

4.4.3. International instruments cited by U.S. Supreme Court in the 2003 Michigan affirmative action cases. In two recent Supreme Court opinions concerning affirmative action in Michigan, two United Nations international human rights law treaties were cited and discussed, including one treaty that the United States has not yet ratified. Cited were the International Convention on the Elimination of all Forms of Racial Discrimination, which the United States has ratified, and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, which the United States has not yet ratified. *See Gratz v. Bollinger*, 539 U.S. 244, 302 (2003) (Ginsburg, J, dissenting); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (Ginsburg, J., concurring). Justice Ginsburg discusses her affirmative action case international law references in a recent article. *See* Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective*, 22 Yale Law and Policy Review 329, (Spring 2004).

4.4.4. U.S. Supreme Court – Paquete Habana – "international law is part of our law". In the Supreme Court case of *Paquete Habana*, in which the famous phrase "international law is part of our law" was coined, the Court cited numerous foreign sources in its ruling confirming that customary international law was indeed part of the law of the United States. *See The Paquete Habana*, 175 U.S. 677, 700 (1900).

4.5. U.S. Supreme Court Justices, over the years, have highlighted the relevance of foreign legislation and international and foreign jurisprudence in U.S. courts. Indeed, virtually all currently sitting Supreme Court Justices have cited foreign and/or international law and jurisprudence in an opinion. Following are examples of some of the instances in which United States Supreme Court Justices have recently cited law from outside of the United States:

Review Exhibit GZ 61

Page _____ Of _____

4.5.1. U.S. Supreme Court Justice Ruth Bader Ginsburg recently stated in a speech about comparative perspectives on constitutional adjudication:

> "[Y]our perspective on constitutional law should encompass the world. The United States was once virtually alone in exposing laws and official acts to judicial review for constitutionality. But particularly in the years following World War II, many nations installed constitutional review by courts as one safeguard against oppressive government and stirred up majorities. National, multinational, and international human rights charters and tribunals today play a key part in a world with increasingly porous borders. My message tonight is simply this: We are the losers if we do not both share our experience with, and learn from others. (Ginsburg, Ruth Bader, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 Yale Law and Policy Review 329, 329 (Spring 2004) (footnote omitted))."

Justice Ginsburg continues:

> "That message is hardly original." *Id.*

Justice Ginsburg then traces multiple instances in which other U.S. Supreme Court Justices, in speeches and in Supreme Court opinions, have cited foreign and/or international jurisprudence in a comparative fashion. *Id.* Some of the references cited by Justice Ginsburg are cited *infra.*

4.5.2. U.S. Supreme Court Justice Sandra Day O'Connor stated:

> "Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts... . While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists [from other places] who have given thought to the same difficult issues that we face here." (Sandra Day O'Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law,* (16 March 2002) 96 Am Society International Law Proceedings 348, 350 (2002)).

More recently, Justice O'Connor noted that:

> "Other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit". (Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, Int'l Jud. Observer, June 1997, at 2).

61 KH

Review Exhibit 53

As recently as yesterday, 27 October 2004, Justice O'Connor, in a public forum, addressed the topic of the importance of international law to the law of the United States. Her presentation is reported as follows:

> "Justice Sandra Day O'Connor extolled Wednesday the growing role of international law in U.S. courts, saying judges would be negligent if they disregarded its importance ... ."
>
> "O'Connor said the Supreme Court is increasingly taking cases that demand a better understanding of foreign legal systems. A recent example was last term's terror cases involving the U.S. detention of foreign-born detainees at Guantanamo Bay, Cuba, she said."
>
> "'International law is no longer a specialty. ...It is vital if judges are to faithfully discharge their duties,' O'Connor told attendees at a ceremony dedicating Georgetown's new international law center."
>
> "'Since September 11, 2001, we're reminded some nations don't have the rule of law or (know) that it's the key to liberty,' she said."
>
> "Later this term, the Supreme Court will decide the constitutionality of executing juvenile killers. The case has attracted wide interest overseas, with many foreign nations filing briefs pointing to international human rights norms as a justification for outlawing the practice."
>
> "O'Connor, who is expected to be a pivotal vote, didn't mention the case but said recognizing international law could foster more civilized societies in the United States and abroad. 'International law is a help in our search for a more peaceful world,' she said.'" *O'Connor extols role of international law*, CNN News Report on the Web, Wednesday, 27 October 2004 (http://www.cnn.com/2004/LAW/10/27/scotus.oconnor.ap/index.html)

4.5.3. U.S. Supreme Court Justice Antonin Scalia stated:

> "The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty that it occupies a place not merely in our own mores but, text permitting, in our Constitution as well". (*Thompson v. Oklahoma,* 487 U.S. 815, 869 n. 4 (1988) (Scalia, dissenting).

4.5.4. U.S. Supreme Court Justice Stephen Breyer stated:

> "[W]e face an increasing number of domestic legal questions that directly implicate foreign or international law.

> [W]e find an increasing number of issues, including constitutional issues, where the decisions of foreign courts help by offering points of comparison. This change reflects the 'globalization' of human rights, a phrase that refers to the ever-stronger consensus (now nearly worldwide) on the importance of protecting basic human rights, the embodiment of that consensus in legal documents, such as national constitutions and international treaties, and the related decision to enlist independent judiciaries as instruments to help make that protection effective in practice. Judges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances... .
>
> International institutional issues cannot be treated as if they were exotic hot house flowers, rarely of relevance to domestic courts. Those issues, when relevant, must be briefed fully with the legal relationships between our Court, and say the International Court of Justice". (Justice Breyer, *Keynote Speech Before the American Society of International Law*, 97 American Society of International Law Proceedings 265, 266, 268 (2003))

Furthermore, while Justice Breyer noted that other Justices of the Supreme Court had recently cited foreign and international law, he also noted that foreign experience is important to the work of the Supreme Court. He stated:

> "John Paul Stevens and David Souter have referred to comparative foreign experience in several important recent opinions. And I have tried to explain, both in opinions and public remarks, why I believe foreign experience is often important to our work." *Id. at 265*

Justice Breyer also has stated:

> "[T]his Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances . . . . In doing so, the Court has found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own [Bill of Rights]" (*Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from certiorari denial).

4.5.5. U.S. Supreme Court Chief Justice Rehnquist stated:

> "For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised that kind of authority... .But now that constitutional law is solidly grounded in so many countries, it is time the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process." (William H. Rehnquist, *Constitutional Courts – Comparative Remarks* (1989), reprinted in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE – A GERMAN-AMERICAN SYMPOSIUM 411, 412 (P. Kirchhof

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Review Exhibit _____

and D.P. Kommers, eds, 1993) (*also quoted in* Ginsburg, Ruth Bader, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 Yale Law and Policy Review 329, 329-30 & n. 3 (Spring 2004)).

4.6. **International and foreign jurisprudence can and should be used in *United States v. David M. Hicks*.** Thus, as evidenced by the foregoing citations to prosecutor's submissions in *United States v. David M. Hicks*, to opinions and other writings and speeches of U.S. Supreme Court Justices, to courts-martial rules, etc, international jurisprudence and foreign jurisprudence and legislation can and should be used in the case of *United States v. David M. Hicks* in assessing the rights that Mr. Hicks possesses under U.S. and international law, in assessing the obligations that the United States has to Mr. Hicks and to the international community of states under United States and international law, and in assessing remedies for Mr. Hicks for violations of his rights.

D. Sources of International Law – Generally

5. **Sources of law in the domestic context.** The phrase "sources of law" refers in part to the authority of norms or rules to bind, the origination of such rules, or the way that such rules are made. In the domestic U.S. context, sources of law would include the U.S. Constitution, federal legislation, state legislation, lawful Executive Orders, and common law precedent (cases decided by judges of high courts, such as the U.S. Supreme Court). These sources of domestic law provide the rules that govern in the domestic arena, and include rules that domestic courts generally apply in rendering judgments on cases that come before domestic courts.

6. **Sources of law in the international context.** Sources of law in the international context differ from sources of law in the domestic context. Three traditional sources of international law exist: (i) treaties; (ii) customary international law; and (iii) general principles of law. Thus, treaties, customary international law, and general principles of law provide the rules that govern in the international legal arena, and are the rules that domestic and international courts and tribunals apply in rendering judgments on cases that come before those courts or tribunals. Both domestic sources and international sources may be interpreted and applied on either the domestic plane or the international plane. For example, international human rights law treaties may be interpreted and applied when assessing, on the domestic plane, the internationally recognized human rights to which David M. Hicks is entitled in the proceedings before the military commissions.

7. **Where traditional sources of international law are listed.** The traditional sources of international law are listed in two significant documents: (a) the Restatement of the Law Third on the Foreign Relations Law of the United States; and (b) the Statute of the International Court of Justice.

8. **Restatement of the Law on the Foreign Relations Law of the United States.** As a general matter, the Restatement of the Law is a product of the American Law Institute, which is a membership association consisting of judges, legal academicians, and practicing lawyers, whose members are selected based on professional standing. (Restatement of the Law Third on the Foreign Relations Law of the United States, *Notes at* p. XI). The Restatements of the Law "receive[s] recognition on the basis of the scholarly and professional care and responsibility with which they are carried out", and are highly

regarded within the legal community as pronouncing the state of the law in particular areas. *Id.* The Restatements are considered authoritative interpretations of law as it exists in the United States.

9. **Restatements as authoritative.** The Restatement of the Law on the Foreign Relations Law of the United States reflects "the rules that an impartial tribunal would apply if charged with deciding a controversy in accordance with international law". (Restatement Third, *Introduction,* p. 3). Hereinafter, the Restatement of the Law Third on the Foreign Relations Law of the United States will be referred to as the "Restatement Third" or as the "Restatement".

10. **Statute of the International Court of Justice.** The Statute of the International Court of Justice is the constitutional document of the ICJ, which is an organ of the United Nations.[1]

11. **Neither Restatements nor the ICJ statute binds the military commissions.** Neither the Restatement nor the Statute of the International Court of Justice[2] is binding on the military commissions.

12. **International law sources in the Restatement Third.** The list of traditional international law sources contained in Restatement Third, article 102, is identical in substance to that in article 38 of the ICJ Statute, though the order of the sources differs slightly in the two instruments. The Restatement Third list of sources follows:

> "(1) A rule of international law is one that has been accepted as such by the international community of states
>
> (a) in the form of customary law;
>
> (b) by international agreement; or
>
> (c) by derivation from general principles common to the major legal systems of the world."

13. **International law sources in Article 38 of the Statute of the International Court of Justice.** Article 38(1) of the Statute of the International Court of Justice lists the three traditional sources of international law as follows:

> (a) "International conventions, whether general or particular, establishing rules expressly recognized by the contesting States [e.g. treaties] (art 38(1)(a));
>
> (b) International custom, as evidence of general practice accepted as law (art 38(1)(b));
>
> (c) General principles of law recognized by civilized nations". (art 38(1)(c));

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[1] Article 93(1) of the *Charter of the United Nations* provides that all Members of the United Nations are *ipso facto* parties to the *Statute of the International Court of Justice*, which is annexed to the Charter. The Charter is available at <http://www.un.org/aboutun/charter/>.

[2] It is not suggested that Article 38(1) of the ICJ Statute is controlling in the case of *United States v. David M. Hicks.* The ICJ Statute only binds states in proceedings before the International Court of Justice. However, Article 38 is oft cited as a definitive descriptive list of international law sources. *See, e.g.* Restatement Third, article 102.

14. In addition to the sources of international law listed in article 38(1)(a) – (c) of the ICJ Statute, article 38(1)(d) provides for "[j]udicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." The items listed in article 38(d) are not sources of international law, but are aids to assist in determining the substantive content of treaties, customary international law or general principles of law.

15. Tribunals of the United States, including the military commissions, when determining which international law rules apply must consider the following sources of international law to be binding: (a) relevant treaties; (b) relevant customary international law rules (including *jus cogens* rules); and (c) relevant general principles of law. These sources are binding in the areas of international human rights law, international humanitarian law, and international criminal law.

E. Treaties

16. Treaties: The first of three traditional sources of international law

16.1. **International Law Source # 1:** Treaties are the first of three traditional sources of international law. The other two traditional sources of international law are customary international law and general principles of law.

16.2. **Treaty defined.** A "treaty" is an agreement, contractual in nature, between and among states, governed by international law and intended to be binding. Treaties, which are referred to in the Restatement Third as "international agreements", are also known by various names, including "conventions", "covenants", "protocols", "charters", or "pacts".

16.3. **Vienna Convention on the Law of Treaties.** The basic rules regarding treaties are codified in the Vienna Convention on the Law of Treaties. Though the United States has not yet ratified or otherwise become bound by the Vienna Convention on the Law of Treaties, the U.S. complies with the substantive rules contained in that treaty because it recognizes the Vienna Convention to be "the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92nd Cong., 1st Sess., at 1 (1971). The Letter of Submittal to the President the Department of State provided that "[a]lthough not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice." The United States "accepts the Vienna Convention [on the Law of Treaties] as, in general, constituting a codification of the customary international law governing international agreements."

16.4. **Ratified treaty as binding.** When a state ratifies a treaty, it fully evidences the state's consent to be bound legally by the treaty, and the treaty becomes legally binding on the state under international law. Section 321 of the Restatement Third provides that "[e]very international agreement in force is binding upon the parties to it and must be performed by them in good faith." This section, which follows Article 26 of the Vienna Convention, codifies the principle of *pacta sunt servanda*, "which lies at the core of the law of international agreements and is perhaps the most important principle of international law. It includes the implication that international obligations survive restrictions imposed by domestic law." (Restatement Third, § 321, comment a)

16.5. **Treaty signed but not ratified.** When a state signs a treaty but does not ratify it, the state takes on the obligation not to take steps that would defeat the object and purpose of the treaty.

16.5.1. **Restatement Third rule on obligations when treaty is signed but not yet ratified.** This rule can be found in the Restatement Third, article 312(3), which provides:

> "Prior to the entry into force of an international agreement, a state that has signed the agreement or expressed its consent to be bound is obliged to refrain from acts that would defeat the object and purpose of the agreement."

Comment i of Restatement Third, article 312 provides:

> "[u]nder Subsection (3), a state that has signed an agreement is obligated to refrain from acts that would defeat the object and purpose of the agreement."

16.5.2. **Vienna Convention on the Law of Treaties rule on obligations when treaty is signed but not yet ratified.** This rule is codified in article 18(a) of the Vienna Convention on the Law of Treaties, which provides:

> "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty".

16.5.3. **The U.S. accepts provisions of the Vienna Convention on the Law of Treaties as customary international law.** The United States has accepted the rules contained in the Vienna Convention on the Law of Treaties as customary international law and hence binding on the U.S.

16.6. **Treaties that codify customary international law or general principles of law.** Treaties – particularly those in the areas of international human rights law, international humanitarian law, and international criminal law – often codify rules of customary international law or general principles of law. A state's ratification of a treaty evidences that state's consent to be bound by the provisions of the treaty, and triggers the obligation of that state to comply in good faith with the treaty terms. (Vienna Convention on the Law of Treaties, article 26). A state's consent to be bound by a treaty that codifies customary international law norms or general principles of law does not affect the state's obligations to comply with the particular customary international law norm or the general principle of law in question. A state is obligated to comply with parallel norms in both treaty form and in customary international law and general principle of law form. A failure to comply with any such norm does not relieve the state of its obligation to comply with a corresponding norm.

16.7. **Parallel international norms that have separate existences as treaty norms, as customary international law norms, and as general principles of law.** Parallel norms exist when a treaty includes among its terms rules that have risen to the level of customary international law or general principles of law. Treaties may either codify norms that already have risen to the level of customary international law or general principles of law, or the customary international law norms or general principles of law may rise to their respective levels after the treaty comes into force. In either event, the norms would have separate, parallel existences, and states party to the

treaty would have treaty obligations to comply with the norm as it appears in the treaty, and all states would have separate (yet overlapping) legal obligations to comply with the customary international law norm and the general principle of law.

16.8. **Examples of parallel norms.** Examples of parallel norms are the rights contained in article 75 of the Protocol Additional I to the Geneva Conventions. The United States has full obligations to comply with these norms not as treaty norms, but as customary international law norms. (This issue is discussed further *infra*.)

16.9. International human rights law treaties signed and ratified by the U.S. (selected)

16.9.1. International Covenant on Civil and Political Rights.[3] The United States has signed and ratified the International Covenant on Civil and Political Rights (ICCPR), and is therefore legally bound to comply with that treaty.

16.9.2. United Nations Charter. The United States has signed and ratified the United Nations Charter, and is therefore legally bound to comply with the terms of that treaty. Though the UN Charter is not ordinarily considered to be an international human rights law treaty, it contains language that calls for the promotion and protection of human rights.

16.10. International humanitarian law treaties signed and ratified by the US (selected)

16.10.1. Geneva Conventions of 1949. The United States has signed and ratified the following four international humanitarian law treaties, collectively known as the Geneva Conventions, and is thus legally bound to comply with all of the provisions of the Geneva Conventions. The four Geneva Conventions, the texts of which can be found in their entirety at www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions, follow:

16.10.1.1. The *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950);

16.10.1.2. The *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950);

16.10.1.3. The *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); and

16.10.1.4. The *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

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[3] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Available at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>.

16.11. International humanitarian law treaties signed but not ratified by the U.S.

16.11.1. Optional Protocols I & II to the Geneva Conventions. The United States has signed but not yet ratified the Protocol Additional I and Protocol Additional II to the Geneva Conventions of 1949, thus triggering the U.S. obligation not to defeat the object and purpose of these two treaties, as follows:

16.11.1.1. Protocol Additional I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts;[4] and

16.11.1.2. Protocol Additional II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts[5]

F. Customary international law

17. Customary international law: The second of three traditional sources of international law

17.1. International law source # 2: Customary international law is the second of three traditional sources of international law. The other two traditional sources of international law are treaties and general principles of law.

17.2. Customary international law defined. Customary international law is an unwritten source of international law that is based on implicit consent to be bound, differentiating it from treaty law, which binds states based on express consent to be bound. Two elements must be present for a principle or rule of customary international law to exist: (i) state practice as proof of custom; and (ii) *opinio juris vel necessitatis* (opinio juris). A norm of customary international law is binding on all states, irrespective of whether the state in question has expressly consented to be bound, and irrespective of whether the state in question is or is not bound by a treaty that might happen to codify that particular rule of customary international law.

17.3. State practice prong. Satisfaction of the state practice requirement calls for a threshold showing of, at minimum: (a) the duration of the practice; (b) the uniformity and consistency of the practice; (c) the generality and empirical extent of the practice; and (d) the conformity of state practice to international standards.[6]

17.4. Opinio juris prong. Opinio juris is a psychological element that requires an examination of a state's motives in engaging in a particular act or practice (which is a subjective feeling of a state

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[4]Opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (Additional Protocol I) Available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>.

[5]Opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (Additional Protocol II) Available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>.

[6] For proof of these elements, courts will look to various sources, including international, regional, and bilateral treaties; international tribunal decisions; and the internal law of relevant states.

that it is obligated to act in such a way because of a legal duty to do so).[7] For the opinio juris requirement to be satisfied, a showing must be made that states engage in the practice out of a sense of legal obligation, and not because engaging in the practice is convenient or coincidental.[8]

17.5. **Creation of customary international law norm.** Once the practice of states fulfils the state practice and *opinio juris* prongs, the norm in question is deemed to be a legally binding custom, or a customary international law norm.

17.6. **Parallel existence of norms as both treaty/international instrument norms and customary international law norms.** For example, the norms contained in the *Universal Declaration of Human Rights* have risen to the level of customary international law, and therefore bind all nations, because state practice and opinio juris have been met. Likewise, norms contained in the Vienna Convention on the Law of Treaties have risen to the level of customary international law, and are binding on the United States in its treaty relations. Similarly, norms contained in article 75 of Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), which establishes standards for a fair trial, also have risen to the level of customary international law.

17.7. **Restatement Third on customary international law.** As the Restatement Third provides, in paragraphs a -- f of article 702, customary international human rights law prohibits the most globally deplored human rights violations, such as genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, and a consistent pattern of gross violations of internationally recognized human rights. "The list is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary [international] law, and some rights might achieve that status in the future." *Id* at comment a.

17.8. ***Jus cogens* as a type of customary international law.** A *jus cogens* norm is essentially a type of customary international law norm that has a higher status in that no derogations are permitted from a *jus cogens* norm. A *jus cogens* norm – or a peremptory norm of international law – is defined by § 102 of the *Restatement Third of the Foreign Relations Law* as a norm that is accepted and recognized by a 'large majority' of States, even if over dissent by 'a very small number of States'. Thus, it represents a bare minimum of acceptable state behavior that the international community expects of states.

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[7] For relevant international jurisprudence on the elements of customary international law, see the following decisions of the International Court of Justice: *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* [1969] ICJ Rep 3; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14.

[8] The following elements must be satisfied for the opinio juris element to be met: (a) the rules protecting the right must be legal in nature (legality); (b) the right must relate to international and not domestic law; and (c) states must be aware of the articulated right.

17.9. The Inter-American Commission on Human Rights explained that *jus cogens* norms

> "derive their status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence". (Report No. 62/02, Case No. 12.285, *Domingues v United States* ¶ 49 [2002]).

For this proposition, *Domingues* cited *Barcelona Traction Case* (Second Phase), ICJ Reports (1970) 3 at 32, sep. op. Judge Ammoun (indicating that obligations of *jus cogens* "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.") and *East Timor Case*, ICJ Reports (1995) 90 at 102).

17.10. ***Jus cogens* examples.** An example of a *jus cogens* norm is the prohibition on torture or other cruel, inhuman or degrading treatment of punishment. This prohibition may not be derogated from by any nation at any time under any circumstances. (*See* Restatement Third, section 702, Reporters' Notes 11.) The status of torture or other cruel, inhuman or degrading treatment or punishment as a jus cogens norm was confirmed by the Inter-American Commission on Human Rights in *Domingues v United States*. (Report No. 62/02, Case No. 12.285, *Domingues v United States* ¶ 49 [2002].) Other examples of *jus cogens* norms, as listed in the Restatement Third, include genocide, slavery or slave trade, the murder or causing the disappearance of individuals, prolonged arbitrary detention, and systematic racial discrimination.

G. General principles of law

18. General principles of law as the third of three traditional sources of international law.

18.1. **International law source # 3:** General principles of law are the third of three traditional sources of international law. The other two traditional sources of international law are treaties and customary international.

18.2. **General principles of law defined.** General Principles of law are identified in article 38 (1)(c) of the ICJ Statute and article (1)(c) of the Restatement Third. General principles of law are essentially non-treaty, non-customary, and non-consensual sources of international law. If conventional and customary international law fail to provide an appropriate rule or principle of international law, general principles of law derived from national laws can be used to fill in lacunae. The rationale is that if a common principle exists within the domestic laws of nations, such a principle ought to be attributable to international law to fill in the gap. General principles of law are rooted in national law, and determined by conducting a comparative analysis. However, some general principles are rooted in "unperfected" international law sources, including treaties and customary international law. An unperfected source of international law would include one that never entered into force, and an unperfected custom might be one in which the opinio juris element is satisfied but the state practice element is not. *See* M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law"*, 11 Michigan Journal of International Law. 768, 768-769 (1990)).

18.3. **When general principles of law will serve as the relevant rule in the context of international law.** Most of the international law rules relevant to the case of *United States v. David Hicks* and relevant to the military commissions in general will be rules that derive from treaty law or customary international law in the three areas of international human rights law, international humanitarian law, and international criminal law. General principles of law will be relevant and binding if the particular norm in question cannot be found in a binding treaty, has not yet risen to the level of customary international law, but has risen to a general principle of law. Tribunals would typically ask whether a norm is a general principle of law after it is determined that treaty or customary international law requirements have not been satisfied.

18.4. **General principles of law related to a fair trial.** The United States is bound to comply with comprehensive treaty law and customary international law that require fair trials. For any particular international human rights law fair trial norm in question, if the military commission finds that treaty law or customary international law do not offer a binding rule, the rule can also be found as a general principle of law, and hence binding on all nations, including the United States. Virtually all of the international human rights law, international humanitarian law, and international criminal law rights to be afforded to *David M. Hicks* are general principles of law, and hence bind the United States which is required to afford those rights to Mr. Hicks. Among the rights that would constitute general principles of law are the right to be free from arbitrary detention, the right to be presumed innocent, the right to security of the person, the right to a fair trial, the right to assistance of counsel, the right to a speedy trial, the right to an appeal, the right to be protected from double jeopardy, the right to protection against ex post facto laws, and a right to general fairness in criminal proceedings. *See, e.g.,* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke Journal of Comparative and International Law 235 (1993).

18.5. **General principles of law not directly related to a fair trial.** Aside from those directly related to fair trials, general principles of law exist in other areas of international law.

H. The relationship between international law and U.S. law: The incorporation of treaties, customary international law and general principles of law into U.S. law

19. Applying U.S. law consistently with treaties, customary international law, and general principles of law.

19.1. It is well-established in U.S. law that domestic U.S. law should be interpreted such that violations of a U.S. international obligation is avoided, including when the international obligation arises under a treaty, under customary international law, or under a general principle of law. *See, e.g., Restatement Third, §§ 114-115.* This rule, which is known as the "Charming Betsy Rule", has long been applied by U.S. courts since it was articulated in 1804. *See Murray v. The Schooner Charming Betty*, 6 U.S. 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country".)

Review Exhibit 61

19.2. The U.S. Supreme Court has considered that international law reflects "values that we share with a wider civilization". *Lawrence v. Texas,* 539 U.S. 558, 576 (2003); see *Atkins v. Virginia*, 536 U.S. 304, 317 n. 21 (2002) ("within the world community, imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"). The United States has expressed a desire keenly to comply with its obligations under international law.

20. Treaty law in U.S. law

20.1. Treaties as supreme law of the land. Treaties are "the supreme law of the land". The U.S. Constitution provides:

> "[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby". (U.S. Constitution, article VI, cl. 2)

20.2. Suing under a treaty of the United States.

20.2.1. Not all treaties of the United States are such that a person may successfully institute a cause of action in a U.S. court alleging breach of the treaty in question. A cause of action may be instituted if the treaty is self-executing. A treaty that does not permit a cause of action affirmatively to be brought in a U.S. court may be a non-self-executing treaty.

20.3. International human rights law treaties as non-self-executing

20.3.1. The Senate Foreign Relations Committee recommended that the United States, upon ratifying the ICCPR, attach a "declaration" to the treaty that provides that provisions of the treaty are non-self-executing. A declaration is merely a statement addressed to other parties to the treaty as to the impact that the treaty may have domestically within the declaring state. A treaty declaration does not seek unilaterally to modify the terms of the treaty, as does a "reservation". A treaty declaration recommended by the Senate is not directed to the courts of the U.S. or to the Executive, as is a treaty "understanding".

20.3.2. A non-self-executing treaty provision is one for which an individual in the U.S. cannot rely when seeking to bring a claim in a U.S. court. However, the non-self-executing nature of a treaty may not prohibit a person from invoking a human rights treaty defensively in a U.S. court.

20.3.3. The U.S., in accepting its obligations under the ICCPR, noted that:

> "The rights guaranteed by the Covenant are similar to those guaranteed by the U.S. Constitution and the Bill of Rights.
>
> ....
>
> "The overwhelming majority of the provisions of the Covenant are compatible with existing U.S. domestic law."

Review Exhibit 61

"In general, the substantive provisions of the Covenant are consistent with the letter and spirit of the United States Constitution and laws, both state and federal. Consequently, the United States can accept the majority of the Covenant's obligations and undertakings without qualification." (S. Exec. Rep. No. 102-23, at 2-10 (1992), *reprinted in* 31 I.L.M. 645, 649-53).

20.3.4. The Restatement Third echoes:

"The International Covenant on Civil and Political Rights requires state parties to the Covenant to respect and ensure rights generally similar to those protected by the United States Constitution. Some provisions in the Covenant parallel express constitutional provisions". (§ 701, Reporters' Notes at note 8).

21. Customary international law as part of U.S. law

21.1. Customary international law has long been held to be a part of the law of the United States. The U.S. Supreme Court has ruled:

"International law, is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdictions, as often as questions of right depending upon it are duly presented for their determination." (*The Paquete Habana*, 175 U.S. 677, 700 (1900))

21.2. The Restatement Third provides:

"[I]nternational law and international agreements are the law of the United States." Restatement Third, § 111(1).

22. Territorial scope of treaty application – Treaties bind throughout territory.

22.1. Vienna Convention on the Law of Treaties – territorial scope of treaties. The Vienna Convention on the Law of Treaties provides:

"A treaty is binding upon each party in respect of its entire territory." (Vienna Convention, Art. 29).

22.2. Territorial reach of the International Covenant on Civil and Political Rights. The ICCPR provides that:

"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". (ICCPR, art 2(1).

Review Exhibit 61

22.3. **International Court of Justice opinion on territorial reach of the ICCPR.** The International Court of Justice recently concluded that a state must comply with the ICCPR even when that state acts outside of that state's own territory. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court stated that the ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory'. The ICJ focused on the object and purpose of the ICCPR, and on the Human Rights Committee findings that the ICCPR applies where a State exercises its jurisdiction on foreign territory.[9] Furthermore, the Court found that the ICCPR's *travaux préparatoires* (essentially the "legislative history" of the treaty) confirmed the Human Rights Committee's interpretation. The Court rejected Israel's argument that the ICCPR did not apply "beyond its own territory, notably in the West Bank and Gaza", and ruled that the ICCPR applies in the Occupied Palestinian Territory.

22.4. **The United States is obligated to comply with the ICCPR when the United States exercises jurisdiction outside its own territory (e.g., in Guantanamo Bay, Cuba).** The United States is legally obligated to comply with the ICCPR when the United States acts both within and outside of the territory of the United States. The United States is legally obligated to comply with all provisions of the ICCPR, at all times and in all respects, as regards all of its actions involving David M. Hicks and the prosecution of Mr. Hicks in the military commissions, including actions taken by the United States and those under United States control vis-à-vis Mr. Hicks before, during, and after Mr. Hicks' prosecution in the military commissions. The United States is exercising jurisdiction in Guantanamo Bay, Cuba. *See Rasul v. Bush; al Odah v. Bush*, 124 U.S. S. Ct. 2686 (2004) (U.S. exercising '"plenary and exclusive jurisdiction" or "exclusive jurisdiction and control" in Guantanamo; 28 U.S.C. §2241 confers on the District Court jurisdiction to hear detainees' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.) Furthermore, the United States may have taken action vis-à-vis Mr. Hicks in places other than Cuba where jurisdiction was exercised.

23. International law versus domestic U.S. law

23.1. **Domestic law cannot be invoked as a defense for breaching international law.** A basic rule of international law is that a state may not invoke its domestic law as a defense for or as justification for breaching that state's international obligations. The Vienna Convention on the Law of Treaties provides, in article 27:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

This is so in part because domestic law (in the U.S. and elsewhere) must be construed in a manner consistent with international law. And, in essence international law trumps domestic law.

23.2. **Executive Orders do not excuse international obligations.** Thus, neither the government nor the military commissions may justify a breach of a treaty, of customary international law norm, or of a general principle of law on the ground that the United States has

[9] *See* Case No. 52/79, *López Burgos* v. *Uruguay*; Case No. 56/79, *Lilian Celiberti de Casariego* v. *Uruguay*; Case No. 106/81, *Montero* v. *Uruguay*.

issued an Executive Order that may conflict with the international law norm. International law remains the law of the land.

I. International instruments that are not traditional sources of international law

24. Resolutions, declarations, standards, and principles as non-treaty international instruments.

24.1. Promulgation of international instruments. Inter-governmental organizations such as the United Nations promulgate various types of international instruments that reflect agreement among states on international law issues, including in the area of international humanitarian law, international human rights law, and international criminal law and procedure. If such international instruments take the form of treaties, then the instruments bind parties who consent to be bound thereto. Treaties are known as "hard law", and fully bind all states that are party to the particular treaties. If an international instrument does not take treaty form, generally it would not have the same binding force as a treaty, and would be considered "soft law", which would have moral authority that is persuasive, but not have legally binding authority.

24.2. Soft law. Soft law instruments might incorporate some customary international law norms, in which case states would be bound by the principles contained in the instruments not because the instruments bind (because they are soft law, and do not bind), but because the principles themselves have the force of binding law as customary international law. In these cases, the principle in question essentially has two existences: (a) as a binding norm of customary international law; and (b) as a norm that happens to be codified in a soft law international instrument.

24.3. Principles in soft law documents may rise to customary law status or may constitute general principles of law. Many if not most of the principles contained in these instruments are binding on states, including the United States, because those principles have risen either to the level of customary international law or those principles have risen to the level of general principles of law. Furthermore, these instruments are relevant as persuasive, moral authority though they may not be binding. Soft law instruments may interpret or elaborate upon existing treaties or rules of customary international law or general principles of law, or develop new standards, particularly in emerging international law areas.

24.4. Soft law as political and moral authority. Though these instruments are not legally binding in and of themselves, they have political and moral authority that guide individuals, courts and tribunals, and governments on the applicable rules of international human rights law. *See, e.g.,* Jeffrey Addicott & Andrew Warner, *Promoting the Rule of Law and Human Rights, Military Review,* August 1994, at n. 6 ("Although the Helsinki Accords are not legally binding, they imparted political and moral authority that became a rallying cry for individuals".)

24.5. Examples of soft law instruments, some of which codify or otherwise contain customary international law norms or general principles of law. As mentioned above, some soft law international instruments codify or otherwise contain customary international law norms or general principles of law. Customary international law norms and the general principles of law contained in soft law instruments operate parallel to the soft law instruments, and bind states even

if those states have not subscribed to the soft law instruments themselves. These soft law instruments may be in the area of international human rights law, international humanitarian law, or international criminal law. Following are examples of soft law international instruments, some of which codify or otherwise contain customary international law norms or general principles of law:

24.5.1. *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, annex 1, E.S.C. Res. 663C, 24 U.N. ESCOR Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), amended by E.S.C. Res. 2076, 62 U.N. ESCOR Supp. No. 1 at 35, U.N. Doc. E/5988 (1977)

24.5.2. *The Code of Conduct for Law Enforcement Officials* (1978) (G.A. res. 34/169, annex 34 U.N.GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979);

24.5.3. *The Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1982).

24.5.4. *Basic Principles on the Role of Lawyers*, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 Aug. to 7 Sept. 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990);

24.5.5. *Guidelines on the Role of Prosecutors*, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 Aug. to 7 Sept. 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990);

24.5.6. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, annex, 43 U.N. GAOR 43d Sess., Supp. No. 49, at 298, U.N. Doc. A/43/49 (1988)

24.5.7. *Basic Principles on the Independence of the Judiciary*, Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 Aug. to 6 Sept. 1985, U.N. Doc. A/ CONF.121/22/Rev.1 at 59 (1985)

J. International human rights law

25. International human rights law – defined

25.1. **Definition.** International human rights law, which is based in treaty, customary international law, and general principles of law, is the branch of public international law that defines norms in place to protect individuals and groups from breaches of basic dignity, respect, and humanity. These protections are afforded to all persons without regard for the identity of the victims or the abuse perpetrators, and irrespective of where in the world the victim or perpetrator might be located. International human rights law obligates individuals, groups and states to respect the physical and mental integrity of all persons. International human rights law must be abided by at all times in all places by all individuals, groups and states. International human rights

law is fully in force during times of peace and during times of war. The existence of armed conflict is not a defense to breach of international human rights law.

25.2. Birth of international human rights law. Modern day international human rights law was born in the era immediately following World War II, when pre-existing human rights norms were incorporated into positive international instruments and heralded as inviolable by the international community of nations. The United Nations Charter proclaims that a principal purpose of the UN is the promotion and protection of human rights, in response to the gross human rights violations that had occurred leading up to and during the War.[10] Shortly thereafter, in 1948, the Universal Declaration of Human Rights[11] (UDHR) was promulgated by the United Nations as the first major positive law international instrument that enumerated human rights belonging to all human beings, irrespective of the identities of the persons, their nationality or location, and irrespective of the identity of the alleged abuse perpetrators. The UDHR delineated a common standard of human rights and fundamental freedoms for all. Because the UDHR was issued as a "declaration" and not as a "treaty", and hence was not binding as an international instrument, the United Nations codified UDHR rights into two principle treaties, the one most relevant to the right to a fair trial being the International Covenant on Civil and Political Rights (1966).[12] The UN Charter, the UDHR, and the ICCPR are international instruments that affirm the principle that everyone is entitled to the enjoyment of human rights protections, whether in time of peace or war.[13]

26. International Human rights law and United States law: The Restatement Third.

26.1. The Restatement Third on The Foreign Relations Law of the United States, article 701 provides that human rights protections flow from treaties, customary international law, and general principles of law, as follows:

> "A state is obligated to respect the human rights of persons subject to its jurisdiction
>
> (a) that it has undertaken to respect by international agreement;
>
> (b) that states generally are bound to respect as a matter of customary international law (§ 702); and
>
> (c) that it is required to respect under general principles of law common to the major legal systems of the world."

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[10] *See* UN Charter, Preamble (1945).

[11] GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (1948). Available at <http://www.unhchr.ch/udhr/lang/eng.htm>.

[12] The other principle treaty enshrining UDHR rights is the *International Covenant on Economic, Social and Cultural Rights* (1966), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 3 January 1976). Available at <http://www.unhchr.ch/html/menu3/b/a_cescr.htm>. The U.S. has signed but not yet ratified the Economic Covenant. The UDHR, the ICCPR (and its Protocols), and the Economic Covenant are commonly referred to as the *International Bill of Human Rights*.

[13] *See*, 'Fact Sheet No 13, International Humanitarian Law and Human Rights' (1991), available at <http://www.unhchr.ch/html/menu6/2/fs13.htm>.

27. **Prolonged arbitrary detention, as treaty norm and customary international law norm, bind the United States – Writing of Professor Addicott.** Associate Professor of Law Jeffrey Addicott explains that the treaty norms and customary international law norms that prohibit "prolonged arbitrary detention" are "binding on all nation-states", including the United States of America. Professor Addicott writes as follows:

> "The term 'human rights' is commonly meant to include so-called first and second-generation human rights. Through treaty and customary international law, first generation human rights are binding on all nation-states. See *Restatement (Third) of the Foreign Relations Law of the United States 702* (1987). The Customary International Law of Human Rights lists these first generation human rights as: (1) genocide, (2) slavery or slave trade, (3) the murder, or causing the disappearance of, individuals, (4) torture or other cruel, inhumane or degrading treatment or punishment, (5) prolonged arbitrary detention, (6) systematic racial discrimination, and (7) a consistent pattern of committing gross violations of internationally recognized human rights." (Jeffrey Addicott, *Legal And Policy Implications For A New Era: The War On Terror*, 4 The Scholar: St. Mary's Law Review On Minority Issues 209 (2002), note 14).

28. **Right to a fair and public trial are legally binding on the United States – Writing of Professor Addicott.** Associate Professor of Law Jeffrey Addicott also explains that the right to a "fair and public trial" is in a category of rights that "are legally binding only on those nation-states that have obligated themselves through treaty," and within the rights that "are the functional equivalents of democratic values found in the U.S. Constitution." (Jeffrey Addicott, *Legal And Policy Implications For A New Era: The War On Terror*, 4 The Scholar: St. Mary's Law Review On Minority Issues 209 (2002), note 14. (*citing* Frank Newman & David Weissbrodt, INTERNATIONAL HUMAN RIGHTS (1991)).

Professor Addicott writes:

> Second generation human rights are legally binding only on those nation-states that have obligated themselves through treaty. Second generation human rights speak to political and civil freedoms such as the freedom of religion, peaceful assembly, privacy, association, fair and public trial, open participation in government, movement, etc. Second generation human rights are the functional equivalents of democratic values found in the U.S. Constitution. See generally Frank Newman & David Weissbrodt, International Human Rights (1991). Jeffrey Addicott, *Legal And Policy Implications For A New Era: The War On Terror*, 4 The Scholar: St. Mary's Law Review On Minority Issues 209 (2002), note 14. (*citing* Frank Newman & David Weissbrodt, INTERNATIONAL HUMAN RIGHTS (1991))

29. **United States promotes protection of human rights, including the prohibition against prolonged arbitrary detention – Writing of Professor Addicott.** Associate Professor of Law Addicott has further contended that, as regards the promotion of human rights:

"[The Army JAG Corps] concern exceeds the minimally accepted standards for human rights established by customary international law. International law prohibits genocide, slavery, murder or disappearance, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination or any activity which demonstrates a consistent pattern of gross violation of internationally recognized human rights. The United States has traditionally promoted by treaty, declaration and action the fullest possible range of meaningful human rights. These rights include freedom of religion, freedom of association, freedoms of speech and all of those principles indicative of a truly democratic society." (Jeffrey Addicott & Andrew Warner, Promoting the Rule of Law and Human Rights, Military Review, August 1994, at 38).

30. U.S. Executive Order re-affirming compliance with international human rights law in U.S. Law – Binding nature of international human rights law treaties in the U.S.

30.1. U.S. Executive Order requiring Executive Branch (including the Military Branches), to comply with the ICCPR. In 1998, the U.S. President issued Executive Order 13,107 which directs all persons in the Executive Branch to comply with the International Covenant on Civil and Political Rights, the Convention against Torture, and the International Convention on the Elimination of All Forms of Racial Discrimination. The Executive Order provides (at 68,991) that it shall apply to "other relevant treaties concerned with protection and promotion of human rights to which the United States is now or may become a party in the future."

Furthermore, the Executive Order provides:

"By the authority vested in me as President by the Constitution and the laws of the United States of America, and bearing in mind the obligations of the United States pursuant to the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and other relevant treaties concerned with the protection and promotion of human rights to which the United States is now or may become a party in the future, it is hereby ordered as follows:

"Section 1. Implementation of Human Rights Obligations.

(a) 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 CAT, and the CERD.

"(b) It shall also be the policy and practice of the Government of the United States to promote respect for international human rights, both in our relationships with all other countries and by working with and strengthening

the various international mechanisms for the promotion of human rights, including, inter alia, those of the United Nations, the International Labor Organization, and the Organization of American States.

"Section 2. Responsibility of Executive Departments and Agencies. (a) All executive departments and agencies (as defined in 5 U.S.C. 101-105, including boards and commissions, and hereinafter referred to collectively as "agency" or "agencies") shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully.... ."

30.2. Executive Order requiring ICCPR compliance applies to the Department of Defense, to "the military departments", and to all commissions, including the military commissions. Executive Order 13,107 applies to all civilian and military employees of the United States included in §§ 101 – 105 of Title 5 of the U.S. Code. Section 102 of 5 U.S.C. defines "the military department" as the Department of the Army, the Department of the Navy, and the Department of the Air Force. (5 U.S.C. § 102). Pursuant to 5 U.S.C. § 101, the Executive Departments of the United States include the Department of Defense. Thus, each person involved with the military commissions who is working on behalf of the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, or any other governmental agency (including the Department of Justice, the Department of State, etc) is bound to comply fully with the International Covenant on Civil and Political Rights, and with all other international human rights law treaties to which the United States is a party.

31. U.S. condemnation of use of military commissions, prolonged arbitrary detention & denial of a fair trial in many overseas countries. The United States government has condemned practices in many other countries where prolonged arbitrary detention exists. Records of this condemnation appear, for example, in Human Rights Reports that are submitted by the Department of State to Congress each year as part of the process in which the U.S. determines whether to grant military, economic or other assistance to foreign countries, the idea being that the U.S. will not (or should not) grant aid to countries that reach certain levels of breach of internationally recognized human rights.

31.1. U.S. condemnation of military commissions and other abuses in Sudan (2003). The United States condemned military tribunals in the Sudan for various reasons, including that:

"The authorities did not ensure due process in . . . military courts.

. . .

Military trials, which sometimes were secret and brief, did not provide procedural safeguards." (Department of State, Human Rights Reports 2003, Report on Sudan)" (http://www.state.gov/g/drl/rls/hrrpt/2003/27753.htm) (visited 25 October 2004)

Review Exhibit 61

31.2. **U.S. condemnation of military commissions and other abuses Abuses in Cuba (2003).** In the 2003 Cuba Human Rights Report, in a section entitled "Denial of Fair Public Trial", the United States condemned military tribunals in Cuba for various reasons, including that:

> "The law and trial practices did not meet international standards for fair public trials."

Further, in a section entitled "Arbitrary Arrest, Detention, or Exile," the 2003 Cuba Human Rights Report

> The authorities routinely engaged in arbitrary arrest and detention . . . subjecting [detainees] to interrogations, threats, and degrading treatment and unsanitary conditions for hours or days at a time. Police frequently lacked warrants when carrying out arrests or issued warrants themselves at the time of arrest....Detainees often were not informed of the charges against them." (http://www.state.gov/g/drl/rls/hrrpt/2003/27893.htm)

31.3. **U.S. condemnation of military commissions and other abuses in Cuba (2002, 2001, 2000, 1999).** In a series of recent U.S. Human Rights Reports for Cuba, in a section entitled "Denial of Fair Public Trial", the United States has routinely condemned military tribunals in Cuba for various reasons, including on the grounds that "[t]he law and trial practices did not meet international standards for fair public trials." For example, see the following references from the 2002, 2001, 2000 and 1999 State Department Human Rights Reports for Cuba:

- *United States Department of State Human Rights Report for 2002* (In Cuba, "The law and trial practices did not meet international standards for fair public trials.) (http://www.state.gov/g/drl/rls/hrrpt/2002/18327.htm)
- *United States Department of State Human Rights Report for 2001* (In Cuba, "The law and trial practices do not meet international standards for fair public trials.") (http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8333.htm)
- *United States Department of State Human Rights Report for 2000* (In Cuba, "The law and trial practices do not meet international standards for fair public trials.") (http://www.state.gov/g/drl/rls/hrrpt/2000/wha/751.htm)
- *United States Department of State Human Rights Report for 1999* (In Cuba, "The law and trial practices do not meet international standards for fair public trials.") (http://www.state.gov/g/drl/rls/hrrpt/1999/382.htm)

31.4. **U.S. condemnation of military commissions and other abuses in Peru (1999).** The United States condemned military tribunals in Peru for various reasons, including that:

> "Proceedings in these military courts--and those for terrorism in civilian courts--do not meet internationally accepted standards of openness, fairness, and due process. Military courts hold treason trials in secret, although such

secrecy is not legally required. Defense attorneys in treason trials are not permitted adequate access to the files containing the State's evidence against their clients, nor are they allowed to question police or military witnesses either before or during the trial. Some military judges have sentenced defendants without even having notified their lawyers that the trials had begun". Department of State, Human Rights Reports 1999, Report on Peru) http://www.state.gov/g/drl/rls/hrrpt/1999/398.htm) (visited 25 October 2004)

31.5. **U.S. condemnation of military commissions and other abuses in Peru (2003).** The United States condemned military tribunals in Peru for various reasons, including that:

> "In June 1999, the Inter-American Court of Human Rights ruled against the Government in the case of four Chileans convicted of treason by a military tribunal and sentenced to life in prison. The Court found that the military had denied the defendants due process rights and ruled that a civilian court should have had jurisdiction. In May 2001, the Supreme Council of the Military Court invalidated an earlier military court decision against providing new trials and ordered new, civilian trials for the four Chileans". (Department of State, Human Rights Reports 2003, Report on Peru) http://www.state.gov/g/drl/rls/hrrpt/2003/27916.htm) (visited 25 October 2004)

31.6. **U.S. condemnation of military commissions and other abuses in Nigeria (1999).** The United States condemned military tribunals in Nigeria for various reasons, including that:

> "The decisions of the tribunals were exempt from judicial review." (Department of State, Human Rights Reports 1999, Report on Nigeria) (http://www.state.gov/g/drl/rls/hrrpt/1999/265.htm) (visited 25 October 2004)

Further:

> "In May the Government repealed the State Security (Detention of Persons) Decree of 1984 (Decree 2), which had allowed prolonged arbitrary detention without charge; however, police and security forces continued to use arbitrary arrest and detention, and prolonged pretrial detention remains a problem." (http://www.state.gov/g/drl/rls/hrrpt/1999/265.htm) (Department of State, Human Rights Reports 1999, Report on Nigeria)(visited 25 October 2004)

31.7. **U.S. condemnation of military commissions and other abuses in Burundi (2003).** The United States condemned military tribunals in Burundi for various reasons, including that:

> "Arbitrary arrest and detention, and lengthy pretrial detention were problems, and there were reports of incommunicado detention. The court system did not ensure due process or provide citizens with fair trials." (http://www.state.gov/g/drl/rls/hrrpt/2003/27715.htm) (Department of State, Human Rights Reports 2003, Report on Burundi)(visited 25 October 2004)

Review Exhibit 61

31.8. **U.S. condemnation of military commissions and other abuses in Egypt (1999).** The United States condemned military tribunals in Egypt for various reasons, including that:

> "However, the military courts do not ensure civilian defendants due process before an independent tribunal. While military judges are lawyers, they are also military officers appointed by the Minister of Defense and subject to military discipline. They are not as independent or as qualified as civilian judges in applying the civilian Penal Code. There is no appellate process for verdicts issued by military courts; instead, verdicts are subject to a review by other military judges and confirmation by the President, who in practice usually delegates the review function to a senior military officer. Defense attorneys have complained that they have not been given sufficient time to prepare defenses and that judges tend to rush cases involving a large number of defendants." (http://www.state.gov/g/drl/rls/hrrpt/1999/408.htm) (Department of State, Human Rights Reports 1999, Report on Egypt)(visited 25 October 2004)

31.9. **U.S. condemnation of military commissions and other abuses in Egypt (2003).** The United States condemned military tribunals in Egypt for various reasons, including that:

> "Military verdicts were subject to a review by other military judges and confirmation by the President, who in practice usually delegated the review function to a senior military officer. Defense attorneys claimed that they were not given sufficient time to prepare defenses and that judges tended to rush cases involving a large number of defendants."
> (http://www.state.gov/g/drl/rls/hrrpt/2003/27926.htm) (Department of State, Human Rights Reports 2003, Report on Egypt)(visited 25 October 2004)

31.10. **U.S. condemnation of military commissions and other abuses in Congo (2001).** The United States condemned military tribunals in the Congo for various reasons, including that:

> "Military courts, which are headed by a military judge and apply military law inherited from Belgium, try military and civilian defendants as directed by the Government, and tried nearly all cases during the year. There is no appeals process in the military courts".
> (http://www.state.gov/g/drl/rls/hrrpt/2001/af/8322.htm) (Department of State, Human Rights Reports 2001, Report on Congo)(visited 25 October 2004)

31.11. **U.S. condemnation of military commissions and other abuses in Israel and the Occupied Territories (2002).** The United States condemned tribunals in Israel and the Occupied Territories for various reasons, including that:

As regards the Israeli government:

> "[p]rolonged detention, limits on due process, and infringements on privacy rights remained problems."

Review Exhibit 61

As regards the Palestinian Authority (PA):

> "[t]he PA courts were inefficient, lacked staff and resources, and often did not ensure fair and expeditious trials. The PA executive and security services frequently failed to carry out court decisions and otherwise inhibited judicial independence. The lack of judicial independence and the lack of rule of law in the PA lead to continuing problems of torture, extrajudicial killings, and arbitrary detention." (http://www.state.gov/g/drl/rls/hrrpt/2002/18278.htm) (Department of State, Human Rights Reports 2002, Report on Israel and the Occupied Territories)(visited 25 October 2004)

K. The International Covenant on Civil and Political Rights

32. Pursuant to article 40 of the ICCPR, a committee of experts, known as the United Nations Human Rights Committee, was established to oversee implementation of the ICCPR in the states parties and to monitor states parties' compliance with the terms of the treaty. The roles of the Human Rights Committee include issuing periodic reports on whether particular states parties are effectively implementing the treaty provisions, issuing "general comments" that generally explain how the Committee interprets terms contained in the treaty, and performing other tasks related to the promotion and protection of human rights under the ICCPR. General Comments of the Human Rights Committee are considered by states parties to the ICCPR to be authoritative statements of the Committee on interpretation of ICCPR substantive terms. The expert from the United States who currently sits on the United Nations Human Rights Committee is Professor Ruth Wedgewood.

L. Derogation from international human rights law and international humanitarian law norms

33. The Restatement Third recognizes that in some instances, a state may derogate from affording rights. But, any power of a state to derogate is limited. The Restatement Third Reporters' Notes provide that:

> "Not all human rights norms are *jus cogens*, but those in clauses (a) to (f) have that quality. It has been suggested that a human rights norm cannot be deemed *jus cogens* if it is subject to derogation in time of public emergency; see, for example, Art. 4 of the Covenant on Civil and Political Rights, § 701, Reporters' Note 6. Nonderogability in emergency and *jus cogens* are different principles, responding to different concerns, and they are not necessarily congruent. In any event, the rights recognized in clauses (a) to (f) of this section are not subject to derogation in emergency under the Covenant." (Restatement Third, Section 702, Reporters' Notes, n. 11)

33.1. Included among the *jus cogens*, non-derogable rights in clauses (a) to (f) of section 702 of the Restatement Third are the prohibition on prolonged arbitrary detention and the prohibition on torture or other cruel, inhuman, or degrading treatment or punishment. *See also Restatement Third, section 702, Comment n.*

Review Exhibit 61

33.2. Derogation under the International Covenant on Civil and Political Rights:

33.2.1. Article 4 of the ICCPR addresses derogation, as follows:

> "1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."
>
> "2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision."
>
> "3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."

33.3. On 24 July 2001, the United Nations Human Rights Committee, which oversees implementation of the ICCPR, promulgated *General Comment No. 29: States of Emergency (Article 4)*. This General Comment provides, in relevant part:

> "Paragraph 2: Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed... ."
>
> "Paragraph 3: ... . During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation."

Review Exhibit 61

"Paragraph 6. The fact that some of the provisions of the Covenant have been listed in article 4 (para. 2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists. The legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes both for States parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation."

"Paragraph 9. Furthermore, article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law. . . ."

"Paragraph 11: . . . . States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence."

"Paragraph 16: Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect 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. [footnote omitted]"

"Paragraph 17. In paragraph 3 of article 4, States parties, when they resort to their power of derogation under article 4, commit themselves to a regime of international notification. A State party availing itself of the right of derogation must immediately inform the other States

parties, through the United Nations Secretary-General, of the provisions it has derogated from and of the reasons for such measures. Such notification is essential not only for the discharge of the Committee's functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant. In view of the summary character of many of the notifications received in the past, the Committee emphasizes that the notification by States parties should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law. Additional notifications are required if the State party subsequently takes further measures under article 4, for instance by extending the duration of a state of emergency.... ."

M. International humanitarian law ("IHL" or the "Law of War" or the "Law of Armed Conflict" or "LOAC")

34. **International humanitarian law ("IHL")** – which is also known as the "law of armed conflict" (LOAC) or the "law of war" – is the subset of public international law that recognizes a sense of humanity in armed conflict. International humanitarian law places limits on the means and method of conducting war, and defines which individuals and under what circumstances they should be protected during armed conflict.[14] International humanitarian law is a set of rules, based on treaties and customary international law, which seek to limit the gruesome effects of armed conflict. International humanitarian law protects civilians and persons who are no longer participating in the hostilities (e.g., hors de combat or POWs), and restricts the means and methods of warfare. International humanitarian law applies only in times of armed conflict, unlike international human rights law, which applies at all times. International humanitarian law does not deal with issues surrounding the legality of the use of force, such issues being governed by, for example, other treaties such as the United Nations Charter, and other customary international law sources such as the right of self-defense.

34.1. **Full and fair trial under international humanitarian law.** International humanitarian law provides that persons alleged to have committed offences during an armed conflict are to be fully afforded a fair trial and be afforded fundamental judicial guarantees.

34.2. **Roots of international humanitarian law codification.** Universal codification of International humanitarian law began in the 19th century. International humanitarian law balances humanitarian concerns and military requirements of states. Much of contemporary International humanitarian law is codified in the four Geneva Conventions of 1949, which have been

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[14] *See* 'What is International Humanitarian Law?' (2004), available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57JNXM/$FILE/What_is_IHL.pdf?OpenElement>.

supplemented by two further agreements, the Additional Protocols of 1977.[15] Many provisions of International humanitarian law are now accepted as customary international law, and are therefore binding on all states, regardless of whether they are parties to the individual treaties.

34.3. **Application of international humanitarian law.** International humanitarian law only applies to armed conflict; it does not cover isolated acts of violence. The law applies only once a conflict has begun. International humanitarian law distinguishes between international and non-international armed conflict. International armed conflicts are those in which at least two States are involved. They are subject to a wide range of rules, including the four Geneva Conventions and Additional Protocol I. Non-international armed conflicts are dealt with by article 3 common to all Four Geneva Conventions of 1949 and Protocol II. Common article 3 provides that persons not participating in the hostilities or who are no longer participating must be treated in all circumstances with humanity and without discrimination. Common article 3 also calls for judgments to be pronounced by regularly constituted courts that provide all judicial guarantees.

34.4. **Rights under international humanitarian law.** International humanitarian law protects those who do not take part in the fighting (such as civilians), and those who have ceased to take part (such as prisoners of war or persons hors de combat). These categories enjoy certain legal guarantees. For instance, it is forbidden to kill or wound an enemy who has surrendered. Detailed rules govern detention conditions for prisoners of war, and the manner in which civilians must be treated when under the authority of an enemy power. These rules include the right to food, shelter and medical care, and the right to exchange messages with family. Furthermore, Additional Protocol I provides extensive legal protection to those individuals who participate in hostilities but are not considered prisoners of war. It provides "fundamental guarantees", including a fair trial.

35. Relationship between international humanitarian law and international human rights law

35.1. **Law of war v. law of peace.** International humanitarian law has been rightly known as the "law of war" or the "law of armed conflict". The label assigned to international human rights law as "the law of peace" is only partly correct, since international human rights law operates not only in times of peace, but also in times of war. On the other hand, international humanitarian law operates only in times of war. Individuals do not lose their international human rights law protections simply because of the existence of armed conflict. International humanitarian law governs the manner in which the means and methods of warfare are limited to protect humanity during armed conflict, ensuring that, for example, civilians are not injured, combatants who drop their arms are protected, etc. Though international human rights law generally protects individuals from states' actions that would breach the mind and body of individuals during times of peace, international human rights law also operates during times of war. In times of peace and in times of armed conflict, international human rights law operates to ensure that all persons are fully afforded human dignity.

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[15] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (Additional Protocol I); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (Additional Protocol II). Available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>.

35.2. **Complementary.** International humanitarian law and international human rights law complement each other. They are based on common principles of humanity and respect for the integrity of bodies and minds of human beings. They are interrelated, and are not mutually exclusive in operation. They both involve rights and duties of individuals, states, and other entities. Their sources are similar (treaty, customary international law, and general principles of law).

35.3. **Conflict between international human rights law and international humanitarian law.** International jurisprudence suggests that if a conflict exists between international humanitarian law and international human rights law, then international human rights law should be looked to in the first instance. However, the relevant *lex specialis* of international humanitarian law, if an armed conflict exists, should also be considered. The Inter-American Commission on Human Rights recently ruled on the issue of the applicability of international human rights law and international humanitarian law in times of armed conflict. The ruling supports the notion that international human rights law and international humanitarian law both apply. The Commission ruled, in 2002, as regards precautionary measures in the case of the persons detained at Guantanamo:

> "[W]hile its specific mandate is to secure the observance of international human rights protections in the Hemisphere, this Commission has in the past looked to and applied definitional standards and relevant rules of international humanitarian law in interpreting the American Declaration and other Inter-American human rights instruments in situations of armed conflict."
>
> "In taking this approach, the Commission has drawn upon certain basic principles that inform the interrelationship between international human rights and humanitarian law. It is well-recognized that international human rights law applies at all times, in peacetime and in situations of armed conflict. In contrast, international humanitarian law generally does not apply in peacetime and its principal purpose is to place restraints on the conduct of warfare in order to limit or contain the damaging effects of hostilities and to protect the victims of armed conflict, including civilians and combatants who have laid down their arms or have been placed hors de combat. Further, in situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another, sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity. In certain circumstances, however, the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law, including the jurisprudence of this Commission, dictates that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis*." (Inter-American Commission on Human Rights, *Pertinent Parts of Decision on Request for Precautionary Measures: Detainees At Guantanamo Bay, Cuba*, 12 March 2002) (a copy of this document is available at: www.photius.com/rogue_nations/guantanamo.html) (last visited 28 October 2004).

35.4. Human Rights Committee – General Comment No. 31 to the ICCPR.

35.4.1. The Human Rights Committee, in General Comment No. 31, addressed the relationship between international human rights law and international humanitarian law during times of armed conflict. The Committee concluded that international human rights law continues to apply even in times of armed conflict. However, the Committee noted that specific rules of international human rights law "may be especially relevant for the purposes of the interpretation of Covenant rights". Thus, the Committee does not call for a suspension of international human rights law norms during armed conflict. The Committee provides that international humanitarian law may be consulted in the interpretation of Covenant rights. The Committee noted:

> "As implied in general comment No. 29, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive. (ccpr/C/21/Rev.1/Add.13, para 11)".

35.5. Furthermore, the International Court of Justice also had occasion to address the relationship between international human rights law and international humanitarian law during times of armed conflict. The ICJ noted:

> "[T]he protection of the [ICCPR] does not cease in times of war, except by operation of Article 4 [of the ICCPR] whereby certain provisions may be derogated from in a time of national emergency". (*Legality of the Threat of Use of Nuclear Weapons*, 1996, ICJ 226, para 25 (ICJ Advisory Opinion, 8 July 1996))

35.5.1. In sum, international human rights law applies even in the face of armed conflict.

N. Arbitrary Detention

35.6. United States Arbitrary detention obligations under treaty law, customary international law, and general principles of law. Under international and domestic law, the United States is obligated to ensure that no person is subject to arbitrary detention of any sort. The U.S. possesses these obligations under treaty law, customary international law, and general principles of law in the areas of international human rights law, international humanitarian law, and international criminal law. Armed conflict is no justification for breaching any person's right to be free from arbitrary detention.

35.6.1. ICCPR prohibits arbitrary detention and prolonged arbitrary detention. The prohibition against prolonged arbitrary detention can be found in article 9(1) of the ICCPR, which guarantees the right to liberty and security of person, including a prohibition on arbitrary arrest or detention.

35.6.2. **Customary international law prohibits arbitrary detention and prolonged arbitrary detention.** The prohibition against arbitrary detention also arises in customary international law, as the prohibition easily satisfies the state practice and opinio juris prongs of the customary international law test.

35.6.3. **State practice prong satisfied – arbitrary detention.** Regarding state practice, the prohibition against arbitrary detention exists in the constitutions and other laws of many states (including the United States), and is in place within numerous international human rights law instruments, many of which the United States has signed only, or signed and ratified. *See, e.g.*, M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke Journal of Comparative and International Law 235 (1993). Many examples of these rights can be found within the United States. For example, the right to be free from arbitrary detention is incorporated into the Fourth Amendment to the United States Constitution (prohibition of unreasonable seizures). The right to be free from arbitrary detention is incorporated into the following international instruments. ICCPR, article 9; the European Convention on Human Rights, article 5; American Convention on Human Rights, article 7(3); and the African Charter of Human and People's Rights, articles 6-7. The right to be free from arbitrary detention is also incorporated into numerous soft law international instruments.

35.6.4. **Opinio juris prong satisfied – arbitrary detention.** As regards opinio juris, states around the globe subscribe to the prohibition against arbitrary detention because of a sense of legal obligation.

35.6.5. **The United States must comply with customary international law norms codified in Article 75 of Additional Protocol I to the Geneva Conventions.** Finally, as regards customary international law, the United States is bound to comply with the detention-related and other rights provided for under customary international law as codified in Article 75 of the Additional Protocol I to the Geneva Conventions.

35.6.6. **Arbitrary detention and prolonged arbitrary detention prohibited during times of peace and times of war.** The right to be free from arbitrary detention protects persons during times of peace and during times of war. That is, states are not permitted to derogate from their obligation to ensure that persons are not arbitrarily detained, even if a state of emergency exists. The Human Rights Committee has stated that:

> "States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence." General Comment No. 29, State of Emergency, CCPR/C/21/Rev.1/Add.11 (31 August 2001) (*See, supra,* discussing relationship between international human rights law and international humanitarian law.)

O. The right to a fair trial

36. What is the right to a fair trial?

36.1. **Fair trial rights.** A fair trial prevents the unlawful and arbitrary deprivation by the State of the human rights of an individual charged with a crime (e.g. the right to liberty). The right to a fair trial is guaranteed by treaties, customary international law, and general principles of law in the areas of international human rights law, international humanitarian law, and international criminal law.

36.2. **Fair trial rights under the ICCPR, article 14 and under other areas of international law.** Though a particularly relevant statement of the right to a fair trial is found in article 14 of the ICCPR, related rights are found throughout the ICCPR. During an armed conflict, the right to a fair trial is guaranteed by international humanitarian law as well as by international human rights law.

37. Importance of a fair trial in the military commissions

37.1. **Fair trial rights – Nuremberg.** Mr. Justice Robert H. Jackson, who was the Chief Prosecutor in the Nuremberg Trials that judged the major war criminals following World War II, stressed the importance of trials of this nature being full and fair. In his opening statement to the International Military Tribunal on 21 November 1945, he stated:

> "Before I discuss the particulars of evidence, some general considerations which may affect the credit of this trial in the eyes of the world should be candidly faced. There is a dramatic disparity between the circumstances of the accusers and the accused that might discredit our work if we should falter in even minor matters, in being fair and temperate . . . . We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspiration to do justice." (reprinted in II TRIAL OF THE MAJOR WAR CRIMINAL BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946, *Second Day, Wednesday, 21 November 1945, Part 04, Morning Session,* at page 101(published at Nuremberg, 1947)).

38. Fair trial rights in international human rights law and international humanitarian law

38.1. **The United States is bound to comply with international human rights law and international humanitarian law.** The United States is bound by two distinct yet overlapping bodies of international law that enumerate fair trial protections for David M. Hicks and the other the detainees at Guantanamo Bay: (i) international human rights law; and (ii) international humanitarian law. These two areas of international law are similar in that sources of each area can be found in treaties and customary international law. One significant distinction between the two areas is that international humanitarian law applies to protect the rights of individuals in situations of international and non-international armed conflict only, whereas international human rights law

Review Exhibit 61

Page _____ Of _____

protects individual during both war and peacetime. International humanitarian law and international human rights law are complementary. Where the two spheres overlap, they will not be mutually exclusive. Rather, the most favorable protection available will apply.[16]

39. The right to a fair trial for detainees at Guantanamo Bay

39.1. All humans have the right to a fair trial. All human beings, irrespective of who they or the nature of their alleged crimes, have the right to a fair trial. The right to a fair trial on a criminal charge begins to run at the date that State activities 'substantially affect the situation of the person concerned'.[17] Irrespective of how the accused David M. Hicks might be classified, he retains the right to a fair trial under international human rights law, international humanitarian law, international criminal law, general U.S. law, and the law of the military commissions.

39.2. Fair trial under the ICCPR and under the customary international law codified in Additional Protocol I of the Geneva Conventions. The principal international law sources that serve as benchmarks for a fair trial are:

(a) the ICCPR; and

(b) customary international law codified in article 75 of Additional Protocol I.

39.3. Fair trial rights in times of peace and in times of war. The ICCPR would generally apply to the right to a fair trial in times of peace, but would also be relevant in times of armed conflict. The customary international law rules codified in article 75 of the Additional Protocol I would apply in times of armed conflict.

40. The International Covenant on Civil and Political Rights (ICCPR)

40.1. The ICCPR binds the United States. The ICCPR legally binds the United States because the United States ratified this treaty on 8 June 1992.

40.2. Executive Order re-affirming U.S. obligations to comply with ICCPR. As mentioned above, the United States has re-affirmed its commitment to comply with its obligations to respect the rights of individuals under the International Covenant on Civil and Political Rights. The Executive Order of 1998 provided that "[i]t shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and

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[16] *See* Douglas Cassell & Bridget Arimond, *Violations of International Human Rights and Humanitarian Law Arising From Proposed Trials before United States Military Commissions* at 9, 15, (unpublished paper) (17 June 2004). International humanitarian law treaties confirm the applicability of the "more favorable provision" rule which benefits the accused. *Id.* For example, Additional Protocol I, article 75, provides that trials should be conducted "in accordance with the applicable rules of international law" and that "no provision of [article 75] may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law", including protection resulting from another treaty. In the case of *United States v. David M. Hicks,* the "applicable rules of international law" referred to in Article 75 would direct the tribunal to the rules of international human rights law. Thus, Mr. Hicks should be afforded a full and fair trial in line with international human rights law.

[17] Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (1993), at 244.

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 Executive Order continues that it "[a]ll executive departments and agencies [including military commissions] shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully".

40.3. **ICCPR fair trial rights – Generally.** The ICCPR extensively details the right to a fair trial, covering protections from pre-arrest to trial to appeal and beyond. Though many ICCPR fair trial rights are found in article 14, other ICCPR articles provide for rights that are also relevant to a fair trial. Among these other articles are article 9 (which provides for rights related to arrest, detention, and liberty and security of the person in general), article 10 (which provides for treating detained persons with humanity and with respect for the inherent dignity of the human person), article 15 (which prohibits, *inter alia*, ex post facto criminal laws), etc.

40.4. **ICCPR fair trial rights – Enumerated.** Rights guaranteed by the ICCPR include:

40.4.1. the right to liberty and security of person, including a prohibition on arbitrary arrest or detention (ICCPR, art 9(1));

40.4.2. the right to be informed of reasons for his arrest and detention (ICCPR, art 9(2));

40.4.3. the right to be informed of the details of any charges brought, and to be brought promptly before a court (ICCPR, art 9(3) & (4));

40.4.4. the right to proceedings to determine the lawfulness of detention (ICCPR, art 9(3));

40.4.5. a prohibition on torture or cruel, inhuman or degrading treatment or punishment during detention, and the right be treated with humanity and with respect for the inherent dignity of the human person (ICCPR, arts 7, 9(1); 10(1));

40.4.6. the right to equality before the courts and tribunals, and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law (ICCPR, art 14(1));

40.4.7. the right to a be presumed innocent until proved guilty according to law (ICCPR, art 14(2));

40.4.8. the right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him (ICCPR, art 14(3)(a));

40.4.9. the right to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing (ICCPR, art 14(3)(b));

40.4.10. the right to be tried without undue delay (ICCPR, art 14(3)(c));

40.4.11. the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; the right to be informed, if he does not have

legal assistance, of this right; and the right to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it (ICCPR, art 14(3)(d));

40.4.12. 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 (ICCPR, art 14(3)(e));

40.4.13. the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court (ICCPR, art 14(3)(f));

40.4.14. the right not to be compelled to testify against himself or to confess guilt (ICCPR, art 14(3)(g));

40.4.15. the right to review of a conviction and sentence by a higher tribunal according to law (ICCPR, art 14(5)); and

40.4.16. a prohibition on retroactive application of criminal laws (ICCPR, art 4(c)).

40.5. **ICCPR rights as minimum guarantees.** ICCPR rights are minimum guarantees to be afforded to all persons. The right to a fair trial is a substantive right that requires more than lip service. It requires that the government take positive action to ensure that the right to a fair trial is fully accorded to the accused. When determining whether fair trial rights have been provided fully, one must ensure that the principle of "equality of arms" is respected. Equality of arms requires that both the defense and the prosecution are to be treated in a manner that ensures their procedurally equal positions during all aspects of all criminal proceedings.

40.6. **Human Rights Committee – fair trial rights non-derogable.** The Human Rights Committee, the expert body set up by the ICCPR to monitor that treaty's implementation, notes that the right to a fair trial is non-derogable, even during states of emergency. The Human Rights Committee stated "the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency." (*General Comment No. 29*: "States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance . . . through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.")

40.7. **No reservation or attempted derogation on ICCPR fair trial rights.** The United States did not attach a reservation to the fair trial rights embodied in the ICCPR when it ratified that treaty. There is no evidence that the United States has sought officially to derogate from ICCPR fair trial rights pursuant to the treaty.

40.8. **U.S. obligation to ensure a fair trial for David M. Hicks.** The United States is fully obligated to ensure that David M. Hicks receives a full and fair trial pursuant to the ICCPR.

41. Customary international law norms codified in article 75 of Additional Protocol I.

41.1. Relevance of Additional Protocol I to *United States v. David M. Hicks.* If the military commission finds the existence of an armed conflict, and that international humanitarian law is relevant to the disposition of *United States v. David M. Hicks*, then the fair trial provisions of Additional Protocol I of the Geneva Conventions would apply because of the nature of the armed conflict and occupation involving Afghanistan.

41.2. Additional Protocol I, article 1(3). Article 1(3) of Additional Protocol I provides that it "shall apply in the situations referred to in article 2 common to" the Geneva Conventions. Common article 2 provides that the Geneva Conventions "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties even if the state of war is not recognized by one of them... .The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance". Thus, article 75 of Additional Protocol I would have applied or would apply with respect to Afghanistan, either on the basis of the existence of an armed conflict, or due to partial occupation.[18]

41.3. U.S. obligations based on signing Protocol I. Because the United States signed the Additional Protocol I of the Geneva Conventions, the U.S. is bound not to take steps to defeat the object or purpose of that treaty. Full obligations affirmatively to comply with all Protocol I provisions as treaty law would only arise upon U.S. ratification of Protocol I. Protocol I, which applies in international armed conflicts, expands the categories of persons protected by the Geneva Conventions, and contains rules on the conduct of hostilities as they relate to civilians (proportionality, indiscriminate attacks against civilians and civilian objects, etc.).

41.4. Protocol I, Article 75 provisions as customary international law. Because the fair trial norms codified in Article 75 of Additional Protocol I of the Geneva Conventions have risen to the level of customary international law, these Article 75 fair trial norms bind the United States even though the United States has not yet ratified Additional Protocol I.

41.5. United States military officials conclude that article 75 of Protocol Additional I to Geneva Conventions has risen to the status of customary international law. In a 1986 memorandum to Mr. John H. McNeill, Assistant General Counsel (International), OSD, several high-ranking military officers concluded that article 75, entitled "Fundamental guarantees", has risen to the level of customary international law. They noted that "[w]e view the following provisions as already part of customary international law", and then listed numerous Protocol provisions, including "Fundamental guarantees: Article 75". Military officials who signed the memorandum are (i) W. Hays Parks, Chief, International Law Branch, DAJA-IA; (ii) LCDR Michael F. Lohr, JAGC, USN; NJAG, Code 10; (iii) Dennis Yoder, Lt. Colonel, USAF, AF/JACI; and (iv) William Anderson, HQ, USMA/JAR. Others who participated in the preparation of the memo included (i) Lt. Col. Burrus M. Carnahan, USAF; and (ii) CDR John C. W. Bennet, JAGC, USN. (*Memorandum to Mr. John H. McNeill, Assistant General Counsel (International), OSD,*

[18] The provisions contained in Additional Protocol I are considered to be customary international law. Thus, neither the United States nor Afghanistan needs to have ratified it to be considered bound by the norms contained in article 75.

responding to 26 March 1986 memorandum from Mr. McNeill asking "our views on which articles of the Protocol are currently recognized as customary international law").

41.6. **Others military personnel, international law experts, and military manual drafters conclude that article 75 of Protocol Additional I to Geneva Conventions has risen to the status of customary international law.** Other U.S. Government legal experts, leading human rights and humanitarian law experts, and military manuals of the United States have noted that the norms contained in article 75 of Additional Protocol I reflect customary international law.[19] In addition, the U.S. Army Judge Advocate General's School, International and Operational Law Department's *Operational Law Handbook* recognizes that the U.S. considers that norms contained in Protocol I, article 75 have risen to customary international law.[20] Again, customary international law norms bind all states without requiring that states expressly consent to be bound to the norms.

41.7. **Additional Protocol I, article 45, common article 2.** Article 45 of Additional Protocol I concerns protection of persons who have taken part in hostilities. Article 45(3) provides that:

> "Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth [Geneva] Convention shall have the right at all times to protection of Article 75 of this Protocol".

Thus, any person who may have taken part in the hostilities in Afghanistan and was captured by U.S. forces is entitled to the rights provided for in article 75.

41.8. **Article 3, Additional Protocol I.** Finally, article 3 of Additional Protocol I provides that persons whose final release, repatriation or re-establishment has not taken place by the general close of military operations or by termination of the occupation shall continue to benefit from the relevant provisions of Additional Protocol I and the Geneva Conventions until their final release, repatriation or re-establishment. Article 75 therefore attaches to, and is applicable to, individuals detained by U.S. forces, in whatever territory detained (making the Protocol apply extraterritorially to the conflict), even if general military operations have closed and even if occupation has not been terminated.

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[19] Douglas Cassell & Bridget Arimond, *Violations of International Human Rights and Humanitarian Law Arising From Proposed Trials before United States Military Commissions* 13, n. 85 and text accompanying note (unpublished paper) (17 June 2004) (*citing* T. Meron, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 64-65 (1989), *citing* Panel, *Customary Law and Additional Protocol I to the Geneva Conventions for the Protection of War Victims: Future Directions in Light of the US Decision Not to Ratify* (1987) 81 *American Society of International Law Proceedings* 26, 37. Also cited in Cassel & Arimond, n. 85 are: *The Sixth Annual American Red Cross--Washington College of Law Conference on International Humanitarian Law* (1987) 2 *American University Journal of International Law and Policy*, 415, 427; and David Scheffer, 'Remarks' (2002) 96 *American Society of International Law Proceedings*, 404, 406.

[20] Available at <http://www.cdmha.org/toolkit/cdmha-rltk/PUBLICATIONS/oplaw-ja97.pdf>. Cassel and Arimond note that editions of the manual more recent than 1997 do not repeat the proposition that article 75 norms have risen to the level of customary international law. *See* Douglas Cassell & Bridget Arimond, *Violations of International Human Rights and Humanitarian Law Arising From Proposed Trials before United States Military Commissions* 13 (unpublished paper) (17 June 2004). But, the authors observe that the more recent editions to not retract the notion. *Id.*

Review Exhibit 61

Page _____ Of _____

41.9. **Article 75, Additional Protocol I – Fair trial rights parallel ICCPR.** Additional Protocol I, Article 75 provides for extensive rights protections that parallel ICCPR safeguards and include:

41.9.1. the right to be treated humanely in all circumstances (article 75 (1));

41.9.2. an absolute prohibition of, at any time and in any place whatsoever, whether committed by civilian or by military agents, violence to the life, health, or physical or mental well-being of persons (article 75(2)(a) - (e));

41.9.3. a prohibition of torture of all kinds, whether physical or mental (article 75(2)(a)(ii));

41.9.4. a prohibition of corporal punishment (article 75(2)(a)(iii));

41.9.5. a prohibition of outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault (article 75(2)(b));

41.9.6. a prohibition of collective punishments (article 75(2)(d));

41.9.7. a prohibition of threats to commit torture, outrages upon personal dignity, in particular humiliating and degrading treatment and any form of indecent assault, and other prohibited behavior (article 75(2)(e));

41.9.8. the right to be informed promptly of the reasons why the persons were arrested, detained or interned for actions related to the armed conflict, and to be informed of the particulars of any offence alleged (article 75(3));

41.9.9. the right to be brought before an impartial and regularly constituted court, respecting the generally recognized principles of regular judicial procedure (article 75(4));

41.9.10. the right that the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him (article 75(4)(a));

41.9.11. the right that the procedure shall afford for an accused before and during trial all necessary rights and means of defence (article 75(4)(a));

41.9.12. the right to be presumed innocent until proved guilty according to law (article 75(4)(d));

41.9.13. a prohibition on the retroactive application of criminal law (article 75(4)(c));

41.9.14. the right to be tried in his presence (article 75(4)(e));

41.9.15. 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 (article 75(4)(g));

41.9.16. a prohibition on compelling a person to testify against himself or to confess guilt (article 75(4)(f));

41.9.17. the right of anyone prosecuted for an offence to have the judgment pronounced publicly (article 75(4)(i)); and

41.9.18. the right to be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised (article 75(4)(j)).

41.10. Obligations of the United States to ensure a full and fair trial for Mr. Hicks. The U.S. is fully obligated to ensure that David M. Hicks receives a full and fair trial pursuant to the customary international law norms codified in Article 75 of the Additional Protocol I to the Geneva Conventions.

P. Remedies for breach -- general – avenues of recourse

42. Remedies available under international law and domestic law for violations of the internationally recognized human rights and humanitarian rights of Mr. David M. Hicks. The remedies available for victims of breaches of international human rights law and international humanitarian law are many. In seeking to identify appropriate remedies that should be available for breaches of Mr. Hicks' rights under international human rights law and international humanitarian law, it is appropriate to consider the following: (a) the ICCPR; (b) the Restatement Third; and (c) *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*[21] (hereinafter "Basic Principles on Remedies and Reparation for Victims").

42.1. ICCPR Remedies. The ICCPR expressly provides for remedies for persons whose human rights are violated. Because the United States is a party to the ICCPR, the United States has an opportunity to ensure that David M. Hicks has a remedy available for him for any breach by the United States of any of his internationally recognized human rights as contained in the ICCPR. As regards remedies, article 3 of the ICCPR provides:

> "3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

[21] (E/CN.4/2000/62) (18 January 2000).Available at: http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/42bd1bd544910ae3802568a20060e21f?Opendocument (Visited 24 October 2004)

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted."

42.2. Remedies under Section 703 of the Restatement Third. The Restatement Third, section 703, provides for remedies for when a state breaches its international human rights law obligations. Section 703 provides:

> "(1) A state party to an international human rights agreement has, as against any other state party violating the agreement, the remedies generally available for violation of an international agreement, as well as any special remedies provided by the agreement.
>
> (2) Any state may pursue international remedies against any other state for a violation of the customary international law of human rights (§ 702).
>
> (3) An individual victim of a violation of a human rights agreement may pursue any remedy provided by that agreement or by other applicable international agreements."

42.3. Basic Principles on Remedies and Reparation for Victims. Relevant portions of the Basic Principles on Remedies for Victims:

"Article 4 Violations of international human rights and humanitarian law norms that constitute crimes under international law carry the duty to prosecute persons alleged to have committed these violations, to punish perpetrators adjudged to have committed these violations, and to cooperate with and assist States and appropriate international judicial organs in the investigation and prosecution of these violations."

"Article 8 A person is 'a victim' where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights. A 'victim' may also be a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental, or economic harm."

"Article 9 A person's status as 'a victim' should not depend on any relationship that may exist or may have existed between the victim and the perpetrator, or

*whether the perpetrator of the violation has been identified, apprehended, prosecuted, or convicted."

"Article 11 Remedies for violations of international human rights and humanitarian law include the victim's right to:

(a) Access justice;

(b) Reparation for harm suffered; and

(c) Access the factual information concerning the violations."

"Article 21 In accordance with their domestic law and international obligations, and taking account of individual circumstances, States should provide victims of violations of international human rights and humanitarian law the following forms of reparation: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition."

"Article 22 Restitution should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property."

"Article 23 Compensation should be provided for any economically assessable damage resulting from violations of international human rights and humanitarian law, such as:

(a) Physical or mental harm, including pain, suffering and emotional distress;

(b) Lost opportunities, including education;

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Harm to reputation or dignity; and

(e) Costs required for legal or expert assistance, medicines and medical services, and psychological and social services."

"Article 24 Rehabilitation should include medical and psychological care as well as legal and social services."

"Article 25 Satisfaction and guarantees of non-repetition should include, where applicable, any or all of the following:

(a) Cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further

unnecessary harm or threaten the safety of the victim, witnesses, or others;

(c) The search for the bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities;

(d) An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim;

(e) Apology, including public acknowledgement of the facts and acceptance of responsibility;

(f) Judicial or administrative sanctions against persons responsible for the violations;

(g) Commemorations and tributes to the victims;

(h) Inclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels;

(i) Preventing the recurrence of violations by such means as:

(i) Ensuring effective civilian control of military and security forces;

(ii) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces;

(iii) Strengthening the independence of the judiciary;

(iv) Protecting persons in the legal, media and other related professions and human rights defenders;

(v) Conducting and strengthening, on a priority and continued basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials;

(vi) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as the staff of economic enterprises;

(vii) Creating mechanisms for monitoring conflict resolution and preventive intervention.

43. **Specific remedies that might be available include**. Specific remedies available in *United States v. David M. Hicks* could include dismissal of the charges against Mr. Hicks, compensation, exclusion of evidence from use against him at trial, and restoration of his liberty. Furthermore, criminal investigations and prosecutions could be commenced against individuals who participated in the perpetration of international human rights law, international humanitarian law, or international criminal law violations, including individuals responsible for failure to ensure that Mr. Hicks receives a full and fair trial under international human rights law, international humanitarian law, international criminal law, U.S. domestic law, and any other relevant law. Remedies should be made available for Mr. Hicks against all perpetrators, whether they are members of the military commission staff or are other government or civilian personnel involved with the proceedings at any stage.

44. **The United States and the military commissions have violated and continue to violate the rights of David M. Hicks under international human rights law, international humanitarian law right, international criminal law, and other relevant law.** The United States and the military commissions have not ensured that David M. Hicks has received all of the rights to which he is entitled under international human rights law, international humanitarian law right, and international criminal law. Thus, the United States and the military commissions have violated the rights of David M. Hicks. These violations arise under the ICCPR, under the customary international law of human rights, and under general principles of international human rights law. Furthermore, these violations arise under international humanitarian law, international criminal law, and other relevant law.

45. **Rights under the ICCPR violated.** The United States and the military commissions have violated and continue to violate rights of Mr. David M. Hicks under the ICCPR, including the following rights:

    45.1. the right to liberty and security of person, including a prohibition on arbitrary arrest or detention (ICCPR, art 9(1));

    45.2. the right to be informed of reasons for his arrest and detention (ICCPR, art 9(2));

    45.3. the right to be informed of the details of any charges brought, and to be brought promptly before a court (ICCPR, art 9(3) & (4);

    45.4. the right to proceedings to determine the lawfulness of detention (ICCPR, art 9(3));

    45.5. the prohibition on torture or cruel, inhuman or degrading treatment or punishment during detention, and the right be treated with humanity and with respect for the inherent dignity of the human person (ICCPR, arts 7, 9(1); 10(1));

    45.6. the right to equality before the courts and tribunals, and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law (ICCPR, art 14(1));

    45.7. the right to a be presumed innocent until proved guilty according to law (ICCPR, art 14(2));

    45.8. the right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him (ICCPR, art 14(3)(a));

45.9. the right to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing (ICCPR, art 14(3)(b));

45.10. the right to be tried without undue delay (ICCPR, art 14(3)(c));

45.11. the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; the right to be informed, if he does not have legal assistance, of this right; and the right to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it (ICCPR, art 14(3)(d));

45.12. 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 (ICCPR, art 14(3)(e));

45.13. the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court (ICCPR, art 14(3)(f));

45.14. the right not to be compelled to testify against himself or to confess guilt (ICCPR, art 14(3)(g));

45.15. the right to review of a conviction and sentence by a higher tribunal according to law (ICCPR, art 14(5)); and

45.16. prohibition on retroactive application of criminal laws (ICCPR, art 4(c)).

46. Rights under customary international humanitarian law and general principles of international humanitarian law violated. The United States and the military commissions have violated and continue to violate the following rights of Mr. David M. Hicks under customary international law of human rights and general principles of law of human rights: the right to a fair trial, the right to be free from arbitrary detention, and other rights.

47. U.S. and military commissions breach rights of David M. Hicks under international humanitarian law. If the tribunal concludes that international humanitarian law is relevant to this case, then the United States and the military commissions have breached the rights of David M. Hicks under international humanitarian law under, for example, the customary international humanitarian law norms codified in Article 75 of the Additional Protocol 1 to the Geneva Conventions. Mr. Hicks is owed a remedy by and through the United States and the military commissions for rights violations under international humanitarian law, including for violations of rights codified in article 75 the Additional Protocol I, including:

47.1. the right to be treated humanely in all circumstances (article 75 (1));

47.2. an absolute prohibition of, at any time and in any place whatsoever, whether committed by civilian or by military agents, violence to the life, health, or physical or mental well-being of persons (article 75(2)(a) - (e));

47.3. a prohibition of torture of all kinds, whether physical or mental (article 75(2)(a)(ii));

47.4. a prohibition of outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault (article 75(2)(b));

47.5. a prohibition of collective punishments (article 75(2)(a)(d));

47.6. a prohibition of threats to commit torture, outrages upon personal dignity, in particular humiliating and degrading treatment and any form of indecent assault, and other prohibited behavior (article 75(2)(e));

47.7. the right to be informed promptly of the reasons why the persons were arrested, detained or interned for actions related to the armed conflict, and to be informed of the particulars of any offence alleged (article 75(3));

47.8. the right to be brought before an impartial and regularly constituted court, respecting the generally recognized principles of regular judicial procedure (article 75(4));

47.9. the right that the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him;

47.10. the right that the procedure shall afford for an accused before and during trial all necessary rights and means of defence (article 75(4)(a));

47.11. the right to be presumed innocent until proved guilty according to law (article 75(4)(d));

47.12. the right to be tried in his presence (article 75(4)(e));

47.13. 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 (article 75(4)(g));

47.14. a prohibition on compelling a person to testify against himself or to confess guilt (article 75(4)(f));

47.15. the right of anyone prosecuted for an offence to have the judgment pronounced publicly (article 75(4)(i)); and

47.16. the right to be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised (article 75(4)(j)).

48. **Rights under international criminal law violated.** The United States and the military commissions have violated and continue to violate the rights of Mr. David M. Hicks under international criminal law. Mr. Hicks is owed a remedy by and through the United States and the military commissions for rights violations under international criminal law.

Review Exhibit 61

Q. Conclusion

49. The United States is legally obligated to afford David M. Hicks and the other Guantanamo Bay detainees their internationally recognized right to a fair trial, their right not to be arbitrarily detained, and all other rights due under binding international human rights law treaties (including the ICCPR), under binding customary international human rights law, and under binding general principles of international human rights law. Furthermore, should the military commissions determine that international humanitarian law is relevant, the United States is legally obligated to afford David M. Hicks and the other Guantanamo Bay detainees fair trial and other rights, customary and otherwise, under binding international humanitarian law as codified in Article 75 of Additional Protocol I of the Geneva Conventions and otherwise. In addition, the United States and the military commissions are legally obligated to provide David M. Hicks with all of his rights under international criminal law, under United States law, and under all other relevant law.

50. The United States, acting through the military commissions and/or otherwise, must ensure that David M. Hicks and the other Guantanamo Bay detainees are afforded all of their rights owed to them, and owed to the international community, under international human rights law, international humanitarian law, international criminal law, United States law, and all other relevant law.

51. The United States and the military commissions have breached the rights of David M. Hicks under international human rights law, international humanitarian law, international criminal law, United States law, and other relevant law. The United States and the military commissions owe Mr. David M. Hicks, the other Guantanamo Bay detainees, and the international community a remedy for these breaches of law.

Signed: 

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Dated: 28 October 2004

Review Exhibit 61

UNITED STATES MILITARY COMMISSION
(GUANTANAMO BAY)
ESTABLISHED PURSUANT TO EXECUTIVE ORDER OF PRESIDENT ON NOVEMBER 13, 2001

UNITED STATES OF AMERICA	)
v.	) AFFIDAVIT OF EXPERT OPINION FOR THE DEFENSE- M. CHERIF BASSIOUNI Distinguished Research Professor of Law, President, International Human Rights Law Institute, DePaul University College of Law
DAVID MATTHEW HICKS	)

INTRODUCTION

1. As of October 7, 2001, the United States became involved in an international armed conflict against the Taliban regime of Afghanistan. This regime was in control of Afghanistan and was recognized by a few states as the *de jure* government of Afghanistan.[1] The Taliban regime was at that time involved in a belligerency with the Northern Alliance, an armed conflict to which the general laws of war applied even before U.S. entry into Afghanistan in October 2001.[2] Foreign nationals volunteered to serve with the Taliban armed forces. During the conflict which lasted several months, and thereafter, the U.S. captured and arrested combatants and non-combatants in Afghanistan and transferred them to a U.S. detention facility on a U.S. Military Base in Guantanamo, Cuba.[3]

2. Although the Administration maintained that those detained at Guantanamo do not have a right to a judicial determination of their status and cases, on June 28, 2004, the United States Supreme Court ruled that foreign nationals held at the U.S. Military base known as Guantanamo Bay have the right to challenge their detentions in U.S. Federal Courts.[4] This ruling confirms that the Executive Order is subject to the Constitution of the United States, irrespective of the legal basis on which the President issued it.

3. The Executive Order is subject to the Constitution, even though the Executive Order applies to activities taking place at a U.S. military base

[1] These states are Pakistan, Saudi Arabia, and the United Arab Emirates. *See* Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond,* 35 CORNELL INT'L L. J. 533-39 n.19, 543-44 (2002).
[2] *See, e.g.,* Paust, *supra* note 1, at 539 n.19.
[3] *See, e.g., Situation of Human Rights in Afghanistan: Report of the Independent Expert of the Commission on Human Rights,* A/59/150 (Sept. 1, 2004).
[4] *Rasul et al. v. Bush,* 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004).

Review Exhibit 62

located outside the U.S.[5] Consequently, the Executive Order, and its interpretation, have to be in conformity with the United States Constitution. Since the Constitution excludes *ex post facto* legislation,[6] if the definition of crimes contained in Military Instruction No. 2 (which was adopted pursuant to the provisions of the November 13, 2001 Executive Order) is *ex post facto*, it would be unconstitutional.

4. The President, irrespective of the legal basis on which he relied on issuing the November 13, 2001 Executive Order, must conform with what the Constitution refers to as "law of nations" in Article 1, Section 8 (which includes treaties, customary international law and "general principles of law"), as well as applicable treaties of the U.S., both of which are part of U.S. law.[7]

5. The Commission has the inherent power to interpret the Military Instructions and it has the inherent power, and duty to interpret the Instructions in a manner that is consistent with the Constitution. A threshold issue to be determined by the Commission is whether the contents of the Military Instructions are compatible with the Constitution and if they are intended to embody international law, which is binding upon the United States, whether international law is properly reflected in said Military Instructions.

QUESTIONS PRESENTED

6. This expert opinion addressees the Military Instructions compatibility with international law with respect to "conspiracy" and "common criminal enterprise." It is the expert testimony of this witness that neither

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[5] *Rasul*, 124 S.Ct. 2692-9. *See also* Jordan J. Paust, *Post-9/11 Overaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1355, 1347-49 (2004).

[6] *See* Constitution of the U.S., Art. I, Sec. 9(3); Art. I, Sec. 10. *See also, Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798); *Miller v. Florida*, 482 U.S. 423 (1987). For the same principle under international law *see* International Covenant on Civil and Political Rights, Dec. 19,1966, 993 U.N.T.S. 3 (*entered into force* Jan.3,1976), at Art. 15. The U.S. has ratified this treaty. *See also*, M. Cherif Bassiouni, *Symposium: Reflection on the Ratification of The International Covenant on Civil and Political Rights By The United States Senate*, 42 DePaul L. Rev. 1169, 1170 (1993) and other articles included in the Symposium issue.

[7] *See* Constitution of the U.S., Art. VI, Sec. 2; Art. I, Sec. 8; *See also, Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (Pa. 1792)(reaffirming the supremacy of the customary law of nations within the United States); Henfield's Case, 11 Cas. 1099, 1101 (C.C.D.Pa. 1793) (No. 6,360)(Chief Justice Jay noting that the laws of the United States, includes the customary "law of nations" and that such law was directly incorporable for the purpose of criminal sanctions). For other cases, opinions, and recognitions that customary international law is "law of the United States," *See, e.g.* Jordan Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J.INT'L L. 301 (1999) and sources cited therein. *See also*, JORDAN PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 67-70, 169-73 (2d ed. 2003).

Review Exhibit 62

Page 2 of 13

"conspiracy" as a general crime, nor "common criminal enterprise" exist in international criminal law.[8]

OPINION

7. Any legislation, or quasi-legislation enacted in the U.S., which is intended to embody or reflect international law must necessarily rely on the sources of international law as stated in Article 38 of the International Court of Justice Statute ("ICJ Statute"), made part of the United Nations Charter ("UN Charter").[9] The United States is a signatory to the UN Charter and a member state of the United Nations and is, therefore, bound by the content of Article 38. Furthermore, it should be noted that Article VI, Section 2 of the Constitution states that "all treaties" are part of the supreme law of the land.[10] The Commission is, therefore, Constitutionally bound to interpret the Military Instructions accordingly.

   Consequently, both the Constitution and the treaty obligations of the U.S. under the Charter of the United Nations require it to comply with the recognized sources of international law contained in Article 38 which are:

   1. International Conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   2. international custom, as evidence of a general practice accepted as law;
   3. the general principles of law recognized by civilized nations;
   4. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law;[11]

   Because this treaty is part of the "supreme law of the land," the Commission is Constitutionally-bound to apply it in connection with the Military Instructions' interpretation, just as it is bound to uphold the Constitution's *ex post facto* prohibition.[12]

8. It is well-established under "General Principles of law" as well as under treaty-law, that any criminal legislation must conform to the "principles of legality."[13] The U.S. Constitution and international law contain the same prohibition against *ex post facto* legislation.[14] Moreover, the "principles of legality" under both the Constitution and international law, require that criminal legislation has to be specific and cannot be vague and

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[8] M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW (2003)(hereinafter "BASSIOUNI, INTRODUCTION"), at Ch. III.
[9] *See* Statute of the International Court of Justice, June 26, 1945, 59 Stat.1055, 3 BEVANS 1179, at Art. 38.
[10] Constitution of the United States, Art. VI, Sec.2.
[11] *See* Statute of the International Court of Justice, *supra* note 9, at Art. 38.
[12] *See* Constitution of the U.S., Art. I, Sec. 9(3); Art. I, Sec. 10. *See also, Calder v. Bull,* 3 U.S. (3 Dall.) 386 (1798); *Miller v. Florida,* 482 U.S. 423 (1987).
[13] *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (2nd rev. ed., 1999)(hereinafter "BASSIOUNI, CRIMES AGAINST HUMANITY").
[14] *See supra* footnote 6.

Review Exhibit 62
Page 3 Of 13

ambiguous.[15] The Military Instruction on "conspiracy" and "common criminal enterprise" are in violation of the Constitutional and international prohibition against *ex post facto* laws and they are vague and ambiguous and, as such, the y violate the "principles of legality" because they are vague and ambiguous.

9. Of all 281 Conventions applicable to 28 categories of international crimes,[16] only five Conventions contain a reference to conspiracy. They are: the Genocide Convention[17], the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotic Substances[18], the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs (as amended)[19], the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime[20], the International Convention on the Suppression and Punishment of the Crime of Apartheid[21], and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.[22] No other international Convention recognizes conspiracy as an international crime. In these Conventions the reference to conspiracy relates to that crime only. Thus, it is unquestionably mistaken to extrapolate from these Conventions the existence of a general crime of conspiracy in international criminal law.

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[15] *See,e.g., Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926); *Rose v. Locke*, 423 U.S. 48 (1975); *Colten v. Kentucky*, 407 U.S. 104 (1972). These cases before the US Supreme Court were decided in the 5th and 14th Amendment grounds.

[16] *See* INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS (M. CHERIF BASSIOUNI, ED. 1997)(" BASSIOUNI, CONVENTIONS").

[17] See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. III(b), S. Exec. Doc. O, at 7 (1949), 78 U.N.T.S. 277, 280 (including "conspiracy to commit genocide" as a crime).

[18] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted Dec. 19, 1988, art. 3(1)(c)(iv), 28 I.L.M. 493 (1989) (including "conspiracy to commit as an offence); *See also,* Protocol Amending the Single Convention on Narcotic Drugs, 1961, Mar. 25, 1972, art. 14, 1976 Can. T.S. No. 48, 18 (amending art. 36(2)(a)(ii) to include "conspiracy to commit" narcotics offences as a crime).

[19] *See* Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, June 26, 1936, art 2(c), 198 L.N.T.S. 299, 309, amended by Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs Concluded at the Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925, and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936, Dec. 11, 1946, T.I.A.S. No. 1671, 12 U.N.T.S. 179 (requiring signatory states to make legislation providing for the severe punishment of conspiracy to traffic drugs).

[20] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, art. 6(1)(d), E.T.S. No. 141, 3 (requiring "each party to adopt legislation ... establishing conspiracy to commit laundering offences as an offence under domestic law").

[21] See International Convention on the Suppression and Punishment of the Crime of Apartheid, U.N. GAOR, 28th Sess., 2185th plen. Mtg., Annex, Supp. No. 30 at 76, art. III(a). U.N. Doc. A/9030 (1973) (assigning criminal responsibility for those who "[c]ommit, participate in, directly incite or conspire in the commission of the acts [of apartheid]").

[22] Supplementary Convention on the Abolition of Slavery, The Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, art. 6(1), T.I. A.S. 6418, 3206, 266 U.N.T.S. 3, 43 (making "being a party to conspiracy" to engage in slavery a punishable act);

10. The Charter of the International Military Tribunal at Nuremberg and the Statute of the International Military Tribunal for the Far East, included conspiracy to commit "crimes against peace" as a separate crime.[23] Thus conspiracy was limited to that crime and the IMT interpreted its Charter as excluding conspiracy to commit "war crimes" and "crimes against humanity." Consequently, no such charge (conspiracy) was brought in connection with these crimes. In addition, conspiracy (as a general crime) was not included as a separate crime in the "Nuremberg Principles" as they were drafted by the International Law Commission in 1950.[24]

11. Nothing in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) or International Criminal Tribunal for Rwanda (ICTR) establishes conspiracy as a general crime under international law. The jurisprudence of these tribunals applied the notion of conspiracy to the crime of genocide and that is because that convention specifically includes it.[25]

12. The existence of a general crime of conspiracy in some national laws is not enough to justify the assumption that such a crime exists in customary international law because it does not reflect a State's *opino juris* that such domestic crimes are also international crimes.[26] Moreover there is no practice of state's establishing conspiracy as a stand-alone crime in International Criminal Law.[27] Conspiracy as a separate crime exists in the common law systems, even though its interpretation and extant varies from state to state where the common law is followed. A survey of common law states that to have a general conspiracy crime undertaken reveals that only a few states have such an offense included in their criminal laws.[28] This means that of the 192 states of the world, 148 do not have the crime of conspiracy in their criminal laws. In addition, no state that criminalizes conspiracy extends it to an international crime, save for

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[23] The International Military Tribunal at Nuremberg was established by the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945; Charter of the International Military Tribunal, 50 Stat. 1544, 1546, 82 U.N.T.S. 279, 284 ("IMT Charter"); Charter of the International Military Tribunal for the Far East. Apr. 26, 1946, T.I.A.S. No. 1589, at 11, 4 Bevans 27 ("IMTFE Charter"). *See also,* WHITNEY HARRIS, TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG (1995).

[24] *See Principles of the Nuremberg Tribunal 1950, Report of the ILC (Principles of International Law Recognized in the Tribunal),* July 29, 1950, U.N. GAOR, 5th Sess., Supp. (No.12) 11, U.N. Doc. A/1316 (1950).

[25] *See supra* fn. 17.

[26] *See, e.g.,* ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971); Michael Akehurst, *Custom as A Source of International Law,* 47 BRIT. Y.B. INT'L L. 1 (1974); OPPENHEIM'S INTERNATIONAL LAW (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

[27] Customary international law requires both *opino juris* and the consistent practice of states. *Id.*

[28] The CIA World Factbook (December 2003), and as complied by nationmaster.com (available at http://www.nationmaster.com/graph-T/gov_leg_sys) lists 250 states and territories. Of these 250 states and territories, there are 192 independent states. Only 44 of these states that follow the common law have a general crime of conspiracy, which for the most part relate to specific crimes. In other words, conspiracy is treated as an inchoate crime. Therefore, there is no conspiracy in of itself, but conspiracy to commit a specific crime.

the treaty offenses mentioned above in paragraph nine (9). Moreover, no state deems that domestic criminal law, as reflecting a customary rule of international law. Thus, conspiracy cannot be considered a crime under customary international law.

13. As to the "general principles" of law[29], which could be a source of international criminal law subject to the principles of legality[30], in order for a general principle to exist it must be found, in accordance with the International Court of Justice's decision in the *Lotus* case[31], in all criminal justice systems of the world. According to this affiant, it would be more appropriate to identify the existence of a general principle in the majority of the laws of states which are part of the major families of legal systems. [32] In case of conspiracy it would be impossible to show that it exists as a crime other then in the domestic criminal laws of common law systems, and even in these systems, conspiracy is mostly limited to a specific crime. The civil law system, as well as the Germanic, Islamic, and the hybrid law systems do not contain the crime of conspiracy. Consequently, it cannot be said that the notion of conspiracy as a general or separate crime exists under "general principles of law."

14. CCE is not contained in any of the 281 conventions on international criminal law.[33] CCE is essentially found in U.S. law.[34] This affiant has found no other similar provision in any of the world criminal laws. It should be noted that there are some laws that have expanded the notion of individual criminal responsibility for belonging to a criminal group.[35] This concept finds support in international criminal law in the IMT's establishment of responsibility for belonging to the SS and SA during WWII.[36] But membership alone was not deemed a crime in its own right.

15. The jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) uniformly establishes that CCE is not a separate category of crimes, but rather a basis for criminal responsibility. The cases that have established this proposition are:

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[29] *See* M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law,* 11 MICH.J.INT'L L. 768-818 (1990)("Bassiouni, *General Principles*").
[30] *See* BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 13.
[31] *See* The Lotus Case (Fr. V. Turk.), 1927 P.C.I.J. (Ser.A) No.10, at 25.
[32] *See* Bassiouni, *General Principles*, *supra* note 29.
[33] BASSIOUNI, CONVENTIONS, *supra* note 16; BASSIOUNI, INTRODUCTION, *supra* note 8, at Ch. 3.
[34] *See* 21 U.S.C. 848 ("Continuing Criminal Enterprise")
[35] *See, e.g.,* Italian Code of Criminal Law, *Associazione per Delinquere,* Arts. 416-18, *Associazione Sovversiva,* Art. 270 and *Associazione per Delinquere di Stampo Mafioso*, Art. 416*bis*; the French Criminal Code Arts. 265-7, *Association de Malfaiteurs*.
[36] *See* BASSIOUNI, INTRODUCTION, *supra* note 8, at 82-4 (discussing the international criminal responsibility of groups and organizations).

Review Exhibit 62
Page 6 Of 13

- Prosecutor v. *Tadic*, Case No. IT-94-1-T, Trial Chamber II Judgment (May 7, 1997)[37] followed by Prosecutor v. *Tadic*, Case No. IT-94-1-A, (Appeals Chamber Judgment) (July 15, 1999)[38]
- The Prosecutor v. *Delacic et al.* Trial Judgment (Nov. 16, 1998) ("Celebici Trial Judgment");
- Prosecutor v. *Brdjanin & Talic*, Decision on Form of Further Amended indictment and Prosecution Application to Amend (June 26, 2001);
- Prosecutor v. *Kmojelac*, Trial Chamber Decision on Form of Second Amended Indictment (May 11, 2000), followed by Prosecutor v. *Krnojelac*, IT-97-25-T, Trial Chamber II Judgment (Mar. 15, 2002), followed by Prosecutor v. Krnojelac, IT-97-25-A, Judgment of the Appeals Chamber (September 17, 2003);
- Prosecutor v. *Furundzija*, Appeals Chamber Judgment (July 21, 2000);
- Prosecutor v. *Blaskic*, IT-95-14-T, Trial Chamber Judgment (March 3, 2000);
- Prosecutor v. *Krstic*, IT-98-33-T (Trial Chamber Judgment, Aug. 2, 2001) followed by Prosecutor v. *Krstic,* Judgment on Appeals, IT-98-33-A (April 19, 2004);
- Prosecutor v. *Kordic & Cerkez*, IT-95-14/2-T (Trial Chamber Judgment, Feb. 26, 2001);
- Prosecutor v. *Milutinovic et al.*, IT-99-37-AR72, Appeals Chamber Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, (May 21, 2003);
- Prosecutor v. *Vasiljevic,* Appeals Chamber Judgment, IT-98-32-A (February 25, 2004).

In all of these cases the Tribunal found that the accused had to commit a specific act which is part of the material element of one of the crimes within the jurisdiction of the Tribunal. In addition, all of the cases required proof of intent for the commission of the specific crime in question, and not only the overall intent of being part of the group, or sharing the goals and objectives of the group.

The basic case of which the Tribunal's jurisprudence on the issue of CCE was founded is the Appellate Chamber Judgment in *Prosecutor v. Tadic.* In that case, the Appeals Chamber identified the three categories of cases involving CCE form of responsibility as follows:

> First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called "concentration camp" cases, where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-

[37] Hereinafter "Tadic TC Judgment".
[38] Hereinafter "Tadic Appeals Judgment."

> treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy. With regard to the third category of cases, it is appropriate to apply the notion of "common purpose" only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further - individually and jointly - the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called "advertent recklessness" in some national legal systems).[39]

The Appellate Chamber then articulated the *actus reus* ("objective elements") of CCE mode of participation:

> i. *A plurality of persons.* They need not be organised in a military, political or administrative structure, as is clearly shown by the *Essen Lynching* and the *Kurt Goebell* cases.
>
> ii. *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.
>
> iii. *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose. [40]

With regards to the *mens rea* ("subjective elements") the Appellate Chamber held that "the *mens rea* element differs according to the category of common design under consideration."[41] It was held that:

> With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which, as noted above, is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*. [42]

This holding was followed by other Trial Chambers Judgment at the ICTY and was reaffirmed by the Appeals Chamber in Prosecutor v. *Milutinovic*

[39] *Tadic* Appeals Judgment, at para.220.
[40] *Tadic* Appeals Judgment, at para.227.
[41] *Tadic* Appeals Judgment, at para.228.
[42] *Tadic* Appeals Judgment, at para.228.

Review Exhibit 62
Page 8 **Of** 13

et al., Appeals Chamber Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise on May 21, 2003.[43]

As a result of the above, ICTY jurisprudence provides that:

a. CCE is a basis for individual criminal responsibility, but is not a crime in of itself;
b. An accused must be proven to have committed, in whole or in part, the material element of the crime charged and have the intent to commit the crime charged.
c. The accused cannot be charged with other crimes committed by other members of the group unless the act that the accused performed was in furtherance of other crimes committed by other members of the group and the accused had requisite intent.
d. Conspiracy applies only to the crime of genocide because the Convention on the Prevention and Punishment of the Crime of Genocide provides for conspiracy.

The jurisprudence of the Tribunal has also found that an accused can be charged with the crimes committed by an accomplice in keeping with prevailing practices of states in connection with vicarious criminal responsibility pertaining to "adding and abetting." Lastly the jurisprudence of the ICTR held that vicarious criminal responsibility arises in connection with solicitation and incitement.[44]

16. The notion of vicarious individual criminal responsibility exists in every legal system in the world, but its interpretation and application varies. In the estimated two-thirds of the world legal systems vicarious criminal responsibility exists only when the person having the prerequisite mental state (as defined by statute) commits an act which is deemed part of the material element of a particular crime. There is, however, no legal system that establishes vicarious criminal responsibility only on the basis of intent, without the commission of some part of the material element of a given offence. There is, therefore, a range between legal systems as to what is required to be proven as part of both the mental and material element required for the different forms of vicarious criminal responsibility. Once again it should be emphasized that no legal system establishes vicarious responsibility with the existence of mere intentionality or for being part of a group, without the commission by the accused of part of the material element contemplated by the crime carried out by other members of that group. The jurisprudence of the ICTY and ICTR, though uncertain as to whether it is in reliance on customary international law or general

[43] Prosecutor v. *Milutinovic et al.*, IT-99-37-AR72, Appeals Chamber Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, (May 21, 2003). *But see,* Sep. Opinion Hunt, at para.30 (noting that he is "not satisfied that [the Appeals Chamber] in *Tadic*...demonstrated a sufficiently firm basis for the recognition of these cases as a separate category" of CCE).
[44] *See, e.g.,* Prosecutor v. *Akayesu*, ICTR-96-4-T, Trial Chamber Judgment (Sept.2, 1998).

principles of international law, requires that the person that is part of the group sharing the same objectives and referred deemed part of the material element of the crime charged. It is in this respect that the Military Instruction and the Government's position are both confused and confusing, first because the link conspiracy and CCE (which has no basis in International criminal law) and second because they extrapolate the widest notion of vicarious responsibility under U.S. conspiracy law to international criminal law. without regard to the fact that there is no basis for such an extrapolation. Admittedly, this may be simply the result of poor draftsmanship and lack of comprehension of international criminal law and comparative criminal law. In this case it would be up to this Commission to properly interpret and apply the meanings of conspiracy (limited to specific treaty crimes) and CCE (unrelated to conspiracy, and merely indicative of a concept of vicarious criminal responsibility which requires the commission of an act or conduct related to the material element of a given crime charged against a member of that group).

CONCLUSION

a. Conspiracy and CCE do not exist as separate crimes in international criminal law.

b. The Military Instruction concerning the crimes of "conspiracy" and "CCE" are in violation of the Constitution's *ex post facto* prohibition and the Fifth and Fourteenth Amendments to the Constitution, on the grounds of vagueness and ambiguity.

c. The Military Instruction concerning the crime of "conspiracy" and "CCE" violate international law, in particular Article 15 of the International Covenant on Civil and Political Rights, which the U.S. ratified.

d. Conspiracy exists with respect to certain international crimes, as indicated in paragraph nine.

e. The Government's position on CCE, as supported by the jurisprudence of the ICTY and ICTR, is mistaken.

October 31, 2004
Chicago, Illinois

M. Cherif Bassiouni

Review Exhibit 62

Page 10 **Of** 13

UNITED STATES MILITARY COMMISSION
(GUANTANAMO BAY)
ESTABLISHED PURSUANT TO EXECUTIVE ORDER OF PRESIDENT ON NOVEMBER 13, 2001

UNITED STATES OF AMERICA v. BASSIOUNI DAVID MATTHEW HICKS	AFFIDAVIT OF PROF. M. CHERIF Distinguished Research Professor of Law and President, International Human Rights Law Institute, DePaul University College of Law

APPENDIX 1

Curriculum Vitae

M. CHERIF BASSIOUNI

- Distinguished Research Professor Law, DePaul University (since 1964), and President International Human Rights Law Institute (since 1990); President International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy (since 1988), Dean (1976-88); Honorary President, International Association of Penal Law, (President 1989-2004); Secretary General, (1974-1989); Non-resident Professor of Criminal Law, The University of Cairo (since 1996); Guest Scholar, Woodrow Wilson International Center for Scholars, Washington, D.C. (1972); Visiting Professor of Law, New York University Law School, (1971); Fulbright-Hays Professor of International Criminal Law, The University of Freiburg, Germany (1970). A frequent lecturer at universities in the U.S. and abroad.

- Author of 27 and editor of 44 books on International Criminal Law, Comparative Criminal Law, Human Rights, and U.S. Criminal Law; and author of 217 articles published in law journals and books in the U.S. and other countries. These publications were in Arabic, English, French, Italian and Spanish. Some of them have been cited by the International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia (ICTY), The International Criminal Tribunal for Rwanda (ICTR), the United States Supreme Court, as well as by several United States Appellate and Federal District Courts, and also by several State Supreme Courts.

Review Exhibit 62

- United Nations positions: Commission on Human Rights' Independent Expert on Human Rights in Afghanistan (2004-present); Chairman of the Drafting Committee of the 1998 United Nations Diplomatic Conference on the Establishment of an International Criminal Court; Vice-Chairman of the General Assembly's Preparatory Committee on the Establishment of an International Criminal Court (1996-98); Vice-Chairman of the General Assembly's Ad Hoc Committee on the Establishment of an International Criminal Court (1995); Chairman of the United Nations Commission of Experts Established Pursuant to Security Council 780 (1992) to Investigate Violations of International Humanitarian Law in the Former Yugoslavia (1993), and the Commission's Special Rapporteur on Gathering and Analysis of the Facts (1992-1993); Commission on Human Rights' Independent Expert on The Rights to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms (1998-2000); Consultant to the Sixth and Seventh U.N. Congress on Crime Prevention (1980-85); Consultant to the Committee on Southern African, Commission on Human Rights (1980-81), (Prepared a Draft Statute for the Creation of an International Criminal Court to prosecute *apartheid*); Co-chairman of the Committee of Experts which prepared the U.N. Convention on the Prevention and Suppression of Torture (1978); Co-chair of the Committee of Experts that drafted proposed U.N. Convention on Torture (1977); Honorary Vice-President to the Fifth Congress on Crime Prevention (1975);

- Consultant to the U.S. Departments of State and Justice on projects relating to international traffic in drugs (1973) and international control of terrorism (1975 and 1978-79); consultant to the Department of State on the defense of the U.S. hostages in Iran (1979-80).

- Among the distinctions and awards received are: Nomination to the Nobel Peace Price (1999); Special Award of the Council of Europe (1990); Defender of Democracy Award, Parliamentarians for Global Action (1998); The Adlai Stevenson Award of the United Nations Association (1993); the Saint Vincent DePaul Humanitarian Award (DePaul University 2000).

- Honorary degrees: Doctor of Law *honoris causa* (LL.D.), National University of Ireland, Galway (2001); Doctor of Law *honoris causa*, Niagara University (1997); Doctor of Law *honoris causa* (Docteur d'Etat en Droit), University of Pau, France (1986); Doctor of Law *honoris causa* (Dottore in Giurisprudenza), University of Torino, Italy (1981).

- Medals: Order of Military Valor, Egypt (1956); Order of Merit of the Republic, Italy, (Commendatore) (1976); Order of Merit of the Republic, Italy (Grand'Ufficiale) (1977); Order of Scientific Merit (First Class), Egypt (1984); Grand Cross Order of Merit of the Austrian Republic (Commander)

Review Exhibit 62

(1990); Order of Lincoln, Illinois, USA (2001); Legion d'Honneur (Officier), France (2003); Grand Cross of the Order of Merit, Federal Republic of Germany (Commander) (2003).

- Earned law degrees: LL.B. University of Cairo; J.D. Indiana University; LL.M. John Marshall Law School; S.J.D. George Washington University. Also studied law at Dijon University, France, and at the University of Geneva, Switzerland.

- Admitted to the practice of law in Illinois, Washington, D.C. and before the United States Supreme Court, the Second, Fifth, Seventh, Ninth and Eleventh Circuits and the United States Court of Military Appeals. Also admitted to practice before the Egyptian Supreme Court. Handled many cases of international dimensions, specializing in extradition and international cooperation in criminal matters. Coordinated major litigation involving multiple parties, including states, on matt/ers involving international law.

Review Exhibit 62

Page 13 of 13

AFFIDAVIT

I am **Michael N. Schmitt**, Professor of International Law and Director of the Program in Advanced Security Studies at the George C. Marshall European Center for Security Studies, a US-German educational institution sponsored jointly by the Department of Defense and German Ministry of Defense. A retired USAF Judge Advocate who has served on the faculties of the United States Air Force Academy and the United States Naval War College, my publications include over 60 articles and edited books, the vast majority dealing with international law, in particular the law of armed conflict. Professional affiliations include the Lieber Society of the American Society of International Law (Member, Executive Board), the International Law Association, and the International Society for Military Law and the Law of War. In 2002, I was elected a Member of the International Institute of Humanitarian Law, and I currently serve on the Steering Committee of Harvard's International Humanitarian Law Research Initiative and on the Board of Editors of the International Review of the Red Cross. I have been involved as an "International Expert" in numerous projects seeking to clarify the law of armed conflict. Currently, I am participating in such projects with regard to non-international armed conflict (Institute of Humanitarian Law), aerial warfare (Harvard), and participation by civilians in hostilities (International Committee of the Red Cross). My academic degrees include an LL.M from Yale Law School, a JD from the University of Texas, an MA in National Security and Strategic Studies from the Naval War College, and an MA and BA from Texas State University.

I have been asked to comment on law of armed conflict (a term synonymous with "law of war" and "humanitarian law") issues related to the case of Mr. David Matthews Hicks.

Sources of International Law

1. The accepted sources of international law are set forth in Article 38 of the Statute to the International Court of Justice:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law; [and]
c. the general principles of law recognized by civilized nations.[1]

As the law of armed conflict is a sub-category of international law, it is derived from such sources.

2. Conventions formally bind only parties thereto. However, certain provisions of various law of armed conflict conventions are characterized as also reflecting customary law, and are thereby binding even on non-Parties. For instance, the United States views much of the 1977 Additional Protocol I to the 1949 Geneva Conventions, to which it is

[1] Statute of the International Court of Justice, art. 38.1(a-c) [ICJ Statute].

Review Exhibit 63

Page 1 of 14

not a Party, as accurately restating the customary international law of armed conflict. Customary international law of armed conflict emerges from "the practice of military and naval forces" during armed conflict. "When such practice attains a degree of regularity and is accompanied by the general conviction among nations that behavior in conformity with the practice is obligatory, it can be said to have become a rule of customary law binding on all nations."[2]

3. War crimes (in international armed conflict) derive from either treaties or customary law (or both); they consist of "grave breaches of the Geneva Conventions of 12 August 1949" and "other serious violations of the law and customs applicable in international armed conflict, within the established framework of international law."[3] The application of the law of armed conflict is further informed by "general principles of law recognized by civilized nations."[4] For instance, Part 3 of the Statute of the International Criminal Court sets forth such general principles of criminal law as *nullum crimen sine lege*[5] and the accepted grounds for individual criminal responsibility.[6]

4. Article 38 goes on to note that "judicial decisions and the teachings of the most highly qualified publicists of the various nations" are "subsidiary means for the determination of rules of law."[7] Thus, in international law, judicial decisions are persuasive, not binding, authority used in identification and interpretation of law. The written works of publicists (scholars) are also referred to for the same purposes.

Commencement of an Armed Conflict

5. The law of armed conflict only applies during times of "armed conflict." This term has replaced "war" as the legal term of art referring to hostilities. Thus, phrases such as "state of war" are *descriptive* (factual), not *juridical* (legal), in nature.

6. There are two categories of armed conflicts, *international* and *non-international* (internal). Since different parts of the law of armed conflict apply to each, it is essential to distinguish between the two. For instance, the laws regarding detention of combatants during an international armed conflict contained in the Third Geneva Convention do not apply during a non-international armed conflict. On the contrary, human rights law governs detention much more prominently during such conflicts. In any event, as

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[2] United States Navy, The Commander's Handbook on the Law of Naval Operations (NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.1), October 1995, para. 5.41. The Handbook is the "law of war manual" for the United States Navy, Marine Corps, and Coast Guard.

[3] Statute of the International Criminal Court, art. 8.2(a-b).

[4] Statute of the International Court of Justice, art. 38(c). Such principles must be accepted by the community of nations. Thus, a principle of criminal culpability such as conspiracy would not be a general principle of law because it is not used in civil law countries (see discussion below).

[5] No crime without a law authorizing it. In other words, an individual may not be held criminally except for crimes over which the court has jurisdiction.

[6] Statute of the International Criminal Court, art. 25.

[7] ICJ Statute, art. 38.1(d)

Review Exhibit 63

Page 2 of 14

explained below, no armed conflict of either sort began in Afghanistan until October 7, 2001. Moreover, none of the specific offenses charged against Mr. Hicks appears, as such, in either the law of international armed conflict or the law of non-international armed conflict.

A. International Armed Conflict

7. International armed conflict requires a conflict between States (non-State actors can be involved, but there must be at least one State on either side). The widely accepted definition of war (which today is called an "international armed conflict" in international law) is that proposed in the classic treatise, *Oppenheim's International Law*: "War is a contention *between two or more States* through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases."[8] In the context of the "global war on terror," the most significant of the constituent elements comprising this definition of international armed conflict is that requiring conflict between two or more sovereign States. This requirement is well established in mainstream international law.[9]

8. The requirement that States be on either side of the battlefield is included in each of the five core instruments setting forth the law of international armed conflict – the four 1949 Geneva Conventions and the 1977 Protocol Additional I to those instruments. Article 2 common to each of the Geneva Conventions provides that they apply, aside from several provisions that specifically pertain in peacetime, "to all cases of declared war or of any other armed conflict *which may arise between two or more of the High Contracting Parties*, even if the state of war is not recognized by one of them." The 1977 Protocol Additional I, which like the Conventions pertains to international armed conflict, adopts the same "armed conflict" standard.[10]

9. The Official Commentaries to these instruments, although not an express source of law themselves, further confirm the prerequisite of State participation in hostilities before they can be characterized as an international armed conflict. Those on the Geneva Conventions define armed conflict as "[a]ny difference arising *between two States* and leading to the intervention of armed forces... even if one of the Parties denies the existence of a state of war."[11] Similarly, the Commentary to Additional Protocol I

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[8] OPPENHEIM, II INTERNATIONAL LAW 202 (Hersch Lauterpacht ed., 7th ed. 1952).

[9] Indeed, as Professor Yoram Dinstein has authoritatively commented, "[o]f the four ingredients in Oppenheim's definition of war, only the first can be accepted with no demur." YORAM DINSTEIN, WAR AGGRESSION AND SELF-DEFENSE 5 (3d ed. 2001).

[10] Article 1.

[11] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD 32-33 (Jean Pictet ed. 1952) [hereinafter GC I Commentary].

specifies that "humanitarian law… covers any dispute *between two States* involving the use of their armed forces."[12]

10. Case law is supportive. For instance, the International Criminal Tribunal for the Former Yugoslavia held in the *Tadic* case that an international armed conflict "exists whenever there is a resort to armed force *between States*."[13] The Appeals Chamber subsequently confirmed this position in its judgment: "It is indisputable that an armed conflict is international if it takes place between two or more States."[14] Finally, there is broad consensus among international law scholars that State involvement on both sides of a conflict is a *sine qua non* of international armed conflict This requirement certainly reflects customary international law.

11. Applying this law to the circumstances of this case, an international armed conflict only began on October 7, 2001, the date Coalition forces commenced military operations against Afghanistan. Those operations were legal as an exercise of the right of self-defense (see discussion below), a right that had existed before October 7th (and in my view well before that date given al Qaeda attacks against US targets stretching back nearly a decade). But it was only on October 7th that the law of armed conflict became operative because it was only then that the armed forces of one State engaged those of another.

12. In my opinion, the international armed conflict in Afghanistan became a *non-*international armed conflict (see below) no later than June 2002, when the Transitional Authority under President Hamid Karzai was created following conclusion of the Emergency Loya Jirga. The Security Council, including the United States, formally recognized the legitimacy of this government in Resolution 1419 of 26 June 2002.[15] Since there are no longer States on either side of the conflict, the continued hostilities in Afghanistan can no longer be characterized as an international armed conflict.

13. Sometimes, the concept of *international armed conflict* is confused with that of *self-defense*, an inherent right of States in international law, recognized in Article 51 of the

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[12] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds. 1987), at para. 62.

[13] ICTY, Appeals Chamber, (decision on the defence motions for interlocutory appeal on jurisdiction), *Tadic*, IT-94-1-AR72, para. 70.

[14] ICTY, Appeals Chamber, Judgment, *Tadic*, IT-94-1-A, para. 84.

[15] Arguably, the conflict became non-international during the period of the Afghan Interim Authority because the conflict had become internalized, with Coalition forces serving to assist the Interim Authority. See, e.g., UNSC Res. 1386 (December 2001) (regarding ISAF operations in Afghanistan and recognizing that "the responsibility for providing security and law and order throughout the country resides with the Afghans themselves"). See also UNSC Res. 1413 (May 2002) which also confirmed that the Afghan people bore responsibility for security in the country. But in any event, by June 2002, the conflict in Iraq had become internal.

United Nations Charter.[16] It is essential that the difference between the two be understood clearly. In the aftermath of the September 11 terrorist attacks, there is no question that the right of self-defense extends to armed attacks committed by non-State actors, such as terrorists.[17] That this is an accepted interpretation of Article 51 is evidenced by the many offers of collective defense (assistance to the United States in defending itself from terrorists) from individual States and from security organizations such as NATO, as well as a string of UN Security Council resolutions either directly citing the right of self-defense with regards to the attacks, or reaffirming earlier resolutions that did so.[18]

14. But one must be careful not to read too much into those acts and documents. They are relevant to the existence of the right to *self-defense*, not an *international armed conflict*. Similarly, the Authorization to use Military Force passed by Congress a week after the attacks was entirely consistent with the exercise by the United States of its right to *self-defense*; it has however, it does not establish the existence of an *international armed conflict* such that the law of armed conflict began to apply.[19] Suggestions to the contrary confuse these two very distinct legal concepts.

15. Of course, at times the concepts of self defense and international armed conflict are related. For instance, an armed attack by State A on State B clearly triggers the right to self-defense and, *because two States are involved*, the law of international armed conflict. Yet if a non-State actor mounts the attack, the law of armed conflict is *not* activated, even though the right to self-defense using military force matures. In such cases, other aspects of domestic and international law become operative (most notably, human rights law and the domestic criminal law of the victim State).

16. Finally, it has been suggested that certain statements by US government officials and other Coalition leaders constitute a "declaration of war" on al Qaeda. In some cases, a

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[16] "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." UN Charter, art. 51.

[17] Michael N. Schmitt, *Bellum Americanum Revisited: U.S. Security Strategy and the Jus ad Bellum*, 176 MILITARY LAW REVIEW 364-421 (2003), 16th Annual Waldemar A. Solf Lecture, U.S. Army Judge Advocate General's School.

[18] Most significantly, Resolution 1368 was issued the very day after the attacks. In preambular language, it specifically reaffirmed the "inherent right of self-defense as recognized by the Charter of the United Nations." Two weeks later, the Council did so again in Resolution 1373. Both resolutions came at a time when no one was pointing to the possibility that the attacks might have been the work of a State. Both were reaffirmed in multiple subsequent resolutions, including resolutions adopted after the Coalition operations began on October 7th.

[19] Authorization to Use Military Force, 115 Stat. 224.

"declaration of war" may indeed create a state of international armed conflict. None of the pronouncements made by President Bush or other Coalition leaders would qualify as such. This is because it is meaningless as a matter of law to "declare war" (technically international armed conflict) on an entity that cannot be the other Party in an international armed conflict. Hostilities with a non-State actor, absent related hostilities with a State, cannot trigger international armed conflict.

B. Non-international Armed Conflict

17. Non-international armed conflict is a legal term of art referring to armed conflicts that are internal in nature. The laws of non-international armed conflict (a component of the "law of armed conflict") are set forth in the Common Article 3 to the 1949 Geneva Conventions, the 1977 Protocol Additional II to the Geneva Conventions (the United States is not a Party to this treaty), and customary international law (the content of customary law in a non-international armed conflict is a matter of some controversy). Even if a non-international armed conflict continues in Afghanistan, it is only this component of international law, not the law of *international* armed conflict that applies. Because the two types of conflict implicate different bodies of law, it is essential to distinguish between them. As noted above, none of the offenses charged against Mr. Hicks, as such, are war crimes under the law of non-international armed conflict. Indeed, the law of non-international armed conflict is much less developed than the law of international armed conflict. For this reason, prosecution for acts committed during a non-international armed conflict generally occurs in domestic courts applying domestic law.

18. At least as important, prior to October 7, 2001, there was not a non-international armed conflict involving the United States in Afghanistan, just as there was no international armed conflict. Suggestion that the attacks of September 11th *began a non-*international armed conflict between the United States and the al Qaeda terrorist organization (and that the law of non-international armed conflict was thereby activated) are simply wrong. The vast majority of legal scholars are in accord on this issue. Common Article 3 to the Geneva Conventions, considered the lowest threshold for non-international armed conflict (Protocol Additional II add criteria), refers to "cases of non-international armed conflict occurring in the territory of one of the High Contracting Parties." The Official Commentary makes clear that non-international armed conflict involves an *intra*-State conflict by suggesting the following criterion when ascertaining whether a conflict is non-international: "That the party in revolt against the *de jure* government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having means of respecting and ensuring respect for the Convention."[20]

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[20] GC I Commentary at 49.

19. Case law supports this interpretation. For instance, the International Criminal Tribunal for Rwanda, a Tribunal dealing exclusively with such conflicts, in the case of *Akayesu* and citing with approval the decision of the Appeals Chamber in the ICTY case of *Tadic*, stated that "an armed conflict exists whenever there is [...] *protracted violence* between *governmental authorities and organized armed groups* or between such groups within a State."[21] In *Rutaganda*, the same tribunal noted that "[C]onflicts referred to in Common Article 3 are armed conflicts with *armed forces* on either side engaged in hostilities: conflicts, in short, which are in many respects similar to an international conflict, but takes place *within the confines of a single country*."[22] And in *Musema*, it stated that "The expression 'armed conflicts' introduces a material criterion: the existence of *open hostilities between armed forces which are organized* to a greater or lesser degree. Within these limits, non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups within the territory of a *single* State."[23] The International Criminal Court Statute, in a provision to which the United States does not object, takes the same approach.[24]

20. It is clear that a transnational terrorist organization operating from scores of countries, with a membership of many nationalities, loosely organized, having lawlessness as it purpose, and attacking States, organizations, and individuals scattered across the globe is not the type of armed group meant in the law of non-international armed conflict.

21. In sum, terms such as "the war on terror" are effective and useful rhetorical devices to mobilize the American people and the nation's resources, and to strengthen our resolve in the face of transnational terrorism. But the term "war" is being used in a lay, not legal, sense, in the same manner as "War on Poverty," "War on Drugs," and so forth. War is an issue of fact and law, not pronouncements. No armed conflict began until October 7, 2001, and the international armed conflict between the United States and Afghanistan had ended by June 2002. Al Qaeda attacks proceeding October 7, 2001, and any post-

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[21] See ICTR, *Akayesu*, (Trial Chamber), September 2, 1998, paras. 619-621, 625.

[22] ICTR, *Rutaganda*, (Trial Chamber), December 6, 1999, para. 170.

[23] ICTR, *Musema* (Trial Chamber), January 27, 2000, paras. 247-248.

[24] Statute of the International Criminal Court, art. 8.2(f).

[25] Michael N. Schmitt, *Bellum Americanum Revisited: U.S. Security Strategy and the Jus ad Bellum*, 176 MILITARY LAW REVIEW 364-421 (2003), 16th Annual Waldemar A. Solf Lecture, U.S. Army Judge Advocate General's School.

[26] Most significantly, Resolution 1368 was issued the very day after the attacks. In preambular language, it specifically reaffirmed the "inherent right of self-defense as recognized by the Charter of the United Nations." Two weeks later, the Council did so again in Resolution 1373.[67] Both resolutions came at a time when no one was pointing to the possibility that the attacks might have been the work of a State. Both were reaffirmed in multiple subsequent resolutions, including resolutions adopted after the Coalition operations began on October 7th.

[27] Authorization to Use Military Force, 115 Stat. 224.

October 7 actions without a clear direct link to the armed conflict in Afghanistan, constituted neither an international, nor non-international, armed conflict.

The Charges

A. Conspiracy

22. Charge 1 against the accused is the inchoate offense of conspiracy. In international criminal law, however, conspiracy is neither an inchoate offense, nor the basis for individual criminal responsibility for a separate war crime. There are but two exceptions: crimes against peace (aggression) and genocide, neither of which constitutes a war crime per se. The limited acceptance of conspiracy derives from the fact that most civil law countries (e.g., continental European in contrast to common law jurisdictions such as the United States and United Kingdom) do not recognize the offense in their domestic criminal law systems.[28] Instead, they focus on complicity, or participation, in an actual crime or attempt.[29] Thus, any attempt to support the existence of a crime of conspiracy through reference to common law cases is misleading. On the contrary, the very fact that the offence is recognized in common law jurisdictions, but not in civil law systems, supports its non-inclusion in international criminal law. Note that I am describing the law of armed conflict as it exists in contemporary practice; to the extent such an offence existed historically, it has long since faded away.

23. Application of conspiracy to international crimes occurred most prominently in the war crimes trials following the Second World War. Inclusion of the notion of conspiracy in the Charters of the various tribunals resulted from US influence during the drafting processes.[30] Article 6 of the Nuremberg Charter (1945) set forth the three crimes within the jurisdiction of the International Military Tribunal (IMT): crimes against peace, crimes against humanity, and war crimes.[31] The term "conspiracy" appeared only in the definition of the first: "...planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or *conspiracy* for the accomplishment of the foregoing." Although a non-specific reference to conspiracy was also contained in the article ("*conspiracy* to commit *any* of the foregoing crimes"), the Tribunal limited application to crimes against peace. Of the 22 defendants, each was charged with conspiracy to commit crimes of peace; eight were convicted of the offence.[32]

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[28] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 191 (2003).

[29] WILLIAM A. SHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 103 (2nd ed. 2004).

[30] CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 8 (2003).

[31] The principles set out in the Nuremberg Charter were confirmed as principles of international law by the U.N. General Assembly on December 11, 1946. Resolution Affirming the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal, G.A. Res. 95(1), U.N. Doc. A/236 (1946).

[32] None were convicted on the conspiracy charge alone.

Review Exhibit 63

Page 8 Of 14

24. Although the IMT captured the greater attention, most of the war crimes trials held after the war were conducted by the individual allies pursuant to Allied Control Council Law No. 10 (1945). That instrument, in Article II (d), only mentioned conspiracy *per se* with regard to crimes against peace.

25. By contrast, the Charter of the International Military Tribunal for the Far East (1946), in Article 5, followed the Nuremberg precedent in citing conspiracy vis-à-vis crimes against peace (Article 5a), but also included conspiracy in the definition of crimes against humanity (Article 5c). It contained no offense of conspiring to commit war crimes.[33]

26. Despite the explicit references to conspiracy in the three aforementioned instruments, and resulting convictions, subsequent international criminal law conventions have not included conspiracy to commit such crimes.[34] A sole exception in the context of armed conflict is conspiracy to commit genocide. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Article III (b), renders "conspiracy to commit genocide" punishable. Other international instruments addressing criminal conduct during armed conflict incorporate the notion of conspiracy only with regard to genocide. The Statutes of the International Tribunal for the Former Yugoslavia (1993) (Article 4.3) and the International Tribunal for Rwanda (1994) (Article 2.3), for instance, both criminalize conspiracy to commit genocide as an inchoate offense, using precisely the same verbiage as the Genocide Convention. Indeed, the ICTR has issued numerous judgments dealing with the offense.[35] It should be noted that the Statute of the International Criminal Court (1998) does not follow the lead of its *ad hoc* counterparts, as it makes no reference to conspiracy at all. On the contrary, initial efforts to address conspiracy in the Statute were rejected on the basis that it does not represent a generally accepted principle of law. Thus, it is clear that modern international criminal law practice restricts the offense of conspiracy to cases of genocide, the most egregious international crime.

27. I would further note that of the underlying crimes that Mr. Hicks is alleged to have conspired to commit, only attacking civilians and civilian objects are war crimes *per se*. Murder by an unprivileged belligerent (see below), destruction of property by an

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[33] Of the 25 defendants convicted by the IMTFE, 23 were found guilty of conspiracy to wage a war of aggression. Again, this offense is a "crime against peace," not a war crime, and does not bear on this case.

[34] On the contrary, disagreement over the scope of even the *underlying* crime of aggression has precluded its inclusion in relevant instruments, with the exception of the Statute of the International Criminal Court, Art. 5.1(d). However, jurisdiction will only exist once the crime has been defined for the purposes of the Statute, something that is highly unlikely in the foreseeable future. *Id.*, art. 5.2.

[35] See, e.g., ICTR, *Musema*, (Trial Chamber), January 27, 2000; *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003; *Niyitegeka*, (Trial Chamber), May 16, 2003; *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003; *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003.

unprivileged belligerent, and terrorism are *not* war crimes *as such* under the law of armed conflict.[36]

28. Since terrorism forms such an integral part of the case against Mr. Hicks, it is important to emphasize that an offense of terrorism, as it is generally understood in common parlance (characterized as having some political purpose or aspect), does not appear in the law of armed conflict. Rather, in the law of armed conflict, the term "terror" refers only to acts that have the specific intent to intimidate the population *in the context of an ongoing armed conflict*. Most significantly, Article 33 of the Fourth Geneva Convention provides that "[c]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited." The Official Commentary indicates that this article refers to "resorting to intimidatory measures to terrorize the population" in the hope of preventing hostile acts by them.[38] Since the Fourth Geneva Convention applies only to situations of occupation, the intent is to preclude acts by the occupying force intended to cow the civilian population into submission. It, in no way, is meant to address acts of political terrorism such as those committed by al Qaeda.

29. The prohibition also appears in both Additional Protocols to the Geneva Conventions. Article 51(2) of Protocol I provides that "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." In the context of non-international armed conflict, Articles 4 and 13 set forth essentially the same prohibitions. The United States is a Party to neither of these treaties. But this point aside, the intent is, again, to encompass acts specifically intended to intimidate the population during an ongoing armed conflict, not acts intended to alter government positions or otherwise reflective of a "political" purpose.

30. Case law, albeit limited, is in accord with this position. Most significant in this regard is the judgment of the International Criminal Tribunal for the Former Yugoslavia in the *Galic* case, which has been *wrongly cited* as support for the existence of a war crime of terrorism in the law of armed conflict.[39] On the contrary, the Tribunal specifically *declined* to consider "political" terrorism, that is, the type of terrorism engaged in by al Qaeda.[40]

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[36] The labeled "crimes" potentially could encompass conduct that is in fact criminal. For instance, intentional destruction of civilian property is a war crime if it does not have a valid military objective, but whether the act was done by a lawful or unlawful combatant would be irrelevant.

[37] Military Commission Order No. 2, para. 6B(2).

[38] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION FOR THE RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 226 (Jean Pictet ed. 1958).

[39] ICTY, *Galic*, Judgment, Case No. IT-98-29-T (Dec. 5, 2003).

[40] The charge against General Galic was "unlawfully inflicting terror upon civilians" by commanding troops that indiscriminately shelled and sniped the civilian population of Sarejevo. In its judgment, the Tribunal expressly refused to consider what is commonly understood as terrorism (in, e.g., the September 11th sense). In a footnote, it specifically stated that: As stated in an earlier [sic], the Majority has not

Review Exhibit 63

Page 10 Of 14

31. To summarize, there is no offense of "terrorism" in the law of armed conflict with regard to acts with a political purpose. Although such acts may in fact frighten the civilian population, political terrorism as such (e.g., the 1998 attacks against the two US embassies in East Africa, the 2000 attack on the USS Cole, the attacks of September 11th) is absent from the law of armed conflict.

32. In any event, regardless of the status of the underlying offenses that Mr. Hicks is alleged to have conspired to commit, there can be no doubt that conspiracy itself is not a crime under the law of armed conflict.

B. Attempted Murder by an Unprivileged Belligerent

33. The offense of murder by an unprivileged belligerent alleged in Charge 2 is likewise absent from the law of armed conflict, although the underlying conduct thereto could constitute an offense if the victim was either a civilian who had not lost his or her immunity from attack (through direct participation in hostilities)[43] or a combatant protected under the law of armed conflict, such as those who have surrendered or are otherwise *hors de combat*. However, in such cases, the status of the individual committing the act (assuming a nexus to the armed conflict) would be irrelevant; both military and civilian personnel can commit war crimes. Rather, it is the status of the *victim* as protected by the law of armed conflict that matters.

34. The specific conduct alleged is that Mr. Hicks attempted to murder combatants, i.e., "American, British, Canadian, Australian, Afghan, and other Coalition forces." Under the law of armed conflict, *combatants* enjoy no general protection from attack.[44] Rather, they are only protected from attack when they are *hors de combat* because they have surrendered,[45] are sick or wounded and not carrying on the fight,[46] are shipwrecked,[47] or

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considered it necessary to enter into discussion of "political" terrorist violence and of attempts to regulate it through international conventions." Id at fn. 222.

[42] *Id.* at fn 222.

[43] *See* Additional Protocol I, art. 51, which is accepted as customary law by the United States [hereinafter PI].

[44] No treaty (including the Statutes governing international courts such as the International Criminal Court, International Criminal Tribunal for the Former Yugoslavia, and International Criminal Tribunal for Rwanda) suggests that targeting a combatant is unlawful absent the special circumstances set forth.

[45] Regulations Annexed to the 1907 Hague Convention IV Respecting the laws and Customs of War on Land, art. 23 [HIVR]; PI, art. 41.

[46] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 12 [GCI]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949 [GCII], art. 12; PI, arts. 10, 42.

have parachuted from a disabled aircraft.[48] They are also immune from attack when serving as *parlementaires* conducting negotiations with the enemy,[49] or as medical or religious personnel.[50] It should be noted that certain types of attacks on a combatant are wrongful not because of the victim's status, but rather because an unlawful method or means of warfare was employed. For instance, a general prohibition on using methods or means of warfare resulting in unnecessary suffering or superfluous injury exists,[51] as do restrictions on specific weapons (such as poison or blinding lasers[52]) and perfidious attacks.[53] If Mr. Hicks engaged in such activities, and they resulted in the death of a member of the Coalition forces, he would be guilty of a war crime. However, Charge II fails to allege any circumstances that, under the law of armed conflict, would render attack on combatants wrongful.

35. This being so, perhaps the reference to "unprivileged belligerent" in Charge 2 (it does not appear as such on its face) was meant to suggest that merely participating in an armed conflict without enjoying combatant status is a violation of the law of armed conflict. If so, such a position is incorrect as a matter of law.

36. There is but one law of armed conflict consequences of direct participation in an armed conflict. Civilians who "take a direct part in hostilities" lose the protection from attack they would otherwise enjoy pursuant to the law of armed conflict.[54] Thus, it is not a violation of the law of armed conflict for combatants to use force against civilians for such time as those civilians engage in hostile action.

37. However, because the unprivileged belligerent does not have combatant status (he remains a civilian), he or she does not enjoy the law of armed conflict immunity from prosecution for murder that a combatant has when killing either an enemy combatant or a civilian directly participating in the hostilities. This immunity from prosecution (together with prisoner of war entitlement) is the seminal benefit of lawful combatancy.

38. Absent such immunity, the unprivileged belligerent who kills a combatant is subject to prosecution for murder pursuant to the domestic law of States with subject matter jurisdiction over the offense and personal jurisdiction over the accused. There being no such crime under the law of armed conflict, domestic law offers the sole basis for

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[47] GC II, art . 12, PI, art. 10.

[48] PI, art. 42.

[49] HIVR, art. 32.

[50] GCI, art. 24, 25; PI, art. 15. Note that by Protocol Additional I, art. 43, these individuals are not combatants.

[51] St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 1868; HIVR art 23; PI, art. 35.

[52] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 1980.

[53] HIVR, art. 23; PI, art. 37.

[54] PI, art 51.3.

prosecution. Although the distinction between the war criminal and the unprivileged belligerent (who may also be a war criminal if he violates the law of armed conflict) has at times proven confusing,[55] such a distinction is well-established in the law of armed conflict.[56] Indeed, the United States Army's *Operational Law Handbook*, a key source of guidance on law during military operations, specifically notes:

> [u]nprivileged belligerents may include spies, saboteurs, or civilians who are participating directly in hostilities or who otherwise engage in unauthorized attacks or other combatant acts. Unprivileged belligerents are not entitled to prisoner of war status, and may prosecuted under the domestic law of the captor.[57]

39. Simply put, it is not a violation of the law of armed conflict to kill a combatant, even when the individual doing so lacks the combatant privilege to use force. Neither is mere unprivileged belligerency a war crime.

C. Aiding the Enemy

40. Finally, there is no prohibition in the law of armed conflict on aiding the enemy. In the law of armed conflict, aiding the enemy is nothing more than a form of direct participation in hostilities. Indeed, some forms of "aiding the enemy" would not even rise to the level of direct participation by virtue of not being "direct enough" (insufficient nexus to the conduct of hostilities). Rather, acts amounting to aiding the enemy are treated in precisely the same manner as direct participation by a civilian in hostilities, i.e., the underlying conduct may only be considered by a judicial body to the extent personal and subject-matter jurisdiction lawfully exist in domestic law —unless that conduct amounts separately to a war crime.

41. That this is the appropriate treatment for direct participants is illustrated by the case of spies, who undoubtedly "aid the enemy" and, in many case, are directly participating in hostilities (and who the *Operational Law Handbook* groups with civilian who directly participate). Typical is the decision of the Dutch Special Court of Cassation in the 1949 *Flesche* case, "espionage...is a recognized means of warfare and therefore is neither an international delinquency on the part of the State employing the spy nor a war crime

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[55] See, e.g., *Ex parte Quirin*, 317 US at 32. The Qurin decision has been criticized for its deviation from law of armed conflict principles by several top scholars and practitioners in the field. For instance, W. Hays Parks, the Law of War Chair, Office of the General Counsel, Department of Defense, has noted that "*Quirin* is lacking with respect to some of its law of war scholarship." *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493 (2003), at fn. 31.

[56] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 234 (2004); Richard. R. Baxter, *So-called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs*, 1952 BRIT. Y.B. INT'L L. 323, *reprinted in* MIL. L. REV. (Bicentennial Issue) 487 (1975). See also, Derek Jinks, *The Declining Status of POW Status*, 45 HARV. INT'L L.J. 367, 436-439, who takes an even more permissive view of the issue.

[57] U.S. ARMY, JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK (2004), at p. 23.

proper on the part of the individual concerned."[58] Commentators are in accord,[59] as are the military manuals such as those of the U.S. Army[60] and U.K. Forces.[61]

42. In summary, none of the offenses as charged constitutes a war crime under the law of armed conflict.

Michael N. Schmitt
1 November 2004

WITH THE UNITED STATES ARMY IN GARMISCH-PARTENKIRCHEN, GERMANY:

I, BARRY J. STEPHENS, the undersigned official, do hereby certify that the foregoing affidavit was subscribed and sworn before me this 1st day of November, 2004, by MICHAEL N. SCHMITT, whose home address is Garmisch-Partenkirchen, Germany, and who is known to me to be an individual accompanying, serving with, or employed by the Armed Forces serving outside the United States. I do further certify that I am, at the date of this certificate, a commissioned offficer in the United States Army in the rank or grade stated below, that by statute no seal is required on this certificate, and same is executed by me in that capacity.

BARRY J. STEPHENS
Major, U.S. Army Judge Advocate General's Corps
Legal Advisor, George C. Marshall Center

Authority: Title 10, United States Code, sections 936 and 1044a, and Army Regulation 27-55.

[58] Flesche (Holland, Special Court of Cassation, 1949) [1949] AD 266, 272 (see Dinstein, Conduct, at 211).

[59] Dinstein, Conduct of Hostilities, at 210, 213; Baxter, generally.

[60] Department of the Army Field Manual 27-10, The Law of Land Warfare, July 1956, para. 77 ("Resort to [espionage] involves no offense against international law").

[61] U.K. Ministry of Defence, The Manual of the Law of Armed Conflict (2004), para. 4.9.7 ("Spies are usually tried by civilian courts under the domestic legislation of the territory in which they are captured").

Review Exhibit 63

With respect to Charge 4 and the specifications thereunder, we also move to strike. In the first place, that charge is conspiracy to commit the other acts--what I meant to say is that that charges conspiracy to commit the other acts.

Our position on that is twofold: that there is no law of war which embraces conspiracy as such, and therefore the charge does not lie. In the second place, we say that if it does lie, it is subject to the same defects for the conspiracy as arise in the case of the first charges, which specify different offenses. In other words, if they have not sufficiently

51

charged the offenses in Charges 1, 2, or 3, of course the conspiracy to commit it could not be an offense properly charged.

There is no article of war covering conspiracy. I think that statement is correct.

The President. Will you recapitulate now your motions?

Colonel Royall. We move to strike each of the charges and each of the specifications and make a separate and specific motion as to each charge and as to each specification under each charge, on the grounds stated in the course of my presentation.

Colonel Dowell. May I add the ground of insufficiency, on the ground that the specifications, with the exception of that under Charge 3, do not specifically state the offense in such a way that would enable the accused to know the acts which are supposed to constitute the offense and against which he is required to defend.

Colonel Royall. That is an additional ground.

The President. We have about five minutes.

The Attorney General. I can confine my argument to that time, if you will bear with me.

May it please the Commission: The argument is based, it seems to me, on an entire misconception of the Law of War. We are not confined to the Articles of War. We are charging offenses against the law of war, which is common law. That offense applies to the conspiracy.

As you gentlemen know, it is not necessary to find a statutory defined offense before a commission either in the Articles of War or elsewhere. I give as a famous example of

52

the type of offense that we are charging the case of Major Andre, which was not an espionage case, though espionage was involved, but it was passing through the enemy lines with the purpose and intent of bribing an officer of the United States Army.

Review Exhibit 64

Page 1 Of 3

Moreover, as I have said before, whether or not the acts which will be proved constitute a civil offense has nothing to do with the situation, because the military offense triable by your Commission is totally different from a civil offense defined in a statute. Whether or not the same proof is necessary is irrelevant.

To show the difference itself, you simply have to refer to the penalties involved in the two offenses. The penalty for the military offense is entirely different from the penalty of the statutory civil offense.

In connection with the specifications themselves, chiefly for the purpose of clarity, I draw your attention to the fact that the two specifications of Charge 1 allege separate offenses in substance, in that in Charge 1 the specification is that these defendants, and I quote, "went behind such lines and defenses in civilian dress," whereas in Specification 2 the charge is that the defendants "appeared, contrary to the law of war, behind the military and naval defenses and lines of the United States."

With respect to Article 81, it seems to me only necessary to point out that the article is in nowise limited, as counsel for the defense suggests. The article is in its title, "Relieving, Corresponding with, or Aiding the Enemy," and it opens, "Whosoever relieves or attempts to relieve."

53

It is not limited to citizens, aliens, or anyone else. Whosoever does this is punishable in the manner specified.

It seems to me that these motions really, in substance, go to the rest of the matter; and although the question is raised technically in a somewhat different question, it seems to me to be already covered by the ruling of the Commission, which has held, I take it, that this Commission has jurisdiction over the defendants, is properly constituted, and has the duty and power to try offenses against the Law or War; and that therefore a discussion of whether or not other offenses committed against the civil statutes are involved is clearly and totally irrelevant.

There has been suggestion, I think, here that these charges are not specific, and if the motion is made on that ground it is out of order. Not being thoroughly familiar with your procedure, I take it there could be a motion for, as we lawyers say, a bill of particulars or for clarification, which would be in order; but I take it the motion is not based on that at all, but goes to the roots of the matter, which seem to me to have been disposed of by the ruling that the Commission has already made.

Colonel Royall. I merely wish to add this. We do not think that these arguments are covered by the rulings already made.

In reply specifically to the Attorney General, it is true that there is such a thing as a law of war aside from the specific Articles of War, but we repeat that we do not

Review Exhibit 64

think they are charged, except in the case of spying, which we are not arguing about, with any established law of war which has

54

been violated. The mere fact that it is a common law does not mean that there must not be some precedent or some criterion, and we do not know of any precedent or criterion for any of these charges except spying.

Now, the word "whosoever" obviously cannot mean that it is a violation of law for a German to aid the German Government, any more than it could be a violation of law for an American to aid the American Government. Therefore, we think there is a very real distinction between aliens and citizens under the 81st Article of War.

The President. The Commission will recess for lunch and open at 2 o'clock.

(At 12:30 o'clock p.m., the Commission recessed until 2 o'clock p.m.)

55

AFTER RECESS

The Commission reconvened

Review Exhib.. 64

Page 3 Of 3

UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

(ADOPTED 25 MAY 1993 BY RESOLUTION 827)
(AS AMENDED 13 MAY 1998 BY RESOLUTION 1166)
(AS AMENDED 30 NOVEMBER 2000 BY RESOLUTION 1329)
(AS AMENDED 17 MAY 2002 BY RESOLUTION 1411)
(AS AMENDED 14 AUGUST 2002 BY RESOLUTION 1431)
(AS AMENDED 19 MAY 2003 BY RESOLUTION 1481)

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.

Article 1
Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2
Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Article 3
Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

Article 4
Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;

Review Exhibit 65

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide.

Article 5
Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

Article 6
Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7
Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 8
Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

by improvisation. Each succeeding step was apparently carried out as each new situation arose, but all consistent with the ultimate objectives mentioned above."

The argument that such common planning cannot exist where there is complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime.

Count One, however, charges not only the conspiracy to commit aggressive war, but also to commit War Crimes and Crimes against Humanity. But the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war. Article 6 of the Charter provides:

"Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit War Crimes and Crimes against Humanity, and will consider only the common plan to prepare, initiate, and wage aggressive war.

War Crimes and Crimes against Humanity

The evidence relating to War Crimes has been overwhelming, in its volume and its detail. It is imposible for this Judgment adequately to review it, or to record the mass of documentary and oral evidence that has been presented. The truth remains that War Crimes were committed on a vast scale, never before seen in the history of war. They were perpetrated in all the countries occupied

II. JURISDICTION AND GENERAL PRINCIPLES

Article 6.

The Tribunal established by the Agreement referred to m Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c)CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Review Exhibit 67

Page 1 Of 1

S/RES/1368 **Condemnation of terrorist attacks on United States**

Date: 12 September 2001 Meeting: 4370
Vote: Unanimous

The Security Council,

Reaffirming the principles and purposes of the Charter of the United Nations,

Determined to combat by all means threats to international peace and security caused by terrorist acts,

Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,

1. *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and *regards* such acts, like any act of international terrorism, as a threat to international peace and security;

2. *Expresses* its deepest sympathy and condolences to the victims and their families and to the people and Government of the United States of America;

3. *Calls* on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;

4. *Calls also* on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 (1999) of 19 October 1999;

5. *Expresses* its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations;

6. *Decides* to remain seized of the matter.

Review Exhibit 68

Page 1 **Of** 19

United Nations A/56/PV.1

General Assembly

Fifty-sixth session

Official Records

1st plenary meeting
Wednesday, 12 September 2001, 3 p.m.
New York

Temporary President: Mr. Holkeri ..... (Finland)

The meeting was called to order at 3.05 p.m.

Item 1 of the provisional agenda

Opening of the session by the Chairman of the delegation of Finland

The Temporary President: I declare open the fifty-sixth session of the General Assembly.

Expression of sympathy

The Temporary President: At the outset, I should like, on behalf of us all, to express our deepest condolences to the people and the Government of the host country, the United States of America, for the tragic, unspeakable loss of life resulting from yesterday's horrendous terrorist acts. What happened yesterday goes beyond our imagination and against every principle that the United Nations stands for. The Organization must now stand in support of the United States and intensify its efforts to root out the scourge of terrorism.

Our hearts also go out to the citizens of New York City, the seat of the Organization, and the heroic men and women who have given their lives in the effort to save others. As yesterday's tragedy is bringing together citizens of their city, it should also bring together States Members of the United Nations, so that what happened yesterday will never happen again.

Item 2 of the provisional agenda

Minute of silent prayer or meditation

The Temporary President: Before calling on representatives to observe a minute of silent prayer or meditation in accordance with rule 62 of the rules of procedure, I propose that as we do so we also observe the International Day of Peace on this, the opening day of a regular session of the General Assembly, as proclaimed by the Assembly in its resolutions 36/67 of 30 November 1981 and 52/232 of 4 June 1998, to be devoted to commemorating and strengthening the ideals of peace both within and among all nations and peoples.

I now invite representatives to stand and observe one minute of silent prayer or meditation.

The members of the General Assembly observed a minute of silent prayer or meditation.

Item 137 of the provisional agenda

Scale of assessments for the apportionment of the expenses of the United Nations (A/56/345)

The Temporary President: Before turning to the other items on our agenda, I should like, in keeping with the established practice, to invite the attention of the General Assembly to document A/56/345, which has been circulated in the General Assembly Hall this afternoon. It contains a letter from the Secretary-General addressed to the President of the General Assembly, in which he informs the Assembly that 15

01-53358 (E)

Member States are in arrears in the payment of their financial contributions to the United Nations within the terms of Article 19 of the Charter.

I should like to remind delegations that, under Article 19 of the Charter,

> "A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years."

May I take it that the General Assembly duly takes note of the information contained in documents A/56/345?

It was so decided.

Item 3 of the provisional agenda

Credentials of representatives to the fifty-sixth session of the General Assembly

(a) Appointment of the members of the Credentials Committee

The Temporary President: Rule 28 of the rules of procedure provides that the General Assembly at the beginning of each session shall appoint, on the proposal of the President, a Credentials Committee consisting of nine members.

Accordingly, it is proposed that, for the fifty-sixth session, the Credentials Committee should consist of the following Member States: China, Denmark, Jamaica, Lesotho, the Russian Federation, Senegal, Singapore, the United States of America and Uruguay.

May I take it that the States I have mentioned are hereby appointed members of the Credentials Committee?

It was so decided.

Item 4 of the provisional agenda

Election of the President of the General Assembly

The Temporary President: I now invite members of the General Assembly to proceed to the election of the President of the General Assembly at its fifty-sixth session.

May I recall that, in accordance with paragraph 1 of the annex to General Assembly resolution 33/138, the President of the General Assembly at the fifty-sixth session should be elected from among the Asian States.

In this connection, I have been informed by the Chairman of the Group of Asian States that the group has endorsed the candidacy of His Excellency Mr. Han Seung-soo of the Republic of Korea for the presidency of the General Assembly.

Taking into account the provisions of paragraph 16 of annex VI to the rules of procedure, I therefore declare His Excellency Mr. Han Seung-soo of the Republic of Korea elected by acclamation President of the General Assembly at its fifty-sixth session.

I extend my sincere congratulations to His Excellency Mr. Han Seung-soo and I invite him to assume the presidency.

I request the Chief of Protocol to escort the President to the podium.

Mr. Han Seung-soo took the Chair.

Address by Mr. Han Seung-soo, President of the General Assembly at its fifty-sixth session

The President: It is with a most grave and solemn mind that I take this podium, as the horrific events of yesterday cast a pall over our proceedings today. Mere words cannot express the outrage and disgust we doubtless all feel for the vile actions perpetrated in our host country, the United States of America. I condemn in the strongest possible terms these heinous acts of terrorism. I pray for those who lost their lives and on behalf of the General Assembly offer our deepest condolences to the families and loved ones of the innocent victims. My most profound feelings of sympathy and solidarity also go out to the people and Government of the United States, as well as to the citizens of New York City, at this time of great distress.

These terrorist crimes were, in effect, acts of war against all the world's peace-loving peoples. Their primary target was, by a vicious twist of fate, located in the very city which is home to the world's foremost institution dedicated to promoting world peace. The opening of this session of the General Assembly has been delayed by a day due to this tragedy, but no terrorists can ever deflect this body from the task to which it has dedicated itself since 1945: ending the

scourge of war in whatever form it may take, once and for all.

Now let me share my vision of the work of the fifty-sixth session of the General Assembly. At the outset, I would like to express sincere gratitude to my predecessor, Mr. Harri Holkeri, whose outstanding leadership was instrumental in making the fifty-fifth session highly successful. I wish President Holkeri all the best in his future endeavours. I would also like to pay tribute to the Secretary-General, Mr. Kofi Annan, for his untiring efforts and selfless dedication to the highest ideals of the United Nations.

I would also like to take this opportunity to thank all the Member States, particularly the countries of the Asian Group, for the confidence they have placed in me.

As I begin my term of office, I have profoundly mixed feelings. While I am overwhelmed by the honour accorded me and my country, I feel at the same time a tremendous burden of responsibility. This is particularly so as I come from a country that has had a long and unique relationship with the United Nations. Indeed, the United Nations has been closely involved with my country since the establishment of the Republic of Korea in 1948 and through the post-Korean War recovery period and the economic development of later years.

Following the end of the cold war, the Republic of Korea joined the United Nations in 1991. I would like to believe that my election to this post, coinciding with the tenth anniversary of Korea's admission to the United Nations, constitutes a recognition by the Member States of Korea's increased contribution to the international community.

Fifty-six years ago, the United Nations was born amid hopes for a lasting peace in the wake of two devastating world wars. In the Charter, the United Nations founding fathers set forth lofty goals and principles aimed at promoting international peace and security, as well as the economic and social advancement of all peoples. Success was never easy, and failure often seemed inevitable. However, with its record of both successes and failures, the United Nations has come to be regarded as the sole universal body representing humanity's highest collective aspirations.

When the cold war ended a decade ago, the international community faced new challenges and opportunities. As the danger of global conflict receded, the world was confronted with new threats to peace and development such as regional and sectarian conflicts and the kinds of terrorist acts that reached a crescendo of violence yesterday.

At the same time, the tide of globalization surges ever onward, bringing both benefits and problems in its wake. While greater interdependence and increased cross-border movement have dramatically enhanced the well-being of mankind in many ways, there is a negative side as well, that is, the growing problem of disease and pollution, recurring financial crises, and increasing cross-border crime — especially trafficking in drugs, weapons and illegal migrants. In several of these areas, the various United Nations agencies have been active for decades. Now, more than ever before, the United Nations is required to serve as a focal point for coordinating global efforts to address these new challenges.

In this context, I would like to emphasize the importance of the Millennium Summit held in this Hall last year. The Summit provided a unique opportunity to review the United Nations progress, to assess its achievements and shortcomings, and to chart the way forward. The Millennium Declaration adopted at the end of the Summit is surely the definitive statement of the challenges and tasks facing the United Nations at this stage in its history. As this is the first session of the General Assembly following the Millennium Summit, one of our most important tasks will be follow-up and implementation of the Millennium Declaration.

We all recognize that an important element of the Millennium Declaration is the resolve of leaders to strengthen the United Nations. I think it is noteworthy that they reaffirmed the central position of the General Assembly as the chief deliberative, policymaking and representative organ of the United Nations. As President of the fifty-sixth session of the General Assembly, I will continue the ongoing initiatives to improve the working methods of the Assembly, in close consultation with all Member States. I will also do my best to move forward the discussions on Security Council reform, with the goal of having a more representative, transparent and effective Security Council.

Review Exhibit 68

Page 4 Of 9

Given the fundamental changes in the international environment, the United Nations role in maintaining peace and security has expanded and become more complex. I therefore attach great importance to improving the United Nations capacity to respond to conflicts in a more effective manner, including consideration of the recommendations contained in the Brahimi report. If it is to do its job of maintaining international peace and security, the United Nations needs to be given the necessary tools and resources to carry out peace operations.

Also at the Millennium Summit, the world's leaders pledged their best efforts to promote democracy and strengthen the rule of law and to expand protection of human rights and fundamental freedoms. Freedom and human rights are truly the birthright of all humanity. The Assembly has to work continuously to promote the human rights of all people. But some categories of human beings are more vulnerable than others, and hence more likely to suffer the loss of that precious birthright. Perhaps the most vulnerable are children, women and displaced persons, who need our special concern and protection.

The United Nations should also strengthen and expand its efforts to prevent and suppress terrorism. All forms of terrorism, whatever their motivation, are an assault on human decency and threaten democracy and democratic values, and thus cannot be justified under any circumstances. Yesterday's terrorist attacks not only compel our attention, but underscore anew the urgency of action by the international community, particularly by the United Nations, against this deadly menace. I pledge my best efforts to that end.

In view of the accelerating progress of globalization and the uneven sharing of its benefits, the issue of development is receiving renewed attention and is being considered from fresh perspectives. More specifically, the question of how to ensure that developing countries share in the benefits of globalization in general, and of information and communication technology in particular, requires our urgent consideration and action. In that regard, I would like to call the attention of the Assembly to a couple of the most important issues to command our attention during my presidency of the General Assembly: bridging the digital divide, and the development of Africa.

The explosive growth of information and communication technologies is opening up boundless new possibilities for accelerated economic and social development. But the capacity of individual countries to take advantage of the digital revolution varies greatly. Indeed, the least developed countries, which could gain so much from information and communication technologies, are the very ones that lack the capacity to translate that potential into reality.

In my view, the General Assembly can make useful contributions by calling global attention to the need for bridging the digital divide. Such efforts by the General Assembly would be timely and constructive in the run-up to the World Summits on the Information Society in 2003 and 2005, planned by the International Telecommunication Union.

In their Millennium Declaration, the world's leaders expressed their deep concern, and highlighted the need to bring Africa into the mainstream of world economic development, in the common interest of all humanity. The Governments and peoples of Africa, together with the United Nations system and the donor community, have striven for decades to eradicate poverty and generate sustainable development. Yet all too often, their best efforts have met with setbacks caused by political strife, armed conflict and, since the 1980s, the devastating spread of HIV/AIDS.

Fortunately, the recent summit meeting of the Organization of African Unity in Lusaka gave a clear political lead on that issue through the new African initiative. I urge that all Member States continue to work together to explore more effective ways and means of assisting African countries in their pursuit of sustainable development.

Having outlined my agenda, I am confident that, working together, we can accomplish what we set out to do. My personal contribution will necessarily be a modest one. All these endeavours to which I will devote myself will be difficult to bring to fruition without the full support and cooperation of all of you. Thus, I humbly ask you to give me your invaluable support and guidance in discharging my duties as President of the General Assembly.

Finally, allow me to suggest that, at this point in history, we should harken back to the original spirit and principles of the United Nations. Let us place first, before anything else, the transcendent vision enshrined in the Charter, namely, the constant and untiring

pursuit of peace, security, equality, human rights, fundamental freedoms and economic and social advancement for all the peoples on this planet. While respecting the sovereign rights and legitimate national interests of all nations, let us strive to make our common future a worthy legacy for succeeding generations. Let us, moreover, seek harmony through diversity, peace through dialogue, and mutual prosperity through cooperation. And so, as we assemble here in the world's greatest parliament, let us rededicate ourselves to the founding principles of the United Nations and renew our commitment to complete the unfinished tasks that lie before us.

Item 8 of the provisional agenda

Adoption of the agenda and organization of work

Condemnation of terrorist attacks in the United States of America (A/56/L.1)

Special session on the General Assembly on Children (A/56/L.2)

The President: I should now like to consult the Assembly with a view to considering immediately draft resolution A/56/L.1 and draft decision A/56/L.2. In this connection, since both documents have been circulated only this afternoon, it will be necessary to wave the relevant provision of rule 78 of the rules of procedure, which reads as follows:

> "As a general rule, no proposal shall be discussed or put to the vote at any meeting of the General Assembly unless copies of it have been circulated to all delegations not later than the day preceding the meeting."

Unless I hear any objection, I shall take it that the Assembly agrees to consider draft resolution A/56/L.1 and draft decision A/56/L.2.

It was so decided.

The President: I now give the floor to the Secretary-General.

The Secretary-General: Thank you, Mr. President — and congratulations on your election to this important responsibility. I can only regret, as you yourself have done, that you should have to assume it at such a dark day for the United States, and indeed for the whole world, and that this draft resolution should be the first item of business over which you preside.

Our host country, and this wonderful host city that has been so good to us over five decades, have just been subjected to a terrorist attack such as we had hardly dared to imagine, even in our worst nightmares. We are all struggling to find words to express our sense of grief and outrage, our profound sympathy for the untold numbers of injured and bereaved, and our solidarity with the people and Government of the United States in this hour of trial.

We are struggling, too, to voice our intense admiration and respect for the valiant police officers, fire fighters and workers of all kinds who are engaged in the rescue and recovery effort — and especially for those, far too numerous, whose determination to help their fellow men and women has cost them their own lives.

We are all struggling, above all, to find adequate words of condemnation for those who planned and carried out these abominable attacks. In truth, no such words can be found. And words, in any case, are not enough.

This Assembly has condemned terrorism on numerous occasions. It has said repeatedly that terrorist acts are never justified, no matter what considerations may be invoked. It has called on all States to adopt measures, in accordance with the Charter and other relevant provisions of international law, to prevent terrorism and strengthen international cooperation against it.

We must now go further.

Earlier today, as you know, the Security Council expressed its readiness to take all necessary steps to respond to yesterday's attacks and to combat all forms of terrorism, in accordance with its responsibilities under the Charter.

I trust that it will indeed take such steps, and that this Assembly — and all its members — will follow suit. All nations of the world must be united in their solidarity with the victims of terrorism, and in their determination to take action — both against the terrorists themselves and against all those who give them any kind of shelter, assistance or encouragement.

68 KA

Review Exhibit 5

Page 6 of 19

I trust that that message will go out loud and clear to the whole world from every member of this Assembly, which represents the whole world.

The President: I now give the floor to the representative of South Africa.

Mr. Kumalo (South Africa): On behalf of the African Group, it is my honour, Sir, to congratulate you on your election as President of the fifty-sixth session of the General Assembly. Clearly, this is neither the day nor the time for any celebration. I hope there will be another appropriate time for us to welcome you once more.

The tragedy that befell the people of the United States is senseless, horrific, and totally beyond belief. On behalf of the African Group, allow me to express our sincere and heartfelt condolences to President George W. Bush, the Government and the people of the United States. Our hearts go out particularly to the people of New York, and especially to our colleagues at the United States Mission to the United Nations, led by Ambassador James B. Cunningham.

For those of us who have the honour to serve in the United Nations, yesterday's tragic events serve to remind us of the heavy responsibility we all bear. We would like to assure you, Sir, of our fullest support and cooperation. We are confident that under your leadership we will make significant progress in addressing global challenges. We remain deeply shocked and distressed at the callous terrorist attacks of yesterday. We hope that the perpetrators of these cowardly acts will soon face the full might of the law. We have no doubt that all members of the international community will cooperate in seeing that justice is done.

The tragedies in Washington, D.C.; New York; and Pennsylvania have brought home the unrelenting threat that international terrorism poses to all States. It is now clearer than ever that no one is safe from terrorism. Today it is the people of the United States who are in tears. In truth, it is the whole world that is weeping. The challenge that the United Nations confronts is to intensify our collective efforts to live up to the preamble of the United Nations Charter, which calls upon us to

> "practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security".

Therefore, it is my honour to express the support of the African Group for the two draft resolutions that are before the Assembly.

The President: I give the floor to the representative of Viet Nam, who will make a statement on behalf of the Group of Asian States.

Mr. Nguyen Thanh Chau (Viet Nam): Sir, on behalf of the Asian Group, I wish to extend to you the warmest congratulations on the occasion of your election to the presidency of the General Assembly. We are fully confident that with your diplomatic skills, you will lead this session to a fruitful conclusion.

We all are profoundly shocked by the acts of barbarism that took place yesterday in New York and in Washington, D.C., which left thousands dead and thousands of others wounded. We strongly condemn these terrorist acts, as they constitute a naked insult to the conscience of humankind.

On behalf of the Asian Group, I wish to convey our deepest sympathy and condolences to the Government and the people of the United States of America, to the cities of New York and Washington, and to the families of the bereaved.

The Asian Group fully supports the draft resolution, contained in document A/56/L.1, condemning these terrorist attacks.

The President: I give the floor to the representative of the Czech Republic, who will make a statement on behalf of the Group of Eastern European States.

Mr. Galuška (Czech Republic): Mr. President, I have the honour to speak here today on behalf of the Group of Eastern European States.

The purpose of today's plenary meeting was to open the new session of the General Assembly. However, under the shadow of the horrifying tragedy that has struck New York; Washington, D.C.; and the whole of the United States, I feel that it is my duty, first of all, to raise our voice in protest against what we witnessed yesterday. Members of the Group of Eastern European States unanimously condemn these terrorist acts, which we perceive to be aimed not only at the United States of America but at the whole civilized world — indeed, the whole of humanity.

Let me express our Governments' deepest sympathy and condolences to the victims, their families and to the people and the Government of the United States.

We express our readiness to unite to strengthen immediately national and international efforts to prevent and suppress terrorism through increased cooperation and the full implementation of the relevant international anti-terrorist conventions, Security Council resolutions and national and regional security measures. I am convinced that the Group of Eastern European States, for its part, will unanimously support draft resolution A/56/L.1, which you, Sir, have so rightly proposed.

Given the circumstances, our work during the fifty-sixth session of the General Assembly will be extremely challenging and responsible. I would like to congratulate you, Mr. President, on your election, and, at the same time, to express in advance my profound appreciation for the demanding work which lies ahead and which, I am sure, you will carry out in an excellent manner. We believe that, under your able leadership, we will continue to implement the necessary steps towards the fulfilment of the goals of the Millennium Summit Declaration.

I would also like to use this opportunity to express the appreciation and gratitude of the Group of Eastern European States to your predecessor, Mr. Harri Holkeri of Finland, for his active role and devoted work as President of the General Assembly. We hope that his legacy will inspire us during this session of the General Assembly as well.

The President: I give the floor to the representative of Guyana, who will speak on behalf of the Group of Latin American and Caribbean States.

Mr. Ishmael (Guyana): I should like first of all, on behalf of the Group of Latin American and Caribbean States, to express sincere congratulations to you, Sir, on your election as President of the General Assembly at its fifty-sixth session. You are bringing to that post a wealth of experience and skills from an illustrious career in academia and from the ministerial and other appointments that you have held at the highest levels of government. The Latin American and Caribbean Group has every confidence that you will provide the leadership and vision needed at this critical juncture in the history of this Organization, as significant developments in international relations continue to have an important impact on the work and activities of the United Nations.

I should also like at this time to convey the Group's appreciation to the immediate past President of the General Assembly, His Excellency Ambassador Holkeri of Finland, for his excellent stewardship over the past year.

The Latin American and Caribbean Group welcomes draft resolution A/56/L.1, which has just been introduced in the Assembly. The Group takes this opportunity to strongly condemn the almost unimaginable tragedy that occurred yesterday — a disastrous series of cruel and barbaric acts in New York, Washington and Pennsylvania that resulted in the loss of many, many innocent lives. We extend heartfelt sympathy to the Government and the people of the United States, and particularly to the victims of the dastardly acts. We share the pain of the residents of the host city, New York, and salute the courage of the fire fighters, police officers and others who gave their lives in a display of valour and courage that will be remembered forever.

The terrorist acts of yesterday must strengthen the resolve of the international community to condemn in the strongest possible terms all forms of terrorism, which are a threat to international peace and security. The Group reaffirms that those responsible must be brought to justice, and we stand in full support of the Government and the people of the United States at this time.

We give our full support to draft resolution A/56/L.1, as well as to the resolution adopted this morning by the Security Council on the matter of international terrorism.

The President: I now give the floor to the representative of Greece, who will speak on behalf of the Group of Western European and Other States.

Mr. Gounaris (Greece): I would like, on behalf of the Group of Western European and Other States, to congratulate you, Sir, on your election as President of the General Assembly at its fifty-sixth session. Indeed, I hope to have another, more propitious opportunity to welcome you in the future.

I would like, on behalf of the Western European and Other States Group, to condemn in the strongest possible terms yesterday's terrorist attacks in New York, Washington, D.C., and elsewhere in the United

States. It is a tragedy on an unprecedented scale that challenges all humanity. There can be no excuse or justification for these acts.

I would like to express our full solidarity with the Government of the United States and the American people for the hideous acts that led to the tragic loss of human life and extend our deepest sympathy to the families of the victims. These horrendous acts were an attack not only on the United States but on humanity itself and on the values and freedoms we all share. However, the life and work of our societies will continue undeterred.

We appeal to all States to work closely together to bring to justice the perpetrators, organizers and sponsors of yesterday's outrageous acts. The United Nations should spare no effort towards our common goal of preventing and suppressing terrorist attacks everywhere in the world. In this respect, we fully support draft resolution A/56/L.1 and draft decision A/56/L.2, just presented to the General Assembly.

The President: We have heard from representatives of all the regional groups.

I now give the floor to the representative of the United States of America, as the host country.

Mr. Cunningham (United States): First, on behalf of the United States, I, too, would like to congratulate you, Sir, on your assumption of the presidency of the General Assembly at its fifty-sixth session and to pledge my Government's support for the success of this session.

Obviously, the hearts of all Americans are heavy today. I would like to thank you, Mr. President, for your words of condolence and sympathy for the victims and their families. I would like to personally convey the gratitude of President Bush and the American people to all the many world leaders and all the others throughout the world who have shown their support and offered their assistance in this time of grief. I would also like to say a special word of appreciation to the Secretary-General for his condolences and, particularly, for his remarks about the city of New York and its public servants and his call for a firm and united response.

We in this Hall are all New Yorkers at this time of tragedy. I have been struck by how many of you have expressed to me that sentiment. Indeed, unfortunately, many non-Americans will be counted among the victims of this attack. We are all grateful to the men and women — police, fire fighters, doctors and nurses — who have shown tremendous heroism in coping with the catastrophic aftermath of the terrible events of 11 September 2001. Our thoughts and prayers go to all the victims and their families. We will grieve, and we will heal.

Your decision, Mr. President, to open the fifty-sixth session of the General Assembly was the right one. I appreciate the support and condolences expressed by the United Nations membership and the condemnation and sense of resolve expressed in the comments today. Together, we have demonstrated here, in the historic Hall of the General Assembly, that we are united and strong in the face of terror.

In his statement on the attacks of 11 September and his decision to evacuate United Nations Headquarters, the Secretary-General recognized that the attack on the United States was also an attack on the United Nations. The entire international community and the shared values upon which this institution was founded are under assault. Security Council resolution 1368 (2001), adopted just hours ago, demonstrates the determination of the international community to confront and triumph over this evil, as will the General Assembly draft resolution that we are about to address.

Yesterday's attack requires that we choose sides between the values of human rights and democracy, held dear by all decent people, and terrorism and the law of the jungle. There are those who oppose terrorism and those who use it. There should be no doubt that we will deal with those who support and harbour terrorists as we deal with the terrorists themselves.

Because this attack struck at all of us, it is right that we should work towards a coalition to defend our shared values against terrorism. Working in coalition, we can multiply the effectiveness of our response. The victims of this attack and their families need our prayers and the certain knowledge of a unified response. We owe to them and to ourselves swift action to find those responsible for these attacks and to bring them to justice.

None of us or our children will forget yesterday's horrifying images. They will become unfortunate but indelible icons of the twenty-first century. Let them serve as a constant reminder of the need to eliminate

this scourge and of the need for determination and action to do so.

The President: We have heard the last speaker in the debate on this item for this meeting.

I thank all representatives for their kind words addressed to me on my assumption of the presidency of the General Assembly.

The Assembly will now take a decision on draft resolution A/56/L.1.

May I take it that the Assembly decides to adopt the draft resolution?

Draft resolution A/56/L.1 was adopted (resolution 56/1).

The President: The Assembly will now take a decision on draft decision A/56/L.2.

May I take it that the Assembly decides to adopt the draft decision?

Draft decision A/56/L.2 was adopted.

The President: I call on the Secretary-General.

The Secretary-General: I think we will soon be taking a decision on the summit for children and that, if we decide to postpone it because of this force majeure, I would want to plead with the General Assembly that we keep our concern for children uppermost in our minds. This is only a postponement, not a cancellation, and the issue is still very much with us.

I think we should stay the course and adopt a concrete agenda for action for this decade. I think that, at this critical stage, we cannot afford to fail the children or wrangle indefinitely over text and documents. I believe that the draft outcome document for the special session is so close to being finalized. I would urge representatives that, despite the postponement, we keep up with that work and take up the issue as soon as next week. I think that, within a relatively short period, with good will and determination, we can have an agreed text. We are close and I do not want us to postpone it or relax because the meeting is not taking place next week. That is my plea.

The President: I should now like to refer to the two-day high-level dialogue on strengthening international economic cooperation for development through partnership.

By decision 55/479 of 12 April 2001, the General Assembly decided that the two-day high-level dialogue would take place on Monday and Tuesday, 17 and 18 September 2001. However, after consultations with the Chairmen of the regional Groups, there is an agreement that the two-day high-level dialogue should now take place on Thursday and Friday, 20 and 21 September 2001, instead.

May I therefore take it that the General Assembly decides to hold the two-day high-level dialogue on Thursday and Friday, 20 and 21 September 2001?

It was so decided.

The President: I should like to inform members that the first meetings of the six Main Committees will take place consecutively tomorrow afternoon, Thursday, 13 September 2001, at 3 p.m. in the General Assembly Hall for the purpose of electing their respective Chairmen.

Immediately thereafter, the General Assembly will hold its second plenary meeting to elect its Vice-Presidents.

I call on the representative of Azerbaijan.

Mr. Aliyev (Azerbaijan): I apologize for asking to speak, but I believe that I will be expressing a general view in what I am going to propose.

It is a kind of humanitarian addendum to the resolution we have just adopted. In this very tragic moment, it is our duty to offer our services to New York City and its courageous people. The members of the United Nations diplomatic community are not only parking-rules violators. We do love this city. We do love New York. We are a part of this great city and we want to help it.

Therefore, I would like to request the Secretary-General to establish, through the United Nations medical service, a United Nations diplomatic blood-donation centre to make our modest contribution to the ongoing New York City rescue process. I call upon all representatives to support this proposal.

The Secretary-General: I think the proposal of the representative of Azerbaijan has had a very good response from the ambassadors and representatives here. That means that the medical service will have no problems and will see lots of people queuing up to give blood.

The meeting rose at 4.20 p.m.

Election of 18 members of the Economic and Social (

UN General Assembly 59th Session

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President | Committees | Elections and Appointments | Documentation | Library Tools

Resolutions

Meetings

Webcast

عربي 中文 Français Русский Español

Journal

Plenary

Plenary

Delegations | Media

Programme

Background

Observers

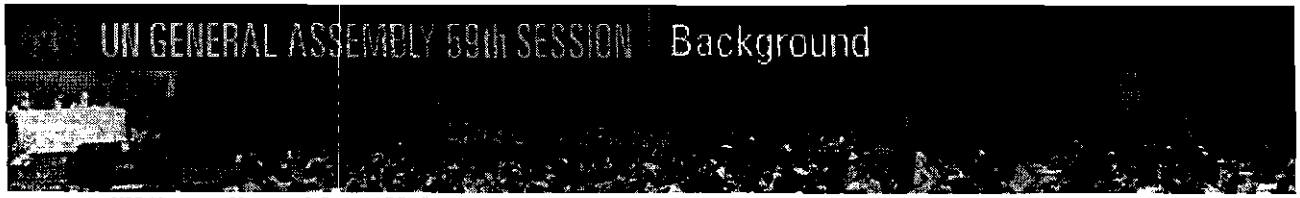
Press Kit

Agenda

UN Terms

Review Exhibit 68

Page 12 Of 24 A



BACKGROUND INFORMATION

| FUNCTIONS AND POWERS | SESSIONS | MAIN COMMITTEES |

The General Assembly is the main deliberative organ of the United Nations. It is composed of representatives of all Member States, each of which has one vote. Decisions on important questions, such as those on peace and security, admission of new Members and budgetary matters, require a two-thirds majority. Decisions on other questions are reached by a simple majority.

FUNCTIONS AND POWERS

Under the Charter, the functions and powers of the General Assembly include:

- to consider and make recommendations on the principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and arms regulation;
- to discuss any question relating to international peace and security and, except where a dispute or situation is being discussed by the Security Council, to make recommendations on it;
- to discuss and, with the same exception, make recommendations on any question within the scope of the Charter or affecting the powers and functions of any organ of the United Nations;
- to initiate studies and make recommendations to promote international political cooperation, the development and codification of international law, the realization of human rights and fundamental freedoms for all, and international collaboration in economic, social, cultural, educational and health fields;
- to make recommendations for the peaceful settlement of any situation, regardless of origin, which might impair friendly relations among nations;
- to receive and consider reports from the Security Council and other United Nations organs;
- to consider and approve the United Nations budget and to apportion the contributions among Members;
- to elect the non-permanent members of the Security Council, the members of the Economic and Social Council and those members of the Trusteeship Council that are elected;
- to elect jointly with the Security Council the Judges of the International Court of Justice; and, on the recommendation of the Security Council, to appoint the Secretary-General.

Back to top

Review Exhibit 68
Page 14 B Of 19

SESSIONS

The General Assembly's regular session usually begins each year in September. The 2000-2001 session, for example, is the fifty-fifth regular session of the General Assembly. At the start of each

regular session, the Assembly elects a new president, 21 Vice-Presidents and the Chairspersons of the Assembly's six Main Committees. To ensure equitable geographical representation, the presidency of the Assembly rotates each year among five groups of States: African, Asian, Eastern European, Latin American and Caribbean, and Western European and other States.

In addition to its regular sessions, the Assembly may meet in special sessions at the request of the Security Council, of a majority of Member States, or of one Member if the majority of Members concurs. Emergency special sessions may be called within 24 hours of a request by the Security Council on the vote of any nine Council members, or by a majority of the United Nations Members, or by one Member if the majority of Members concurs.

At the beginning of each regular session, the Assembly holds a general debate, often addressed by heads of state and government, in which Member States express their views on the most presssing international issues.

Back to top

MAIN COMMITTEES

Most questions are then discussed in its six Main Committees:

- **First Committee** - Disarmament and International Security Committee
- **Second Committee** - Economic and Financial Committee
- **Third Committee** - Social, Humanitarian and Cultural Committee
- **Fourth Committee** - Special Political and Decolonization Committee
- **Fifth Committee** - Administrative and Budgetary Committee
- **Sixth Committee** - Legal Committee

Some issues are considered only in plenary meetings, rather than in one of the Main Committees. All issues are voted on through resolutions passed in plenary meetings, usually towards the end of the regular session, after the committees have completed their consideration of them and submitted draft resolutions to the plenary Assembly.

Voting in Committees is by a simple majority. In plenary meetings, resolutions may be adopted by acclamation, without objection or without a vote, or the vote may be recorded or taken by roll-call. While the decisions of the Assembly have no legally binding force for governments, they carry the weight of world opinion, as well as the moral authority of the world community.
The work of the UNited Nations year-round derives largely from the decisions of the General Assembly - that is to say, the will of the majority of the Members as expressed in resolutions adopted by the Assembly. That work is carried out:

- By the committees and other bodies established by the Assembly to study and report on specific issues, such as disarmament, peacekeeping, development and human rights;
- in international conferences called for by the Assembly; and
- by the Secretaria of the UNited Nations - the Secretary-General and his staff of international civil servants.

Back to top

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Review Exhibit 68

Page 15 Of 21

14 A

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FREQUENTLY ASKED QUESTIONS UN

Here you will find answers to your frequently asked questions.
Discover how the UN works at the UN Website Site Index.
For any other inquiries, please contact us.
Thank you and come visit us again!

Q: What is the term of the Secretary-General?

A: The Secretary-General's term is five years. Although there is technically no limit to the number of five-year terms the top official and chief administrative officer of the United Nations may serve, no Secretary-General so far has held office for more than two terms. The current Secretary-General, Kofi Annan of Ghana will complete his second term in office in December 2006

Q: I'm bringing a group to the United Nations for a Guided Tour . How should I go about booking one?

If your group is composed of 12 or more people, you should book the tour in advance by telephoning Group Reservations at (212) 963-4440 or sending an e-mail to unitg@un.org . If you have fewer than 12 persons in your group, no reservation is necessary. Guided tours are conducted 7 days a week, Monday to Friday: 9:30 a.m. to

Review Exhibit 68

Page 16 Of 21
15 19

4:45 p.m.;Saturday, Sunday and holiday: 10:00 a.m. to 4:30 p.m. (closed weekends in January and February). Tours in English normally leave about every half hour and last for approximately 45 minutes to one hour. If you need a tour in a language other than English, call (212) 963-7539 on the day you plan to visit. For general information on tours including ticket prices, call (212) 963-TOUR (8687). The United Nations is located on First Avenue at 46th Street. *Children under 5 are not admitted on tour.* If you are planning to bring a group of students please visit the Teacher's Link. This web site offers step-by-step instructions for planning a visit to the United Nations, including suggestions for resources to use for preparation and then follow-up with students.

Q: How can I get information on the United Nations?

A: The Public Inquiries Unit distributes information kits containing pamphlets and fact sheets on a variety of topics of general interest as well as booklets for students at intermediate and secondary levels and a "teacher's kit" containing a variety of UN publications. You can also click on the UN Website; UN CyberSchoolBus -or visit a depository library near you.

Q: How many countri members of the Secu ones are they?

A: The Security Counc members. The 5 perm France, the Russian F Kingdom and the Unite proposal brought befo negative vote. The ten are periodically electe a two-year term.

Review Exhibit 68

Page 17 Of 219

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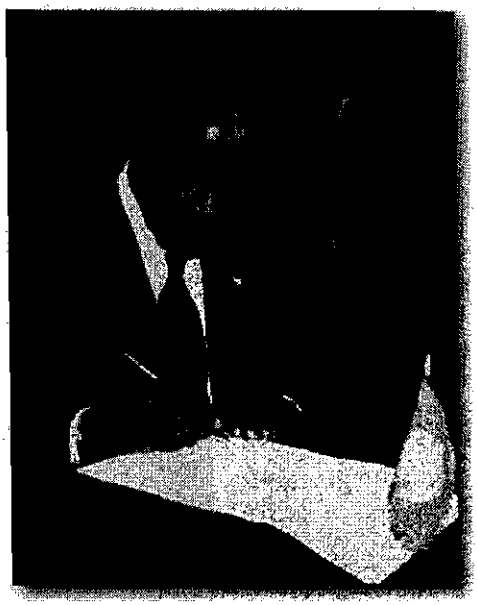

Q: I would like to sen Secretary-General to to achieve global uni address?

A: E-mails addressed t should be sent to inqui can only be taken up b presented by an officia Member State and afte the agenda of the Orga Membership.

Q: How many countr world?

A: We are not an auth suggest you visit a pub consult an encycloped United Nations, howev Countries

Q: Do you have a listing of job openings/volunteer positions/internships available?

A: You can find a listing of employment opportunities with the UN if you visit our Office of Human Resources Management, at 1 UN Plaza, Room DC1-0200, United Nations, New York, NY 10017 (How to apply?).They are open Mondays, Wednesdays and Fridays from 10:00 am to 12:00 noon. For more information on employment opportunities, please click on Fact-sheet 17.

There is no official volunteer programme at the United Nations Headquarters in New York. You may, however, find information on UN Volunteers, the volunteer arm of the UN that supports peace, relief and human development in 150 countries by visiting their website at: http://www.unv.org.

For information on internships at the United Nations Headquarters, please click on the

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Review Exhibit 68

Page 17 **Of** 19

United Nations Internship Programme .

Q: I am a high school graduate and I want to continue my studies at a university. Does the UN offer scholarships?

A: The UN offers no general scholarship or student exchange programme. However, UNESCO's Study Abroad contains information on study, travel and work in Member countries. This publication contains 2,950 entries concerning higher education and training opportunities in all disciplines in 124 countries. It includes information on scholarships, financial assistance, university-level courses, short-term courses, training programmes, student employment possibilities and facilities for handicapped. This publication is available for consultation in many public libraries, or may be ordered from:

UNESCO Publishing, Promotion and Sales Division
1, rue Miollis, F-75732
Paris Cedex 15
FRANCE
Fax: 33 01 45 68 57 41
Additional information on educational opportunities at the UN is listed on its website at www.unsystem.org.

Q: I heard that the UN issues international passports, visas and driver's licenses. How can I apply?

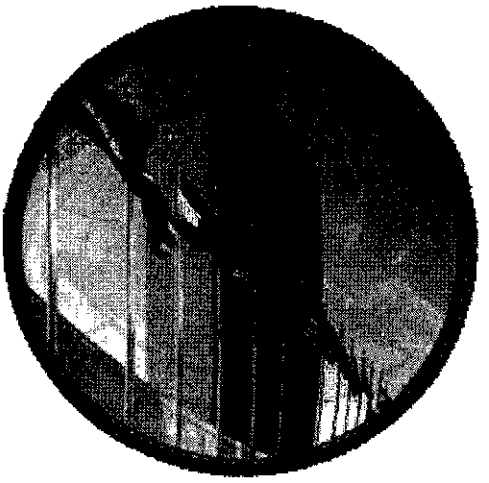
A: No!! Neither the UN nor any of its specialized agencies or international organizations issues or authorizes the issuance of international driver's licenses, passports or travel documents for the public. The issuance of such official documents is exclusively a function of national authorities. The UN is not a government and thus cannot issue any of the aforementioned documents.

Review Exhibit 68

Page 20 Of 249

Q: Where can I purch various countries?

A: The UN flag and thc are available from UN Nations, New York, NY 963-7700/7702 or toll-f UN does not "loan" or or private individuals.



Q: I need/wish to dor from/to the UN.

A: The United Nations contributions provided the contributions are n aims and activities of tl or money orders made Nations may be sent tc 2770A, United Nations The United Nations ca assistance to individua Being a Organization c funds are allocated onl have been officially ap

Home Page | FAQ | Fact Sheets | Notebook | Teachers Kit | Brie

Review Exhibit 68

Page 2T **Of** 2T 19

War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

34 (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Review Exhibit 69

Page 4 Of 4

Article 9
Elements of Crimes

more than thirteen officers." In Gen. Halleck's Order of Jan. 1, 1862, heretofor noticed,[88] it was declared:—"They" (military commissions) "will
1304 be composed of not less than three members, one of whom will act as judge advocate or recorder where no officer is designated for that duty. A larger number will be detailed where the public service will permit." In practice during the late war, while commissions were most commonly constituted with five members, there was a not unusual number, and was regarded as the proper *minimum*.[89] The court in Vallandigham's case was convened with nine members, of whom seven acted on the trial. In practice also a *separate officer* has been almost invariably detailed as *judge advocate*.[90]

JURISDICTION—As to place. (1) A military commission, (except where otherwise authorized by statute,) can legally assume jurisdiction only of offences committed within the field of the command of the convening commander. Thus a commission ordered by a commander exercising *military government*, by virtue of his occupation, by his army, of territory of the enemy, cannot take cognizance of an offence committed without such territory.[91] (2) The place must be the theatre of war or a place where military government or martial law may legally be exercised; otherwise a military commission,
(unless specially empowered by statute,) will have no jurisdiction of
1305 offences committed there.[92] The ruling in the leading case of *Ex parte* Milligan,[93] that a military commission, which had assumed jurisdiction of offences committed in 1862 in Indiana,—a locality not involved in war nor subject to any form of military dominion,—had exceeded its powers, has been referred to under the previous Titles, where also the fields of military government and martial law have been defined. (3) It has further been held by English authorities that, to give jurisdiction to the war-court, the *trial* must be had within the theatre of war, military government, or martial law; that, if held elsewhere, and where the civil courts are open and available, the proceedings and sentence will be *coram non judice*.[94] Thus it is considered by Finlason that the trial, by a military court, of Wolf Tone in 1798, was illegal because he was tried in Dublin, outside of the region of war and martial law.[95]

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[88] G. O. 1, Dept. of the Mo., 1862.

[89] DIGEST, 501.

[90] The ruling, however, in G. C. M. O. 267 of 1865, that the proceedings of a military commission for which no judge advocate had been detailed were on that account "*illegal*," was erroneous, since whether such a tribunal shall or not be supplied with a judge advocate, is, in the absence of law on the subject, a matter in the discretion of the commander.

[91] See Finlason, Repression of Riot and Rebellion, 106; Franklyn, Outlines of Mar. Law, 85; Pratt, 216; G. O. 125, Second Mil. Dist., 1867; G. O. 20, 1847, (Gen. Scott.) In the Jamaica Case, it was held by Chief Justice Cockburn, in Queen *v.* Nelson & Brand, that Governor Eyre acted illegally in arresting Gordon at Kingston, outside the "proclaimed district," (the district placed by the Governor's proclamation under martial law,) where he would have been entitled to a jury trial in a civil court, and removing him within that district for trial and punishment before a martial court. Finlason, Hist. of the Jamaica Case; Jones, 11, 12; Franklyn, 85; Pratt, 216. In Queen *v.* Eyre, Blackburn, J., held that the removal was justifiable. Finlason, Hist. Jamaica Case; Do., Report of Case of Queen *v.* Eyre; Solicitor's Journal, vol. 12, p. 674.

[92] See Clode, M. L., 189.

[93] 4 Wallace, 2. And see Milligan *v.* Hovey, 3 Bissell, 13; Skeen *v.* Monkheimer, 21 Ind., 1; Murphy's Case, Woolworth, 141; Devlin's Case, 12 Ct. Cl., 266; Id., 12 Opins. At. Gen., 128; G. O. 7, Dept. of Kans., 1862; Do. 87, Id., 1864; Do. 115, Dept. of the Mo., 1864. Compare, in this connection, the argument of Hon. J. A. Bingham, on the Trial of the Assassins of President Lincoln.

[94] See Clode, M. L., 189.

[95] Finlason, Coms. on Mar. Law, p. 4–5, 129. And see this trial, reported in 27 Howell's St. T., 615.

These rules which have their origin in the fact that war, being an exceptional status, can authorize the exercise of military power and jurisdiction only within the limits—as to place, time, and subjects—of its actual existence and operation, have not always been strictly regarded in our practice. A singular instance of their disregard during the late war is presented by the case of T. E. Hogg and his six associates, who, for the alleged offence of taking passage upon a U. S. merchant vessel at Panama, (a foreign country,) in November, 1864, with the secret purpose of subsequently seizing by force and arms the ship and cargo in the interest of the Southern confederacy, were, upon apprehension, transported to, and tried by military commission at, San Francisco, a place quite without the theatre of the war.[83]

As to time. An offence, to be brought within the cognizance of a mili-
1306 tary commission, must have been committed within the period of the war or of the exercise of military government or martial law. As in the ordinary criminal law one cannot legally be puished for what is not an offence at the time of the sentence,[84] so a military commission cannot, (in the absence of specific statutory authority,) legally assume jurisdiction of, or impose a punishment for, an offence committed either before or after the war or other exigency authorizing the exercise of military power.[85] Thus, a military commander, in the exercise of military government over enemy's territory occupied by his army cannot, with whatever good intention, legally bring to trial before military commissions ordered by him offenders whose crimes were committed prior to the occupation. So, while the jurisdiction may be continued after active hostilities have ceased, it cannot be maintained after the date of a peace or other form of absolute discontinuance, by the competent authority, of the war status. Thus, in the case, already referred to, of Capt. Foster, of the Georgia volunteers, charged with the murder of Lieut. Goff, Pa. Vols., in Mexico, pending the Mexican war, it was held by Attorney General Toucey that, the temporaray military government "having ceased by the restoration of the Mexican authorities, neither the offence nor any prosecution for it can
1307 any longer, in contemplation of law, have existence."[86] So, where the status has been that of *martial law proper*, the jurisdiction expires with the formal revocation of the declaration of the same, or, in the absence of a formal revocation, with the complete passing off of the exigency.[87] Where trials, or proceedings for trials, founded on martial law, are pending, the

[83] G. O. 52, Dept. of the Pacific, 1865. They were all sentenced to death, but their sentences were commuted to imprisonment in a penitentiary.

[84] Com. v. Duane, 1 Binney, 601; Anon., 1 Washington, 84; U. S. v. Tynen, 11 Wallace, 88; U. S. v. Finlay, 1 Abbott, U. S. R., 364.

[85] See Finlason, Coms. on Mar. Law., 53; Clode, M. L., 189; Thring, Crim. Law of Navy, 42–3; Wells on Jurisdiction, 577; 12 Opins. At. Gen., 200; G. O. 26 of 1866; Do. 12, Dept. of the South, 1868; Do. 9, First Mil. Dist., 1870; DIGEST, 507. "Martial law is not retrospective. An offender cannot be tried for a crime committed before martial law was proclaimed." Pratt, 216. And see Jones, 12. The jurisdiction of such a tribunal is "determined and limited by the period (and territorial extent) of the military occupation." G. O. 125, Second Mil. Dist., 1867.

[86] 5 Opins., 55. The case of the Modoc Indians, tried, in July, 1873, by military commission after hostilities had been finally concluded, may seem to have been an exception to the general rule laid down under this head. The jurisdiction assumed by the government in this instance is defended as follows by Atty. Gen. Williams:—"Doubtless the war with the Modocs is practically ended, unless some of them should escape and renew hostilities. But it is the right of the United States, as there is no agreement for peace, to determine for themselves whether or not anything more ought to be done for the protection of the country or the punishment of crimes growing out of the war." 14 Opins., 253.

[87] See *In re* Martin, 45 Barb., 146; also Finlason, Coms. on Mar Law. 4, 5, 130, as to Crogan's case.

D 39

UNITED STATES OF AMERICA	)	
	)	**DEFENSE REQUEST**
	)	**FOR TRIAL DATE**
v.	)	**Of 15 MARCH 2005**
	)	
DAVID HICKS	)	2 November 2004

The Defense in the case of the *United States v. David Hicks* provides the following requests that the trial phase of the commission commence after 15 March 2004.:

I. This request is filed in accordance with the President's Military Order of November 13, 2001.

II. Relief Requested: The defense requests that the commission schedule the trial in the above matter for a period of time after 15 March 2005.

III. Discussion:

At the August session of the commission, the defense indicated that it believed the defense would be ready for trial on or about 10 January 2005. This belief was based on an assessment of the amount of discovery that had been provided, and that access to certain witnesses would have been granted in a manner allowing the defense to complete its pre-trial investigation and witness preparation in time for a trial on or about 10 January 2005. However, the defense's estimation of the time necessary to complete its pre-trial investigation and preparation has been rendered inaccurate by intervening events, and by the pace of other developments beyond the defense's control.

For example, the defense has not yet been permitted to interview other detainees at Guantanamo. While the defense first made written requests to interview detainees in January 2004 (repeated in February 2004 and June 2004), those requests were denied on the basis that JTF GTMO did not have any arrangements in place to accommodate those requests. It was not until 29 September 2004, more than a month after the initial session of the commission, that JTF GTMO established an SOP for defense counsel access to other detainees. Relatedly, the prosecution has agreed to provide, but has been unable to produce, for the defense a "face book" containing photos of each detainee held in Guantanamo – again, more than five months after the request was first made in writing. The defense needs this "face book" to identify, with the aid of Mr. Hicks, those detainees who may have relevant information regarding Mr. Hicks' case. Once the particular relevant detainees are identified, and their languages, too, interpreters will have to be requested through the Appointing Authority's office – a process that has also proven lengthy (perhaps months).

Review Exhibit 71

Also, the defense has been attempting to obtain country clearances for travel to Afghanistan and Pakistan to interview several specific potential witnesses it has identified. The required clearance applications have been submitted. The clearance for Afghanistan has yet to be acted upon. The clearance for Pakistan has been denied. The defense has been informed that a six-week advance request must be provided, which requirement was not reflected in the country clearance. As a result, the application must be resubmitted. As such, this stage of the investigation cannot commence until the middle of December 2004. The defense believes it the witnesses it has identified in Pakistan have information and evidence that is critical to Mr. Hicks' defense, and unavailable from any other source.

Moreover, despite the defense's efforts, it has been denied access to documents related to, and to witnesses assigned to, units on the ground in Afghanistan from October 2001–January 2002. The defense believes it is critical to Mr. Hicks' defense to interview these potential witnesses and review certain classified information generated during that period.

The government recently provided defense with the names of 43 government investigators who either interviewed Mr. Hicks, or were involved in the investigation of which he was the subject. The defense has not yet had the opportunity to interview these investigators. Also, the defense has been unable to arrange interviews with certain individuals in Federal custody who are likely to possess information about Mr. Hicks.

Furthermore, the government has yet to provide the defense a witness list, and has refused to provide a Bill of Particulars. Certainly, a critical phase of the defense investigation will begin only when a witness list is received, and unquestionably those witnesses will not be located in one geographical area, or within close proximity to defense counsel. Without a Bill of Particulars, the defense will be unable to prepare for trial.

The defense will be unable to accomplish the above and complete final trial preparation by 10 January 2005. The above tasks and interviews will require extensive coordination and travel by defense counsel. Taking into account the holidays in November and December, scheduling the trial for 15 March 2005 or thereafter may allow the defense the requisite time to complete its investigation and preparation.

In addition, the Charge Sheet suggests a breadth of this case that will encompass a huge swath of time and geography – at least fifteen years and five continents. The subject matter projected by the government also would entail separate investigations of a variety of contested issues and events occurring between 1989 and 2001, including assassination attempts, bombings, and meetings that require defense investigation and preparation.

Also, Mr. Hicks's new living arrangements make visiting him more time-consuming, and far more cumbersome with respect to case preparation. Since we cannot

visit him in his place of confinement, there is a limited amount of material he can bring with him to meetings, and, therefore, that we can cover at one time.

In addition, during the hearings this week, a commission member indicated a desire to hear expert testimony, but from an expert designated by the commission rather than the parties. That process could take some time (if done with appropriate deliberation and care), and should not be rushed in order to accommodate what the Appointing Authority has described as only a "tentative" trial date. Similarly, Mr. Hicks's threshold motions, including the challenge to the failure to appoint an alternate, and other jurisdictional motions, as well as any case-dispositive motions that must be certified to the Appointing Authority, should be decided before sufficiently before trial. Otherwise, we will all be embarking on a fruitless mission.

Also in that context, evidentiary and other motions not directed at the face of the charge sheet or the commission's jurisdiction have not been scheduled yet. Indeed, since the prosecution has not yet indicated what statements (and by whom) and/or documents it intends to offer in evidence, the defense cannot even begin to fashion appropriate evidentiary motions. Nor can the defense do so until the prosecution informs the defense of what evidence it intends to introduce. Those motions – to suppress, *in limine*, and others – will require significant preparation, evidentiary hearings, and argument before they can be resolved.

Accordingly, it is respectfully submitted that the current January 10, 2004, trial date be adjourned until March 15, 2004, at the earliest.

IV. Conclusion: Given the above, the defense requests that the commission schedule the trial date for Mr. Hicks for a date after 15 March 2005.

V. Oral Argument: The Defense requests oral argument on this motion.

By: _____//signed//_____
M.D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel

_____//signed_____
JOSHUA L. DRATEL
Civilian Defense Counsel

Review Exhibit 71

Page 3 **Of** 3

UNITED STATES OF AMERICA v. DAVID M. HICKS	**STIPULATION OF FACT** 3 November 2004

The Prosecution and the Defense, with the consent of the Accused, hereby stipulate to the following facts:

1. On 17 August 2004, a Combatant Status Review Tribunal (CSRT) was convened to make a determination as to whether the Accused meets the criteria to be designated as an enemy combatant.

2. On 22 September 2004, the CSRT made its determination.

3. On 30 September 2004, the Director, Combatant Status Review Tribunals, concurred in the decision of the CSRT and determined that the case is now considered final.

For the Defense:

M. D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel

JOSHUA L. DRATEL
Joshua L. Dratel, P.C.
Civilian Defense Counsel

DAVID M. HICKS
Accused

For the Prosecution:

Lieutenant Colonel, U.S. Marine Corps
Prosecutor

Review Exhibit 72

Page 1 of 1

UNITED STATES OF AMERICA	)	**ORDER**
v.	)	3 November 2004
DAVID M. HICKS	)	

To best prepare the parties to ensure a full and fair trial, the following ORDER is issued:

I. All of following requirements are continuing in nature.

II. The Prosecution shall provide to the Defense the following items at the times indicated.

1. Evidence that tends to exculpate the accused on the merits, and evidence that might mitigate the sentence an accused may receive, whether the prosecution intends to offer such evidence or not. These matters have already been disclosed, and the Prosecution shall continue to provide them

2. Not later than 3 December 2004, evidence that the Prosecution intends to offer on the merits at the trial and not included in paragraph II-1 above to include:

a. A list of witnesses it intends to call, the subject matter of each witness' testimony, and the charge or charges to which the testimony pertains.

b. A list of any exhibits - whether paper, pre-admitted, matters upon which conclusive notice has been taken - or otherwise. This requirement may be satisfied by referring to documents already provided with sufficient particularity to identify them.

c. Statements made by the accused the prosecution intends to offer at trial.

d. Evidence seized from the person of the accused that the prosecution intends to offer at trial.

3. Not later than 1 February 2005, evidence that the Prosecution intends to offer on the sentencing portion of the trial, if any, and not included in paragraphs II-1 or II-2 and not previously disclosed as per paragraph II-1 or II- 2 above.

Review Exhibit 73

Page 1 **Of** 2

III. The Defense shall provide to the Prosecution the following items at the times indicated.

1. Not later than 20 December 2004, evidence that the Defense intends to offer on the merits in its case in chief to include:

a. A list of witnesses it intends to call, the subject matter of each witness' testimony if different or in addition to that previously provided to the government as part of a witness request, and the charge or charges to which the testimony pertains.

b. A list of any exhibits - whether paper, pre-admitted, matters upon which conclusive notice has been taken - or otherwise. This requirement may be satisfied by referring to documents already provided with sufficient particularity to identify them.

2. Not later than 1 February 2005, notice of any affirmative defense, the charge or charges to which the defense may apply, and a synopsis of the evidence that establishes the defense.

3. Not later than 15 February 2005, evidence that the Defense intends to offer on the sentencing portion of the trial, if any, and not previously disclosed as per paragraphs III-1 or III-2 above.

IT IS SO ORDERED.

Peter E. Brownback III
COL, JA, USA
Presiding Officer

Review Exhibit 73

Page 2 Of 2

UNITED STATES OF AMERICA v. DAVID M. HICKS	**DEFENSE ESSENTIAL FINDINGS ON MOTION TO STRIKE TERRORISM (D20)**

The Defense submits the following proposed essential findings in relation to the above-referenced motion:

1. The General Counsel of the Department of Defense issued Military Commission Instruction (MCI) No. 2.

2. MCI No. 2 is not an authoritative source of law, and is in no way binding on the Commission.

3. The crime of Terrorism in section 6B of MCI No. 2 does not state an offense under the law of war. Neither is it an offense triable by military commission.

4. There is no universally accepted definition of "terrorism" in domestic or international law. It is generally a descriptive term for specific criminal conduct taken with a particular goal—political or otherwise. Individuals may be prosecuted for committing specific conduct, not descriptive terms. Thus, for example, a person who kidnaps and murders an individual in an effort to spread terror may be prosecuted for the criminal offenses of kidnapping and murder, not "terrorism."

5. The commission finds that "terrorism" is not an offense under the law of war or triable by military commission. Accordingly, reference to "terrorism" in Charge 1 is stricken and dismissed.

JEFFERY D. LIPPERT
Major, United States Army
Detailed Defense Counsel

Review Exhibit 74

Page 1 **Of** 1

UNITED STATES OF AMERICA v. DAVID M. HICKS	**DEFENSE PROPOSED ESSENTIAL FINDINGS** **DEFENSE MOTION TO DISMISS CHARGE 3** **(D13)** 1 November 2004

The Prosecution submits the following proposed essential findings in relation to the above-referenced motion:

1. The General Counsel of the Department of Defense issued Military Commission Instruction (MCI) No. 2.

2. MCI No. 2 does not establish the crimes and elements that are intended for use by this Military Commission.

3. The crimes and elements listed in MCI No. 2 are in no way reflective of established law.

4. Aiding the Enemy has been expressly recognized by Congress as an offense triable by military commission since prior to the 1951 enactment of the Uniform Code of Military Justice. The present-day statutory offense of Aiding the Enemy is contained in Article 104 of the UCMJ.

5. Allegiance to the United States is an essential element of UCMJ Article 104, Aiding the Enemy.

6. For purposes of this motion, Article 21 of the Uniform Code of Military Justice is the same as its precursor, Article 15 of the Articles of War.

7. Article 15 of the Articles of War was in effect when the U.S. Military Commission case of Ex parte Quirin, 317 U.S. 1 (1942) was tried.

8. In Quirin, the Accused entered into the territory of the United States. Thus, they had an allegiance to the United States and a duty to obey its laws. Accordingly, they could be charged with Aiding the Enemy.

9. Because Mr. Hicks had no allegiance to the United States, and the conduct occurred outside the territorial jurisdiction of the United States, the Charge 3, Aiding the Enemy, does not state an offense against Mr. Hicks. The charge is dismissed.

JEFFERY D. LIPPERT
Major, U.S. Army
Detailed Defense Counsel

Review Exhibit 75

Page 1 **Of** 1

UNITED STATES OF AMERICA v. DAVID M. HICKS	**DEFENSE PROPOSED ESSENTIAL FINDINGS ON MOTION TO DISMISS CHARGE 2 (D12)** 1 November 2004

The Defense submits the following proposed essential findings in relation to the above-referenced motion:

1. The General Counsel of the Department of Defense issued Military Commission Instruction (MCI) No. 2.

2. MCI No. 2 is not an authoritative source of law, and is binding on the Commission only to the extent that MCI No. 2 is reflective of existing law.

3. The jurisdiction of this Commission is limited to law of war offenses and "offenses triable by military commission." The ordinary domestic crimes of murder and attempted murder are not war crimes, and do not fall within this Commission's jurisdiction.

4. The crime of "Murder by an Unprivileged Belligerent" as set forth in section 6B of MCI No. 2 states neither an offense under the law of war, nor an offense triable by military commission.

5. It is not a violation of the law of war, nor an offense triable by military commission, for an individual merely to be an unprivileged belligerent. Neither is it a violation of the law of war, nor an offense triable by military commission for an unprivileged belligerent to kill or attempt to kill a combatant or any other non-protected person. Such conduct by an individual would, however, constitute a crime (murder or attempted murder) under domestic law of a sovereign having jurisdiction over the individual or the offense.

6. An unprivileged belligerent may not be tried for such an offense by a military commission. The status of "unprivileged belligerent" is not in itself a war crime or offense under the law of war, or any other offense deemed by Congress to be triable before a military commission.

7. The "offense" of "murder by an unprivileged belligerent" stated in Charge 2 does not state an offense. The portion of Charge 2 regarding murder or attempted murder by an unprivileged belligerent is dismissed.

JEFFERY D. LIPPERT
Major, U.S. Army
Detailed Defense Counsel

Review Exhibit 76

Page 1 Of 1

UNITED STATES OF AMERICA v. DAVID M. HICKS	**DEFENSE PROPOSED ESSENTIAL FINDINGS ON MOTION TO STRIKE DESTRUCTION OF PROPERTY BY AN UNPRIVILEGED BELLIGERENT (D9)**

The Defense submits the following proposed essential findings in relation to the above-referenced motion:

1. The General Counsel of the Department of Defense issued Military Instruction (MCI) No. 2.

2. The crimes and elements listed in MCI No. 2, para. B, are not an authoritative source of law for the commission, and are in no way binding on the commission, because they are not reflective of existing law.

3. Criminal liability for conduct constituting destruction of property by an unprivileged belligerent is not an offense under the law of war. Neither is it an offense triable by military commission. As a result, pursuant to UCMJ §§821 & 836, this commission lacks jurisdiction to try Mr. Hicks for such an offense.

4. It is not a violation of the law of war, nor an offense triable by military commission for an individual merely to be an unprivileged belligerent.

5. The motion to strike the term destruction of property by an unprivileged belligerent from Charge 1 is granted.

JEFFERY D. LIPPERT
Major, U.S. Army
Detailed Defense Counsel

Review Exhibit 77

Page 1 **Of** 1