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

2ND VOLUME OF REVIEW EXHIBITS (RE): RES 13-20*

NOVEMBER 1-3, 2004 SESSIONS

(REDACTED VERSION)

* Review Exhibits 13 to 16 were issued at both the August and November 2004 sessions.

United States v. David M. Hicks

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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.

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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)
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IV*	Federal Litigation at U.S. Supreme Court and D.C. Circuit, involving *Hamdan v. Rumsfeld*
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UNITED STATES V. DAVID M. HICKS--REVIEW EXHIBITS

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

UNITED STATES OF AMERICA	)	**PROSECUTION RESPONSE TO DEFENSE WITNESS REQUESTS OF 8 OCTOBER 2004 AND MOTION TO EXCLUDE ATTORNEY AND LEGAL COMMENTATOR OPINION TESTIMONY**
v.	)	
DAVID M. HICKS	)	
	)	13 October 2004

1. Timeliness. This Response is submitted within the time frame established by Presiding Officer Memorandum (POM) 10.

2. Action Upon Defense Request. The Defense seeks to have four legal commentators produced to testify in Guantanamo Bay and one via telephone for the motions hearing scheduled to commence 1 November 2004. The Prosecution does not agree to these requests; accordingly, they are submitted to the Presiding Officer per POM 10.

3. Relief Sought. That the Defense witness requests be denied and that the proffered testimony of legal commentators be excluded from the motions hearing.

4. Facts.

a. On 8 October 2004, the Defense filed electronically witness requests for five law professors to testify before the Commission. Although filed with the Presiding Officer, not the Prosecution as required by POM 10, the Presiding Officer responded on 10 October 2004 that he expected the provisions of POM 10 to be followed and considered the witness requests to be with the Prosecution. Accordingly, the Prosecution is filing this response per POM 6, para. 6.

b. The requested experts are as follows: Professor Tim McCormack (from Victoria, Australia); Professor George Edwards (from Indianapolis, Indiana); Professor Antonio Cassese (from Florence, Italy); Professor Cherif Bassiouni (from Chicago, Illinois); and Professor Jordan Paust (by telephone). Ten of the motions filed by the Defense cite "the testimony of expert witnesses" as evidence.

5. Discussion.

a. Commission Law.

(1) The President's Military Order (PMO) of November 13, 2001 mandates that all commissions be "full and fair." PMO, Sec. 4(c)(2). The standard for production of witnesses is that it must be "necessary and reasonably available as determined by the Presiding Officer." Military Commission Order (MCO) No. 1, para.

5(H). Testimony is admissible if it is probative to a reasonable person and not cumulative. *Id.*, para. 6(D)(1) and (2)(a).

(2) Applying the above standards, the production of the requested witnesses should be denied and their testimony excluded. A parade of legal scholars appearing before the Commission in motions hearings as "expert witnesses" to express their opinion on what the law is, or should be, is not consistent with recognized standards for expert witnesses or the notion of "full and fair" trials. Defense, in its pre-trial motions, all but states that the Military Commission lacks the ability to reach legal conclusions – something "beyond the training and expertise of lay persons" – without expert testimony, but offers no explanation as to why briefs, arguments of counsel and legal research are insufficient to state the Accused's position on the law. The Commission, like other courts and tribunals, is squarely suited to receive submissions of counsel regarding the interpretation of applicable law and render an informed decision.

(3) Additionally, POM 10 delineates a procedure for the Commission to determine the appropriateness of a requested witness' testimony. The critical component of a witness request is the synopsis of the witness' testimony. POM 10 provides:

> 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 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.**
>
> . . . .
>
> 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 should also include **a statement of law as to why the expert is necessary or allowable on the matter in question.**

POM 10, para. 4(c), (i) (emphasis added).

The Defense fails in its burden of demonstrating why the requested witnesses need to be produced for this motions session.

(a) Professor George Edwards. The Defense request for Professor Edwards specifies a number of areas in which he wishes to "explain," "discuss," or "describe" certain general topics. For example, he "will explain the sources of International Law (and the sources of international rights law and to some smaller degree relevant international humanitarian law)." Likewise, Professor Edwards will describe "monism v. dualism" and "how much weight should be given to promulgations" of

various international entities. However, the synopsis fails to state with specificity what testimony he would provide that would be relevant to the motions being decided or why as a matter of law it is necessary or allowable.

(2) Professor Tim McCormack. The Defense request for Professor McCormack indicates that he will provide generalized testimony regarding how "Charges 2 and 3 do not represent violations of the law of war," which is an ultimate conclusion for the Commission to make, not a witness, and "an overview of the law of war" and "how the law of war operates in armed conflicts." This does not provide an adequately detailed synopsis of his testimony and why it is necessary or allowable.

(3) Professor Cherif Bassiouni. Again, the Defense presents a generalized description of the subject matter they wish 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 or why it is necessary or allowable.

(4) Professor Antonio Cassese. The Defense synopsis of Professor Cassese's testimony describes the various subject areas where he will offer his opinion. These include inchoate offenses such as conspiracy. However, there is no explanation as to why his testimony is not cumulative with Professor Bassiouni's (or vice versa) and why it is necessary and allowable.

(5) Professor Jordan Paust. Professor Paust appears to be offered to provide a general overview of international law. Again, there is not an adequate synopsis demonstrating why his testimony is necessary or allowable.

b. U.S. Law.

(1) Both federal and state law generally prohibits the trial testimony of lawyers regarding the law. In Sprecht v. Jensen, 853 F.2d 805 (10th Cir. 1988), *cert. denied,* 488 U.S. 1008 (1989), the Court reversed the trial court's decision to allow a lawyer to testify in a civil rights action because the lawyer's testimony consisted only of legal conclusions which supplanted the trial roles of both the court and jury. The Court in Sprecht, citing the law in several other Circuits, held that "an expert witness may not give an opinion on ultimate issues of law" for at least two reasons. *Id.* at 808. Primarily, an "expert" on the law supplants the judge's role as the source of the law and creates confusion. *Id.* at 807. Secondarily, the trial process is such that if one side calls an expert on the law, the other will do so as well. The result is an inefficient process with lengthy testimony of multiple contradictory experts. *Id.* at 809.

(2) Similarly, the states have followed the federal courts in barring attorney experts on the law. See, e.g., Summers v. A.L. Gilbert Co., 69 Cal.App.4th 1155; 82 Cal.Rptr. 2d 162 (1999) ("California is not alone in excluding expert opinions on issues of law. ... At least seven circuit courts have held that the Federal Rules of Evidence prohibit such testimony.") *Id.* at 1179.

(3) Moreover, a U.S. Appellate Court explicitly warns that over-reliance on opinions of academics can lead to incorrect conclusions about the actual content of customary law. United States v. Ramzi Ahmed Yousef, 327 F.3d 56, 69-70 (2d Cir 2003). It stated, "scholars do not *make* law, and that it would be profoundly inconsistent with the law-making process within and between States for courts to permit scholars to do so by relying upon their statements, standing alone, as sources of international law." *Id.* at 77. Standing for the same proposition, *see also* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

c. International Law. Consistent with U.S. holdings, the International Criminal Tribunal – Yugoslavia (ICTY) has disallowed expert testimony that interferes with the very role of the court. In Kordic and Cerkez (a matter involving Law of War violations before the ICTY) the Trial Chamber would not permit an expert to offer testimony that included legal conclusions. Persuaded by defense counsel that such testimony elevated the witness to the status of a "fourth judge" the Chamber denied the request, concluding that such testimony would impermissibly provide an opinion "on the very matters upon which this Trial Chamber is going to have to rule" and that doing so "invades the right, power and duty of the Trial Chamber to rule upon the issue." Kordic and Cerkez, IT 95-14/2-T, Transcript (January 28, 2000) at 13289-13290, 13306-13307.) Furthermore, the Chamber concluded, "it's dealing with the matters which we have to deal with ultimately, drawing the conclusions and inferences which we have to draw, we think that it does not assist and is, therefore, not of probative value." *Id.*

d. Conclusion. The use of law professors as witnesses in the motions session is unnecessary and would invade the province of the triers of fact and law. On the other hand, when unique or significant issues of law are before a court, as undeniably exist in this case, both U.S. and International Courts have recognized the benefit of receiving *written material* from legal scholars and commentators. The Defense witness requests should be denied and the proffered testimony not permitted. Instead, the appropriate mechanism is for the parties to develop the assistance of these scholars and to incorporate their opinions into the parties' submissions to the Commission for its consideration.

6. Files Attached. None.

7. Oral Argument. The Prosecution asserts that this motion can be resolved without the necessity of oral argument.

8. Legal Authority.

a. United States v. Ramzi Ahmed Yousef, 327 F.3d 56 (2d Cir 2003)

b. Sprecht v. Jensen, 853 F.2d 805 (10th Cir. 1988), *cert. denied,* 488 US 1008 (1989)

c. Summers v. A.L. Gilbert Co., 69 Cal.App.4th1155; 82 Cal.Rptr. 2d 162 (1999)

d. Kordic and Cerkez, IT 95-14/2-T, Transcript (January 28, 2000)

e. Military Commission Order No. 1

f. Presiding Officer Memorandum No. 10

g. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)

[redacted]
Lieutenant Colonel, U.S. Marine Corps
Prosecutor

UNITED STATES OF AMERICA	)	
	)	**DEFENSE RESPONSE TO PROSECUTION MOTION TO EXCLUDE ALL EXPERT WITNESSES**
v.	)	
DAVID M. HICKS	)	
	)	**19 October 2004**

The defense in the case of the *United States v. David M. Hicks* moves the military commission to permit the testimony of expert witnesses before the military commission, and states in support of this motion:

1. **Synopsis**: The defense has requested the government produce expert witnesses to provide testimony in support of defense motions before the military commission. These experts will testify on various areas of international law relevant to Mr. Hicks' case. The prosecution has refused to produce these witnesses,[1] based on the common argument that expert witnesses should not be permitted to testify at the motion hearing. The prosecution's attempt to bar expert testimony is not supported by international or domestic law.

2. **Facts**: The defense has filed 16 motions with the commission. The defense has requested to present testimony of 5 expert witnesses in various areas of international law in support of these motions. The prosecution has refused to produce these witnesses based on one common argument that legal expert witnesses should not be permitted to testify before the commission. The prosecution argument is not based on the qualifications or relevance of the requested witnesses' testimony.[2] The commission is made up of one officer who is a lawyer by training, and 4 military officers with no formal legal training.[3]

3. **Discussion**:

A. Defense Access to Witnesses

Under Military Commission Order No. 1 (MCO 1), section 5H, "[t]he accused may obtain witnesses . . . and documents for the accused's defense, to the extent necessary and reasonably available as determined the Presiding Officer." MCO 1 section D(2)(a) regarding production of witnesses states:

> The Prosecution or the Defense may request that the Commission hear the testimony of **any person,** such testimony **shall be received** if found to be admissible and not cumulative. The Commission may also summon and hear witnesses on its own initiative.

[1] The prosecution submitted "Prosecution Response to Defense Witness Requests of 8 October 18, 2004 and Motion to Exclude Attorney and Legal Commentator Opinion Testimony of 13 October 2004, in which the prosecution seeks to exclude the testimony of any expert witness.

[2] The prosecution claims the synopsis contained in the defense's request are inadequate as well. As the Presiding Office has yet tot rule on the witness requests, it would be premature to address this issue.

[3] The number of members is yet to be decided, this motion is written still pending the Appointing Authority's decision on member challenges. The alternate member is also a military officer who is not a lawyer.

To be admissible, testimony must have probative value to a reasonable person.[4] Following these provisions, the commission should permit the testimony of expert witnesses and grant the defense's request for five (5) expert witnesses to testify on various aspects of International law in support of the defense's motions.

The defense has requested the production of several experts on aspects of international law, including the law of war, to testify in support of defense motions pending before the commission. These witnesses are widely respected scholars who have published articles, and in some cases seminal textbooks, on issues relevant to defense motions. The prosecution does not base their exclusion of expert witnesses base on any claim of lack of qualification. The synopses of these experts' testimony defense provided to the government (and subsequently to the commission) is more than sufficient to show the testimony of these experts would have probative value to a reasonable person on the legal issues the commission must decide to rule on the defense's motions.

The testimony of these experts would not be cumulative. In its motions, the defense has provided arguments based on sources of law that support the defense positions stated in their motions. These arguments are not evidence. They are statements of one party's attorneys regarding an outcome for the case that party desires. Accordingly, to date, no evidence has been presented in support of the defense motions.

The testimony of the requested experts, on the other hand, would be evidence. The requested experts are not advocates for any party in this case. They are independent scholars whose legal training and expertise gives them the ability to examine a particular situation and comment and explain how the law applies. Here expert testimony on the law applicable to the defense motions is critical to the commission to effectively determine the proper ruling on each motion. The commission is not only the finder of fact in this case; it is the finder of law. This is a unique position for the all but one of the member of the commission.

In a court-martial with members, the panel is always the finder of fact. However, the panel is never the finder of law. The UCMJ provides the panel with a military judge to act as the finder of law. It is the military judge, without any input from the panel, who determines what law applies in the case. The military judge is, of course, a lawyer, usually with extensive experience and training on the legal issues involved in a court-martial. The panel members take the military judge's instructions on the law and apply the facts they find to it to determine guilt or innocence.

In this commission, however, there is no judge. The presiding officer, while he has legal training, is not the source of law for the panel. The panel may and should look to the presentations of the parties for input on the legal principles, concepts, and standards they should apply to the facts in this case.

Except for the presiding officer, none of the panel members has any formal legal training. None of the commission members is an expert in international law. To decide the defense motions, the commission must make determinations and make rulings on complicated issues of

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[4] MCO 1 D(1).

international law. The commission, while it has the power to do so on its own initiative, has not summoned any expert witnesses to testify before the commission. Therefore, for the panel to make an informed decision on the legal issues presented in the defense motions, the parties must present evidence of the law to the panel as part of their presentations in support of or in opposition to the parties' motions. As stated above, the arguments the parties state in their written motions are not evidence. The testimony of expert witness, called by either side, is therefore admissible, and not cumulative. Moreover, it will assist the panel in determining important issues in this case. Accordingly, under MCO D(2)(a) it must be admitted.

B. Response to Prosecution Arguments

(1) Live Expert Legal Testimony is Superior to Written Expert Briefs

In the prosecution's document dated 13 October 2004, entitled, "Motion to Exclude Attorney and Legal Commentator Opinion Testimony," it readily admits the necessity of evidence from "legal scholars and commentators." However, the prosecution seeks to limit the presentation of such evidence to written materials only. In its motion the prosecution states, "when **unique or significant issues of law** are before a court, **as undeniably exist in this case**, both U.S. and International courts have recognized the benefit of receiving **written material** from legal scholars and commentators." (See Prosecution Motion, page 4, emphasis added)

Presenting expert legal opinion evidence in written form only would impair the defense's ability to fully present its case, and limit the ability of the commission to fully explore these issues. A written brief is not a substitute for live testimony. Live testimony allows the attorney to present the evidence in a more accessible fashion. Moreover, without live testimony, the commission will be unable to question the witnesses. The issues involved in the defense motions are complex, and some have never been litigated before. Allowing the commission to ask questions of these expert witnesses will be critical to ensure that the commission, as finder of law, fully understands the issues involved. Finally, having the experts testify live allows the opposing party to cross examine the witness, and allows the commission to observe the witnesses' demeanor, both of which are important to the commission in properly weighing the evidence.

(2) Cases Cited by the Prosecution are Inapplicable to U.S. v. Hicks

(a) *Specht v. Jensen*[5]

The *Specht* case involved an interpretation of the Federal Rules of Evidence (Federal Rules) in which the 10th Circuit disallowed testimony by an expert witness on a legal issue. The prosecution cites this case for the proposition that legal expert testimony would supplant the role of the judge, and requires a lengthy "battle of the experts." In citing *Specht* it would appear the prosecution is trying to "have its cake and eat it too." The President's military order establishes that the Federal Rules do not apply to this commission. Additionally, this commission is not structured with a separate judge and jury removing the concern of an expert witness interfering with the judge's role. Accordingly, the holding in *Specht*, does not apply to this, or any other military commission case. However, in *Specht*, the 10th Circuit looked to the Federal Rules of

[5] 853 F.2d 805 (10th Cir. 1988), *cert. denied*, 488 U.S. 1008 (1989).

Evidence Advisory Committees' test for when expert testimony might be necessary. The court stated:

> There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.[6]

Applying this "common sense" test to Mr. Hicks' case, it is reasonable and prudent to have the commission hear from individuals with specialized training and expertise in the area of international law so the members will be educated in this complex area.

United States district courts have historically allowed testimony by experts on international law. For example, in *Fernandez-Roque v Smith*, 622 F.Supp 887 (1980), a U.S. district court conducted an evidentiary hearing and heard expert testimony on the then current state of international law from two professors from Columbia University[7] and Vanderbilt University.[8] In its opinion, the court stated "expert testimony is an acceptable method of determining international law."[9] Expert testimony relating to the state of international law was also received in a number of other district court cases, including *Navios Corporation v. The Ulysses II,*[10] *United States v. Maine*,[11] and *Texas v. Louisiana.*[12]

Following the precedent set by the U.S. federal courts, the commission should allow expert testimony on legal issues even if it meant having both sides present expert testimony on a particular issue. The commission panel can only benefit by hearing expert testimony and questioning experts from both sides as to what law the commission should apply.

(b) *United States v. Ramzi Ahmed Yousef*[13]

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[6] Id at 807.

[7] Professor Louis Henkin was co-director of the Columbia University Center for the Study of Human Rights. He also served as chief reporter for the American Law Institutute's *Restatement of the Foreign Relations Law of the United States (Revised)* and as president of the United States Institute of Human Rights. He had also authored several books and articles in the field of international law, and was considered an authority in that field.

[8] Professor Harold G. Maier was Director of the Transnational Legal Studies Program at Vanderbilt University. He had served as a consultant and counsellor on international law t the U.S. State Department, and had testified before Congressional committees concerning immigration and other international issues. He was the author of numerous works in the field of international law.

[9] *Roque v Smith*, 622 F.Supp 887 (1980).

[10] 161 F.Supp 932 (D.Md.1958) (testimony on the state of war in hostilities between Egypt and the United Kingdom and France in 1956).

[11] 420 U.S. 515, 95 S.Ct. 1155, 43 L.Ed. 2d 363 (1975), Transcript of the Hearing before the Special Master 473, 1899 (1971) (testimony on the law of the continental shelf and other law of the sea issues).

[12] 426 U.S. 465, 96 S.Ct. 2155, 48 L.Ed.2d 775 (1976), Transcript of the Hearing before the Special Master 939-1906 (1975) (testimony concerning the continental shelf boundary).

[13] 327 F.3d 56 (2nd Cir 2003)

The prosecution cites the *Yousef* case in which the appellate court warned lower courts not to rely solely on written material from academics as sources of international law. The court did not, however, ban the use of expert testimony. The court explained that "misplaced reliance on a **treatise** as a primary source of the customary international law . . . "[14] led the lower court astray. In *Yousef*, the lower court had adopted the statements of the Restatement (Third) as evidence of the customs, practices, or laws of the United States and/or evidence of customary International law".[15] The court pointed out that to determine customary international law, one must "look primarily to the formal lawmaking and official actions of States and only secondarily to the works of scholars as evidence of the established practice of States."[16]

In this case, however, as the defense has argued extensively in its briefs, the charges against Mr. Hicks, and indeed the very establishment of this commission itself are creations of the executive branch. Many of them have no basis in Congressional legislation. Most of the legal issues presented in this case are issues of first impression. The defense submits that expert testimony and input to the commission regarding critical issues of law is an absolute necessity, rather than an imposition as is suggested by the prosecution.

(c) *Kordic and Cerkez*[17]

The prosecution in its attempt to find support in international courts fails to fully disclose in its motion the use of the expert witness in *Kordic and Cerkez*. The prosecution's motion implies that the International Criminal Tribunal of Yugoslavia (ICTY) disallowed expert testimony in a situation similar to that presented to this commission. This implication is wrong.

A full reading of the transcript in *Kordic and Cerkez*, reveals that the prosecution attempted to present "expert witness" testimony during the merits portion of the trial from an individual who had performed an independent investigation into the **facts** of the case being tried. The prosecution also attempted to submit this individual's report, which contained conclusions as to how the "facts" from his investigation should be applied to the relevant law. The court refused to admit this "expert's" testimony and report.[18]

As the President promulgated in his military order, the rules of evidence do not apply to this commission. Selectively employing the federal rules of evidence is the prosecution trying to have "its cake and eat it too."

[14] Id. at 99. (Prosecution motion utilizes Lexis page number of 69)

[15] Id at 100.

[16] Id at 103.

[17] IT 95-14/2

[18] Kordic and Cerkez, IT 95-14/2-T, entire transcript of January 28, 2000. See specially, J. Robinson at 13280. "I think this is what concerns us, because ultimately that is a matter which we have to decide on the basis of the facts."

In our case, the defense is offering testimony from legal experts on issues involving pre-trial legal motions, not factual issues. Thus, the prosecutions reliance on *Kordic and Cerkez* is misplaced.

More importantly, however, the ITCY has allowed expert testimony on legal issues in cases. For example, in *Mucic et al,*[19] the ITCY trial chamber heard from an expert legal opinion testimony involving a specific aspect of the Geneva Convention. In a later appeal proceeding the court ordered that the defense could present legal expert testimony on an issue regarding the Costa Rican constitution.[20] A true representation of the practice of international courts and tribunals in determining questions of law would show that expert legal testimony is readily accepted.[21] In fact, it is the Court which usually seeks such evidence from an amicus curiae, rather than waiting for the parties to present such evidence. This is currently the practice of the ICTY in the case of Slobodan Milosevic.[22]

C. Conclusion:

Under MCO 1 section 5H and section D, the expert testimony proffered by the defense is admissible. Such testimony is not cumulative with the motions and documents submitted by the defense, and will be helpful to the commission in determining critical issues of first impression on complex areas of International law relevant to Mr. Hicks' case.

To provide Mr. Hicks a full and fair trial, the defense submits the proffered expert witness evidence must be admitted. Further, the proffered experts should be allowed to testify live before the commission to facilitate the most effective presentation of the evidence, and to allow the commission the opportunity to question the witnesses.

The prosecutions arguments that expert legal testimony would not be helpful to the commission and would promote a "battle of the experts" are untenable. Only the prosecution would benefit by the absence of expert legal testimony on the defense motions in this case. To date, the prosecution has offered no basis for many of its positions other than the often used, but meaningless "under Commission Law," the vast majority of which was created by the executive branch in establishing the commission process and the "offenses" to be tried in it.

Both Mr. Hicks and the commission, which has the difficult responsibility of being both the finder of fact and law, deserve to have experts trained in International law, including the law of war, testify during the pre-trial motions phase of this commission trial.

4. **Evidence**: The testimony of expert witnesses.

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[19] IT-96-21-T of 16 November 1998

[20] Order available at www.un.org/icty/celebici/appeal/order-e/00214EV311633.htm

[21] The judges for the international criminal tribunals are required to have extensive experience and yet still accept expert witnesses. See judges qualifications for ICTY and ICTR.

[22] The ICTY is using Mr. Tim McCormack, one of the defense requested expert witnesses, as amicus curiae in the Molosevic case.

5. **Relief Requested**: For the above reasons, the defense requests that the commission deny the prosecution's motion to exclude the use of expert witness and permit expert witnesses, called by either side to this commission, to testify live before the panel at Guantanamo Bay.

6. The defense requests oral argument on this motion.

By: _____

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UNITED STATES OF AMERICA v. DAVID M. HICKS	**PROSECUTION REPLY: MOTION TO EXCLUDE ATTORNEY AND LEGAL COMMENTATOR OPINION TESTIMONY CONCERNING THEIR VIEWS OF THE LAW** 22 October 2004

1. Timeliness. This Reply is submitted within the timeframe established by Presiding Officer Memorandum 4-2. The Prosecution requests that this motion be decided at the Commission's first opportunity.

2. Relief Sought. That the Military Commission preclude the admission of law professor testimony on the law.

3. Facts. On 13 October 2004, the Prosecution filed a motion to "Preclude Attorney and Legal Commentator Opinion Testimony Concerning Their Views of the Law." The Defense responded to this motion on 19 October 2004.

4. Discussion.

The Defense Has Made No Showing as to Why the Commission Should Forego Legal Briefs and Instead Receive the Testimony of Academics and Lawyers.

a. As a general proposition, witnesses are permitted as a form of evidence to establish or rebut *facts* in issue, not the law. The Defense asks the Commission to depart from the norm to allow various academics to appear before the Commission to offer their views on international and U.S. law. If called as witnesses, according to the Defense, these professors have "the ability to examine a particular situation and comment and explain how the law applies." Defense Response to Prosecution Motion to Exclude All Expert Witnesses ("Response") p.2. But it is the *Commission's* province, not that of law professors proffered by the litigants, to determine "how the law applies." Although the Defense wishes to have these experts "testify in support of defense motions pending before the commission," they also argue that the requested lawyers "are not advocates for any party in this case." Response, p.2. Based upon the information supplied by the Defense, it is apparent that these academics do have an opinion and will advocate a position on the legal issues before the Commission. Such opinions on the law, however, are traditionally and appropriately addressed in legal briefs or other submissions by counsel.

b. The Defense maintains that the witnesses, in addition to being non-advocates for the Defense, are "independent scholars" who, because of their legal training and

expertise, have superior knowledge of the law. Response, p. 2. However, only testimony which is probative as to the *facts* at issue is admissible. The standard for admissibility of evidence is set out in Military Commission Order (MCO) No.1 (6)(D)(1): "Evidence shall be admitted if ... the evidence would have probative value to a reasonable person."[1] "Evidence" pertains to facts. A common definition of "relevant evidence," for example, is evidence "tending to prove or disprove or disprove a *fact*." Black's Law Dictionary (6th ed. 1990) (emphasis added); *accord* Mil. R. Evid. 401; Fed. R. Evid. 401.

c. Attempting to categorize these witnesses as "experts" is equally unavailing. The Federal and Military Rules of Evidence, while not binding upon the Commission, are illustrative. Both restrict expert witness testimony to questions of fact. Federal Rule of Evidence 702 provides the following: "If scientific, technical, or other specialized knowledge will assist the trier of *fact* to understand the evidence or to determine a *fact* in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of opinion or otherwise." (*See also,* Mil. R. Evid. 702 which is identical) (emphasis added). Witnesses who will offer only legal opinions having no bearing on a *fact* in issue should not be permitted to testify. That is what legal briefs and cited authority are for.

d. The Defense correctly points out that the District Court in *Fernandez-Roque v. Smith,* 622 F. Supp 887 (1980), heard testimony from two law professors. However, there was no indication that this was over any objection, and it was for the limited purpose of determining, in the absence of other controlling law, what the existing international custom was in a particular area. Furthermore, in considering this type of testimony, the court cited the following language from a U.S. Supreme Court case demonstrating that resort to the *works* of jurists, not testimony, is the norm:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, *where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations*, and, **as evidence of these, to the works of jurists and commentators** who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

The Paquete Habana, 1175 U.S. 677 (1900)(emphasis added). *See also, United States v. Yousef*, 327 F.3d 56 (2nd Cir. 2003).

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[1] The United States Supreme Court noted and affirmed similar language in addressing the issue of admissibility and probativeness in considering an earlier military commission: "The regulations prescribed by General MacArthur governing the procedure for the trial of [Yamashita] by the commission directed that the commission should admit such evidence 'as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man.'" *In re Yamashita*, 327 U.S. 1, 18 (1946).

e. Litigants calling professors to testify on the law implicates precisely the concerns cited by the court in *Specht v. Jensen*, 853 F.2d 805 (10th Cir. 1988), *cert. denied*, 488 U.S. 1008 (1989) when it held that it was error for the lower court to allow expert testimony on the law. *Id.* at 808. Primarily, an "expert" on the law supplants the judge's role as the source of the law and creates confusion. *Id.* at 807. Secondarily, the trial process is such that if one side calls an expert on the law, the other will do so as well. *Id.* at 809. The result is an inefficient process with lengthy testimony of multiple contradictory experts.

5. Oral Argument. This motion can be resolved without the necessity of oral argument.

6. Legal Authority. Beyond that already noted in the motion and response, the following legal authority was cited:

a. *The Paquete Habana*, 1175 U.S. 677 (1900).

b. Black's Law Dictionary (6th ed. 1990).

//Original Signed//

[redacted]
Lieutenant Colonel, U.S. Marine Corps
Prosecutor

UNITED STATES OF AMERICA v. DAVID M. HICKS	**Defense Objection to the Presiding Officer or his Assistant Instructing Providing Advice to the Commission on the Law** 7 September 2004

The Defense in the case of the *United States v. David M. Hicks* objects to the preliminary instructions to the Commission as set forth in the Trial Guide for Military Commissions (draft of 22 August 2004) (Trial Guide), to Sections 4A and 5 of MCI No. 8, and to provisions concerning the role and activities of the Assistant to the Presiding Officers as set forth in POM #2 para. 1c, POM #2-1 para. 1c, the Appointing Authority's memorandum to the Presiding Officer dated 19 August 2004 (Appointing Authority's memo), and Presiding Officer's interlocutory question #4, as follows:

Introduction:

1. Page 10 of the Trial Guide the Presiding Officer (PO) provides "information" on the "procedures the Commission will be using in deciding" cases to the Commission. The third paragraph of this "information" states, "[a]s I am the only lawyer appointed to the Commission, I will instruct and advise you on the law."

2. The Defense objects to this "information" being given to the Commission members because it is not authorized by the President's Military Order of November 13, 2001 (PMO), Military Commission Order No. 1 (MCO #1), or Military Commission Instruction No. 8 (MCI #8).

3. Further, to the extent that Sections 4A and 5 of MCI No. 8, as well as, the questions posed in interlocutory question #4 are inconsistent with the PMO making the Commission as a whole the finder of fact and law, the defense objects to the PO adjudicating or ruling any substantive motions and questions that arise during the course of Mr. Hicks' trial.

4. In addition, there is no authority for the Assistant to the Presiding Officers to "provide advice to either the Presiding Officer [or the Commission] in the performance of the Presiding Officer's adjudicative functions" as stated in the Appointing Authority's memo and POM #2 because, as will be shown below, the Presiding Officer has limited power to rule on controverted matters, and any "advice," evidence, or information on the applicable law provided to the Commission must come from the parties.

Discussion:

5. There is no provision in either the PMO or MCO #1 which would allow the PO to "instruct and advise" the Commission on the law. The PMO makes the Commission as a whole the "finders of fact and law" for the Commission.

6. The PMO does not give the PO the powers of a military judge. "The PMO identifies only one instance in which the Presiding Officer may act on an issue of fact on his own. Then, it is only with the members present that he may so act and the members may overrule the presiding Officer's opinion by a majority of the commission."[1] By stating that the Commission as a whole is the sole finder of fact and law, the PMO specifically rejects the notion that the PO is a judge. The PO is authorized to make preliminary rulings on admissibility of evidence, which may be overturned by the Commission, and to make decisions regarding administrative matters such as scheduling and closing sessions. Beyond those functions, the PO has no independent authority. Any substantive matters, which the defense submits includes any matter over which there is a controversy between the parties, must be decided by the Commission as a whole as the sole finders of fact and law.

6. Allowing the PO to advise the other Commission members on the law, and to rule on substantive motions and objections, places the PO in a de facto position of authority over the other Commission members, giving him undue influence over the Commission.

7. The PO should have no more voice or influence in the Commission than any other member. If the PO is authorized to "instruct and advise" the Commission on the law, or to rule on controverted matters, he would, by definition, have more influence on the deliberations of the Commission than is authorized by the PMO. Granting one member more influence over the Commission than other members are afforded would skew the Commission's deliberations and make it impossible for the Commission to provide a "full and fair" trial.

8. Moreover, any "advice" on the law provided to the Commission should come from the parties through the operation of the adversarial system. Because the Commission is the "finder of fact and law," the parties should have the ability to present evidence of what the law is to the Commission so that they may make findings as to what law applies to Mr. Hicks case. Indeed, that is the system under which the Commission members were explicitly questioned during *voir dire*, as endorsed by the PO. Altering that construction at this stage would sow considerable confusion (in addition to being directly contrary to the PMO).

9. Because the PO is not a judge, and has no greater voice in the proceedings than any other member of the Commission, he should not be entitled to obtain advice on "his adjudicative functions" from the Assistant to the Presiding Officers. First, as stated above, the Presiding Officer's only adjudicative function is making initial rulings on admissibility of evidence. As a former military judge of over 10 years experience, COL Brownback will need no assistance in determining, at least preliminarily, what evidence is admissible. Second, all input on the applicable law should be coming from the parties. Allowing one member of the Commission to have what amounts to a law clerk will place that member in a de facto position of authority over the rest of the panel. Further, it raises the specter of materials not in the record being introduced into the deliberations of the Commission. Should any of these situations occur, the Commission would not be able to provide a "full and fair" trial for Mr. Hicks.

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[1] See Memorandum: Legal Advisor to the Appointing Authority of August 11, 2004.

10. Moreover, if the PO or the Assistant to the Presiding Officer is authorized to instruct or advise a member of the Commission or the Commission as a whole on the law, it may lead to the parties being precluded from presenting relevant and probative evidence on the applicable law, or arguing their position on the law to the Commission.

11. This would inhibit the Commission in carrying out its duty as the sole finder of fact and law. Such a result is inconsistent with the PMO and would make it impossible for Mr. Hicks to have a full and fair trial.

12. Any evidence, briefs, or arguments on the state of the law applicable in this case should be provided by the parties as part of their cases or in response to requests from the Commission. Such evidence, briefs, or position should be heard by the Commission as part of its proceedings. Any rulings on controverted matters that arise during the trial process should be decided by the Commission as a whole, and should be based solely on the evidence and arguments of the parties, not on advice or instructions from the PO or the Assistant to the PO.

13. The PO's IQ #4 says it "may appear to some to be unclear" – it is obviously unclear to the PO, who raises doubts as to the clarity of the system itself (since uncertainty was the hallmark of the preliminary proceedings conducted August 23-26, 2004, at the U.S. Naval Station, Guantanamo Bay, Cuba). In Para 3 of IQ #4, the PO glaringly fails to offer the obvious third alternative– in fact, the solution compelled by the PMO and MCO No. 1: that the PO may not provide advice or instruction to other commission members.

14. Para 5(a) of IQ#4 attempts to make an analogy to the UCMJ: "as would a military judge in a courts-martial" However, this illuminates the problem of creating a system without any analog to a legitimate pre-existing legal system. Components of those systems cannot be incorporated piecemeal to fit the result desired by the PO (or the Appointing Authority). The Commission is stuck with the fatally deficient system that has been enacted. Continuing to change it in fundamental ways in mid-stream merely demonstrates that the system suffers from the twin vices of vagueness: it fails to provide adequate notice, and it is too susceptible to arbitrary and discriminatory application. Indeed, counsel cannot predict which provisions of which systems the PO or Appointing Authority will engraft on to the Commission process, or when such integration will occur (or whether the incorporation will be in whole, or in part, or which part). The possibilities completely defeat the purpose of the notice aspect of due process and fundamental fairness. Accordingly, it cannot be countenanced.

15. Para 5(b)(1) of IQ#4 seeks the option of providing instructions not in open court outside the presence of the parties, including the accused. This option will remove all transparency to the proceeding.

16. The option put forth in Para 5(b)(2) is completely contrary to the system under which we conducted *voir dire* – that ultimately the decision was for the commission as a whole, and each individual member had to resolve disputed questions of law. The PO acknowledged that on the record, and now is seeking to amend the fundamental authority of the PO as limited under the MCO's and MCI's. That dramatically alters the fundamental character of the commission(s), and directly contravenes the structure directed by the PMO. The same is true for the revisions

proposed in ¶¶ 5(B)(3), 5(B)(4), 5(B)(5), 5(B)(6) & 5(B)(7). The persistent effort to recast the structure of the Commission would make a mockery of MCO No. 1 with respect to the Commission's role, as a unit and as per the PMO and MCO No. 1, as the arbiter of all issues of fact and law. If the PO's proposals are approved, the Commission system will be even more bereft of discernible, predictable rules and standards than it is already.

Conclusion:

13. The Defense requests:

(a) the Trial Guide be amended to strike any reference to the PO or any other person acting as a legal advisor to the Commission or providing legal advice to the Commission or the PO;

(b) the provisions of Sections 4A and 5 of MCI No. 8 be amended to comport with the PMO regarding the limited authority of the PO;

(c) the PO retract his prior statements to the Commission regarding his power to "instruct and advise" the Commission on the law, and inform the Commission members that the Commission as a whole will hear and decide all controverted matters raised at during Mr. Hicks' trial except those certified to the Appointing Authority pursuant to MCO No. 1 section 4A(5)(d);

(d) the Appointing Authority issue guidance to the PO regarding the duties and role of the Assistant to the PO consistent with this objection; and

(e) that the Appointing Authority respond to interlocutory questions #4 by informing the PO that he does not instruct on law or attempt to influence other commission members on areas of the law. That all issues of law should be presented by the parties in an open session of the commission and decided by the commission as a whole.

By: _____

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

IN THE UNITED STATES MILITARY COMMISSION
AT U.S. NAVAL BASE, GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. DAVID M. HICKS	**PROSECUTION RESPONSE TO DEFENSE OBJECTION (PRESIDING OFFICER & ASSISTANT ROLE ON LEGAL ADVICE AND INSTRUCTIONS)** 12 October 2004

1. Timeliness. This response is being filed within the timeline and extensions granted by the Presiding Officer.

2. Prosecution Position on Defense Motion. The Defense seeks five specific forms of relief. These prayers for relief and the Prosecution response to each are as follows:

a. Defense requests revision of the Trial Guide, specifically, that the paragraph pertaining to the role of the Presiding Officer (PO) on page 10 of the guide used in the initial session of 24 August 2004 be revised to strike the sentence asserting that the PO "will instruct and advise" the Commission on the law. Prosecution agrees that this sentence should be revised and clarified in light of the 31 August 2004 revision of Military Commission Instruction No. 8 (MCI 8).

b. Defense requests revision of MCI 8, paras. 4(A) and 5. The request is moot since the requested revisions were promulgated on 31 August 2004. The Prosecution contends that the revisions made to MCI 8 were not required as a matter of law under the President's military Order (PMO) or Military Commission Order No. 1 (MCO 1). The current revised MCI 8 is consistent with those orders.

c. Defense requests that the PO retract the statements made on the record concerning his role to "instruct and advise" the commission on the law. The Prosecution agrees that the PO should clarify his role to the Commission members in light of the 31 August revision to MCI 8.

d. Defense requests that the Appointing Authority (AA) issue guidance to the PO regarding the appropriate role of the Assistant to the PO (APO). Prosecution believes this question is moot in light of the revision to Presiding Officer Memorandum No. 2 (POM 2), published on 16 September 2004. The APO's role is limited to administrative matters and advice to the PO on the procedural functions allocated to the PO under commission law.[1]

[1] "Commission Law" as used in this motion response refers to the President's Military Order (PMO) of November 13, 2001, and the orders, directives and instructions issued by the Secretary of Defense and the DoD General Counsel pursuant to the PMO.

e. Defense requests that the AA respond to Interlocutory Question No. 4 "by informing the PO that he does not instruct on law or attempt to influence" the Commission on matters of law to be decided by the Commission as a whole. The AA has responded to Interlocutory Question No. 4, ruling that the full Commission must adjudicate all issues of fact and law before the Presiding Officer may certify a question to the Appointing Authority. Effectively, the Appointing Authority has denied this Defense request.

3. Facts. On 31 August 2004, the DoD General Counsel promulgated a revision of MCI 8 that clarifies the PO's authority on matters of law. Likewise, the duties and functions of the APO were clarified by publication of POM 2 (revised) on 16 September 2004. These revisions render the Defense objections moot, as outlined above. It only remains to clarify these matters on the record and to work out the prudential application of these rules.

4. Analysis

Revisions to MCI 8 since the initial hearing in this case render most of the defense objections moot. The role of the PO vis-à-vis the other panel members has been substantially clarified by that revision. The PO has authority to control many aspects of the proceedings of the military commission, but he is not the final authority on the law. He does not have authority to "instruct and advise" on all issues of law. He does, however, "instruct and advise" on all procedural and evidentiary questions that he is responsible for under Commission Law.[1]

The asserted basis of the Defense objections is that the original version of MCI 8 was inconsistent with the PMO and MCO 1, in that it defined PO authority to rule on matters of law more broadly than those orders allowed. In stating its objections, the Defense makes no reference to custom, treaty or any other source of international law. The Prosecution agrees that the issues addressed here do not raise issues of international law.

The President has authorized the trial of certain non-citizens for violations of the law of war and other offenses triable by military commission. His authority for doing so is derived from 10 U.S.C. §821 and §836, and from his constitutional powers as Commander in Chief, acting pursuant to the congressional authorization to use all means necessary to defend the nation.[2] Military Commissions derive their authority and rules of procedure from the orders and regulations that call them into existence.[3] Existing models of judicial procedure, historical practice, and analogies to courts-martial may be useful

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[2] *Authorization for Use of Military Force Joint Resolution* (Public Law 107-40, 115 Stat. 224).

[3] "Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common law war courts. They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth." *Madsen v. Kinsella*, 343 U.S. 341, 347-48.

sources of comparative analysis, general principles of law, and practical guidance;[4] but the role and authority of the PO and APO are determined by Commission Law and reasonable inferences drawn from that body of law.

a. The Law Is Determined By the Whole Commission.

The President's Military Order of November 13, 2001 states that the military commission will be "triers of both fact and law."[5] That Order also contemplates that one of the members of the commission will be designated as the "presiding officer."[6] The qualifications, functions and authority of the PO and other members of the commission are not specified and delineated in the PMO, but are expressly left to definition by the Secretary of Defense in subsequent implementing "orders and regulations."[7]

The PMO is broad enough to allow for a range of structural allocations of authority between the PO and other members of the Commission. The original version of MCI 8, dated April 30, 2003, stated: "The Presiding Officer shall generally adjudicate all motions and questions that arise during the course of a trial by military commission."[8] While this formulation is arguably consistent with the PMO, the revised version is unquestionably so and renders the Defense objections on that basis moot. The revision of MCI 8, dated 31 August 2004, makes it clear that the substantive law of the case and disputed issues of law arising at trial must be determined by the Commission as a whole: "Except for determinations concerning protection of information...and the probative value of evidence, the full Commission shall adjudicate all issues of fact and law in a trial."[9]

b. The PO Is Not Authorized to Instruct the Commission on Substantive Law.

The Defense argues vigorously for equal authority among and between all members of the Commission in deciding issues of law before the Commission. With the promulgation of revised MCI 8, the Defense view has been adopted. The Prosecution agrees that this procedural arrangement will allow for a full and fair trial.

Under current Commission Law, including the revision of MCI 8, the PO does not have independent authority to make rulings of law, to give authoritative instructions on the law, or formally to advise Commission members on the substantive law of the case. The Prosecution agrees that current Commission Law requires the entire Commission to vote on and determine all issues of law presented to the Commission for decision. It is equally clear under Commission Law that the Presiding Officer does have express

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[4] *See* Part I (Preamble) of the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002), states: "*Subject to* any applicable rule of international law or *to any regulations prescribed by the President or by other competent authority*, military commissions and provost courts shall be *guided by* the *appropriate principles* of law and rules of procedures and evidence prescribed for courts-martial." ¶2(b)(2)(emphasis added).
[5] President's Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001)(*hereinafter* PMO) §4(c)(2).
[6] *Id* §4(c) (3).
[7] *Id.* §4(b).
[8] MCI No. 8, dated 30 April 2003, ¶4.A. This was further echoed in ¶5, which stated: "The Presiding Officer shall rule on appropriate motions or, at his discretion...may submit them to the commission for decision or to the Appointing Authority as a certified interlocutory question."
[9] MCI No. 8, ¶5.

authority to preside over the proceedings of the military commission and to give procedural and administrative instructions necessary for the expeditious and efficient trial of cases before the commission.[10]

In courts-martial, federal courts and other systems which separate the functions of judge and jury, an instruction procedure is necessary to allow the judge to impart binding legal rules to the finders of fact.[11] An "instruction" in this sense is defined in Black's Law Dictionary as a "direction given by the judge to the jury concerning the law of the case; a statement made by the judge to the jury informing them of the law applicable to the case in general or some aspect of it; an exposition of the rules or principles of law applicable the case or some branch or phase of it, which the jury are bound to accept and apply."[12] Instructions merely give voice to judicial determinations of the law. In other words, they are an attribute of judicial authority and ancillary to the authority to make rulings on the law. Because the functions of judge and jury are combined, no one member has final authority to "instruct," "inform," "advise," or "direct" the others on disputed matters of law.

Members of the Commission function as a panel of judges on matters of law.[13] Under this arrangement, authoritative instructions on the law by the PO are inappropriate. It is a fundamental function of the Commission *as a whole* to deliberate upon and make findings on the law. Since neither the PO nor any other member has individual authority to pronounce what the law is, no individual member of the Commission is vested with authority to give instructions.

Hence, the PO must refrain from "instructing" members on disputed issues of substantive law in motions practice or in defining crimes and defenses pertinent to the case. This limitation on PO instructions becomes manifestly reasonable when the precise duties of the PO are more fully articulated.

c. The PO Has the Power to "Preside" Over Commission Proceedings.

It is evident from the President's Military Order that he envisioned the commissions to be guided in their functions by a "Presiding Officer." It is certainly reasonable to say that the President expected the PO to preside over and control the proceedings of the commissions, leaving the precise scope and limits of that authority to implementing regulations. However, it cannot be doubted that it was the intent of the President and Secretary of Defense that the PO have special duties and the powers to carry them into execution. That much is implicit in the very term "*Presiding* Officer."

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[10] MCI No. 8, ¶5.

[11] R.C.M. 801(a)(5) requires the military judge in courts-martial to "instruct the members on questions of law and procedure which may arise." *See also* Fed.R.Crim.P. 30.

[12] BLACK"S LAW DICTIONARY 856 (6th ed. 1997). It further notes "Attorneys for both sides normally furnish the judge with suggested instructions. Fed.R.Civil P. 51; Fed.R.Crim.P. 30. many states and federal courts have model or pattern jury instructions which are required to be used, or substantially followed by the trial judge."

[13] "[T]he full Commission shall adjudicate all issues of fact and law in a trial." MCI No. 8, ¶4A.

In DoD Military Commission Order No. 1 (MCO 1), the Secretary of Defense specifies qualifications of all members of the commission and further defines the unique role and qualifications of the PO. The PO is to be a member of the commission, but must possess the legal qualifications of a judge advocate.[14] These qualifications enable the PO to carry out his unique functions, which include, *inter alia*, control of proceedings to ensure a full and fair trial;[15] rulings on the admission or exclusion of evidence;[16] closure of the proceedings;[17] certification of interlocutory questions;[18] scheduling hearings;[19] supervising discovery and production of evidence;[20] issuing protective orders;[21] announcing the findings and sentence of the commission;[22] and regulation of the examination of witnesses.[23] Recognizing the need for further definition of roles and procedures, the Secretary expressly anticipated the need for further implementing regulations to be promulgated by the authority of the DoD General Counsel.[24]

The DoD General Counsel has further specified the functions and authority of the PO in MCI 8. The PO has authority to conduct or permit the questioning of commission members for purposes of voir dire,[25] and to forward information and recommendations relevant to removal for cause of any member to the Appointing Authority.[26] In certifying interlocutory questions to the Appointing Authority, the PO shall decide what materials should be forwarded to the AA and whether the proceedings should be held in abeyance pending the AA decision on the question.[27] The PO is empowered to manage the filing of motions and charged with ruling on motions to compel discovery and disclosure of witnesses.[28]

Consistent with the PO's general duty to control the proceedings to ensure a full and fair trial, and consistent with the unique legal qualifications of his office, MCI 8 authorizes the PO to "ensure the execution of all ancillary functions necessary for the impartial and expeditious conduct of a full and fair trial by military commission."[29] According to MCI 8, para. 5, examples of these ancillary functions include scheduling commission hearings, administering oaths, conducting *in camera* meetings with counsel, and "providing necessary instructions to other commission members."[30]

Taken together, while the full Commission decides issues of law, the Presiding Officer has substantial responsibility to conduct and control the proceedings. This

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[14] MCO No. 1, ¶ 4.A.(4).
[15] *Id.* ¶4.A.(5)(b)
[16] *Id.* ¶ 4.A.(5)(a)
[17] *Id.*
[18] *Id.* ¶ 4.A.(5)(d).
[19] *Id.* ¶ 4.A.(5)(b).
[20] *Id.* ¶ 5.H. & 6.A.(5).
[21] *Id.* ¶ 6.D.(5).
[22] *Id.* ¶ 6.E(9).
[23] *Id.* ¶ 6D(2)(c).
[24] *Id.* ¶ 7A.
[25] MCI 8, ¶ 3A(2)
[26] *Id.* ¶ 3A(3).
[27] *Id.* ¶ 4.
[28] *Id.* ¶ 6A.
[29] MCI 8, ¶5.
[30] *Id.*

authority implements the President's intent to ensure a full and fair trial under the control of a PO and the Secretary's intent to vest the PO with special legal powers sufficient to ensure a full and fair proceeding. The powers given to the PO in implementing instructions and orders are not inconsistent with the PMO. Rather, they offer specificity and clarification and enable the PO to preside over the proceedings.

d. The Power to Preside Includes the Power to Instruct On Appropriate Matters.

In order to fulfill his duties and functions, the PO will necessarily have to provide direction and instructions to counsel and other members of the Commission in the course of proceedings before the Commission. While he will not give instructions on substantive law of crimes and defenses or disputed points of law in motions practice, Commission Law gives the PO responsibilities and authority reasonably necessary to carry them out. MCI 8 expressly lists among the implied duties of the PO "providing necessary instructions to other commission members."[31]

Commission Law does not specify the kinds of instructions that the PO will find necessary. However, such instructions logically fall into several categories. First, the PO will give any administrative instructions to members of the commission regarding scheduling of the time and place of hearings, uniform of the day, security measures and their effects on the proceedings, limits on the movement of members within the hearing site, and other similar matters. These are very basic instructions that serve to assemble the Commission and to ensure its efficient and impartial functioning, which is one of the PO's core functions.

A second category of instructions that the PO might deem necessary for a full, fair and expeditious trial include cautionary instructions to preserve the impartiality of the members, such as an instruction regarding pretrial publicity, reference to sources of information outside of Commission hearings, and direct contact with news reporters.

A third category of necessary instructions might address procedural matters at trial and what could be termed "trial mechanics." These instructions would include the recitation of procedural rules under Commission Law, such as the order of trial, method of proceeding in motions practice, voting procedures, and the like. Instructions on deliberations should include recitations of Commission Law relevant to that function, such as the presumption of innocence and burden of proof. It is reasonable to assume that the PO will instruct members on a procedure for questioning of witnesses by the members, for requesting a vote of the full commission on a PO ruling to exclude evidence, and the meaning and effect of any other decision made by the PO pursuant to his authority under Commission Law as outlined above (e.g., the closure of proceedings, exclusion of the accused, or admonishment of counsel.)

Commission Law entrusts the PO with responsibility to preside over the proceedings to ensure a full, fair and expeditious trial. While he lacks the comprehensive authority that a military or federal trial judge has to rule on legal issues, he has the critical responsibility to rule on admissibility of evidence, manage the trial administratively,

[31] MCI No. 8, ¶5.

perform specific procedural functions and to take any other action necessary to fulfill his role.

e. The PO May Present His Views on the Law in Deliberations.

The orders and regulations governing the military commissions do not provide for a "legal advisor" to the commission, but they do require that the PO possess legal qualifications as a Judge Advocate. The PO's authority to preside and execute his specified functions does not confer broad authority to act as a general legal advisor to the Commission on disputed issues of law or the substantive law of crimes and defenses. Resolution of those matters is for the entire Commission. However, his legal training and experience benefits the Commission in several ways and are an asset to the Commission in providing a full and fair trial for the Accused.

As may any member of the Commission, the PO may question witnesses, call witnesses, and ask counsel for their views on the law. His legal training and experience will assist the Commission in sharpening issues before the Commission, pursuing relevant lines of inquiry with witnesses, focusing counsel on issues during motions and argument, and analyzing the need for additional evidence on material issues. The PO may summon witnesses, order the production of evidence, and designate special commissioners to take evidence.[32]

Under Commission Law, the PO is a voting member of the Commission.[33] As such, he is to participate fully in the deliberations and voting on all issues of law and fact. Like any member, he is expected to bring his common sense, reasoning ability and knowledge of the ways of the world to bear on those deliberations.[34] By requiring the PO to have legal qualifications and also making him a voting member of the Commission, MCO 1 clearly contemplates that the Commission will benefit from the general legal knowledge and training of the PO. This is inherent in the structure of the Commission. Like other members, he may refer to the legal materials in Commission Law (e.g., MCI 2 for elements of offenses) and any matters presented by counsel on the record. Like judges in all systems, members of the panel may examine any legal authorities relevant to issues that arise in litigation. Undoubtedly, his legal training and experience will enable him to assist other members of the Commission in the process of deliberation about legal issues.

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[32] *See* MCO No. 1, ¶ 6A(5). This provision empowers the Commission as a whole to summon witnesses, order production of evidence, and designate special commissioners to take evidence. As to these functions, it states: "The Presiding Officer shall exercise these powers on behalf of the Commission at the Presiding Officer's own initiative, or at the request of the Prosecution or the Defense, as necessary to ensure a full and fair trial..."

[33] *Id.*, ¶4A(4).

[34] *See* "Trial Guide for Military Commissions" (draft of 23 Aug 2004): "**PO:** Bear in mind that only matters properly before the Commission, as a whole will be considered. In weighing and evaluating the evidence we will use our common sense, and our knowledge of human nature and the ways of the world. In light of all the circumstances in the case, we will consider the inherent probability or improbability of the evidence. The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests with us." This instruction is taken substantially from the *Military Judge's Benchbook*, DEP'T OF THE ARMY PAMPHLET 27-9 (15 sep 2002).

His expertise will assist the Commission in resolving issues of law, putting findings in proper form and assisting in drafting essential findings of law and fact, as appropriate.

f. Commission Law Allows Flexibility In Procedures for Making Legal Rulings.

Under Commission Law, the timing and method of ascertaining the law is left to the discretion of the Commission and the adversarial initiative of the parties. If either party seeks a ruling on a substantive law issues relating to crimes, defenses, or other issues of law, such issues may be raised in the course of pretrial motions, during trial, or during findings and sentencing argument.

As "triers of fact and law," Members of the Commission have the final decision as to what elements of proof are required to prove each offense. Prior to presentation of the case on the merits it would be appropriate for the PO to offer preliminary instructions, including trial procedures and notice regarding the elements of offenses to be tried. This public declaration of the elements on the record, and in the presence of the accused and counsel, serves the interests of a full and fair trial. The "Trial Guide for Military Commissions" (Draft of 23 Aug 2004), includes a procedure for such notice as part of the preliminary instruction phase of trial on the merits.[35] This procedure implies the necessity of making conclusions of law on the elements of offenses charged and any anticipated affirmative defenses prior to trial on the merits. The Commission may permit filing of briefs and argument of counsel on these issues, as necessary.

The Prosecution recommends the same approach with respect to motions. Counsel for each side present their point of view through written briefs and oral argument. The members then enter into closed conference to make conclusions on the law. Each member in the closed conference has equal voice and need not give greater or lesser weight to the opinion of the PO. The PO then announces the members' conclusions of law in open court. Either side may request the Commission issue conclusions of law and factual findings for the purpose of establishing a record for appellate review.

At the conclusion of the trial, counsel may each argue their view of the facts and any applicable law. The Commission as "triers of both fact and law" then renders its verdict.

g. The Assistant to the POs May Assist the PO In Executing His Functions.

Authority for the appointment of an Assistant to the POs (APO) is found in MCO 1, para 4D: "Other personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks may be detailed or employed by the Appointing Authority, as necessary." Additionally, DoD Dir. 5105.70 empowers the AA to "appoint any other personnel necessary to facilitate military commissions."[36] Given the scope and nature of the PO's duties outlined above, it is entirely appropriate to detail an assistant to ensure the smooth operation of the Commission.

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[35] "Trial Guide for Military Commissions," p. 22-23 (Draft of 23 Aug 2004).
[36] DoD Dir. 5105.70, ¶4.1.1

As stated in section a above, the PO does not have independent authority to make rulings of law, to give authoritative instructions on the law, or independently to advise Commission members on the substantive law of the case. Accordingly, the APO has no role in those matters either. Rather, the APO serves as an assistant to this and any future POs on functions that are expressly allocated to the PO under Commission Law. POM 2-1, dated Sep 16, 2004, sets forth the nature and scope of the APO's duties. In summary, the APO will assist the PO in all aspects of his duties as an attorney-advisor. However, the POM states categorically that the APO is "*not* authorized to...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."[37] This change has been published since the Defense raised its objections; the redefined roles of the PO and APO appear to allay the concerns raised.

5. Legal Authority.

a. President's Military Order of November 13, 2001.
b. Manual for Courts-Martial (2002).
c. Military Commission Order No. 1
d. Military Commission Instruction No. 8
e. DoD Dir. 5105.70
f. Federal Rules of Criminal Procedure.
g. *Madsen v. Kinsella*, 343 U.S. 341 (1952)

//Signed//

[redacted]
Lieutenant Colonel, U.S. Marine Corps
Prosecutor

[17] Presiding Officer Memorandum # 2-1, ¶3.d (Sep 16, 2004).

UNITED STATES OF AMERICA	)	
	)	
	)	**Withdrawal of Defense**
v.	)	**Motion D 2**
	)	
	)	31 October 2004
DAVID M. HICKS	)	
	)	

In light of the Presiding Officer's Memorandum dated October 30, 2004, with respect to the corrective instruction to the Commission Members regarding instructions on the law (that the Presiding Officer will not be issuing any to the Commission Members), David M. Hicks hereby withdraws defense motion D2 as moot.

By: _____

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

Second Session

Review Exhibit 14-C

Page 1 **Of** 1

UNITED STATES OF AMERICA	)	
	)	**DEFENSE MOTION TO DISMISS FOR LACK OF JURISDICTION: THE ARMED CONFLICT IN AFGHANISTAN HAS ENDED**
v.	)	
DAVID M. HICKS	)	
	)	**1 October 2004**

The defense in the case of the *United States v. David M. Hicks* requests that the military commission dismiss all charges, and states in support of this request:

1. **Synopsis**: The military commission lacks jurisdiction over Mr. Hicks because the armed conflict in Afghanistan has ended.

2. **Facts**: On 22 December 2001, Hamid Karzai was sworn in as the head of a 30-member governing council in Afghanistan, ending the international armed conflict in Afghanistan.

3. **Discussion**:

The law of war only applies in situations of armed conflict. International armed conflict is defined by Common Article 2 of the Geneva Conventions[1] as a declared war or any other armed conflict which may arise between **two or more** of the High Contracting Parties (i.e. two or more States), even if the state of war is not recognized by one of them.[2]

A non-international armed conflict is defined by Article 1 of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Additional Protocol II)[3] as all armed conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.

[1] *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); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked in Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *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); *Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively, Geneva Conventions). Available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>.

[2] Common Article 2 states: "[i]n addition to the provisions which shall be implemented in peacetime, the present Convention 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."

[3] Opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978). Available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>.

Situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature are not included within this definition.[4]

The authority to exercise military jurisdiction to try law of war violations lasts ". . . so long as a state of war exists-from its declaration until peace is proclaimed."[5] While the Supreme Court has allowed military commission jurisdiction to continue after the end of hostilities, it has done so only in limited circumstances, such as when U.S. forces formally occupy foreign territory, or when the U.S. is part of a power-sharing governmental arrangement.[6] Absent either of these circumstances, military commission jurisdiction exists only during the ". . . time of war."[7]

The conflict in Afghanistan between the governing authority in Afghanistan, the Taliban regime, and the United States that occurred in 2001 was an international armed conflict. With the Taliban's final surrender in Kandahar on 17 November 2001, and the establishment of a new government, the international armed conflict ceased. Under the Bonn agreement, the Afghanistan Interim Authority (AIA) was formed and assumed office on 22 December 2001,[8] as the recognized Government of Afghanistan. The United States never occupied Afghanistan. The AIA was renamed the Transitional Islamic State of Afghanistan (TISA). The TISA constitution was ratified on 4 January 2002.[9]

After 22 December 2001, the conflict in Afghanistan ceased to be an international armed conflict because there was no longer an armed conflict "between two or more" States; in fact, the AIA has never engaged in an armed conflict with the United States. Since January 2002, contingents of foreign peacekeepers and U.S. troops have continued to assist in maintaining order in Afghanistan. Any violence that continued was not in the nature of an international armed conflict because those engaging in violence against peacekeepers and U.S. troops did not represent a State. Further, the periodic fighting in the TISA did not amount to a non-international armed conflict, because those engaging in violence were no longer under responsible command

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[4] Article 1 states: "1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

[5] *In re Yamashita*, 327 U.S. 1, 11 (1946).

[6] *Madsen v. Kinsella* 343 U.S. 341, 348 (1952). The President has the urgent and infinite responsibility not only of combating the enemy but of governing any territory occupied by the United States by force of arms."

[7] Id. at 348.

[8] See U.S. State Department, "Background Note: Afghanistan," available at <http://www.state.gov/r/pa/ei/bgn/5380.htm>.

[9] See "Karzai takes power in Kabul," BBC News (22 December 2001), available at <http://news.bbc.co.uk/1/hi/world/south_asia/1724641.stm>. See also "Whitbeck: Afghanistan's historic day," CNN (22 December 2001), available at <http://www.cnn.com/2001/WORLD/asiapcf/central/12/22/ret.whitbeck.otsc/>.

(since the Taliban organization collapsed in December 2001), nor were they in control of part of Afghanistan's territory.[10] The periodic fighting in TISA constituted neither sustained nor concerted military operations. Any periodic clashes in the TISA after December 2001 have been internal disturbances, or sporadic acts of violence.

Because the international armed conflict in Afghanistan has ended, so has the authority, under the law of war, to convene military commissions. Therefore, this commission lacks jurisdiction to try Mr. Hicks for any offense.

4. **Evidence**:

A: The testimony of expert witnesses.

B: Attachments

1. *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, Article 2.
2. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, Article 1.
3. U.S. State Department, "Background Note: Afghanistan."
4. "Karzai takes power in Kabul," BBC News (22 December 2001).
5. "Whitbeck: Afghanistan's historic day," CNN (22 December 2001).

5. **Relief Requested**: The defense requests that all charges be dismissed.

6. The defense requests oral argument on this motion.

By: _____

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

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[10] See U.S. State Department, "Background Note: Afghanistan," available at <http://www.state.gov/r/pa/ei/bgn/5380.htm>.

fulltext

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Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

Preamble

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Geneva Convention for the Relief of the Wounded and Sick in Armies in the Field of July 27, 1929, have agreed as follows:

Chapter I. General Provisions

Art 1. The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Art. 2. In addition to the provisions which shall be implemented in peacetime, the present Convention 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.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

fulltext

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Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

Preamble

The High Contracting Parties, Recalling that the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949, constitute the foundation of respect for the human person in cases of armed conflict not of an international character,

Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person,

Emphasizing the need to ensure a better protection for the victims of those armed conflicts,

Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates or the public conscience,

Have agreed on the following:

Part I. Scope of this Protocol

Art 1. Material field of application

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Bureau of South Asian Affairs
August 2004

People
History
Government
Political Conditions
Economy
Foreign Relations
U.S. Relations
Travel/Business
Background Notes A-Z

Background Note: Afghanistan

PROFILE

OFFICIAL NAME:
Transitional Islamic State of Afghanistan

Geography
Area: 647,500 sq. km. (249,935 sq. mi.); slightly smaller than Texas.
Cities: *Capital* (1999/2000 UN est.) Kabul–1,780,000. *Other cities* (1988 UN est.; current figures are probably significantly higher)–Kandahar (226,000); Herat (177,000); Mazar-e-Sharif (131,000); Jalalabad (58,000); Konduz (57,000).
Terrain: Landlocked; mostly mountains and desert.
Climate: Dry, with cold winters and hot summers.

People
Nationality: *Noun and adjective*–Afghan(s).
Population: 28,717,213 (July 2003 est.). More than 4 million Afghans live outside the country, mainly in Pakistan and Iran, although over two and a half million have returned since the removal of the Taliban.
Annual population growth rate (2003 est.): 3.38%. This rate does not take into consideration the recent war and its continuing impact.
Main ethnic groups: Pashtun, Tajik, Hazara, Uzbek, Turkmen, Aimaq, Baluch, Nuristani, Kizilbash.
Religions: Sunni Muslim 84%, Shi'a Muslim 15%, other 1%.
Main languages: Dari (Afghan Persian), Pashto.
Education: Approximately 4 million children, of whom some 30% are girls, enrolled in school during 2003. *Literacy* (2001 est.)–36% (male 51%, female 21%), but real figures may be lower given breakdown of education system and flight of educated Afghans.
Health: *Infant mortality rate* (2003)—142.48/1,000. *Life expectancy* (2003 est.)–47.67 yrs. (male); 46.23 yrs. (female).
Work force: Mostly in rural agriculture; number cannot be estimated due to conflict.

Government
Type: Afghanistan identifies itself as an "Islamic Republic."
Independence: August 19, 1919 (from U.K. control over Afghan foreign affairs).
Constitution: Adopted on January 4, 2004, paving the way for nationwide presidential and parliamentary elections. The presidential elections are scheduled for October 9, 2004; parliamentary elections are planned for early 2005.

Economy
GDP: $4 billion (2002-03 est.).
Per capita GDP: $180-$190 (based on 22 million population estimate).
Purchasing parity power: $19 billion (2002 est.)
GDP growth: 28.6% (2002-03 est.)
Natural resources: Natural gas, oil, coal, copper, chromite, talc, barites, sulfur, lead, zinc, iron, salt, precious and semiprecious stones.
Agriculture (estimated 52% of GDP): *Products*--wheat, corn, barley, rice, cotton, fruit, nuts, karakul pelts, wool, and mutton.
Industry (estimated 26% of GDP): *Types*--small-scale production for domestic use of textiles, soap, furniture, shoes, fertilizer, and cement; hand-woven carpets for export; natural gas, precious and semiprecious gemstones.
Services (estimated 22% of GDP): transport, retail, and telecommunications.
Trade (2002-03 est.): *Exports*--$100 million (does not include opium): fruits and nuts, handwoven carpets, wool, cotton, hides and pelts, precious and semiprecious gems. *Major markets*--Central Asian republics, Pakistan, Iran, EU, India. Estimates show that the figure for 2001 was much lower, except for opium. *Imports*--$2.3 billion: food, petroleum products, machinery, and consumer goods. Estimates show that imports were severely reduced in 2001. *Major suppliers*--Central Asian republics, Pakistan, Iran.
Currency: The currency is the afghani, which was reintroduced as Afghanistan's new currency in January 2003. The exchange rate of the new currency has remained broadly stable since the completion of the conversion process from the country's old afghani currency. At present, $1 U.S. equals approximately 43 afghanis. Since its inception the new afghani has gained gradual acceptance throughout the country, but other foreign currencies are also still frequently accepted as legal tender.

PEOPLE
Afghanistan's ethnically and linguistically mixed population reflects its location astride historic trade and invasion routes leading from Central Asia into South and Southwest Asia. Pashtuns are the dominant ethnic group, accounting for about 38-44% of the population. Tajik (25%), Hazara (10-19%), Uzbek (6-8%), Almaq, Turkmen, Baluch, and other small groups also are represented. Dari (Afghan Persian) and Pashto are official languages. Dari is spoken by more than one-third of the population as a first language and serves as a lingua franca for most Afghans, though the Taliban use Pashto. Tajik, Uzbek, and Turkmen are spoken widely in the north. Smaller groups throughout the country also speak more than 70 other languages and numerous dialects.

Afghanistan is an Islamic country. An estimated 84% of the population is Sunni, following the Hanafi school of jurisprudence; the remainder is predominantly Shi'a, mainly Hazara. Despite attempts during the years of communist rule to secularize Afghan society, Islamic practices pervade all aspects of life. In fact, Islam served as the principal basis for expressing opposition to the communists and the Soviet invasion. Likewise, Islamic religious tradition and codes, together with traditional practices, provide the principal means of controlling personal conduct and settling legal disputes. Excluding urban populations in the principal cities, most Afghans are divided into tribal and other kinship-based groups, which follow traditional customs and religious practices.

HISTORY
Afghanistan, often called the crossroads of Central Asia, has had a turbulent history. In 328 BC, Alexander the Great entered the territory of present-day Afghanistan, then part of the Persian Empire, to capture Bactria (present-day Balkh). Invasions by the Scythians, White Huns, and Turks followed in succeeding centuries. In AD 642, Arabs invaded the entire region and introduced Islam.

Arab rule gave way to the Persians, who controlled the area until conquered by the Turkic Ghaznavids in 998. Mahmud of Ghazni (998-1030) consolidated the conquests of his predecessors and turned Ghazni into a great cultural center as well as a base for frequent forays into India. Following Mahmud's short-lived dynasty, various princes attempted to rule sections of the country until the Mongol invasion of 1219. The Mongol invasion, led by Genghis Khan, resulted in massive slaughter of the population, destruction of many cities, including Herat, Ghazni,

and Balkh, and the despoliation of fertile agricultural areas.

Following Genghis Khan's death in 1227, a succession of petty chiefs and princes struggled for supremacy until late in the 14th century, when one of his descendants, Tamerlane, incorporated Afghanistan into his own vast Asian empire. Babur, a descendant of Tamerlane and the founder of India's Moghul dynasty at the beginning of the 16th century, made Kabul the capital of an Afghan principality.

In 1747, Ahmad Shah Durrani, the founder of what is known today as Afghanistan, established his rule. A Pashtun, Durrani was elected king by a tribal council after the assassination of the Persian ruler Nadir Shah at Khabushan in the same year. Throughout his reign, Durrani consolidated chieftainships, petty principalities, and fragmented provinces into one country. His rule extended from Mashad in the west to Kashmir and Delhi in the east, and from the Amu Darya (Oxus) River in the north to the Arabian Sea in the south. With the exception of a 9-month period in 1929, all of Afghanistan's rulers until the 1978 Marxist coup were from Durrani's Pashtun tribal confederation, and all were members of that tribe's Mohammadzai clan after 1818.

European Influence

During the 19th century, collision between the expanding British Empire in the subcontinent and czarist Russia significantly influenced Afghanistan in what was termed "The Great Game." British concern over Russian advances in Central Asia and growing influence in Persia culminated in two Anglo-Afghan wars. The first (1839–42) resulted not only in the destruction of a British army, but is remembered today as an example of the ferocity of Afghan resistance to foreign rule. The second Anglo-Afghan war (1878-80) was sparked by Amir Sher Ali's refusal to accept a British mission in Kabul. This conflict brought Amir Abdur Rahman to the Afghan throne. During his reign (1880-1901), the British and Russians officially established the boundaries of what would become modern Afghanistan. The British retained effective control over Kabul's foreign affairs.

Afghanistan remained neutral during World War I, despite German encouragement of anti-British feelings and Afghan rebellion along the borders of British India. The Afghan king's policy of neutrality was not universally popular within the country, however.

Habibullah, Abdur Rahman's son and successor, was assassinated in 1919, possibly by family members opposed to British influence. His third son, Amanullah, regained control of Afghanistan's foreign policy after launching the third Anglo-Afghan war with an attack on India in the same year. During the ensuing conflict, the war-weary British relinquished their control over Afghan foreign affairs by signing the Treaty of Rawalpindi in August 1919. In commemoration of this event, Afghans celebrate August 19 as their Independence Day.

Reform and Reaction

King Amanullah (1919-29) moved to end his country's traditional isolation in the years following the third Anglo-Afghan war. He established diplomatic relations with most major countries and, following a 1927 tour of Europe and Turkey—during which he noted the modernization and secularization advanced by Ataturk—introduced several reforms intended to modernize Afghanistan. Some of these, such as the abolition of the traditional Muslim veil for women and the opening of a number of co-educational schools, quickly alienated many tribal and religious leaders. Faced with overwhelming armed opposition, Amanullah was forced to abdicate in January 1929 after Kabul fell to forces led by Bacha-I-Saqao, a Tajik brigand. Prince Nadir Khan, a cousin of Amanullah's, in turn defeated Bacha-i-Saqao in October of the same year and, with considerable Pashtun tribal support, was declared King Nadir Shah. Four years later, however, he was assassinated in a revenge killing by a Kabul student.

Mohammad Zahir Shah, Nadir Khan's 19-year-old son, succeeded to the throne and reigned from 1933 to 1973. In 1964, King Zahir Shah promulgated a liberal

constitution providing for a two-chamber legislature to which the king appointed one-third of the deputies. The people elected another third, and the remainder were selected indirectly by provincial assemblies. Although Zahir's "experiment in democracy" produced few lasting reforms, it permitted the growth of unofficial extremist parties on both the left and the right. These included the communist People's Democratic Party of Afghanistan (PDPA), which had close ideological ties to the Soviet Union. In 1967, the PDPA split into two major rival factions: the Khalq (Masses) faction headed by Nur Muhammad Taraki and Hafizullah Amin and supported by elements within the military, and the Parcham (Banner) faction led by Babrak Karmal. The split reflected ethnic, class, and ideological divisions within Afghan society.

Zahir's cousin, Sardar Mohammad Daoud, served as his Prime Minister from 1953 to 1963. During his tenure as Prime Minister, Daoud solicited military and economic assistance from both Washington and Moscow and introduced controversial social policies of a reformist nature. Daoud's alleged support for the creation of a Pashtun state in the Pakistan-Afghan border area heightened tensions with Pakistan and eventually resulted in Daoud's dismissal in March 1963.

Daoud's Republic (1973-78) and the April 1978 Coup

Amid charges of corruption and malfeasance against the royal family and poor economic conditions created by the severe 1971-72 drought, former Prime Minister Daoud seized power in a military coup on July 17, 1973. Zahir Shah fled the country, eventually finding refuge in Italy. Daoud abolished the monarchy, abrogated the 1964 constitution, and declared Afghanistan a republic with himself as its first President and Prime Minister. His attempts to carry out badly needed economic and social reforms met with little success, and the new constitution promulgated in February 1977 failed to quell chronic political instability.

Seeking to exploit more effectively mounting popular disaffection, the PDPA reunified with Moscow's support. On April 27, 1978, the PDPA initiated a bloody coup, which resulted in the overthrow and murder of Daoud and most of his family. Nur Muhammad Taraki, Secretary General of the PDPA, became President of the Revolutionary Council and Prime Minister of the newly established Democratic Republic of Afghanistan.

Opposition to the Marxist government emerged almost immediately. During its first 18 months of rule, the PDPA brutally imposed a Marxist-style "reform" program, which ran counter to deeply rooted Afghan traditions. Decrees forcing changes in marriage customs and pushing through an ill-conceived land reform were particularly misunderstood by virtually all Afghans. In addition, thousands of members of the traditional elite, the religious establishment, and the intelligentsia were imprisoned, tortured, or murdered. Conflicts within the PDPA also surfaced early and resulted in exiles, purges, imprisonments, and executions.

By the summer of 1978, a revolt began in the Nuristan region of eastern Afghanistan and quickly spread into a countrywide insurgency. In September 1979, Hafizullah Amin, who had earlier been Prime Minister and Minister of Defense, seized power from Taraki after a palace shootout. Over the next 2 months, instability plagued Amin's regime as he moved against perceived enemies in the PDPA. By December, party morale was crumbling, and the insurgency was growing.

The Soviet Invasion

The Soviet Union moved quickly to take advantage of the April 1978 coup. In December 1978, Moscow signed a new bilateral treaty of friendship and cooperation with Afghanistan, and the Soviet military assistance program increased significantly. The regime's survival increasingly was dependent upon Soviet military equipment and advisers as the insurgency spread and the Afghan army began to collapse.

By October 1979, however, relations between Afghanistan and the Soviet Union were tense as Hafizullah Amin refused to take Soviet advice on how to stabilize

and consolidate his government. Faced with a deteriorating security situation, on December 24, 1979, large numbers of Soviet airborne forces, joining thousands of Soviet troops already on the ground, began to land in Kabul under the pretext of a field exercise. On December 26, these invasion forces killed Hafizullah Amin and installed Babrak Karmal, exiled leader of the Parcham faction, bringing him back from Czechoslovakia and making him Prime Minister. Massive Soviet ground forces invaded from the north on December 27.

Following the invasion, the Karmal regime, although backed by an expeditionary force that grew as large as 120,000 Soviet troops, was unable to establish authority outside Kabul. As much as 80% of the countryside, including parts of Herat and Kandahar, eluded effective government control. An overwhelming majority of Afghans opposed the communist regime, either actively or passively. Afghan freedom fighters (mujahidin) made it almost impossible for the regime to maintain a system of local government outside major urban centers. Poorly armed at first, in 1984 the mujahidin began receiving substantial assistance in the form of weapons and training from the U.S. and other outside powers.

In May 1985, the seven principal Peshawar-based guerrilla organizations formed an alliance to coordinate their political and military operations against the Soviet occupation. Late in 1985, the mujahidin were active in and around Kabul, launching rocket attacks and conducting operations against the communist government. The failure of the Soviet Union to win over a significant number of Afghan collaborators or to rebuild a viable Afghan army forced it to bear an increasing responsibility for fighting the resistance and for civilian administration.

Soviet and popular displeasure with the Karmal regime led to its demise in May 1986. Karmal was replaced by Muhammad Najibullah, former chief of the Afghan secret police (KHAD). Najibullah had established a reputation for brutal efficiency during his tenure as KHAD chief. As Prime Minister, Najibullah was ineffective and highly dependent on Soviet support. Undercut by deep-seated divisions within the PDPA, regime efforts to broaden its base of support proved futile.

The Geneva Accords and Their Aftermath

By the mid-1980s, the tenacious Afghan resistance movement--aided by the United States, Saudi Arabia, Pakistan, and others--was exacting a high price from the Soviets, both militarily within Afghanistan and by souring the U.S.S.R.'s relations with much of the Western and Islamic world. Informal negotiations for a Soviet withdrawal from Afghanistan had been underway since 1982. In 1988, the Governments of Pakistan and Afghanistan, with the United States and Soviet Union serving as guarantors, signed an agreement settling the major differences between them. The agreement, known as the Geneva accords, included five major documents, which, among other things, called for U.S. and Soviet noninterference in the internal affairs of Pakistan and Afghanistan, the right of refugees to return to Afghanistan without fear of persecution or harassment, and, most importantly, a timetable that ensured full Soviet withdrawal from Afghanistan by February 15, 1989. About 14,500 Soviet and an estimated one million Afghan lives were lost between 1979 and the Soviet withdrawal in 1989.

Significantly, the mujahidin were party neither to the negotiations nor to the 1988 agreement and, consequently, refused to accept the terms of the accords. As a result, the civil war continued after the Soviet withdrawal, which was completed in February 1989. Najibullah's regime, though failing to win popular support, territory, or international recognition, was able to remain in power until 1992 but collapsed after the defection of Gen. Abdul Rashid Dostam and his Uzbek militia in March. However, when the victorious mujahidin entered Kabul to assume control over the city and the central government, a new round of internecine fighting began between the various militias, which had coexisted only uneasily during the Soviet occupation. With the demise of their common enemy, the militias' ethnic, clan, religious, and personality differences surfaced, and the civil war continued.

Seeking to resolve these differences, the leaders of the Peshawar-based mujahidin groups established an interim Islamic Jihad Council in mid-April 1992 to assume power in Kabul. Moderate leader Prof. Sibghatullah Mojaddedi was to chair the council for 2 months, after which a 10-member leadership council

composed of mujahidin leaders and presided over by the head of the Jamiat-i-Islami, Prof. Burhanuddin Rabbani, was to be set up for 4 months. During this 6-month period, a Loya Jirga, or grand council of Afghan elders and notables, would convene and designate an interim administration which would hold power up to a year, pending elections.

But in May 1992, Rabbani prematurely formed the leadership council, undermining Mojaddedi's fragile authority. In June, Mojaddedi surrendered power to the Leadership Council, which then elected Rabbani as President. Nonetheless, heavy fighting broke out in August 1992 in Kabul between forces loyal to President Rabbani and rival factions, particularly those who supported Gulbuddin Hekmatyar's Hezb-i-Islami. After Rabbani extended his tenure in December 1992, fighting in the capital flared up in January and February 1993. The Islamabad Accord, signed in March 1993, which appointed Hekmatyar as Prime Minister, failed to have a lasting effect. A follow-up agreement, the Jalalabad Accord, called for the militias to be disarmed but was never fully implemented. Through 1993, Hekmatyar's Hezb-i-Islami forces, allied with the Shi'a Hezb-i-Wahdat militia, clashed intermittently with Rabbani and Masood's Jamiat forces. Cooperating with Jamiat were militants of Sayyaf's Ittehad-i-Islami and, periodically, troops loyal to ethnic Uzbek strongman Abdul Rashid Dostam. On January 1, 1994, Dostam switched sides, precipitating large-scale fighting in Kabul and in northern provinces, which caused thousands of civilian casualties in Kabul and elsewhere and created a new wave of displaced persons and refugees. The country sank even further into anarchy, forces loyal to Rabbani and Masood, both ethnic Tajiks, controlled Kabul and much of the northeast, while local warlords exerted power over the rest of the country.

Rise of the Taliban

In reaction to the anarchy and warlordism prevalent in the country, and the lack of Pashtun representation in the Kabul government, a movement of former mujahidin arose. Many Taliban had been educated in madrassas in Pakistan and were largely from rural Pashtun backgrounds. The name "Talib" itself means pupil. This group dedicated itself to removing the warlords, providing order, and imposing Islam on the country. It received considerable support from Pakistan. In 1994, it developed enough strength to capture the city of Kandahar from a local warlord and proceeded to expand its control throughout Afghanistan, occupying Kabul in September 1996. By the end of 1998, the Taliban occupied about 90% of the country, limiting the opposition largely to a small mostly Tajik corner in the northeast and the Panjshir valley. Efforts by the UN, prominent Afghans living outside the country, and other interested countries to bring about a peaceful solution to the continuing conflict came to naught, largely because of intransigence on the part of the Taliban.

The Taliban sought to impose an extreme interpretation of Islam--based in part upon rural Pashtun tradition--on the entire country and committed massive human rights violations, particularly directed against women and girls, in the process. Women were restricted from working outside the home and pursuing an education, were not to leave their homes without an accompanying male relative, and were forced to wear a traditional body-covering garment called the burka. The Taliban committed serious atrocities against minority populations, particularly the Shi'a Hazara ethnic group, and killed noncombatants in several well-documented instances. In 2001, as part of a drive against relics of Afghanistan's pre-Islamic past, the Taliban destroyed two large statues of the Buddha outside of the city of Bamiyan and announced destruction of all pre-Islamic statues in Afghanistan, including the remaining holdings of the Kabul Museum.

From the mid-1990s the Taliban provided sanctuary to Osama bin Laden, a Saudi national who had fought with them against the Soviets, and provided a base for his and other terrorist organizations. The UN Security Council repeatedly sanctioned the Taliban for these activities. Bin Laden provided both financial and political support to the Taliban. Bin Laden and his al Qaeda group were charged with the bombing of the U.S. Embassies in Nairobi and Dar Es Salaam in 1998, and in August 1998 the United States launched a cruise missile attack against bin Laden's terrorist camp in Afghanistan. Bin Laden and al Qaeda are believed to be responsible for the September 11, 2001 terrorist acts in the United States, among

other crimes.

In September 2001, agents working on behalf of the Taliban and believed to be associated with bin Laden's al Qaeda group assassinated Northern Alliance Defense Minister and chief military commander Ahmed Shah Masood, a hero of the Afghan resistance against the Soviets and the Taliban's principal military opponent. Following the Taliban's repeated refusal to expel bin Laden and his group and end its support for international terrorism, the U.S. and its partners in the anti-terrorist coalition began a campaign on October 7, 2001, targeting terrorist facilities and various Taliban military and political assets within Afghanistan.

Under pressure from U.S. air power and anti-Taliban ground forces, the Taliban disintegrated rapidly, and Kabul fell on November 13, 2001. Sponsored by the UN, Afghan factions opposed to the Taliban met in Bonn, Germany in early December and agreed to restore stability and governance to Afghanistan by creating an interim government and establishing a process to move toward a permanent government. Under this so-called Bonn Agreement, an Afghan Interim Authority was formed and took office in Kabul on December 22, 2001 with Hamid Karzai as Chairman. The Interim Authority held power for approximately 6 months while preparing for a nationwide "Loya Jirga" (Grand Council) in mid-June 2002 that decided on the structure of a Transitional Authority. The Transitional Authority, headed by President Hamid Karzai, renamed the government as the Transitional Islamic State of Afghanistan (TISA). One of the TISA's primary achievements was the drafting of a constitution that was ratified by a Constitutional Loya Jirga on January 4, 2004.

GOVERNMENT AND POLITICAL CONDITIONS
Afghanistan identifies itself as an "Islamic Republic." The new national constitution adopted on January 4, 2004 paves the way for nationwide presidential and parliamentary elections. The presidential elections are scheduled for October 9, 2004; parliamentary elections are planned for early 2005.

The government's authority beyond the capital, Kabul, is slowly growing, although its ability to deliver necessary social services remains largely dependent on funds from the international donor community. So far, the United States has committed over $4 billion to the reconstruction of Afghanistan. At an international donors' conference in Berlin in April 2004, donors pledged $4.5 billion for Afghanistan over the next year, and a total of $8.2 billion over the next three years.

With anti-terrorist coalition support, the government's capacity to secure Afghanistan's borders to maintain internal order is increasing. The government continues to work closely with coalition forces in rooting out remnants of al Qaeda and the Taliban. The core of an Afghan National Army (ANA) is being trained, as are police. Some ministerial reforms are underway, most prominently at the Ministry of Defense, which has been reorganized to better reflect Afghanistan's ethnic diversity.

Principal Government Officials
President--Hamid Karzai
Minister of Foreign Affairs--Dr. Abdullah Abdullah

Afghanistan maintains an embassy in the United States at 2341 Wyoming Avenue, NW, Washington, DC 20008 (tel: 202-483-6410; email: info@embassyofafghanistan.org).

ECONOMY
In the 1930s, Afghanistan embarked on a modest economic development program. The government founded banks; introduced paper money; established a university; expanded primary, secondary, and technical schools; and sent students abroad for education. In 1956, the Afghan Government promulgated the first in a long series of ambitious development plans. By the late 1970s, these had achieved only mixed results due to flaws in the planning process as well as inadequate funding and a shortage of the skilled managers and technicians

needed for implementation.

Historically, there has been a dearth of information and reliable statistics about Afghanistan's economy. The 1979 Soviet invasion and ensuing civil war destroyed much of the underdeveloped country's limited infrastructure and disrupted normal patterns of economic activity. Gross domestic product had fallen substantially over the preceding 23 years because of loss of labor and capital and disruption of trade and transport. Continuing internal strife hampered both domestic efforts at reconstruction as well as international aid efforts. However, Afghanistan's economy has been growing at a fast pace since the 2001 fall of the Taliban, albeit from a low base. In 2003, growth was estimated at close to 30%, and the growth rate is expected to be over 20% in 2004.

Agriculture
The Afghan economy continues to be overwhelmingly agricultural, despite the fact that only 12% of its total land area is arable and less than 6% currently is cultivated. Agricultural production is constrained by an almost total dependence on erratic winter snows and spring rains for water; irrigation is primitive. Relatively little use is made of machines, chemical fertilizer, or pesticides.

Grain production is Afghanistan's traditional agricultural mainstay. Overall agricultural production dramatically declined following 4 years of severe drought as well as sustained fighting, instability in rural areas, and deteriorated infrastructure. Soviet efforts to disrupt production in resistance-dominated areas also contributed to this decline, as did the disruption to transportation resulting from ongoing conflict. The easing of the drought, which had affected more than half of the population into late 2002, and the end of civil war produced the largest wheat harvest in 25 years during 2003. Wheat production was an estimated 58% higher than in 2002. However, the country still needed to import an estimated million tons of wheat to meet its requirements for the year. Millions of Afghans, particularly in rural areas, remained dependent on food aid.

The war against the Soviet Union and the ensuing civil war led to migration to the cities and refugee flight to Pakistan and Iran, further disrupting normal agricultural production. Shortages were exacerbated by the country's already limited transportation network, which had deteriorated further due to damage and neglect resulting from war and the absence of an effective central government. Agricultural production and livestock numbers are still not sufficient to feed a large percentage of Afghanistan's population.

Opium has became a source of cash for many Afghans, especially following the breakdown in central authority after the Soviet withdrawal, and opium-derived revenues probably constituted a major source of income for the two main factions during the civil war in the 1990s. The Taliban earned roughly $40 million per year on opium taxes alone. Opium is easy to cultivate and transport and offers a quick source of income for impoverished Afghans. Afghanistan was the world's largest producer of raw opium in 1999 and 2000. Much of Afghanistan's opium production is refined into heroin and is either consumed by a growing regional addict population or exported, primarily to Western Europe. Despite efforts to bring opium cultivation under control, the most recent 2003 crop is reportedly the largest recorded. The international community and the new Afghan Government are currently working on new initiatives to eliminate the narcotics economy.

Trade and Industry
Trade accounts for a small portion of the documented Afghan economy, and there are no reliable statistics relating to trade flows. In 2002-03, exports--not including opium or re-exports--were estimated at $100 million and imports estimated at $2.3 billion, a significant increase over 2001-02. Since the 1989 Soviet withdrawal and the 1991 collapse of the Soviet Union, other limited trade relationships with Central Asian states appear to be emerging. Exports to Iran and Pakistan account for about one-half of total exports. Belgium, Russia, Germany, the United Arab Emirates, and the United States each account for 5% or more of Afghanistan's exports. Japan, Korea, and Pakistan account for about 40% of imports. Other significant sources of imports are Germany, India, Iran, Kenya, Turkmenistan, and

the United States. While the United States revoked Afghanistan's most-favored-nation (MFN) trading status in 1986, it reestablished normal trade relations in June 2002. Most of Afghanistan's exports (excluding illegal or smuggled exports) are agricultural products and carpets.

Afghanistan is endowed with a wealth of natural resources, including extensive deposits of natural gas, petroleum, coal, copper, chromite, talc, barites, sulfur, lead, zinc, iron ore, salt, and precious and semiprecious stones. In the 1970s the Soviets estimated Afghanistan had as much as five trillion cubic feet (tcf) of natural gas, 95 million barrels of oil and condensate reserves, and 400 million tons of coal. Unfortunately, ongoing instability in certain areas of the country, remote and rugged terrain, and inadequate infrastructure and transportation network have made mining these resources difficult, and there have been few serious attempts to further explore or exploit them.

The most important resource has been natural gas, first tapped in 1967. At their peak during the 1980s, natural gas sales accounted for $300 million a year in export revenues (56% of the total). Ninety percent of these exports went to the Soviet Union to pay for imports and debts. However, during the withdrawal of Soviet troops in 1989, Afghanistan's natural gas fields were capped to prevent sabotage by the mujahidin. Restoration of gas production has been hampered by internal strife and the disruption of traditional trading relationships following the collapse of the Soviet Union. Gas production dropped from a high of 290 million cubic feet (Mmcf) per day in the 1980s to a low of about 22 Mmcf in 2001.

Trade in goods smuggled into Pakistan once constituted a major source of revenue for Afghan regimes, including the Taliban, and still figures as an important element in the Afghan economy. Many of the goods smuggled into Pakistan originally entered Afghanistan from Pakistan, where they fell under the Afghan Trade and Transit Agreement (ATTA), which permitted goods bound for Afghanistan to transit Pakistan free of duty. When Pakistan clamped down in 2000 on the types of goods permitted duty-free transit, routing of goods through Iran from the Gulf increased significantly. Shipments of smuggled goods were subjected to fees and duties paid to the Afghan Government. The trade also provided jobs to tens of thousands of Afghans on both sides of the Durand Line, which forms the border between Afghanistan and Pakistan. Pakistan's closing its Afghan border in September 2001 presumably curtailed this traffic.

Transportation

Landlocked Afghanistan has no functioning railways, but the Amu Darya (Oxus) River, which forms part of Afghanistan's border with Turkmenistan, Uzbekistan, and Tajikistan, has barge traffic. During their occupation of the country, the Soviets completed a bridge across the Amu Darya and built a motor vehicle and railroad bridge between Termez and Jeyretan. The U.S., in conjunction with the governments of Afghanistan and Tajikistan, is currently exploring the feasibility of resuscitating a bridge link over the Amu Darya.

Most road building occurred in the 1960s, funded by the U.S. and the Soviet Union. The Soviets built a road and tunnel through the Salang Pass in 1964, connecting northern and southern Afghanistan. A highway connecting the principal cities of Herat, Kandahar, Ghazni, and Kabul with links to highways in neighboring Pakistan formed the primary road system.

Afghanistan's national airline, Ariana, operates domestic and international routes, including flights to New Delhi, Islamabad, Dubai, Moscow, Istanbul, Tehran, and Frankfurt. A private carrier, Kam Air, commenced domestic operations in November 2003.

Many sections of Afghanistan's highway and regional road system are undergoing significant reconstruction. The U.S. (with assistance from Japan) completed building a highway linking Kabul to the southern regional capital, Kandahar. Construction is soon to begin on the next phase of highway reconstruction between Kandahar and the western city of Herat. The Asian Development Bank is nearing completion on a road reconstruction project between Kandahar and Spin

Boldak, located at the southeastern border with Pakistan.

Humanitarian Relief
The UN and the international donor community continue to provide considerable humanitarian relief. Since its inception in 1988, the umbrella UN Office for the Coordination of Humanitarian Assistance to Afghanistan (UNOCHA) has channeled more than $1 billion in multilateral assistance to Afghan refugees and vulnerable persons inside Afghanistan. The U.S., the European Union (EU), and Japan are the leading contributors to this relief effort. One of its key tasks is to eliminate from priority areas--such as villages, arable fields, and roads--some of the 5 million to 7 million land mines and 750,000 pieces of unexploded ordnance (UXO), sown mainly during the Soviet occupation, which continue to litter the Afghan landscape. Afghanistan is the most heavily mined country in the world; mine-related injuries number up to 150 per month, and an estimated 200,000 Afghans have been disabled by landmine/UXO accidents. Mine-clearing efforts are ongoing, with great progress made from the construction of the Kabul-Kandahar road. With funding from international donors, including the U.S., the UN and non-governmental organizations (NGOs) have instituted a number of educational programs and mine awareness campaigns in various parts of the country.

FOREIGN RELATIONS
Before the Soviet invasion, Afghanistan pursued a policy of neutrality and nonalignment in its foreign relations. In international forums, Afghanistan generally followed the voting patterns of Asian and African nonaligned countries. Following the Marxist coup of April 1978, the Taraki government developed significantly closer ties with the Soviet Union and its communist satellites.

After the December 1979 invasion, Afghanistan's foreign policy mirrored that of the Soviet Union. Afghan foreign policymakers attempted, with little success, to increase their regime's low standing in the noncommunist world. With the signing of the 1988 Geneva Accords, Najibullah unsuccessfully sought to end Afghanistan's isolation within the Islamic world and in the Non-Aligned Movement.

Most Western countries, including the United States, maintained small diplomatic missions in Kabul during the Soviet occupation. (Throughout the Soviet occupation, the U.S. did not recognize the Afghan regimes, and its mission was headed by a Charge d'Affaires rather than an Ambassador.) Many countries subsequently closed their missions due to instability and heavy fighting in Kabul.

Pakistan, Saudi Arabia, and the United Arab Emirates recognized the Taliban regime in 1997. Saudi Arabia and the United Arab Emirates withdrew recognition following the September 11, 2001 attacks. Repeated Taliban efforts to occupy Afghanistan's seat at the UN and Organization of the Islamic Conference (OIC) were unsuccessful.

The fall of the Taliban in October 2001 opened a new chapter in Afghanistan's foreign relations. Afghanistan is now an active member of the international community, and has extended diplomatic relations with countries from around the world. In December 2002, the six nations that border Afghanistan signed a 'Good Neighbor' Declaration, in which they pledged to respect Afghanistan's independence and territorial integrity.

Pakistan
The 1978 Marxist coup strained relations between Pakistan and Afghanistan. Pakistan took the lead diplomatically in the United Nations, the Non-Aligned Movement, and the Organization of the Islamic Conference in opposing the Soviet occupation. During the war against the Soviet occupation, Pakistan served as the primary logistical conduit for the Afghan resistance.

Pakistan initially developed close ties to the Taliban regime, and extended recognition in 1997. This policy was not without controversy in Pakistan, where many objected to the Taliban's human rights record and radical interpretation of Islam. Following the Taliban's resistance to Islamabad's pressure to comply with

relevant UN Security Council Resolutions and surrender Osama bin Laden after the September 11, 2001 attacks in New York City and Washington, DC, Pakistan dramatically altered its policy by closing its border and downgrading its ties.

Despite occasional tensions between the two countries, particularly along their shared border region, Afghanistan and Pakistan are engaged in ongoing dialogue to resolve their outstanding differences. Senior representatives from the two countries meet periodically through the Tripartite Commission, a U.S.-facilitated forum that offers both sides an opportunity to articulate views on specific issues and work toward common solutions. Both sides have much to gain from an improved relationship; much of Afghanistan has long relied on Pakistani links for trade and travel to the outside world, while Pakistan views Afghanistan as eventually becoming its primary route for trade with Central Asia.

Iran

Afghanistan's relations with Iran have fluctuated over the years, with periodic disputes over the water rights of the Helmand River as the main issue of contention. Following the Soviet invasion, which Iran opposed, relations deteriorated. The Iranian consulate in Herat closed, as did the Afghan consulate in Mashad. The Iranians complained of periodic border violations following the Soviet invasion. In 1985, they urged feuding Afghan Shi'a resistance groups to unite to oppose the Soviets. Iran supported the cause of the Afghan resistance and provided limited financial and military assistance to rebel leaders who pledged loyalty to the Iranian vision of Islamic revolution. Iran still provides refuge to about 1.4 million Afghans.

Following the emergence of the Taliban and their harsh treatment of Afghanistan's Shi'a minority, Iran stepped up assistance to the Northern Alliance. Relations with the Taliban deteriorated further in 1998 after Taliban forces seized the Iranian consulate in Mazar-e-Sharif and executed Iranian diplomats.

Since the fall of the Taliban, Afghanistan's relations with Iran have improved. Iran has been active in Afghan reconstruction efforts, particularly in the western portion of the country, and is constructing a road between their eastern border and Herat, a major trade route linking the two countries.

Russia

In the 19th century, Afghanistan served as a strategic buffer state between czarist Russia and the British Empire in the subcontinent. Afghanistan's relations with Moscow became more cordial after the Bolshevik Revolution in 1917. The Soviet Union was the first country to establish diplomatic relations with Afghanistan after the third Anglo-Afghan war and signed an Afghan-Soviet nonaggression pact in 1921, which also provided for Afghan transit rights through the Soviet Union. Early Soviet assistance included financial aid, aircraft and attendant technical personnel, and telegraph operators.

The Soviets began a major economic assistance program in Afghanistan in the 1950s. Between 1954 and 1978, Afghanistan received more than $1 billion in Soviet aid, including substantial military assistance. In 1973, the two countries announced a $200-million assistance agreement on gas and oil development, trade, transport, irrigation, and factory construction. Following the 1979 invasion, the Soviets augmented their large aid commitments to shore up the Afghan economy and rebuild the Afghan military. They provided the Karmal regime an unprecedented $800 million. The Soviet Union supported the Najibullah regime even after the withdrawal of Soviet troops in February 1989.

During the reign of the Taliban, Russia became increasingly disenchanted over Taliban support for Chechen rebels and for providing a sanctuary for terrorist groups active in Central Asia and in Russia itself. Russia provided military assistance to the Northern Alliance.

Though Afghanistan's current government has improved relations with Russia, the sensitive history between the two countries has left deep scars and residual feelings of mistrust. Afghanistan's outstanding foreign debt to Russia continues to

be a source of contention.

Tajikistan
Afghanistan's relations with Tajikistan have been complicated by political upheaval and civil war in Tajikistan, which spurred some 100,000 Tajiks to seek refuge in Afghanistan in late 1992 and early 1993. Tajik rebels seeking to overthrow the Tajik Government headed by Imamali Rahmanov began operating from Afghan bases and recruiting Tajik refugees into their ranks. These rebels, reportedly aided by Afghans and a number of foreign Islamic extremists, conducted cross-border raids against Russian and Tajik security posts and sought to infiltrate fighters and materiel from Afghanistan into Tajikistan. Also disenchanted by the Taliban's harsh treatment of Afghanistan's Tajik minority, Tajikistan facilitated assistance to the Northern Alliance.

In the post-Taliban era, Afghanistan seeks closer ties with its northern neighbor in order to capitalize on the potential economic benefits of increased trade. A planned bridge span linking the two countries over the Amu Darya River is a tangible sign of this new collaboration.

UN Efforts
During the Soviet occupation, the United Nations was highly critical of the U.S.S.R.'s interference in the internal affairs of Afghanistan and was instrumental in obtaining a negotiated Soviet withdrawal under the terms of the 1988 Geneva Accords.

In the aftermath of the Accords and subsequent Soviet withdrawal, the United Nations assisted in the repatriation of refugees and provided humanitarian aid such as health care, educational programs, and food and has supported mine-clearing operations. From 1990-2001, the UN worked to promote a peaceful settlement between the Afghan factions as well as provide humanitarian aid. Since October 2001, the UN has played a key role in Afghanistan through the UN Assistance Mission to Afghanistan (UNAMA), including spearheading efforts to organize Afghan elections slated for October 2004 (presidential) and early 2005 (parliamentary).

U.S.-AFGHAN RELATIONS
The first extensive American contact with Afghanistan was made by Josiah Harlan, an adventurer from Pennsylvania who was an adviser in Afghan politics in the 1830s and reputedly inspired Rudyard Kipling's story "The Man Who Would be King." After the establishment of diplomatic relations in 1934, the U.S. policy of helping developing nations raise their standard of living was an important factor in maintaining and improving U.S.-Afghan ties. From 1950 to 1979, U.S. foreign assistance provided Afghanistan with more than $500 million in loans, grants, and surplus agricultural commodities to develop transportation facilities, increase agricultural production, expand the educational system, stimulate industry, and improve government administration.

In the 1950s, the U.S. declined Afghanistan's request for defense cooperation but extended an economic assistance program focused on the development of Afghanistan's physical infrastructure--roads, dams, and power plants. Later, U.S. aid shifted from infrastructure projects to technical assistance programs to help develop the skills needed to build a modern economy. The Peace Corps was active in Afghanistan between 1962 and 1979.

After the April 1978 coup, relations deteriorated. In February 1979, U.S. Ambassador Adolph "Spike" Dubs was murdered in Kabul after Afghan security forces burst in on his kidnapers. The U.S. then reduced bilateral assistance and terminated a small military training program. All remaining assistance agreements were ended after the December 1979 Soviet invasion.

Following the Soviet invasion, the United States supported diplomatic efforts to achieve a Soviet withdrawal. In addition, generous U.S. contributions to the refugee program in Pakistan played a major part in efforts to assist Afghans in need. U.S. efforts also included helping Afghans living inside Afghanistan. This

cross-border humanitarian assistance program aimed at increasing Afghan self-sufficiency and helping Afghans resist Soviet attempts to drive civilians out of the rebel-dominated countryside. During the period of Soviet occupation of Afghanistan, the U.S. provided about $3 billion in military and economic assistance to Afghans and the resistance movement.

The U.S. Embassy in Kabul was closed in January 1989 for security reasons, but officially reopened as an Embassy on January 17, 2002. Throughout Afghanistan's difficult and turbulent 23 years of conflict, the U.S. supported the peaceful emergence of a broad-based government representative of all Afghans and actively encouraged a UN role in the national reconciliation process in Afghanistan.

Today, the U.S. is assisting the Afghan people as they rebuild their country and establish a representative government that contributes to regional stability, is market friendly, and respects human rights. The U.S. and Afghanistan are also working together to ensure that Afghanistan never again becomes a haven for terrorists. The U.S. provides financial aid for mine-clearing, reconstruction, and humanitarian assistance through international organizations.

Principal U.S. Official
Ambassador–Zalmay Khalilzad

The U.S. Embassy in Afghanistan is at the Great Masoud Road, Kabul (tel: +93-2-290002/5; fax: +93-2-290153).

TRAVEL AND BUSINESS INFORMATION
The U.S. Department of State's Consular Information Program provides Consular Information Sheets, Travel Warnings, and Public Announcements. **Consular Information Sheets** exist for all countries and include information on entry requirements, currency regulations, health conditions, areas of instability, crime and security, political disturbances, and the addresses of the U.S. posts in the country. **Travel Warnings** are issued when the State Department recommends that Americans avoid travel to a certain country. **Public Announcements** are issued as a means to disseminate information quickly about terrorist threats and other relatively short-term conditions overseas which pose significant risks to the security of American travelers. Free copies of this information are available by calling the Bureau of Consular Affairs at 202-647-5225 or via the fax-on-demand system: 202-647-3000. Consular Information Sheets and Travel Warnings also are available on the Consular Affairs Internet home page: http://travel.state.gov. Consular Affairs Tips for Travelers publication series, which contain information on obtaining passports and planning a safe trip abroad are on the internet and hard copies can be purchased from the Superintendent of Documents, U.S. Government Printing Office, telephone: 202-512-1800; fax 202-512-2250.

Emergency information concerning Americans traveling abroad may be obtained from the Office of Overseas Citizens Services at (202) 647-5225. For after-hours emergencies, Sundays and holidays, call 202-647-4000.

The National Passport Information Center (NPIC) is the U.S. Department of State's single, centralized public contact center for U.S. passport information. Telephone: 1-877-4USA-PPT (1-877-487-2778). Customer service representatives and operators for TDD/TTY are available Monday-Friday, 8:00 a.m. to 8:00 p.m., Eastern Time, excluding federal holidays.

Travelers can check the latest health information with the U.S. Centers for Disease Control and Prevention in Atlanta, Georgia. A hotline at 877-FYI-TRIP (877-394-8747) and a web site at http://www.cdc.gov/travel/index.htm give the most recent health advisories, immunization recommendations or requirements, and advice on food and drinking water safety for regions and countries. A booklet entitled Health Information for International Travel (HHS publication number CDC-95-8280) is available from the U.S. Government Printing Office, Washington, DC 20402, tel. (202) 512-1800.

Information on travel conditions, visa requirements, currency and customs regulations, legal holidays, and other items of interest to travelers also may be obtained before your departure from a country's embassy and/or consulates in the U.S. (for this country, see "Principal Government Officials" listing in this publication).

U.S. citizens who are long-term visitors or traveling in dangerous areas are encouraged to register at the Consular section of the U.S. embassy upon arrival in a country by filling out a short form and sending in a copy of their passports. This may help family members contact you in case of an emergency.

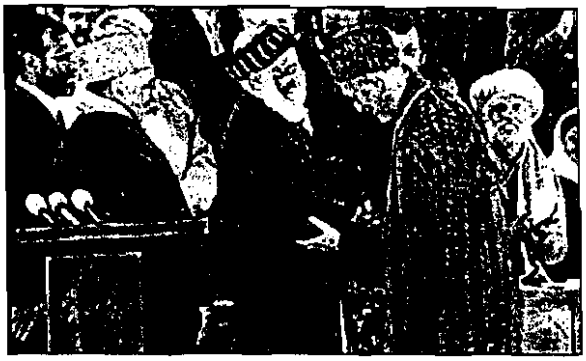
Further Electronic Information
Department of State Web Site. Available on the Internet at http://www.state.gov, the Department of State web site provides timely, global access to official U.S. foreign policy information, including Background Notes and daily press briefings along with the directory of key officers of Foreign Service posts and more.

Export.gov provides a portal to all export-related assistance and market information offered by the federal government and provides trade leads, free export counseling, help with the export process, and more.

STAT-USA/Internet, a service of the U.S. Department of Commerce, provides authoritative economic, business, and international trade information from the Federal government. The site includes current and historical trade-related releases, international market research, trade opportunities, and country analysis and provides access to the National Trade Data Bank.

Saturday, 22 December, 2001, 10:20 GMT

Karzai takes power in Kabul



Power is transferred with a handshake

Hamid Karzai has been sworn in as Afghanistan's new leader at an emotionally-charged ceremony in Kabul.

In the first peaceful transfer of power in Afghanistan for decades, Mr Karzai embraced former president Burhanuddin Rabbani and called on Afghans to "forget the painful past".

In a speech punctuated by applause and shouts of support, Mr Karzai called for international help in re-building his war-ravaged country and promised to work hard for unity and peace.

The new government is to run Afghanistan for the next six months - the first stage in a process which should culminate in elections within two and a half years.

Mr Karzai, 44, said his administration would respect all Islamic rules, the freedom of speech and the rights of women. He also stressed the need to rebuild Afghanistan's education system, severely damaged under the country's former Taleban rulers.

This agreement, although far from perfect, has been warmly welcomed by the people of Afghanistan and by all the countries of the world

UN envoy Lakhdar Brahimi

"We should put our hands together to forget the painful past. As brothers and sisters, we should go forward to a new Afghanistan together.

"Our country has had destruction in all aspects of life. We need a new beginning and hard work from all Afghans," he said.

'Momentous day'

Mr Karzai identified the government's most important duty to be ensuring security and peace, and stressed that Afghanistan was again a full member of the international community, now that the Taleban had been ousted.

He then swore in the 29 members of his new cabinet, on what the UN's chief representative called "a momentous day".

Lakhdar Brahimi, who brokered the new government's make-up at talks in Bonn, said Afghanistan had suffered too long.

Click here for a who's who of the Afghan power brokers.

"Each and every Afghan has been touched by this tragedy and has grown tired of war. People have now put their faith in this interim administration, and this faith must be rewarded," he said.

He said the ceremony, attended by representatives from every province in the country, marked the end of a "long dark night of conflict and strife".

"This agreement, although far from perfect, has been warmly welcomed by the people of Afghanistan and by all the countries of the world," he said.

Hamid Karzai is promising to work for peace

Mr Karzai, wearing a traditional lambskin hat, spoke in his native Pashtun. But he took care to read a poem in Dari, the country's other main language.

Jobs in the new government have been deliberately divided among Afghanistan's ethnic groups. But some Pashtun leaders are angry because a majority of posts have gone to the Tajik-dominated Northern Alliance.

Image of Masood

In a sign of Northern Alliance influence, a huge portrait of its assassinated leader Ahmed Shah Masood hung behind the assembled leaders, and each mention of his name during the ceremony was greeted by cries of respect.

About 2,000 Afghan leaders and foreign diplomats attended the inauguration, held in the Interior Ministry building.

A picture of Masood dominated the ceremony

Security was tight, with armed soldiers and police patrolling in the grounds of the ministry, accompanied by a small contingent of Royal Marines who are the vanguard for the British-led international security force.

Challenges ahead

Key tasks for the new government include establishing security throughout the country, restoring essential services and beginning the process of reconstruction.

Since the collapse of the Taleban, there have been reports of increasing numbers of armed men on the streets in some cities and of pockets of looting and lawlessness.

Three men who security officials described as Taleban fighters were arrested inside the Interior Ministry compound on Saturday morning.

Whitbeck: Afghanistan's historic day

December 22, 2001 Posted: 12:05 PM EST (1705 GMT)

CNN Correspondent Harris Whitbeck

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(CNN) – It's a new era in Afghanistan. Following five years of Taliban rule, a new interim government was sworn in Saturday morning in Afghanistan, with the Pashtun leader Hamid Karzai as its chairman.

CNN Correspondent Harris Whitbeck is in the capital of Kabul and filed this report:

HARRIS WHITBECK: We are on the grounds of the presidential palace, where Hamid Karzai, the new chairman of the interim government, has just given his first news conference. He said that the next few days will be very busy. He said tomorrow he will hold his first Cabinet meeting. He says his main priority is to try to maintain peace and stability in this country.

HAMID KARZAI: Peace and stability in Afghanistan and to give the Afghan people an opportunity to live at absolute peace.

Economically, Afghanistan has suffered tremendously because of years of war and disaster in the country.

WHITBECK: Mr. Karzai spoke about the significance of this day. He said that this day will go down in Afghan history only if he delivers on what he and his 29-member council have promised. He said if they do not deliver, this day will actually go into oblivion.

RESOURCES
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Attachment 5 to RE ____

UNITED STATES OF AMERICA v. DAVID M. HICKS	)	**PROSECUTION RESPONSE TO DEFENSE MOTION: ARMED CONFLICT IN AFGHANISTAN HAS ENDED** 15 October 2004

1. Timeliness. This response is being filed within the timeframe established by the Presiding Officer.

2. Relief Sought. The defense motion to dismiss should be denied.

3. Overview. The United States and other Coalition nations are engaged not only in a war against the Taliban in Afghanistan, but in a global conflict against al Qaida. Neither the global conflict against al Qaida nor the conflict against the Taliban in Afghanistan has ended.

4. Facts.

a. As the United States Supreme Court succinctly stated in *Hamdi v. Rumsfeld,* 124 S.Ct. 2633 (2004):

> On September 11, 2001, the al Qaida terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these 'acts of treacherous violence,' Congress passed a resolution authorizing the President to 'use all necessary and appropriate force against those nations, organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.' Authorization for Use of Military Force ('the AUMF'), 115 Stat 224. Soon thereafter, the President ordered United Stated Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.

Id. at 2635.

b. The international community immediately recognized the attacks of September 11, 2001 as an act of war, and invoked provisions of international treaties applicable to international armed conflict. *See, e.g.,* UN Security Council Resolution 1368 of 12 September 2001; NATO Press Release, 12 September 2001; White House Press Release, September 14, 2001.[1]

[1] Available at www.whitehouse.gov/news/releases/2001/09/20010914-12.html.

c. War planning against the perpetrators of September 11, 2001 – al Qaida – began immediately following those attacks. On September 20, 2001, President Bush, in an address to the Joint Session of Congress and the American people,[2] noted that the September 11th attacks constituted "an act of war against our country."[3] He also condemned the Taliban regime and put it on notice that it must either assist in bringing the terrorists to justice or "share in their fate."[4] Warning the American public to expect "a lengthy campaign, unlike any other we have ever seen,"[5] the President delivered a message to the United States military: "Be ready. I've called the Armed Forces to alert, and there is a reason. The hour is coming when America will act, and you will make us proud."[6]

d. Indeed, the September 11th attacks on the United States were an act of war, sparking the commencement of major combat operations in Afghanistan against the al Qaida network and the Taliban regime, known as Operation Enduring Freedom. But the war did not leap into existence on September 11, 2001. Al Qaida had declared and been waging this war against the United States years prior to the September 11th attacks. Final Report of the National Commission on Terrorist Attacks Upon the United States, Authorized Edition (2004), at 46, 48, 59. As a federal court has said, "Certainly the terrorist attacks that have followed, if not preceded, the 1998 embassy bombings – the 1996 bombing of the military barracks at Khobar Towers, Saudi Arabia, the 2000 suicide attack on the U.S.S. Cole in Yemen, and most tragic and violent of all, the attacks on our own soil of the Pentagon, the World Trade Center, and in Pennsylvania – are sufficient to confirm the President's assertion that a state of war exists between the United States and [al Qaida]." El-Shifa Pharmaceutical Industry Corporation. v. United States, 55 Fed. Cl. 751, at 771-772. (Fed. Cl. 2004).

e. On October 7, 2001, the President announced that on his orders, the U.S. military had "begun strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan." Presidential Address to the Nation of October 7, 2001.[7] Operations in Afghanistan continue,[8] as do worldwide operations against al Qaida.[9]

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[2] Address to a Joint Session of Congress and the American People of September 20, 2001, available at www.whitehouse.gov/news/releases/2001/09/20010920-8.html

[3] Id.

[4] Id.

[5] Id.

[6] Id.

[7] Available at www.whitehouse.gov/news/releases/2001/10/20011007-8.html.

[8] See, e.g., WASHINGTON, March 13, 2004 -- Operation Mountain Blizzard has successfully ended in Afghanistan, and Operation Mountain Storm has begun, coalition officials in the Afghan capital of Kabul announced in a news release today. In the two months of Mountain Blizzard, the coalition conducted 1,731 patrols and 143 raids and cordon-and-search operations. They killed 22 enemy combatants and discovered caches with 3,648 rockets, 3,202 mortar rounds, 2,944 rocket- propelled grenades, 3,000 rifle rounds, 2,232 mines and tens of thousands of rounds of small-arms ammunition, the news release said. Mountain Storm is the next in the continuing series of operations in the south, southeast, and eastern portions of Afghanistan designed to destroy terrorist organizations and their infrastructure while continuing to focus on national

5. Discussion. "The capture and detention of lawful combatants and the capture, detention, *and trial of unlawful combatants*, by 'universal agreement and practice,' are 'important incident[s] of war.' Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2640 (U.S.2004) *citing* Ex parte Quirin, 317 U.S. 1, 28 (1942) (emphasis added). "The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." *Id.* "It is a clearly established principle of the law of war that detention may last no longer than active hostilities." *Id.* (citations omitted). Enemy combatants "can be detained during an armed conflict, but the detaining country must release and repatriate them 'without delay after the cessation of active hostilities,' *unless they are being lawfully prosecuted* or have been lawfully convicted of crimes and are serving sentences." *Id.*, at 2641, *citing* Paust, *Judicial Power to Determine the Status and Rights of Persons Detained without Trial*, 44 Harv. Int'l L. J. 503, 510-511 (2003) (emphasis added).

In the first international criminal tribunals held since World War II, the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY") came to one concise definition of when an armed conflict exists for purposes of applying international law: "An armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between states *or protracted armed violence between governmental authorities and organized armed groups,* or between such groups within the states.... International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached..." Prosecutor v Dusko Tadic, *Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction*, paragraph 67, International Criminal Tribunal for the Former Yugoslavia, 2 October 1995 (Cassese, J). This definition has become the generally accepted definition of armed conflict in international law. See Rome Statute of the International Criminal Court, Article 8.2(f)[10]; *see also* Prosecutor v Kunarac, *Judgment,* paragraph 56, International Criminal Tribunal for the Former Yugoslavia, 12 June 2002.

Applying this definition, it is clear that the United States is at war, first and foremost, with al Qaida. The operations levied by the United States against the Taliban were only necessary after the Taliban refused to turn over Usama bin Laden and others responsible for the September 11th attacks, and for its support of al Qaida's terrorist operations within Afghanistan. Before the Taliban refused to cooperate, before U.S. forces were sent into Afghanistan, the United Nations, the North Atlantic Treaty Organization, and other international bodies had invoked collective defense provisions used for international armed conflicts, and Congress had passed its 2001 AUMF. Had the

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stability and support, officials said. See http://www.defenselink.mil/news/Mar2004/n03132004_200403135.html

[9] See, e.g., Remarks as Delivered by Secretary of Defense Rumsfeld, New York City, New York, October 4, 2004 (the war against al Qaida "will likely go on for years").

[10] In fact, although the United States is not party to the ICC, as of 27 September 2004, 97 countries are State parties to the Rome Statute of the International Criminal Court and have accepted this definition. http://www.icc-cpi.int/statesparties.html

Taliban acceded to the President's demands, there would no less be an international armed conflict against al Qaida.

Thus, there is an international armed conflict, but it is not just about the Taliban and Afghanistan as the Defense suggests; it is about the international terrorist organization al Qaida. Al Qaida has conducted attacks across the globe, to include East Africa, Yemen, the United States, and other locations. This is truly a global war against a determined, organized, and capable enemy.

As to duration of the conflict, the Prosecution will offer more detailed evidence at trial that demonstrates it started as early as the early 1990s; for the purpose of this motion, suffice it to say that it predates September 11, 2001, and continues to date.[11]

Hostilities in Afghanistan against the Taliban as well as al Qaida clearly are ongoing. Contrary to the Defense's position, Operation Enduring Freedom is a continuing military operation and hostilities continue sufficient to warrant the continued detention and prosecution of the Accused. According to the Department of Defense website on October 7, 2004, marking the third anniversary of Operation Enduring Freedom, fighting continues in 2004.[12] In late June 2004, the Supreme Court of the United States also expressly recognized the existence of hostilities sufficient to continue application of the laws of war in Afghanistan: "Active combat operations against Taliban fighters apparently are ongoing in Afghanistan." *Hamdi*, 124 S.Ct. at 2642 (2004) *citing e.g.*, Constable, U. S. Launches New Operation in Afghanistan, Washington Post, Mar. 14, 2004, p A22 (reporting that 13,500 United States troops remain in Afghanistan, including several thousand new arrivals); J. Abizaid, Dept. of Defense, Gen. Abizaid Central Command Operations Update Briefing, Apr. 30, 2004, http://www.defenselinkmil/transcripts/2004/tr20040430-1402.html. "If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF." *id.*

What is likely the strongest, yet most unfortunate evidence regarding the existence of continued hostilities, are continued casualties. As recently as September 20, 2004, two Army soldiers were killed in Afghanistan when a patrol was ambushed by small-arms fire and rocket-propelled grenades, and an observation post was fired on by

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[11] For example, subsequent to the bombings of United States embassies in Kenya and Tanzania on August 7th 1998, President Clinton ordered the United States forces to strike terrorist-related facilities, belonging to al Qaida, in Afghanistan and Sudan on August 20th 1998. (Archived Presidential statements from http://www.washingtonpost.com/wp-srv/inatl/longterm/eafricabombing/stories/text082098b.htm) On the same day,after carrying out the missile attacks, and in compliance with United Nations Article 51 notice requirements, Bill Richardson, U.S. Ambassador to the United Nations, sent a letter to the Security Council stating that the United States strike was in reaction to a "series of armed attacks" by "the Bin Ladin organization" against U.S. Embassies and U.S. nationals. http://usembassy-australia.state.gov/hyper/WF980821/epf508.htm.

[12] See http://www.defenselink.mil/news/Mar2004/n03132004_200403135.html

anti-Coalition forces.[13] The facts are clear that the armed conflict continues and a general conclusion of peace has not been reached.

The Defense points to what it terms "Taliban's final surrender in Kandahar that occurred on 17 November 2001," citing no source. This is an inaccurate reference. On 24 November 2001, Taliban leaders surrendered near the city of Konduz.[14] On 7 December 2001, Taliban leaders surrendered at Kandahar.[15] Moreover, it is clear that irrespective of these tactical surrenders, there never was a general conclusion of peace between the Coalition and the Taliban, let along al Qaida.

The armed conflict the United States is engaged in with al Qaida did not begin on 7 October 2001; nor did it end on 22 December 2001. Such an assertion is simply not supported under the generally recognized definition of "armed conflict" under international law. Moreover, even were hostilities to have ended, the International Committee of the Red Cross[16] has opined that prosecutions for violation of the laws of war are actually more appropriately tried *after* the hostilities have ended:

> ...it may still be wondered whether the person accused of war crimes can and should be tried during hostilities. The International Committee of the Red Cross has pointed out on several occasions, notably before the meeting of Government Experts in Geneva in 1947, how difficult it is for an accused person who is to be tried by a military tribunal to prepare his defence during hostilities. How, indeed, could he bring proof which might lessen or even disprove his responsibility? Cases clear enough for a verdict to be passed before the end of hostilities will doubtless remain an exception.

International Committee of the Red Cross, Commentary on the Geneva Conventions of 12 August 1949 596 (Oscar Uhler & Henri Coursier, eds., 1958).[17] Thus, even if the conflict had ended, there would be no cause for the defense to claim that the charges against the Accused should be dismissed, as trying the Accused by military commission would be equally permissible *after* the cessation of hostilities.

Since the armed conflict between the United States and al Qaida continues to this day, and because the law is clear that it is proper to try individuals for violations of crimes of war *even after* the end of hostilities, the defense motion to dismiss all charges should be denied.

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[13] See http://www.defenselink.mil/releases/2004/nr20040922-1311.html

[14] (http://cnn.worldnews.printthis.clickability.com/pt/cpt?action=cpt&title=CNN.com). Even this report indicates that 'hard –core Taliban fighters and al Qaida troops, mostly from outside Afghanistan, have vowed to keep fighting.

[15] (www.foxnews.com/printer_friendly_story/0,3566,40208,00.html)

[16] The International Committee of the Red Cross acts as a guardian for international humanitarian law. See http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList109/7E2A3790156D885FC1256C5400268136

[17] Available at: www.icrc.org/ihl.nsf/bea7ecf1a7801c6241256739003e6369/83d26231d75c3884c12563cd0042eeb5

6. Table of Authorities:
    a. Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2642 (2004)
    b. Prosecutor v. Dusko Tadic, *Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction*, paragraph 67, International Criminal Tribunal for the Former Yugoslavia, 2 October 1995 (Cassese, J)
    c. Rome Statute of the International Criminal Court,Article 8.2(f)
    d. Prosecutor v. Kunarac, *Judgment,* paragraph 56, International Criminal Tribunal for the Former Yugoslavia, 12 June 2002.
    e. Commentary on the Geneva Conventions of 12 August 1949 596 (Oscar Uhler & Henri Coursier, eds., 1958) (www.icrc.org/ihl.nsf/bea7ecf1a7801c6241256739003e6369/83d26231d75c3884c12563c

7. Witnesses/Evidence.

    a. Transcript, President Clinton's Press Conference August 20, 1998 http://www.clintonpresidentialcenter.org/legacy/082098-speech-by-president-address-to-nation-on-terror.htm

    b. Transcript, General Shelton's briefing on the missile strikes in Sudan and Afghanistan, 20 August 2004 http://www.pbs.org/newshour/bb/military/july-dec98/cohen_8-20.html

    c. Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council 2/1998/780, 20 August 1998 www.jb.law.uu.nl/jb-vol/US-SC.pdf

    d. Joint Resolution by Congress to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ040.107

    e. Transcript, President Bush's address of 7 October 2001 announcing the beginning of strikes against al Qaida training camps and military installations of the Taliban regime in Afghanistan. http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html

    f. White House Statement by the Press Secretary on the Geneva Convention, May 7, 2003 http:www.whitehouse.gov/news/releases/2003/05/print/20030507-18.html

    g. Department of Defense News Release No. 761-04, August 9, 2004 http://www.defenselink.mil/releases/2004/nr20040809-1100.html

h. Department of Defense News Release No. 941-04, September 22, 2004
http://www.defenselink.mil/releases/2004/nr20040922-1311.html

i. Statement by NATO invoking Article 5 of the Washington Treaty
http://www.nato.int/docu/pr/2001/p01-124e.htm

j. United Nations Resolution 1368
http://ods-dds-ny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf

k. Department of Defense Operation Enduring Freedom Timeline & related links
www.defenselink.mil/home/features/1082004a.html

//Signed//

[redacted]
Lieutenant Colonel, U.S. Marine Corps
Prosecutor

UNITED STATES OF AMERICA	)	
	)	**DEFENSE REPLY TO DISMISS**
	)	**FOR LACK OF JURISDICTION:**
v.	)	**THE ARMED CONFLICT IN**
	)	**AFGHANISTAN HAS ENDED**
DAVID M. HICKS	)	**26 October 2004**

The defense in the case of the *United States v. David M. Hicks* requests that the military commission dismiss all charges, and states in support of this request:

1. **Synopsis**: The military commission lacks jurisdiction over Mr. Hicks because the armed conflict in Afghanistan has ended. The prosecution, in its reply to the defense motion, completely ignores the legal distinction between an international and internal armed conflict and the accompanying consequences under international law.

2. **Facts asserted in prosecution response:** The defense does not dispute the public statements cited. The defense does not dispute that isolated military engagements are occurring in Afghanistan. No evidence has been provided to the defense to support the media statements cited by the prosecution.

On 22 December 2001, Hamid Karzai was sworn in as the head of a 30-member governing council in Afghanistan. The Afghan government under Karzai is not an enemy state involved in any type of armed conflict with the United States.

3. **Discussion**:

The prosecution argues that an international armed conflict between the U.S. and al-Qaida has been on-going since the early 1990s and continues today with no end in sight. Just because U.S. military forces are participating in military operations within Afghanistan does not mean those operations fall under the legal definition of an international armed conflict. Our nation can use force against a terrorist threat within the U.S. or abroad pursuant to the right of self-defense set forth in Article 51 of the U.N. Charter. It is doing so against al Qaida. However, such use of military force is not an international armed conflict because al Qaida is not a state.[1] For military operations to be classified as an international armed conflict, the military operations must be being waged by a state against another state. Because al Qaida is not a state, the Law of Armed Conflict (LOAC) provisions that allow states to detain enemy personnel indefinitely during an international armed conflict do not apply.

[1] As is clearly stated in Common Article 2 of the Geneva Conventions, "... these 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...."

A. The right of a state to use self-defense under Article 51 of the U.N. Charter

A state can use military force in self-defense. U.N. Security Council Resolution 1368 was an affirmation of the U.S. right to use force in self-defense under the U.N. Charter. However, there is no requirement that an international armed conflict exist for the U.S. to use force. The prosecution's response is full of reasons for the U.S. to use military force, none which support that the U.S. was involved in an international armed conflict with al-Qiada. The prosecution has confused the notion of the right to use force in self-defense under the Article 51 and the imitation of an international armed conflict which activates the law of armed conflict. The international armed conflict between the U.S. and the Taliban government is completely different and is further discussed below.

B. The definition of an international armed conflict and internal armed conflict

The prosecution mixes the definitions of internal and international armed conflict when it cites from the ICTY case of *Tadic*. It fails to identify that the first definition, "**there is a resort to armed force between States**"[2] as the sole definition for an international armed conflict and the second and third definitions are for an internal armed conflict.

The prosecution cites to the International Criminal Court statue as further support for their position without explaining that the statue differentiates between the definition of an international armed conflict and an internal armed conflict. The ICC defines an internal armed conflict as "...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]

The use of force in self-defense is a separate concept that is irrelevant to the existence of an international armed conflict. Depending on the military operations and who is involved, such self-defense action may or may not qualify as one of these types of armed conflict. When the U.S. initiated armed attacks against the former Taliban regime in Afghanistan, an international armed conflict began. The full range of the LOAC were applicable to that conflict.[4]

C. The international conflict ended and Mr. Hicks was not being prosecuted.

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[2] *Prosecutor v. Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Para. 70.

[3] ICC Statute, 8.2(f).

[4] Whether an armed conflict is categorized an international or internal will impact what sections of LOAC apply to that given conflict. During an international armed conflict the entire range of LOAC applies. During an internal armed conflict, only Common Article 3 to the four Geneva Conventions of 1949, Protocol Additional II to these treaties (for parties) and a limited body of customary law apply. However, the attacks of 11 September 2001, while providing justification to use force under Article 51, did not fall within the category of an internal armed conflict because they did not meet the threshold requirements for an internal armed conflict.

The government has asserted that in 2001, Mr. Hicks was an al Qaida operative fighting in Afghanistan. It is also possible that Mr. Hicks may simply have been a foot soldier operating under the direction of the Taliban regime. Either way, the provisions of the LOAC that allow for enemy combatants to be held without trial until the end of hostilities does not apply. The law that applies to Mr. Hicks is the domestic law of either the United States, or the new Afghanistan government.

As stated above LOAC does not apply to operations against al Qaida. Thus, if, as the government asserts, Mr. Hicks was an al Qaida operative, it may not hold him under the LOAC until the "end of hostilities" because that rule of the LOAC does not apply.[5] They must deal with Mr. Hicks under U.S. law. Moreover, because the international armed conflict has ended, the U.S. should have released, repatriated, or taken timely steps to prosecute Mr. Hicks.[6] The government could have chosen any one of a number of forums in which to try Mr. Hicks, including the federal district courts or the military justice system.[7]

The facts are clear that Mr. Hicks was not being prosecuted as the Karzi government took power. Yet, Mr. Hicks was not released. Nor was Mr. Hicks prosecuted during the entire following year. It was not until July 3, 2003, 18 months later, that Mr. Hicks was designated for potential trial by military commission with charges not being brought until June 10, 2004.

The authority to exercise military jurisdiction to try law of war violations lasts ". . . so long as a state of war exists-from its declaration until peace is proclaimed."[8] While the Supreme Court has allowed military commission jurisdiction to continue after the end of hostilities, it has done so only in limited circumstances such as when U.S. forces formally occupy foreign territory, or when the U.S. is part of a power-sharing governmental arrangement.[9] Without either of these circumstances, military commission jurisdiction exists only in the ". . . time of war."[10]

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[5] In its response to this defense motion and others, the government has espoused a position that the United States is involved in a "Global War" with al Qaida, or that because this is "wartime" that the government may invoke the LOAC to justify its treatment of Mr. Hicks. While the defense does not deny that combat operations have been ongoing on several fronts over the past 3-4 years, and that the United States has a right to defend itself under Art. 51 of the U.N. Charter, the terms "Global War,""War on Terror," or "wartime" are merely rhetorical or political devices that have no relevance to a legal discussion of the rules applicable to the military operations in which the United States has been involved. Any legal discussions of the LOAC and its implications must start with an analysis of what type of armed conflict, if any, is involved in a military operation, and what, if any rules under the LOAC are implicated by the armed conflict or lack thereof. Any discussion of "Global Wars" or "the War on Terrorism" merely serve to confuse and obfuscate the legal issues relevant to Mr. Hicks', or any other, case before the commission.

[6] *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004)

[7] Mr. Hicks could also have been tried by Australia for any violation of his law, or by the TISA for violations of its law.

[8] *In re Yamashita*, 327 U.S. 1, 11 (1946).

[9] *Madsen v. Kinsella* 343 U.S. 341, 348 (1952). The President has the urgent and infinite responsibility not only of combating the enemy but of governing any territory occupied by the United States by force of arms."

[10] Id. at 348.

Conclusion: The international armed conflict in Afghanistan ended on 22 December 2001 with the new government taking power in Afghanistan. The U.S. military did not occupy Afghanistan thereby preserving jurisdiction to try Mr. Hicks, nor did the U.S. government take reasonable steps to prosecute Mr. Hicks after the end of the international armed conflict. Waiting over two years from the end of the international armed conflict to commence prosecution, removes any validity in trying Mr. Hicks after the end of the international armed conflict.

The prosecution asserts that this commission has jurisdiction over Mr. Hicks because the U.S. is supposedly involved in a continuing international armed conflict with al Qaida. This assertion is false. Accordingly, this commission should have no jurisdiction to try Mr. Hicks.

4. **Evidence:** The testimony of expert witnesses.

5. **Relief Requested:** The defense requests that all charges be dismissed.

6. The defense requests oral argument on this motion.

By: _____

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

J. D. Lippert
Major, U.S. Army
Detailed Defense Counsel

Joshua Dratel
Civilian Defense Counsel

UNITED STATES OF AMERICA	)	
	)	**DEFENSE MOTION FOR APPROPRIATE RELIEF: IMPOSITION OF IMPROPER PRE-TRIAL DETENTION UNDER INTERNATIONAL LAW**
v.	)	
DAVID M. HICKS	)	
	)	**1 October 2004**

The defense in the case of the *United States v. David M. Hicks* moves the military commission for appropriate relief, up to and including dismissal of all charges against Mr. Hicks, because his continued pre-trial detention violates international law, and states in support of this request:

1. **Synopsis**: Mr. Hicks was arbitrarily and improperly detained by U.S. forces in Afghanistan. Even if the commission were to find that his detention had been justified during military operations in, and the occupation of, Afghanistan, his ongoing detention at Guantanamo Bay Naval Base is no longer appropriate. It is disproportionate and unjust, and therefore arbitrary. Mr. Hicks's arrest and detention do not comply with U.S. domestic or international substantive law. Protective detention is not recognized by either U.S. or international law. Finally, Mr. Hicks's arrest and detention violates both U.S. domestic and international procedural law. Temporal limits have been clearly and severely breached with regard to the requirements that Mr. Hicks be promptly informed of the reasons for arrest, be produced before a judge, and be informed of the details of the charges against him. Also, Mr. Hicks's right to challenge the legality of his detention by means of *habeas corpus* was denied until he was given access to counsel in December 2003. The arrest and detention of Mr. Hicks are therefore illegal in numerous respects under both U.S. domestic law and international law.

2. **Facts**: Mr. Hicks was seized and concurrently detained in Afghanistan in or around November 2001. The armed conflict in Afghanistan concluded at the latest 1 May 2003. On 3 July 2003, Mr. Hicks was designated as eligible for trial by military commission. Charges were instituted against Mr. Hicks on 10 June 2003. Mr. Hicks appeared before the commission for the first time 25 August 2004.

3. **Discussion**:

A: The Prohibition on Arbitrary Arrest and Detention

The prohibition against arbitrary detention has been a fundamental guarantor of liberty since its codification in the Magna Carta in the 13th century.[1] It remains at the heart of the

[1] The Magna Carta (Latin for the 'Great Charter') was signed by King John of England on 15 June 1215, at Runnymede, England. King John was forced to sign the Magna Carta to appease the barons of England who had revolted against high taxes, and were concerned that the King's actions were not subject to the law. The Magna Carta contained 63 provisions, one of the most important being the fundamental concept of *habeas corpus* (by which no one can be imprisoned without due process of law). The short term effects of the Magna Carta were minimal, as Pope Innocent III quickly excommunicated every baron who signed the Magna Carta and declared it null and void.

common law and is an essential component of due process and the rule of law. It has been affirmed in the Constitution of the United States and other national Constitutions,[2] and is recognized by both international and regional human rights instruments.[3]

Article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR)[4] provides for the right to "liberty and security of person." It states that no one shall be subjected to "arbitrary arrest or detention." The construction "liberty and security of person" has been interpreted to mean freedom of bodily movement and freedom from interference with personal dignity. A breach of this Article occurs, *inter alia*, when an individual is physically confined in a prison or detention facility. Arrest or detention will be "arbitrary" when it is discriminatory, inappropriate, disproportionate, unjust or unpredictable in view of the circumstances of the case. In addition, according to the *travaux préparatoires*, the term "arbitrary" encompasses conduct broader than what is simply "illegal." Thus, deprivations of liberty that fall short of "illegal" conduct nevertheless qualify as breaches of Article 9(1). In addition, neither the law itself, nor its enforcement, can be arbitrary.[5]

It is submitted that the detention of Mr. Hicks has been "arbitrary" within this definition. Mr. Hicks was detained indefinitely, solely on the basis that he allegedly participated in the hostilities in Afghanistan. The United States Government has claimed the right to detain individuals such as Mr. Hicks until the "war on terrorism" is over, even if such individuals are tried by a military commission and found not guilty.[6] This is completely disproportionate, and therefore arbitrary.

B: Substantive and Procedural Law Regarding Arrest and Detention

Article 9(1) of the ICCPR states that no one shall be "deprived of his liberty except on such grounds and procedures as are established by law." The references to "grounds" and

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However, the Magna Carta was confirmed by later English kings, and its impact on modern law remains strong as both a fundamental source of the common law and as a forerunner to American civil rights and liberties.

[2] Fifth Amend. U.S. Const. See also *Constitution Act 1982 — Canadian Charter of Rights and Freedoms*, section 9. Available at <http://www.solon.org/Constitutions/Canada/English/ca_1982.html>.

[3] *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/Res/217A (III) (1948), Article 9. Available at <http://www.unhchr.ch/udhr/lang/eng.pdf>. *European Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 4 November 1950, 213 UNTS 221, Article 5 (entered into force 3 September 1953). Available at <http://www.echr.coe.int/Convention/webConvenENG.pdf>. *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123, Article 7 (entered into force 18 July 1978). Available at <http://www.oas.org/juridico/english/Treaties/b-32.htm>.

[4] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Available at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>. Ratified by the US on 8 June 1992. See also Executive Order 13107 "Implementation of Human Rights Treaties" of 10 December 1998. Available at <http://usgovinfo.about.com/library/eo/bl13107.htm>.

[5] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993), p. 172.

[6] U.S. Department of Defense News Briefing, 21 March 2002, transcript published by M2 PressWIREe, 22 March 2002. General Counsel William J. Haynes stated that "[i]f we had a trial right this minute, it is conceivable that somebody could be tried and acquitted of that charge, but may not necessarily automatically be released. The people that we are detaining, for example, in Guantanamo Bay, Cuba, are enemy combatants that we captured on the battlefield seeking to harm U.S. soldiers or allies, and they're dangerous people. At the moment, we're not about to release any of them unless we find that they don't meet those criteria . . ."

"procedures" will mean that deprivation of liberty must be in accordance with domestic substantive and procedural law. Furthermore, such laws must be applicable and accessible to all, whether laid down in statute or forming part of the common law.

International law also provides certain procedural requirements at arrest and during detention. The ICCPR and article 75 of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Additional Protocol I)[7] provide for certain minimum procedural or temporal rights, relating to:

- the right to be informed of the reasons for arrest;
- the right to be informed of any charges; and
- the right to be brought before a judicial authority.

The ICCPR and Additional Protocol I also provide the procedural right to challenge the legality of detention.

1. Power to Detain Under the Law of War— The United States Government has maintained its authority to detain enemy combatants under the law of war.[8] However, at the point that the armed conflict in Afghanistan ceased (in December 2001),[9] the Government no longer had the right to continue detaining Mr. Hicks, unless it instituted criminal charges against him. Yet, criminal charges against Mr. Hicks were not filed after the armed conflict in Afghanistan had ended. Therefore, during the period between the end of the armed conflict, and the date charges were filed against Mr. Hicks (10 June 2003), his detention failed to comply with procedural law.

2. The Right to be Informed of Reasons for Arrest — Article 9(2) of the ICCPR states that anyone who is arrested "shall be informed, at the time of arrest, of the reasons for his arrest." Article 75(3) of Additional Protocol I states that individuals arrested or detained for actions related to the armed conflict "shall be informed promptly ... of the reasons why these measures have been taken." The purpose of these articles is to provide the detainee with enough general information to put him in a position to challenge the legality of the detention, which is provided for in article 9(4) of the ICCPR.

Mr. Hicks was not informed of the reasons for his detention at the time he was placed under United States control and transported to Guantanamo Bay Naval Base. While the government has previously publicly stated that Mr. Hicks and others detained in Afghanistan were being held at that time solely for the purposes of preventing them from rejoining hostilities, *see* **ante**, at n. 8, neither the ICCPR nor Additional Protocol I recognize that excuse as a valid reason for failure to comply with procedural time limits. Furthermore, the authorities failed to inform Mr. Hicks of the reasons for his detention at the point the armed conflict in Afghanistan ended, and detention persisted for the clear and exclusive purpose of prosecution.

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[7] Opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

[8] The United States Government stated to the United Nations in its letter dated 2 April 2003 that detainees "are being held in accordance with the laws and customs of war, which permit the United States to capture and detain enemy combatants to prevent their re-engaging in the on-going armed conflict": UN Doc E/CN.4/2003/G/73.

[9] See Defense Motion to Dismiss as the International Armed Conflict Has Ended, *United States v. David M. Hicks.*

3. The Right to Challenge the Legality of Detention — Article 9(4) of the ICCPR states that anyone who is deprived of his liberty by arrest or detention "shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." Although this Article does not expressly mention *habeas corpus*, the right to such relief is indeed provided. The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, requires that procedures for *habeas corpus* be "simple and expeditious and at no cost for detained persons without adequate means."[10] The detainee has the right to continuing review of the lawfulness of detention at reasonable intervals.[11] The United Nations Human Rights Committee, the Inter-American Commission on Human Rights and the European Court of Human Rights have all found that detention for a period of as little as one week or less violates the requirement that an accused be able to bring judicial proceedings to challenge the legality of detention.[12]

As Mr. Hicks was not informed of the reasons for his detention, was held incommunicado, and was not permitted access to legal counsel, he was improperly deprived of his right and ability to challenge the lawfulness of his detention for an lengthy period of time.

4. The Right to be Informed Promptly of Charges — Article 14(3)(a) of the ICCPR states that everyone shall be "informed promptly and in detail ... of the nature and cause of the charge against him."[13] Article 75(4)(a) of Additional Protocol I states that the procedure of the court "shall provide for an accused to be informed without delay of the particulars of the offence alleged against him."

General Comment 13 on the ICCPR explains that the right to be informed "promptly" requires that information be given "as soon as the charge is first made by a competent authority." In the opinion of the Human Rights Committee, the expert body set up by the ICCPR to monitor that treaty's implementation, "this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such." The information must indicate both the law, and the alleged facts upon which the charge is based.[14] In considering the same provision (found in the Geneva Conventions), the International Committee of the Red Cross has stated that the maximum period should be ten days.[15]

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[10] See Principles 32. Adopted by General Assembly Resolution 43/173 of 9 December 1988. Available at <http://www.unhchr.ch/html/menu3/b/h_comp36.htm>.

[11] *Id.*

[12] Human Rights Committee, "Torres v. Finland," U.N. Doc. CCPR/C/38/D/291/1988 (5 April 1990), para. 5.3; Inter-American Commission on Human Rights, "The Situation of Human Rights in Cuba, Seventh Report," OEA/Ser.L/V/II.61 Doc. 29 rev. 1 (4 October 1983), para. 13; European Court of Human Rights, "Brogan and Others v The United Kingdom," [1988] ECHR 24 (29 November 1988), para. 62.

[13] See also article 9(2) of the ICCPR which states that anyone who is arrested 'shall be promptly informed of any charges against him.'

[14] General Comment 13, reproduced in "Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies," U.N. Doc. HRI/GEN/1/Rev.7, 12 May 2004, para. 8.

[15] Claude Pilloud et al, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), para. 3072. Available at <http://www.icrc.org/ihl.nsf/WebCOMART?OpenView>.

On 27 February 2002, the Secretary of Defense stated "[w]e are now starting the process of doing a series of interrogations that involve law enforcement."[16] At this point, they were interviewing with a view to possible prosecution, as opposed to earlier interrogation for intelligence purposes. Regardless whether and when (the government may argue) the clock began to run, Mr. Hicks's right to be informed promptly of the nature and cause of the charges was still violated.

On 3 July 2003, Mr. Hicks was designated eligible for trial by military commission, more than one and a half years after his detention began. That was the very last point in time at which the Government decided to take "procedural steps" against him, thereby starting the procedural clock for notice of charges.[17] No charges were brought against Hicks until 10 June 2004, almost another year later. A delay of almost one year far exceeds the time limit for being "promptly" informed of formal charges, especially when measured against the prior year and a half of incommunicado, uncounseled detention and interrogation.

4. The Right to be Brought Promptly Before a Judge — According to Article 9(3) of the ICCPR, once charged, a person "shall be brought promptly before a judge or other officer authorized by law to exercise judicial power." General Comment 8 on the ICCPR states that delays must not exceed "a few days."[18] Article 9(3) also provides that anyone detained on a criminal charge "shall be entitled to trial within a reasonable time or to release." General Comment 8 states that the total length of detention pending trial may be in conflict with this entitlement. It says that pre-trial detention should be an exception and should be as short as possible. Article 14(3)(c) states that everyone has the right "to be tried without undue delay."

Mr. Hicks was not brought before a judge until the week of 23 August 2004. That was more than a year after his initial designation, and three months after he was charged. His trial is not scheduled to begin until more than three years after his initial detention.

Accordingly, the clear and serious contravention of the substantive and procedural law of arrest and detention require that the charges against Mr. Hicks be dismissed, and/or for any such other and proper relief.

4. **Evidence**:

A: The testimony of expert witnesses.

B: Attachments

1. *Constitution Act 1982 — Canadian Charter of Rights and Freedoms*, section 9.
2. *Universal Declaration of Human Rights* (1948), Article 9.
3. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 5.
4. *American Convention on Human Rights*, Article 7.

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[16] Interview with KSTP-ABC, St Paul, Minnesota.

[17] It could be argued that the procedural clock was started even earlier, i.e. at the time of transfer to Guantanamo Bay Naval Base in early 2002, or even at the time of capture in late 2001.

[18] General Comment 8, reproduced in "Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies," U.N. Doc. HRI/GEN/1/Rev.7, 12 May 2004, para. 2.

5. *International Covenant on Civil and Political Rights*, Articles 9 and 14.
6. Executive Order 13107 "Implementation of Human Rights Treaties" (1998).
7. Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993), p. 172.
8. U.S. Department of Defense News Briefing (21 March 2002).
9. United States Government Letter to the United Nations (2 April 2003), U.N. Doc E/CN.4/2003/G/73.
10. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, Article 75.
11. United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 32.
12. Human Rights Committee, "Torres v. Finland."
13. Inter-American Commission on Human Rights, "The Situation of Human Rights in Cuba, Seventh Report."
14. European Court of Human Rights, "Brogan and Others v The United Kingdom."
15. General Comment 13, reproduced in "Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies," U.N. Doc. HRI/GEN/1/Rev.7.
16. Claude Pilloud et al, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987).
17. Secretary of Defense, Interview with KSTP-ABC, St Paul, Minnesota, 27 February 2002.
18. General Comment 8, reproduced in "Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies," U.N. Doc. HRI/GEN/1/Rev.7.

5. **Relief Requested**: For the above reasons, the defense requests that this commission dismiss all charges against Mr. Hicks and direct that he be released from confinement.

6. The defense requests oral argument on this motion.

By: _____

M.D. MORI
Major, U.S. Marine Corps
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Constitution Act, 1982(1)

SCHEDULE B

CONSTITUTION ACT, 1982

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon the principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other means of communication.

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

Democratic Rights

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.(2)

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.(3)

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.(4)

Mobility Rights

Attachment 1 to RE 16A

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

(*a*) to be infomed promptly of the reason therefor;

(*b*) to retain and instruct counsel without delay and to be infomed of that right; and

(*c*) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

11. Any person charged with an offence has the right

(*a*) to be infomed without unreasonable delay of the specific offence;

(*b*) to be tried within a reasonable time;

(*c*) not to be compelled to be a witness in a proceedings against that person in respect of the offence;

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*e*) not to be denied reasonable bail without cause;

(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or International law or was criminal according to the general principles of law recognized by the community of nations;

(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(*i*) if found guilty of the offence and if punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel or unusual treatment or punishment.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or

Universal Declaration of Human Rights

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly,

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by

teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article I

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Attachment 2 to RE 16A

Page 2 of 3

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier

Attachment 2 to RE 16A

Page 3 of 3

Council of Europe
Conseil de l'Europe

Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11

with Protocol Nos. 1, 4, 6, 7, 12* and 13*

The text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, is repealed.

Registry of the European Court of Human Rights
February 2003

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* These Protocols will enter into force when ratified by ten Contracting States.

Attachment 3 to RE 164

Page 1 of 4

Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.1950

The governments signatory hereto, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

Article 1 – Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Section I – Rights and freedoms

Article 2 – Right to life

1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a in defence of any person from unlawful violence;

b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4 – Prohibition of slavery and forced labour

1 No one shall be held in slavery or servitude.

2 No one shall be required to perform forced or compulsory labour.

3 For the purpose of this article the term "forced or compulsory labour" shall not include:

a any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

b any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

c any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

d any work or service which forms part of normal civic obligations.

Article 5 – Right to liberty and security

1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a the lawful detention of a person after conviction by a competent court;

b the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

AMERICAN CONVENTION ON HUMAN RIGHTS "PACT OF SAN JOSE, COSTA RICA"

Preamble

The American states signatory to the present Convention,

Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states;

Considering that these principles have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope;

Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights; and

Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters,

Have agreed upon the following:

PART I - STATE OBLIGATIONS AND

RIGHTS PROTECTED

CHAPTER I - GENERAL OBLIGATIONS

Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, "person" means every human being.

Article 2. Domestic Legal Effects

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their

constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

CHAPTER II - CIVIL AND POLITICAL RIGHTS

Article 3. Right to Juridical Personality

Every person has the right to recognition as a person before the law.

Article 4. Right to Life

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be reestablished in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

Article 5. Right to Humane Treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

3. Punishment shall not be extended to any person other than the criminal.

4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.

5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.

6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

Article 6. Freedom from Slavery

1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.

2. No one shall be required to perform forced or compulsory labor. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labor, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.

3. For the purposes of this article, the following do not constitute forced or compulsory labor:

a. work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such work or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company, or juridical person;

b. military service and, in countries in which conscientious objectors are recognized, national service that the law may provide for in lieu of military service;

c. service exacted in time of danger or calamity that threatens the existence or the well-being of the community; or

d. work or service that forms part of normal civic obligations.

Article 7. Right to Personal Liberty.

1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released

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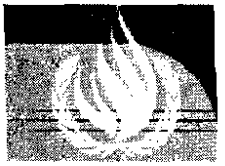
without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

Office of the High Commissioner for Human Rights



International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

***entry into force* 23 March 1976, in accordance with Article 49**

status of ratifications
declarations and reservations

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1 ***General comment on its implementation***

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no

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Article 9 ***General comment on its implementation***

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 14 ***General comment on its implementation***

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and 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;

(e) 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;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and

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when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release December 10, 1998

EXECUTIVE ORDER 13107

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IMPLEMENTATION OF HUMAN RIGHTS TREATIES

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.

Sec. 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. The head of each agency shall designate a single contact officer who will be responsible for overall coordination of the implementation of this order. Under this order, all such agencies shall retain their established institutional roles in the implementation, interpretation, and enforcement of Federal law and policy.

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observed. The principle of legality is violated if somebody is either arrested or detained on grounds which are not clearly established in a domestic law, or which are contrary to such law as in the case of *Bolanos v. Ecuador*.[71]

3. Prohibition of Arbitrariness

The prohibition of arbitrariness in the second sentence of Art. 9(1) represents an additional limitation on deprivation of liberty that is directed at both the national legislature and the organs of enforcement. It is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily.

As with the requirement of legality, the prohibition of arbitrariness was adopted by the HRComm as an alternative to an exhaustive listing of all permissible cases of deprivation of liberty.[72] It is based on an Australian proposal that was highly controversial in both the HRComm and the 3d Committee of the GA.[73] In particular, the British delegate long sought to have the sentence struck.[74] He ultimately abstained during the voting due to the decision to retain this requirement.[75] Whereas some delegates were of the view that the word "*arbitrary*" ("arbitraires") meant nothing more than unlawful,[76] the majority stressed that its meaning went beyond this and contained elements of injustice, unpredictability, unreasonableness, capriciousness and unproportionality, as well as the Anglo-American principle of due process of law.[77] Various speakers also pointed out that the word "arbitrary" had already been adopted in Art. 6 after lengthy discussion. The British motion to strike was ultimately defeated by a vote of 44:11, with 14 abstentions.[78]

Thus, in light of the historical background of Art. 9(1), a systematic interpretation of the second and third sentences shows that, in conformity with comparable provisions in Arts. 6(1), 12(4) and 17(1), the prohibition of

71 No. 238/1987, § 9.
72 *See supra* para. 10.
73 *See* A/2929, 35 (§§ 29-32); A/4045, §§ 43-49; A/C.3/SR.861-SR.866; Bossuyt 193 ff.; Dinstein, *supra* note 70, at 130 f.; United Nations, *supra* note 55, at 5 ff.
74 A/C.3/L.686; A/C.3/SR.861, §§ 23-27; A/C.3/SR.864, §§ 16-18.
75 A/C.3/SR.866, § 33.
76 *Cf., e.g.*, A/C.3/SR.863, §§ 8, 21, 29, SR.866, §§ 16-18.
77 *Cf., e.g.*, A/C.3/SR.863, §§ 15, 17, SR.864, §§ 2, 10, SR.865, §§ 11, 15, 19, 27, 3 SR.866, §§ 8, 25, 34. *See also* the views of the Committee in *van Alphen v. t*

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M2 PRESSWIRE March 22, 2002

Secretary of Defense Donald H. Rumsfeld Thursday, March 21, 2002 - 2: 00 p.m. EST

(Also participating were Marine Corps Gen. Peter Pace, vice chairman, Joint Chiefs of Staff; Under Secretary of Defense Douglas Feith; and Department of Defense General Counsel William J. Haynes. The fact sheet distributed during the briefing is on the web at http://www.defenselink.mil/news/Mar2002/d20020321fact.pdf. The DoD Military Commission Order discussed during the briefing is on the web at http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf. Also see the related news release at http://www.defenselink.mil/news/Mar2002/b03212002_bt140-02.html.)

Q: You're on the wrong side.

Rumsfeld: I don't feel right over here. (Laughter.) There's something wrong with this picture. (At the podium.)

Q: (Off mike) - on the left.

Rumsfeld: Good afternoon.

Q: Good afternoon.

Rumsfeld: We were reminded last week, as the coalition forces battled Taliban and al Qaeda in the mountains, that we're still in the early stages of this dangerous and what promises to be long war. But while much of the difficult work remains, thanks to the courage and dedication of the soldiers and sailors and airmen and Marines, we've had some good success thus far.

On September 11th, the terrorists attacked the United States, killing thousands of innocent men, women and children.

Less than a month later, the coalition countries responded and the Taliban had been driven from power. Hundreds of Taliban and al Qaeda terrorists have been killed, and hundreds more have been rounded up and detained by coalition forces.

This success has given us a glimpse into the future we face. As the president noted in his State of the Union address, we have found evidence, in caves and tunnels and safe houses in Afghanistan, of further terrorist plots to kill Americans and others, as well as terrorist efforts to acquire weapons of mass destruction, capabilities that, if they are successful, could help them kill not thousands more but tens of thousands more.

This is a dangerous and determined adversary for whom September 11th was an opening salvo in a long war against our country, our people and our way of life. Our task, our purpose must be to stop the terrorists; to find them, to root them out and get them off the street so that they cannot murder more American citizens.

One of the tools at our disposal to meet that challenge is the use of military commissions to try some of those who are captured in the conflict. Today we are announcing some of the procedures we plan to use to carry out the president's military order. Before discussing them, I want to mention some of the thinking that went into their development.

In the president's military order, he directed the Department of Defense to find ways to conduct commissions in a manner that would be consistent both with our national security interests and with the traditions of fairness and justice under law, on which this nation was founded, the very principles that the terrorists seek to attack and destroy.

In the months since the president issued his order, we have consulted with a number of experts from around the country, in and out of government, in and out of Washington, in an effort to come up with rules and procedures that will ensure just outcomes while protecting the American people from the dangers that are in fact posed by terrorists.

There's a powerful tension between getting a story fast and getting a story right. That's a fact. You all know that.

It's important, I believe, to try to balance those competing pressures. Often the pressures of the moment for speed tend to overpower the desirability of getting it right. On and after September 11th, in reporting the number of people who were killed here at the Pentagon, DoD was criticized for being too slow, but we got it right. With respect to the global position device recently found in Afghanistan, DoD got it fast, but we now believe we got it wrong. On the development of the rules for the military commissions, DoD has been characterized by some as being slow. The fact is, I have been determined to try to get it right. It is an exceedingly important subject, and it's important for our country that we do it right.

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,I've taken some time, first because I wanted to do it well, but second because we had the time available. No individual has yet been assigned to be tried by a military commission. So despite the appetite for speed, it was more important to do it well than to do it fast.

Our approach has been based on two important principles.

First, the president decided to establish military commissions because he wanted the option of a process that is different from those processes which we already have, namely, the federal court system in the United States and the military court system under the Uniform Code of Military Justice.

So when people take note of the fact that there are differences with respect to the procedures for the military commissions, they should understand that there is a reason for it. Those two systems have different rules and procedures, yet each produces just outcomes. It follows, therefore, that military commissions, which will have rules and procedures that are somewhat different from either of those two systems, can also produce just outcomes, despite the differences. An observer who may be more familiar with the federal court system or the military code of justice may try to evaluate the new approach being fashioned for military commissions against what they're familiar with and then raise questions about the rules and procedures for the military commissions. That's understandable.

But I want to be clear from the start. The commissions are intended to be different, and the reason is - is because the president recognized that there had to be differences to deal with the unusual situation we face and that a different approach was needed for that reason, just as was the case during several previous conflicts in our country's history.

Our second guiding principle is related. Observers may be inclined to examine each separate provision and compare it to what they know of the federal criminal court system or the court-martial system, and feel that they might prefer a system that they were more comfortable with. I suggest that no one provision should be evaluated in isolation from the others. If one steps back from examining the procedures provision by provision, and instead drops a plumb line down through the center of them all, we believe that most people will find that taken together, they are fair and balanced and that justice will be served in their application.

The general counsel, Jim Haynes, who has spent an enormous amount of time on this subject, and the undersecretary of Defense for Policy - and needless to say, there's a mixture here of legal and political policy questions - are here. They will come up to the podium and respond to technical questions after General Pace and I depart. They'll review the procedures and answer questions. However, I do want to highlight some of the main provisions.

The accused will enjoy a presumption of innocence; will not be required to testify or incriminate themselves at the trial. They will have the ability to discover information and to obtain witnesses and evidence needed for trial and be present at public trial. Cannot be tried for the same offense twice.

Will be provided with military defense counsel at government expense, and will also be able to hire defense counsel of their choosing at their expense.

Further, proceedings will be open, unless the presiding officer determines it's necessary to close the proceedings to protect classified or sensitive information, or for another reason; namely, the safety of the trial participants.

The standard for conviction will be "beyond a reasonable doubt" and will require a two-thirds vote of the commission.

The imposition of a death penalty will require a unanimous vote of the seven-member commission. After the trial, there will be an automatic post-trial process of appeal and review.

Let there be no doubt, commissions will conduct trials that are fair and impartial. At the same time while ensuring just outcomes, the procedures are also designed to respond to the unique circumstances for which they were established.

For example, military commissions will allow the use of classified information without endangering sources and methods.

In a civilian trial, prosecutors could be faced with a situation where in order to avoid exposing classified information, they would have to either allow defendants to go free, or accept a lighter sentence, a situation that could be undesirable in the case of a hardened Taliban or al Qaeda terrorist.

The procedures allow us to protect civilian judges, juries, counsel and witnesses from ongoing terrorist threats.

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For example, the judge who handled the trial for the first World Trade Center attack is still under 24-hour protection by Federal Marshals, and may be for the rest of his life. That is unacceptable in the cases likely to be assigned to the commissions.

And the procedures permit more inclusive rules of evidence. In wartime, it may be difficult to locate witnesses or establish chains of custody for documents. Critical evidence that could protect the American people from dangerous terrorists should not be excluded simply because it was obtained under conditions of war.

Let me conclude. We are a nation of laws. We have been attacked by lawless terrorists. The manner in which we conduct trials under military commissions will speak volumes about our character as a nation, just as the manner in which we were attacked speaks volumes about the character of our adversaries.

We have made every reasonable effort to establish a process that is just; one that protects both the rights of the defendant to a fair trial, but also protects the rights of the American people to their security and to live as they were meant to live, in freedom, and without free of terrorists.

I want to add a word of appreciation not just to Jim Haynes, who will be up here in a moment, but to a number of non-Defense Department individuals, most of them former government officials or judicial officials of various types, who have given a great deal of time to provide advice as we worked through these many important issues.

(To staff) I believe we have their names that are going to be passed out in the materials?

Staff: Yes, sir.

Rumsfeld: Good.

After General Pace makes his remarks, we will be happy to take one or two questions, and then we're going to bring up the experts.

General Pete Pace, United States Marine Corps.

Pace: Thank you, sir.

I am personally very comfortable with these procedures.

They are in fact fair, they are balanced, they are just. And I am also very proud of the process that we went through to get to these procedures. I personally sat in on hours and hours of deliberations with the secretary and his team, both from inside the Pentagon and, as he mentioned, experts from outside, and certainly experts from outside of government who were advising him, and the process itself was very reassuring to me and it should be to all of you.

It is well-suited to protect not only the rights of the accused, but also, as the secretary mentioned, the safety of the participants in the trials, and also to protect our intelligence in the ongoing war on global terrorism.

And finally, and very importantly, I have absolute faith in the men and women of our armed forces who, when called upon to participate in these commissions, will do their utmost to ensure a very fair, forthright, honest trial.

Thank you, sir.

Rumsfeld: On reflection, I would like to mention the names of the individuals who helped out. They did it without compensation because of their patriotism: Judge Griffin Bell, former attorney general; the Honorable Bill Coleman, former secretary of Transportation; the Honorable Lloyd Cutler, former counselor with the president - two presidents; the Honorable Mark Hoffman, who served as general counsel of the Department of Defense and also secretary of the Army; Professor Bernard Meltzer - Dr. Meltzer is University of Chicago law school and was involved in the Nuremburg trials; the Honorable Newt Minow, who was the - President Kennedy's chairman of the Federal Communications Commission; the Honorable Terry O'Donnell, who's a former Department of Defense general counsel; Judge William Webster, former federal judge, former director of CIA and FBI; and Professor Ruth Wedgwood of Yale University and Johns Hopkins University. As I say, they didn't - they don't - none of them work for this department; they just volunteered to help out and have been enormously helpful.

A couple of questions. Charlie.

Q: Mr. Secretary, there are still critics who say that no matter how you cut it or couch it, that military trials are not as fair or as thorough as civilian trials, trials in civilian courts. Are you looking

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- will these military trials guarantee simply more swift and sure justice than civilian courts? And are you worried about security - someone throwing a hand grenade into a courtroom? Is that why you're going to military trials?

Rumsfeld: Charlie, there will always be critics. It's a free country! We learn from our critics. They say it's your - that all of that dialogue and discussion that takes place informs the public, informs the people in government, and it's helpful. Are we very, very pleased and satisfied that this will produce just outcomes? You bet. We also have the ability to amend it if, for some reason, we found that there was something that we hadn't thought of. We're plowing new ground here, to a certain extent. So the critics can be critics, and we can be government officials, and you can be members of the press.

We'll all do our jobs and try to do them well.

Q: And regarding security, will military trials allow you to hold it, say, aboard ship or in more secluded places, where you will have more secure protection?

Rumsfeld: There's nothing in the military order that I can recall that discusses the location of the commission.

Q: You've made no decision on where these will be?

Rumsfeld: We have not decided it, because we do not have any candidates yet to be tried before commissions.

Shall we make this the last question? (Groans from the press corps.)

Q: Under what -

Q: No pressure! Rumsfeld: No, leave her alone. Come on!

Q: How about a couple of quickies?

Q: There's a provision that says that you and - or the president must give final approval to the findings and the sentencing. Under what conditions or circumstances do you think you will be overruling what the commission has found, or the sentence?

Rumsfeld: Oh, my goodness. You're asking - first of all, we don't have any candidates for the commissions.

Q: What is the practical purpose of that for -

Rumsfeld: That's what the order provided, and there it is. The president's military order provided - left it that way, and trying to speculate as to how some accused might or might not be handled down the road, I think, is beyond my ability.

You can try Jim Haynes on that. Maybe he has a better answer.

And since I didn't answer that, I'll ask Pam to have the last question.

Q: (Sighs.) Again with the pressure!

Rumsfeld: Well, you can handle it. You can handle it.

Q: Yeah. Actually, I have sort of two big questions for you. One is something -

Rumsfeld: One question, not two.

Q: What if I do it in one long run-on sentence?

Rumsfeld: No. Won't work.

Q: You say that you have a commitment to having an open process, and in this fact sheet that you've given us, it talks about that. But at the same time, you say you need to be able to present national security information that cannot be expressed openly. So how are you going to balance those two? How can the people who will be following these proceedings be assured that they are impartial and fair, and not sort of kangaroo courts with a predetermined outcome, if they cannot have access to that?

Rumsfeld: There's that word. There's that word.

Q: I had to raise it.

Rumsfeld: You had to get that "kangaroo court" in there so that people would have that in their minds -

Q: (Off mike) - opportunities to address -

Rumsfeld: - in their minds, when we've just presented something that is the product of many months of effort. It is

Q: So the other option -

Rumsfeld: - it is balanced. It is fair. It is designed to produce just outcomes, which it will.

Q: How will you make it open?

Rumsfeld: And that characterization is so far from the mark that I am shocked - sort of.

Q: Yes. So the other option is for us to just go get these quotes from people and not give you a chance to address it.

Rumsfeld: I understand. I -

Q: But how will you balance that openness? How can it be open if at the same time you're trying to protect national security?

Rumsfeld: Our country faces that already. We deal with classified material in court. It's done on a regular basis, and there are ways that it can be handled so that - I happen to know the answer of this. To give it to you, it is - it would get me down to a level of detail that I'd prefer not. But there is one way of knowing that - is, I believe that the - I'm going to let Jim do it. If the military counsel would be present during any period when anyone else who should not be present because of the sensitivity of classified material might be excluded from the process, nonetheless, the defendant's military counsel would, in fact, be present at all times.

Q (Inaudible) - ask General Pace a question, sir?

Rumsfeld: Yeah. All right. (Laughs; soft laughter.)

Q: Thank you. I appreciate it.

General Pace, understanding we're not going to talk about any particular instance or - this is not really a hypothetical: Is the Department of Defense - the Pentagon and the U.S. military - in fact, prepared to invoke the death penalty against - in this process, against an accused person?

Pace: I'm not exactly sure why you would come specifically to me with that question, but as the rules of the court are laid out, it is well within the authority of a tribunal, when a person's brought before them, if they are charged with a capital crime, if they deem it appropriate to find that person guilty and if all seven vote unanimously that that person should be put to death, then that is well within their prerogative to do. And then, of course, it would go the process that the secretary laid out, as far as who would make the final decision.

Q: Can we do a follow-up on that?

Rumsfeld: Tell you what I'm going to do: I'm going to ask Jim Haynes and Doug Feith to come up. Jim is the general counsel; Doug Feith is the undersecretary for policy. They have been - particularly Jim, but Doug to some extent - have been deeply involved in this process. They are able to answer a whole host of questions at a level of detail, and I would think in a manner that would be very helpful to the folks here. And I'd prefer to have them take over at this time.

Thank you.

Q: Do you think any of those prisoners you captured are innocent? (Laughter.)

A: Trick question.

Rumsfeld: I haven't had a chance to look them over. That process is -

Q: Just wondering if you thought you'd captured any innocent people.

Rumsfeld: We've captured some innocent people and turned 'em loose from time to time, as you well know.

Q: Can I do a follow-up to the question just asked?

Haynes: May I say one thing first, just so you'll know? I am Haynes - (laughter) - and this is Feith.

(Cross talk.)

Haynes: I also would like to echo something the secretary said about the process. We were very careful about it, very deliberate. We reached out not just to those people identified, but also to the experts within the building - the Judge Advocates General and the general counsels of the military department were very important in the development of these procedures. They will have substantial roles in implementing them. And we also, of course, consulted with other agencies.

We considered everything that we heard on the Hill and in the press. It was very helpful to read about all of the things that you wrote, and we found that to be very helpful.

Furthermore, we don't intend this to be the end of that deliberate process. The rules provide that we will have full and fair trials, and I am very confident that those who are charged with executing that responsibility will do so.

Q: On the three-member review boards we're talking about, the president appoints those - does the president appoint those boards? And does it automatically go -

Haynes: Let me say one thing. We gave some fact sheets at the outset. We will have the actual rules for you when you leave. And at a very quick time afterwards, if they're not already up, they'll be on the website.

Q: But the president can appoint civilian members to those review boards, can he not?

Haynes: There is a review panel of three members.

Those members may be appointed by - will be appointed by the Secretary of Defense. If any of the three is a civilian, then the president will appoint that civilian as a temporary military officer, under existing legislation.

Q: Do things go automatically to the review panel, or would a thing have to appeal?

Q: What would you say to the suggestion that - which is coming from many quarters, as you know - that the structure is designed simply to make it easier for you to win convictions, that that's the purpose of this whole thing, to make it easier to convict?

Feith: I would say that's wrong. This was a - the process of putting together these procedures was a balancing process. We have a number of important objectives that we had to keep in mind as we developed the procedures. Clearly, as has been emphasized, one of the key objectives is providing a fair trial for the individuals. But we're in the middle of a war, and we had to design a procedure that would allow us to pursue justice for these individuals while at the same time prosecuting the war most effectively. And that means setting rules that would allow us to preserve our intelligence secrets, develop more information about terrorist activities that might be planned for the future so that we can take action to prevent terrorist attacks against the United States.

I mean, there was a constant balancing of the requirements of our war policy and the importance of providing justice for the individuals. And that's why the secretary refers to this plumb line. I mean, there were lots of considerations at play here, and each deviation from the standard kinds of rules that we have in our criminal courts was motivated by the desire to strike this balance between individual justice and the broader war policy.

Q Can I ask a question about the openness of these proceedings? In the trial format, it says the trial proceedings will be open unless otherwise determined by the presiding officer; but in reading through this fact sheet, it seems to be weighed much more heavily toward closing the proceedings than having them open; number one. Number two, the presiding officer may also allow attendance by the public and press. Well, if it's to be open, I mean, who besides the public and press would it be open to; number one? Number two, why doesn't it say that the proceedings will be open to the public and press?

Haynes: The procedures do say that the proceedings will be open to the maximum extent practicable, but under certain circumstances that are identified in the rules, such as the presentation of classified information or the safety of witnesses or the timing of the trials for particular reasons to be determined at the time, then they may be closed insofar that it's necessary to protect that information.

Q: But even - if I could follow up - but even the sentence, "The presiding officer may also allow," it's almost as if that's an afterthought -

Haynes: It's not an afterthought.

Q: - as opposed to a ground rule that they will be open to the press and public and closed under only extraordinary circumstances. The way this is written is weighed far more in favor of closing the proceedings than having them open.

Haynes: I would suggest that you read the rules. And I know you don't have them now, but you'll have them soon.

Q: Is there appeal authority for -

(Cross talk.)

Q: One thing you apparently have not addressed here, which I think is very germane: Are any of the members of these commissions going to be legally trained, coming from JAGs or what have you, or you don't consider that necessary?

And a follow-up to that is, how similar will any of these tribunals be to the Nuremberg trials at the end of World War II?

Haynes: To answer your first question, yes, people who will serve on the commissions must be competent to perform the duties. The presiding officer of the commission must be a judge advocate. The other members are not necessarily judge advocates, but they may be. Traditionally, military commissions - and this is true of courts- martial - are not necessarily legally trained, but they are competent and educated people and will be chosen on that basis.

Q: (Inaudible) -

Q: Wait a minute! What about the Nuremberg thing?

Haynes: Well, there are some similarities to Nuremberg and there are some dissimilarities to Nuremberg. These procedures are, frankly, much more detailed, and in many respects are more generous than what was done at Nuremberg.

Q: Under the procedures that you have outlined -

Q: But as far as -

Q: Sorry. Please, go ahead.

Q: As far as trials and procedures are concerned, are you in touch with any country, or if any country have asked any help or consultations in any way?

Haynes: We have received so much unsolicited and solicited help, and we've considered it all.

Q: Can you answer the question the secretary didn't answer about under what circumstances would he or the president be allowed to overrule the findings reached by the commission and a review board, and why is that needed, that last step of them approving it?

Haynes: Well, remember that the secretary's procedures are implementing the president's military order. The president's military order specifically provided that he would be the final approval authority, unless he specifies that the secretary of Defense will be.

Nevertheless, we do have in these procedures some specific instructions, including, for example, an acquittal or a finding of "not guilty," once it is final, may not be changed, even though the case will proceed up for final approval by the president or the secretary of the Defense.

Q: Do these procedures guarantee that if a defendant is acquitted, that the defendant will be set free?

Haynes: The procedures don't address the outcome of a trial, except to say that a sentence will be enforced quickly.

Q: Does that mean that if you are acquitted, there is a chance that you will not be set free?

Haynes: Well, it's - as the secretary said, we're talking about hypothetical two or three times removed. If we had a trial right this minute, it is conceivable that somebody could be tried and acquitted of that charge, but may not necessarily automatically be released. The people that we are detaining, for example, in Guantanamo Bay, Cuba, are enemy combatants that we captured on the battlefield seeking to harm U.S. soldiers or allies, and they're dangerous people. At the moment, we're not about to release any of them unless we find that they don't meet those criteria. At some point in the future -

Q: But if you - (off mike) - convict them, if you can't find them guilty, you would still paint them with the brush that we find you dangerous even though we can't convict you, and continue to incarcerate them?

Feith: Part of the reason I don't think you can give an unqualified answer to that question is you couldn't do it even under our domestic criminal legal system. I mean, one could have circumstances where you're going to charge - or somebody is charged with a number of offenses, and they might be tried for one and acquitted, but there still may be other reasons to hold the person. And so, I mean, you can't even say in a domestic court that if somebody gets acquitted of a particular charge he'll be let free. It depends on what else may be pending against the person.

Q: (Off mike) - of other cases, though.

Haynes: May I say a couple things?

Feith: Sure.

Haynes: One thing we can say, that if a person is foundnot guilty, they will not be charged again for the same crime.

Q: Double jeopardy you have ruled out. But you haven't - (laughs). But what is curious to me is, if you are acquitted, if you are found not guilty doesn't necessarily mean you're going to be released.

LOAD-DATE: March 22, 2002

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E/CN.4/2003/G/73
7 April 2003

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Fifty-ninth session
Agenda item 11 (a)

CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF: TORTURE AND DETENTION

Letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights

The enclosed document is intended as an observation from the United States of America on the "Report of the Working Group on Arbitrary Detention" (E/CN.4/2003/8).

Please publish this response* as a United Nations document to be available for all delegates when considering items under agenda item 11.

(*Signed*): Jeffrey De Laurentis
Counsellor for Political Affairs

* Reproduced in the annex as received, in the language of submission only.

GE.03-12799 (E 080403

Attachment 9 to RE 16A

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Annex

Response of the Government of the United States of America to the December 16, 2002 Report of the Working Group on Arbitrary Detention

The Government of the United States welcomes the opportunity to respond to the above-mentioned Report relating to detention at Guantanamo Naval Base (Guantanamo). The Report concluded that until a tribunal convened under Article Five of the Third Geneva Convention of 1949 has determined whether individuals detained at Guantanamo enjoy prisoner-of-war (POW) status, detainees provisionally enjoy the protection of the Geneva Convention, including the right to review of the lawfulness of their detention and the right to a fair trial under Articles 105 and 106. The Report further concluded that where the benefit of POW status is not recognized by a competent tribunal, the right of detainees would be governed by the International Covenant on Civil and Political Rights, which guarantees review of the lawfulness of detention and the right to a fair trial under Articles 9 and 14.

The United States Government refers to its letter to the Working Group of December 17, 2002, respecting detention at Guantanamo, which is incorporated in this Response. As noted in that letter, the mandate of the Working Group does not include competence to address the Geneva Conventions of 1949 or matters arising under the law of armed conflict. Nevertheless, the United States Government, in a spirit of cooperation, offers this response to the Working Group Report.

The United States Government respectfully disagrees with the conclusions reached by the Working Group that the individuals detained at Guantanamo are entitled to a review of the lawfulness of their detention. As the Working Group is aware, on September 11, 2002, terrorists used unlawful and perfidious means to attack innocent civilians in the United States. These acts, as the United Nations Security Council recognized, constituted a threat to international peace and security. Since September 11, the United States has exercised its inherent right of self-defense as recognized in Article 51 of the Charter of the United Nations and UN Security resolutions 1368 (12 September 2001) and 1373 (28 September 2001) and has used other lawful and reasonable means to thwart further attacks by enemy combatants on American persons and property.

Enemy Combatants. Individuals detained at Guantanamo are enemy combatants captured in the course of ongoing hostilities or directly supporting hostile forces. As such, they are being held in accordance with the laws and customs of war, which permit the United States to capture and detain enemy combatants to prevent their re-engaging in the on-going armed conflict. At the time of capture, they were bearing arms against the United States or otherwise acting in support of hostile armed forced engaged in an on-going armed conflict. Individuals detained at Guantanamo include a number of senior al Qaida operatives or others committed to killing Americans and others. The United States continues to fight against enemy combatants who are planning and conducting attacks against it.

Article Five Tribunals. Members of the Taliban and al Qaida detained at Guantanamo are not entitled to Prisoner of War status under the Third Geneva Convention, and there is no need to convene an Article 5 tribunal to make individualized status determinations. Article 5 does not require a party to the Geneva Convention to convene tribunals to consider status determinations unless there is doubt. For members of al Qaida and the Taliban, captured while engaged in ongoing hostilities or directly supporting hostile operations, there is no doubt about their status. Article 5 states that "[s]hould any doubt arise," detainees "shall enjoy the protection of the [Geneva Convention] until such time as their status has been determined by a competent tribunal."

Requirements for POW Status. Members of the Taliban and al Qaida are not entitled to prisoner of war status under the Third Geneva Convention because members of neither meet the conditions for being considered lawful combatants (or POWs) under Article Four of the Third Geneva Convention of 1949. Al Qaida is a terrorist organization and cannot be considered a State Party to the Geneva Conventions. Moreover, its members unlawfully engage in an armed conflict targeting civilians and military personnel and objects around the world. Al Qaida's conduct flagrantly violates even the most fundamental laws and customs and war. In addition to unlawfully targeting civilians, al-Qaida's methods and means of waging war are at odds with every requirement applicable to lawful armed forces. It is important to the rule of law that we not recognize al Qaida and the Taliban as having POW status. Doing so would disserve the world's interests by diminishing the principles embodied in the Geneva Conventions.

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Enemy Combatants are Not Entitled to Be Released or to Have Access to Court or Counsel. Some have erroneously claimed that the United States is violating domestic and international laws that prohibit the "indefinite" detention of individuals without trial. There is broad authority under the laws and customs of war to detain enemy combatants, without any requirement to bring criminal charges while hostilities last. The detention of an enemy combatant is not an act of punishment but one of security and military necessity. It serves the important purpose of preventing an enemy combatant from continuing to fight against us. There is no law requiring a detaining power to prosecute enemy combatants or release them prior to the end of hostilities. Likewise, under the laws and customs of war, detained enemy combatants have no right of access to counsel or the courts to challenge their detention. Should a detainee be charged with a criminal offense, he would have the right to counsel and applicable fundamental procedural safeguards. No detainee has been charged with a criminal offense.

We cannot have an international legal system in which honorable soldiers who abide by the law of armed conflict and are captured on the battlefield may be detained and held until the end of a war, but terrorists who violate the law of armed conflict must be released and allowed to continue their belligerent, unlawful or terrorist activities. Such a legal regime would signal to the international community that it is acceptable for armies to behave like terrorists.

Humane Treatment of Detainees. The United States treats enemy combatants at Guantanamo humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention. Detainees get excellent medical and dental care on a par with that provided to U.S. Armed Forces. Since detention operations began we have treated wounds sustained in battle and relieved pain and suffering that pre-dates detention. The United States is providing detainees with appropriate shelter; clothing and shoes; showers, soap, and toilet articles; and three culturally appropriate meals a day. Detainees are provided the means to send and receive mail, subject to security screening. They are given the opportunity to worship freely.

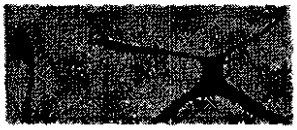
The International Committee of the Red Cross has visited and will continue to be able to visit the detainees.

The United States Secretary of Defense has stated his intention not to hold anyone longer than necessary. To that end, the Department of Defense has procedures in place to assess, systematically and periodically, the Guantanamo detainee population and determine, among other things, if continued detention is necessary for each individual. The Department of Defense has already approved the release of a number of detainees at Guantanamo and anticipates that there will be additional detainee releases in the future. Prior to any release, consistent with military requirements, the Department of Defense generally notifies the receiving state and the ICRC in order to enable them to make necessary arrangements prior to the detainees' departure from Guantanamo.

For the reasons discussed above, the United States Government respectfully disagrees with the conclusions of the Working Group and requests that this response, together with its letter of December 17, 2002, be published by the Commission.

Attachment 9 to RE 16A

Page 5 of 5



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Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

PREAMBLE.

The High Contracting Parties,

Proclaiming their earnest wish to see peace prevail among peoples,

Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,

Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations,

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict,

Have agreed on the following:

PART I. GENERAL PROVISIONS

Art 1. General principles and scope of application

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.

2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.

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Page 1 of 3

Art 75. Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
(a) violence to the life, health, or physical or mental well-being of persons, in particular:
(i) murder;
(ii) torture of all kinds, whether physical or mental;
(iii) corporal punishment; and
(iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
(c) the taking of hostages;
(d) collective punishments; and
(e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with an offence is presumed innocent until proved guilty according to law;
(e) anyone charged with an offence shall have the right to be tried in his presence;
(f) no one shall be compelled to testify against himself or to confess guilt;
(g) anyone charged with an offence shall have the right to examine, or have examined,

Attachment 10 to RE 16A

the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
(j) a convicted person shall be advised on conviction or his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:
(a) persons who are accused or such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
(b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1

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Page 3 of 3

Office of the High Commissioner for Human Rights

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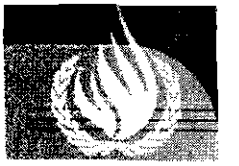

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Adopted by General Assembly resolution 43/173 of 9 December 1988

Attachment 11 to RE 16A

Page 1 of 2

Principle 32

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

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Page 2 of 2

UNITED NATIONS

CCPR

International Covenant on Civil and Political Rights

Distr.

GENERAL

CCPR/C/38/D/291/1988
5 April 1990

Original: ENGLISH

Communication No. 291/1988 : Finland. 05/04/90. CCPR/C/38/D/291/1988. (Jurisprudence)

Convention Abbreviation: CCPR
Human Rights Committee
Thirty-eighth session

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS -THIRTY-EIGHTH SESSION

concerning

Communication No. 291/1988

Submitted by: Mario Inés Torres (represented by counsel)

Alleged victim: The author

State party concerned: Finland

Date of communication: 17 February 1988

Date of decision on admissibility: 30 March 1989

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 April 1990,

Having concluded its consideration of communication No. 291/1988, submitted to the Committee by

Attachment 12 to RE 16A

Page 1 of 5

Mr. Mario Inés Torres under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and by the State Party,

Adopts the following:

Views under article 5. paragraph 4, of the Optional Protocol

1. The author of the communication, dated 17 February 1988, is Mario I. Torres, a Spanish citizen born in 1954, who claims to be the victim of a violation by Finland of article 7, 9, paragraph 4, and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The background

2.1 A former political activist, Mr. Torres resided at Toulouse, France, from 1957 to 1979. From 1974 to 1977, he served a prison sentence for acts of sabotage committed against Spanish property in France. In 1979, he returned to Spain.

2.2 On 19 March 1984, he was arrested by the special services of the Spanish Guardia Civil, on suspicion of being a member of a terrorist group, and was detained for 10 days.

2.3 From 1985 to 1987, the author resided in France.

2.4 On 26 August 1987, the author trave lied to Finland and requested asylum. On 8 October 1987, however, he was detained by the security police pursuant to the Aliens Act. Since that date and until his extradition to Spain in March 1988, tile detention order was renewed on seven occasions for seven days at a time by decision of the Ministry of the Interior. On 3 December 1987, the Minister of the Interior rejected the author's request for asylum and his request for a resident's permit. On 9 December 1987, the author appealed to the Supreme Court, requesting his release from detention, and on the same day filed a second request for asylum, which was refused by the Ministry of the Interior on 27 January 1988.

2-5 On 16 December 1987, the Government of Spain requested the author's extradition through the International Criminal Police Commission (Interpol). By decision of the same day, the author's detention was prolonged pursuant to the Finnish law on the Extradition of Criminals. On 23 December 1987, the City Court of Helsinki decided to prolong detention on the same grounds. On 4 January 1988, the Ministry of Justice decreed that, since extradition had not yet been officially requested by Spain, the author could no longer be detained pursuant to the Law on the Extradition of Criminals. On 5 January 1988, an order concerning the prolongation of his detention, pursuant to the Aliens Act, was issued by the police.

2.6 On 8 January 1988, the Embassy of Spain at Helsinki formally requested the extradition of Mr. Torres as a suspect in a robbery committed at Barcelona on 2 December 1984, By a note verbale dated 3 February 1988, the request was extended to cover his alleged membership in an armed group. City The Court of Helsinki thereupon decided, on 11 January 1988, that Mr. Tortes could be detained pursuant to the Law on the Extradition of Criminals. On 4 March 1988, the Supreme Administrative Court of Finland considered that there had been justifiable grounds for lawfully detaining the author pursuant to the Aliens Act. on 10 March 1988, the Minister of Justice approved the extradition request and the

author was extradited to Spain on 28 March 1988. Until the author's extradition, the City Court of Helsinki reviewed the detention at two-week intervals.

2.7 The detention of Mr. Torres from 8 October to 15 December 1987 and from 5 to 10 January 1988 was based on the Aliens Act and from 16 December 1987 to 4 January 1988 and from 11 January to 28 March 1988 on the law on the Extradition of Criminals; during the entire period, Mr. Torres was detained at the Helsinki District Prison.

2.8 On 14 October 1988, the Juzgado Central de Instrucción convicted the author of armed robbery and sentenced him to seven years' imprisonment. He is currently appealing his conviction and remains on bail.

Complaint

3. The author claims that the extradition order of 10 March 1988 was contrary to article 7 of the Covenant, because the Finnish authorities had been provided with information, on the basis of which it could be feared that the author would be subjected to torture if he were to return to Spain. With regard to his complaint under article 9, paragraph 4, of the Covenant, the author argues that during his detention pursuant to the Aliens Act, he was not provided an opportunity to have recourse to a judicial body, and that the proceedings before the Supreme Administrative Court were unreasonably prolonged.

State party's comments and observations

4.1 The State party submits that article 7 of the Covenant does not cover the issue of extradition, and adds that the decision on the extradition of Mr. Tortes was taken in conformity with the international obligations of Finland: "The request for extradition by Spain concerned armed robbery as well as membership in an armed group. The extradition was considered possible only on the basis of the former but not of the latter. The Finnish extradition order specifically provided that the Spanish authorities do riot prosecute Mr. Tortes for crimes other than the one for which extradition was granted (armed robbery). The rights guaranteed under the Covenant have thus not been affected by the extradition. Even if an extradition were treated as potential complicity to a violation of article 7, the State party argues that Mr. Torres did not submit the necessary evidence to indicate that he would, after his extradition, be subjected to treatment in violation of article 7."

4.2 The State party further elaborates on the grounds for the author's detention the first decision, dated 7 October 1987, was based on reasons relating to a presumed risk of crime (Alien's Act, section 23, subsections 1 arid 2). The second decision, dated 3 December 1987, was justified by the preparations for his extradition to Spain and a presumed risk of crime and evasion (Aliens Act,
section 23, subsections 1 and 2). The third decision, dated 5 January 1988, was predicated, inter alia, on a presumed risk of crime (Aliens Act, section 23, subsections 1 arid 2).

4.3 Under section 33 of the Aliens Act, Mr. Torres could have appealed tile extension of his detention to the Supreme Administrative Court within 14 days of the decision. He did appeal the decision made by the Ministry of the Interior on 26 November 1987 on the extension of detention, and his appeal was dismissed by the Supreme Administrative Court on 4 March 1988. Under section 32 of the Aliens Act (" Seeking annulment of a decision rendered by the police or a passport control officer"), Mr. Torres had the right to submit the decisions on detention (concerning the first seven days) taken by the police 011 7 October 1987,
3 December 1987 and 5 January 1988, respectively, to review by the Ministry of the Interior. He did seek annulment of the two latter decisions of the police. In its decisions of 23 February 1988, the Ministry of the Interior considered that there had been reasonable grounds for detention.

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4.4 The State party further submits that detention under the Extradition Act must, pursuant to section 19, be referred "without delay" to the City Court which in turn shall, according to section 20, decide "without delay" whether detention should be continued. The detention order of 16 December 1987 was prolonged by decision of 23 December 1987 of the Helsinki City Court. According to section 22 of the Extradition Act, the decision of the City Court can be appealed to the Supreme Court. There is no time-limit for an appeal. The State party notes that the files do not indicate that Mr. Torres ever filed this appeal and submits that this domestic remedy was thus not exhausted and is, in principle, still available to him.

4.5 Finally, the State party indicates that a government bill with a view to amending the Aliens Act will be submitted to Parliament shortly so as to guarantee the right to have detention order reviewed by a court without delay.

Issues to be considered by the Committee

5.1 On the basis of the information before it the Committee concluded that all conditions for declaring the communication admissible were met, including the requirement of exhaustion of domestic remedies under article 5, paragraph 2, of the Optional Protocol.

5.2 In its decision on admissibility, the Committee reserved consideration of the author's allegations under article 7 for the merits in order to be able to ascertain whether the Finnish Government, when deciding upon Mr. Torres' extradition, was in possession of such information as to indicate that he might upon extradition be subjected to torture or to other cruel, inhuman or degrading treatment.

5.3 The Committee further recalled that according to the uncontested facts, Mr. Torres was unable to challenge his detention under the Aliens Act during the first week of detention on several occasions. The Committee noted that the Aliens Act did not contain a right of complaint for detention up to several days; therefore, it had to consider whether the provisions of the Aliens Act, which were concretely applied to the author, conformed with the requirements of article 9, paragraph 4, of the Covenant. The Committee observed that the State party had not furnished any information on the domestic remedies which the author could have pursued with respect to this particular complaint; it thus concluded that in respect of this complaint there were no domestic remedies available to Mr. Torres.

5.4 The Committee noted the State party's statement that although the author had, on 9 December 1987, filed an appeal to the Supreme Administrative Court against the decision by the Ministry of the Interior of 26 November 1987, the Court did not decide until nearly three months later. In the light. of the circumstances, the Committee found that Mr. Torres' complaint relating to the delay in having his detention adjudicated upon could raise issues under article 9, paragraph 4, of the Covenant.

5.5 On the basis of the written information before it, the Committee considered that there was no evidence in substantiation of the author's claim that he was a victim of any of the rights set forth in article 14 of the Covenant.

5.6 On 30 March 1989, the Human Rights Committee declared the communication admissible in so far as it related to complaints under articles 7 arid 9, paragraph 4, of the Covenant.

6. The Committee notes the author's allegation that Finland is in violation of article 7 of the Covenant for extraditing him to a country where there were reasons to believe that he might be subjected to torture. The Committee finds, however, that the author has not sufficiently substantiated his fears that he would be subjected to torture in Spain.

Attachment 12 to RE 16A

7.1 Three separate questions arise with respect to article 9, paragraph 4, of the Covenant: (a)whether the fact that the author was precluded, under the Aliens Act, from challenging his detention for the periods of 8 to 15 October 1987, 3 to 10 December 1987 and 5 to 10 January 1988 before a court when he was being detained under orders of the police, constitutes a breach of this provision; (b) whether once he was by law entitled to challenge his detention under the Aliens Act, alleged delays in the handing down of the judgement constitute a breach; arid (c) whether the application of the Extradition Act to the author entails any violation of this provision.

7.2 With respect to the first question, the Committee has taken note of the State party's contention that the author could have appealed the detention orders of 7 October, 3 December 1987 and 5 January 1988 pursuant to section 32 of the Aliens Act to the Ministry of the Interior. In the Committee's opinion, this possibility, while providing for some measure of protection arid review of the legality of detention, does not satisfy the requirements of article 9, paragraph 4, which envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control. The Committee further notes that while the author was detained under orders of the police, he could not have the lawfulness of his detention reviewed by a court. Review before a court of law was possible only when, after several days, the detention was confirmed by order of the Minister. As no challenge could have been made until the second week of detention, the author's detention from 8 to 15 October 1987, from 3 to 10 December 1987 and from 5 to 10 January 1988 violated the requirement of article 9, paragraph 4; of the Covenant that a detained person be able "to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful" (emphasis added).

7.3 With respect to the second question, the Committee emphasizes that, as a matter of principle, the adjudication of a case by any court of law should take place as expeditiously as possible. This does not mean, however, that precise deadlines for the handing down of judgements may be set which, if riot observed, would necessarily justify the conclusion that a decision was riot reached "without delay". Rather, the question of whether a decision was reached without delay must be assessed on a case by case basis. The Committee notes that almost three months passed between the filing of the author's appeal, under the Alien's Act, against the decision of the Ministry of the Interior and the decision of the Supreme Administrative Court. This period is in principle too extended, but as the Committee does riot know the reasons for the judgment being issued only on 4 March 1988, it makes no finding under article 9, paragraph 4, of the Covenant.

7.4 With respect to the third question, the Committee notes that the Helsinki City Court reviewed the author's detention under the Extradition Act at two-week intervals. The Committee finds that such reviews satisfy the requirements of article 9, paragraph 4, of the Covenant

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts of the communication disclose a violation of article 9, paragraph 4. of the International Covenant on Civil arid Political Rights, because the author was unable to challenge his detention from 8 to 15 October 1987, front 3 to 10 December 1987 and from 5 to 10 January 1988 before a court.

9. In accordance with the provisions of article 2 of the Covenant, the State party is under an obligation to remedy the violations suffered by the author arid to ensure that similar violations do not occur in the future. The Committee takes this opportunity to indicate that it would welcome information on any relevant measures taken by the State party in respect of the Committee's views. In this context, the Committee welcomes the State party's expressed intention to amend its legislation so as to guarantee the right to have detention based on the Aliens Act reviewed without delay by a court.

Attachment 12 to RE 16A

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Organization of American States

OEA/Ser.L/V/II.61
Doc. 29 rev. 1
4 October 1983
Original: Spanish

THE SITUATION OF HUMAN RIGHTS IN CUBA
SEVENTH REPORT

CHAPTER III

RIGHT TO LIBERTY AND PERSONAL SECURITY

A. GENERAL OBSERVATIONS

Attachment 13 to RE 16A

Page 1 of 2

12. Other legal provisions elaborate on the Constitution in this matter. With respect to illegal detention and the inviolability of personal integrity, Article 241 and following, of the Law of Penal Procedure establish the necessary procedures. For its part, Article 245 provides that the police may not detain a person for more than twenty-four hours without advising the Instructor de Sumarios (an official who carries out judicial and police functions) and that the latter, within seventy-two hours, shall release the detainee or turn him over to the prosecuting attorney.

13. Within seventy-two hours of receipt of the report of the Instructor de la Policia (Police Investigator), the Prosecutor must nullify the detention, take a precautionary measure or decree provisional imprisonment of the detainee. Among the precautionary measures are the setting of bail or house arrest. In the following seventy-two hours, the Court that has jurisdiction over the case must confirm or nullify the measure adopted by the Prosecutor. It should be pointed out that in theory, the law allows for a detainee to remain in prison for a week without appearing before a judge or court competent to hear his case. In the opinion of the Commission, this is an excessively prolonged period.

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BROGAN AND OTHERS v. THE UNITED KINGDOM (11209/84) [1988] ECHR 24 (29 November 1988)

In the case of Brogan and Others*,

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* Note by the registry: The case is numbered 10/1987/133/184-187. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr R. Ryssdal, President
Mr J. Cremona,
Mr Thór Vilhjálmsson,
Mrs D. Bindschedler-Robert,
Mr F. Gölcüklü,
Mr F. Matscher,
Mr J. Pinheiro Farinha,
Mr L.-E. Pettiti,
Mr B. Walsh,
Sir Vincent Evans,
Mr R. Macdonald,
Mr C. Russo,
Mr R. Bernhardt,
Mr A. Spielmann,
Mr J. De Meyer,
Mr J. A. Carrillo Salcedo,
Mr N. Valticos,
Mr S. K. Martens,
Mrs E. Palm,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 27 May and 28 October 1988,

Delivers the following judgment, which was adopted on the last-mentioned date:

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62. As indicated above (paragraph 59), the scope for flexibility in interpreting and applying the notion of "promptness" is very limited. In the Court's view, even the shortest of the four periods of detention, namely the four days and six hours spent in police custody by Mr McFadden (see paragraph 18 above), falls outside the strict constraints as to time permitted by the first part of Article 5 para. 3 (art. 5-3). To attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word "promptly". An interpretation to this effect would import into Article 5 para. 3 (art. 5-3) a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision. The Court thus has to conclude that none of the applicants was either brought "promptly" before a judicial authority or released "promptly" following his arrest. The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 para. 3 (art. 5-3).

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GENERAL

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COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES

Note by the Secretariat

This document contains a compilation of the general comments or general recommendations adopted, respectively, by the Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee against Torture and the Committee on the Rights of the Child. The Committee on Migrant Workers has not yet adopted any general comments.

GE.04-41302 (E) 070604

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case may a people be deprived of its own means of subsistence". This right entails corresponding duties for all States and the international community. States should indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph and to what extent that affects the enjoyment of other rights set forth in the Covenant.

6. Paragraph 3, in the Committee's opinion, is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. The general nature of this paragraph is confirmed by its drafting history. It stipulates that "The States parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations". The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination. Such positive action must be consistent with the States' obligations under the Charter of the United Nations and under international law: in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination. The reports should contain information on the performance of these obligations and the measures taken to that end.

7. In connection with article 1 of the Covenant, the Committee refers to other international instruments concerning the right of all peoples to self-determination, in particular the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970 (General Assembly resolution 2625 (XXV)).

8. The Committee considers that history has proved that the realization of and respect for the right of self-determination of peoples contributes to the establishment of friendly relations and cooperation between States and to strengthening international peace and understanding.

Twenty-first session (1984)

General comment No. 13: Article 14 (Administration of justice)

1. The Committee notes that article 14 of the Covenant is of a complex nature and that different aspects of its provisions will need specific comments. All of these provisions are aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as 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. Not all reports provided details on the legislative or other measures adopted specifically to implement each of the provisions of article 14.

2. In general, the reports of States parties fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law. Laws and practices dealing with these matters vary widely from State to State. This diversity makes it all the more necessary for States

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parties to provide all relevant information and to explain in greater detail how the concepts of "criminal charge" and "rights and obligations in a suit at law" are interpreted in relation to their respective legal systems.

3. The Committee would find it useful if, in their future reports, States parties could provide more detailed information on the steps taken to ensure that equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice. In particular, States parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.

4. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.

5. The second sentence of article 14, paragraph 1, provides that "everyone shall be entitled to a fair and public hearing". Paragraph 3 of the article elaborates on the requirements of a "fair hearing" in regard to the determination of criminal charges. However, the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1.

6. The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons. It should be noted that, even in cases in which the public is excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public.

7. The Committee has noted a lack of information regarding article 14, paragraph 2 and, in some cases, has even observed that the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.

8. Among the minimum guarantees in criminal proceedings prescribed by paragraph 3, the first concerns the right of everyone to be informed in a language which he understands of the charge against him (sub-para. (a)). The Committee notes that State reports often do not explain how this right is respected and ensured. Article 14 (3) (a) applies to all cases of criminal charges, including those of persons not in detention. The Committee notes further that the right to be informed of the charge "promptly" requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based.

9. Subparagraph 3 (b) provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is "adequate time" depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter.

10. Subparagraph 3 (c) provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place "without undue delay". To make this right effective, a procedure must be available in order to ensure that the trial will proceed "without undue delay", both in first instance and on appeal.

11. Not all reports have dealt with all aspects of the right of defence as defined in subparagraph 3 (d). The Committee has not always received sufficient information concerning the protection of the right of the accused to be present during the determination of any charge against him nor how the legal system assures his right either to defend himself in person or to be assisted by counsel of his own choosing, or what arrangements are made if a person does not have sufficient means to pay for legal assistance. The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.

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12. Subparagraph 3 (e) states that the accused shall be entitled 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. This provision is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.

13. Subparagraph 3 (f) provides that if the accused cannot understand or speak the language used in court he is entitled to the assistance of an interpreter free of any charge. This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence.

14. Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

15. In order to safeguard the rights of the accused under paragraphs 1 and 3 of article 14, judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution.

16. Article 14, paragraph 4, provides that in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. Not many reports have furnished sufficient information concerning such relevant matters as the minimum age at which a juvenile may be charged with a criminal offence, the maximum age at which a person is still considered to be a juvenile, the existence of special courts and procedures, the laws governing procedures against juveniles and how all these special arrangements for juveniles take account of "the desirability of promoting their rehabilitation". Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14.

17. Article 14, paragraph 5, provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. Particular attention is drawn to the other language versions of the word "crime" ("infraction", "delito", "prestuplenie") which show that the guarantee is not confined only to the most serious offences. In this connection, not enough information has been provided concerning the procedures of appeal, in particular the access to and the powers of reviewing tribunals, what requirements must be satisfied to appeal against a judgement, and the way in which the procedures before review tribunals take account of the fair and public hearing requirements of paragraph 1 of article 14.

18. Article 14, paragraph 6, provides for compensation according to law in certain cases of a miscarriage of justice as described therein. It seems from many State reports that this right is often not observed or insufficiently guaranteed by domestic legislation. States should, where necessary, supplement their legislation in this area in order to bring it into line with the provisions of the Covenant.

19. In considering State reports differing views have often been expressed as to the scope of paragraph 7 of article 14. Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of ne bis in idem as contained in paragraph 7. This understanding of the meaning of ne bis in idem may encourage States parties to reconsider their reservations to article 14, paragraph 7.

Twenty-third session (1984)

General comment No. 14: Article 6 (Right to life)

1. In its General comment No. 6 [16] adopted at its 378th meeting on 27 July 1982, the Human Rights Committee observed that the right to life enunciated in the first paragraph of article 6 of the International Covenant on Civil and Political Rights is the supreme right from which no derogation is permitted even in time of public emergency. The same right to life is enshrined in article 3 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948. It is basic to all human rights.

2. In its previous general comment, the Committee also observed that it is the supreme duty of States to prevent wars. War and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year.

3. While remaining deeply concerned by the toll of human life taken by conventional weapons in armed conflicts, the Committee has noted that, during successive sessions of the General Assembly, representatives from all geographical regions have expressed their growing concern at the development and proliferation of increasingly awesome weapons of mass destruction, which not only threaten human life but also absorb resources that could otherwise be used for vital economic and social purposes, particularly for the benefit of developing countries, and thereby for promoting and securing the enjoyment of human rights for all.

4. The Committee associates itself with this concern. It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.

5. Furthermore, the very existence and gravity of this threat generates a climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights.

6. The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.

7. The Committee accordingly, in the interest of mankind, calls upon all States, whether Parties to the Covenant or not, to take urgent steps, unilaterally and by agreement, to rid the world of this menace.

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commentaries

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Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

Introduction to the Commentary on the Additional Protocols I and II of 8 June 1977

Claude PILLOUD† - Jean DE PREUX -
Yves SANDOZ - Bruno ZIMMERMANN -
Philippe Eberlin - Hans-Peter Gasser - Claude F. Wenger
(Protocol I)
Philippe EBERLIN *(Annex I)*
Sylvie-S. JUNOD *(Protocol II)*

with the collaboration of
Jean PICTET

—

Commentary
on the Additional Protocols
of 8 June 1977
to the Geneva Conventions
of 12 August 1949

—

Editors
Yves SANDOZ - Christophe SWINARSKI -
Bruno ZIMMERMANN

—

International Committee of the Red Cross

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Martinus Nijhoff Publishers

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Geneva 1987

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3072 "Promptly": unfortunately this expression is rather imprecise. Article 9 of the Covenant provides that anyone who is arrested will be informed at the time of his arrest of the reasons for his arrest. However, Article 9 is not one of the articles from which derogation is not allowed, even in case of war (Article 4). According to Article 71 of the fourth Convention, anyone who is charged and prosecuted by the Occupying Power will be informed promptly of the charges made against him. These examples reveal the clear intention that those arrested should be advised promptly of the reasons for their arrest; it is difficult to determine a precise time limit, but ten days would seem the maximum period.

3073 Legal practice in most countries recognizes preventive custody, i.e., a period during which the police or the public prosecutor can detain a person in custody without having to charge him with a specific accusation; in peacetime this period is no more than two or three days, but sometimes it is longer for particular offences (acts of terrorism) and in time of armed conflict it is often prolonged. [p.877] Useful indications can be found in national legislation. In any case, even in time of armed conflict, detaining a person for longer than, say, ten days without informing the detainee of the reasons for his detention would be contrary to this paragraph.

3074 The second sentence of the paragraph is not very clear and requires some comment.

3075 "Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible": it seems clear that detainees not charged with a criminal offence within the period mentioned must be released; this is laid down in all national legislation. However, in time of armed conflict States often assume the right to take security measures with regard to certain persons who are considered dangerous.

3076 "And in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist": this provision is based on Articles 43 and 132 of the fourth Convention, which are concerned with periodic review of internment decisions. It is understandable that internment decisions are taken because of circumstances (armed conflict, combat in a nearby area, hostile movement in the population etc.). On the other hand, it is difficult to accept that people are arrested or detained because of circumstances; such decisions should be based on a presumption of a criminal offence. Perhaps the intention was to indicate that sometimes internment is preceded by arrest and detention sanctioned by court order. However, the reference to "the circumstances" should not be taken too literally, but these words should be understood as meaning "the facts".

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United States Department of Defense.

News Transcript

On the web: http://www.dod.mil/cgi-bin/dlprint.cgi?
http://www.dod.mil/transcripts/2002/t02282002_t0227sd6.html
Media contact: +1 (703) 697-5131
Public contact: http://www.dod.mil/faq/comment.html or +1 (703) 428-0711

Presenter: Secretary of Defense Donald H. Rumsfeld Wednesday, February 27, 2002

Rumsfeld Interview with KSTP-ABC, St. Paul, Minn.

(Interview with Cale Ramaker, KSPT-ABC, St. Paul, Minn.)

Question: Secretary Donald Rumsfeld joins us from the Pentagon in Washington today. Secretary, thanks for joining us.

Rumsfeld: Yes indeed, I'm pleased to do it.

Question: We want to get up to date on all of the developments that are going on in the war on terrorism as America responds.

I guess first of all today or this morning the Pentagon or the U.S. military requested DNA evidence from the bin Laden family and I'm assuming this is in response to a Hellfire missile attack a few weeks ago, is that correct?

Rumsfeld: Oh, I don't know that it's directly in response to that. It has, a number of people in the government have felt for some time that it would be appropriate to try to get DNA material. We have of course dealt with a great many caves and tunnels and there undoubtedly were al Qaeda and Taliban people in those caves and tunnels, and to the extent that eventually we are able to match DNA it would be helpful to know positively yes or positively no.

Question: In terms of trying to find bin Laden, where is that right now in the list of things that are going on in Afghanistan?

Rumsfeld: Well, it's one of the things that are going on. The other things that are going on, of course, is we're still looking for the top oh, five or ten Taliban and al Qaeda that are still outstanding, including Omar and Osama bin Laden. We are very actively interrogating the people who have been captured to gather intelligence information which is enabling us to stop terrorist attacks elsewhere in the world. We're tracking down the remaining al Qaeda and Taliban people so that we can improve the security situation in the country and make life a bit easier for the interim government that's taking place. We also have a project that we're probably going to be starting soon to help develop an Afghan army so that they'll have a national army rather than simply the various warlords spread around the countryside.

Question: Let's stay in Afghanistan for a minute and then in a second I want to get to the situation in Camp X-Ray.

What is the military's role right now in Afghanistan? There have been some rumblings in the media

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that covers the Pentagon that there's concerns over whether or not it's a peacekeeping role now or if it's a nationbuilding role that the military is involved in right now.

Rumsfeld: Well, it is involved in neither peacekeeping nor nationbuilding. The Afghan people are going to build their own nation in their own way as they have for many, many decades.

The peacekeeping role is currently being led by the United Kingdom, Great Britain, and there are four, five, six countries that are involved with them as I recall. They have 4,000 to 5,000 people in the country, mostly in Kabul. There has been some discussion about their expanding their role. We do not have peacekeepers connected to the so-called ISAF.

Question: Are you concerned at all though that it could develop into a situation which happened in Somalia in the early 1990s when originally, if I'm correct, our original role in Somalia was as peacekeepers, and a lot of us know how that ended with the attack on 16 U.S. servicemen and women.

Rumsfeld: I don't know exactly what you mean by like Somalia. It's a very different situation. If you mean --

Question: That started as a peacekeeping role and I know you've been very careful to say that the role that's developing in Afghanistan is not peacekeeping, but there are some people that are concerned that we might just kind of be backed into that situation.

Rumsfeld: I think not. I don't think we will be backed into that situation. We went in there not as peacekeepers but as warriors to find the al Qaeda and to capture or kill them and to go in and throw the Taliban government out so that the people of Afghanistan could be liberated. That's what we've been in the process of doing.

Question: And the situation in Camp X-Ray right now in Guantanamo Bay, Cuba with the detainees, give us an update on where that's at in terms of the investigation, interrogating all of them, and then what happens to the detainees once you're done with them.

Rumsfeld: You bet. There are, I don't know, 300 or 400 people down there at the present time, I suppose 300 something, and they have all now, except for one or two, been questioned and interrogated, looking for intelligence information so that we could stop other terrorist threats, people from attacking our country and our friends and allies and our deployed forces.

We're now starting the process of doing a series of interrogations that involve law enforcement. That is to say to determine exactly what these individuals have done. Not what they know of an intelligence standpoint, but what they've done from a law enforcement standpoint. That process is underway.

Question: What can the average American person assume is going to happen to these detainees? Are they going to be let go eventually? Or you talk about law enforcement, you're talking about investigating them for crimes?

Rumsfeld: Well, they will fall into four or five baskets. One is if we find that someone's an innocent and shouldn't have been brought there, why they would be released. If we find that someone is very low level and we simply want to keep them off the streets so they don't go out and kill more people but that they're not masterminds, we might turn them back to Afghanistan to be imprisoned or Pakistan. We might send them back to their country of origin, whatever their nationality may be, to be detained and processed.

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Those that their behavior suggests that they should be put through some justice system, criminal justice system, they might very well be put in the U.S. criminal justice system; they might be put into the U.S. military justice system; or they might be sent to another country to be put in a criminal justice system; or last, the President may decide that the more important ones conceivably could be tried by a so-called military commission.

Question: Right, which we haven't seen yet.

In the Philippines right now we have U.S. servicemen and women there. Give us an update on what is going on there exactly.

Rumsfeld: Well, what we have is relatively small numbers, a few hundred American service people in the Philippines working with thousands of Philippine army people who are tackling a terrorist problem that's quite serious. As you know there are two Americans who are still held hostage there, and some Americans have been brutally murdered by these terrorists.

Our role is not a combat role. The Philippines have a constitution that prohibits foreign forces from engaging in combat. What we're doing is providing some training and some advice and some intelligence assistance.

Question: That also, I understand, may be the case now in Georgia which is a former Soviet Union republic. We are hearing reports that there may be up to as many as 200 Special Forces going into Georgia to assist them there. I understand there may be some al Qaeda that have groups in that region.

Rumsfeld: There are al Qaeda and some Chechnyans and various other terrorists in the northern part of Georgia. Their government -- Georgia, of course, is a part of the NATO Partnership for Peace, so we've had a military-to-military relationship with them for some time. But they've requested some trainers. What we have in there I believe is a handful, five or six people, who have gone in to do an assessment and give some thought to how the United States might be helpful in training some Georgia forces so that they can deal more effectively with their terrorist problem.

Question: I don't have a lot of time left here but I do want to mention Iraq. There's been a lot of speculation as to whether or not the U.S. is at some point going to go in and try and take out Saddam Hussein. We've heard reports that the Bush Administration is working behind the scenes on a possible attack plan. Is that true?

Rumsfeld: The President decides things like that, and to the extent those of us who work with him discuss those things with him, we do it on a confidential basis.

Question: But that is something that's on the playing table as much as you can tell me?

Rumsfeld: I didn't say it was and I didn't say it wasn't and I don't intend to.

Question: All right. Secretary Rumsfeld, thank you for joining us.

Rumsfeld: Thank you.

http://www.dod.mil/transcripts/2002/t02282002_t0227sd6.html

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COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES

Note by the Secretariat

This document contains a compilation of the general comments or general recommendations adopted, respectively, by the Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee against Torture and the Committee on the Rights of the Child. The Committee on Migrant Workers has not yet adopted any general comments.

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notes that it is not sufficient for the implementation of this article to prohibit such treatment or punishment or to make it a crime. Most States have penal provisions which are applicable to cases of torture or similar practices. Because such cases nevertheless occur, it follows from article 7, read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation. Among the safeguards which may make control effective are provisions against detention incommunicado, granting, without prejudice to the investigation, persons such as doctors, lawyers and family members access to the detainees; provisions requiring that detainees should be held in places that are publicly recognized and that their names and places of detention should be entered in a central register available to persons concerned, such as relatives; provisions making confessions or other evidence obtained through torture or other treatment contrary to article 7 inadmissible in court; and measures of training and instruction of law enforcement officials not to apply such treatment.

2. As appears from the terms of this article, the scope of protection required goes far beyond torture as normally understood. It may not be necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment. These distinctions depend on the kind, purpose and severity of the particular treatment. In the view of the Committee the prohibition must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure. Even such a measure as solitary confinement may, according to the circumstances, and especially when the person is kept incommunicado, be contrary to this article. Moreover, the article clearly protects not only persons arrested or imprisoned, but also pupils and patients in educational and medical institutions. Finally, it is also the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority. For all persons deprived of their liberty, the prohibition of treatment contrary to article 7 is supplemented by the positive requirement of article 10 (1) of the Covenant that they shall be treated with humanity and with respect for the inherent dignity of the human person.

3. In particular, the prohibition extends to medical or scientific experimentation without the free consent of the person concerned (art. 7, second sentence). The Committee notes that the reports of States parties have generally given little or no information on this point. It takes the view that at least in countries where science and medicine are highly developed, and even for peoples and areas outside their borders if affected by their experiments, more attention should be given to the possible need and means to ensure the observance of this provision. Special protection in regard to such experiments is necessary in the case of persons not capable of giving their consent.

Sixteenth session (1982)

General comment No. 8: Article 9 (Right to liberty and security of persons)

1. Article 9 which deals with the right to liberty and security of persons has often been somewhat narrowly understood in reports by States parties, and they have therefore given incomplete information. The Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. It is true that

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some of the provisions of article 9 (part of paragraph 2 and the whole of paragraph 3) are only applicable to persons against whom criminal charges are brought. But the rest, and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. Furthermore, States parties have in accordance with article 2 (3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant.

2. Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. More precise time limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days. Many States have given insufficient information about the actual practices in this respect.

3. Another matter is the total length of detention pending trial. In certain categories of criminal cases in some countries this matter has caused some concern within the Committee, and members have questioned whether their practices have been in conformity with the entitlement "to trial within a reasonable time or to release" under paragraph 3. Pre-trial detention should be an exception and as short as possible. The Committee would welcome information concerning mechanisms existing and measures taken with a view to reducing the duration of such detention.

4. Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.

Sixteenth session (1982)

General comment No. 9: Article 10 (Humane treatment of persons deprived of their liberty)

[General comment No. 9 has been replaced by general comment No. 21]

1. Article 10, paragraph 1 of the Covenant provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. However, by no means all the reports submitted by States parties have contained information on the way in which this paragraph of the article is being implemented. The Committee is of the opinion that it would be desirable for the reports of States parties to contain specific information on the legal measures designed to protect that right. The Committee also considers that reports should indicate the concrete measures being taken by the competent State organs to monitor the mandatory implementation of national legislation concerning the humane treatment and respect for the human dignity of all persons deprived of their liberty that paragraph 1 requires.

The Committee notes, in particular, that paragraph 1 of this article is generally applicable to persons deprived of their liberty, whereas paragraph 2 deals with accused as distinct from convicted persons, and paragraph 3 with convicted persons only. This structure quite often is not reflected in the reports, which mainly have related to accused and convicted persons. The

UNITED STATES OF AMERICA v. DAVID M. HICKS	)	**PROSECUTION RESPONSE TO DEFENSE MOTION ALLEGING IMPROPER PRETRIAL DETENTION UNDER INTERNATIONAL LAW** 15 October 2004

1. Timeliness. This Prosecution response is being filed within the time frame established by the Presiding Officer.

2. Position on Motion. The Prosecution requests that this Motion be denied.

3. Overview. The Accused has been afforded all rights due under United States and international law. The Law of Armed Conflict, not the authority cited by defense, applies to the detention of the Accused.

4. Facts.

a. On 11 September 2001, members of the al Qaida terrorist network hijacked four American commercial airliners with the intent to attack prominent targets in the United States. The highjackers intentionally crashed two airlines into the World Trade Center in New York City, New York, and one airliner into the Pentagon in Arlington, Virginia. A fourth airliner crashed in a field in Shanksville, Pennsylvania after the airliners' passengers attempted to re-take the plane. More than three thousand persons died in these attacks. *See The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks upon the United States*, pgs. 4-14 (2004).

b. On 18 September 2001, Congress passed a resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." *Authorization for Use of Military Force*, 115 Stat. 224 (2001).

c. On 7 October 2001, the President ordered the air campaign against the Taliban regime in Afghanistan and al Qaida to begin. On 21 October 2001, the U.S. began ground operations against Taliban and al Qaida forces.

d. On 13 November 2001, the President authorized the use of military commissions to try persons Accused of either engaging, aiding, abetting, or conspiring to commit acts of international terrorism.

e. On or about early December 2001, the Accused, an Australian citizen, was captured by the Northern Alliance near Baghlan, Afghanistan and soon transferred to U.S. forces. At the time of his capture, the Accused was fighting with al Qaida forces against the U.S. forces.

f. The Accused arrived at the United States Naval Base in Guantanamo Bay, Cuba on 17 January 2001 and is being held as unlawful enemy combatant.

g. On 9 June 2004, the Appointing Authority for Military Commissions, Mr. John D. Altenburg, Jr., approved the charges against the Accused and directed trial by Military Commission to be convened at a later date.

h. On 25 August 2004, the Accused made his initial appearance before the Military Commission.

i. The armed conflict with the al Qaida terrorist network and the Taliban continues. As of 22 September 2004, over 16,000 U.S. service members are deployed in Afghanistan in support of this armed conflict.

5. Discussion.

Pursuant to the Laws of Armed Conflict, the United States has the fundamental right to capture and detain lawful combatants and to capture, detain, and try unlawful combatants for law of war offenses. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004), *citing Ex parte Quirin*, 317 U.S. 317, 1, 28 (1942). Defense erroneously applies an inapplicable body of law, specifically, the International Covenant on Civil and Political Rights (ICCPR) and Additional Protocol I to the Geneva Conventions (Additional Protocol I) to assert, incorrectly, that the accused is entitled to relief. The ICCPR and Additional Protocol I do not apply to these Military Commission proceedings.

a. International Covenant on Civil and Political Rights Does not Apply

(1) Defense relies almost exclusively on the International Covenant on Civil and Political Rights (ICCPR) to allege international law violations. However, such reliance is misplaced; the ICCPR does not apply to prosecutions for violations of law of war offenses and is, therefore, not relevant to Military Commission proceedings. By requesting relief under the ICCPR, the Accused is requesting that the Military Commission disregard United States law and decisions delivered since U.S. ratification of the ICCPR in 1992.

(2) The Coalition, including the United States, is engaged in an armed conflict with al Qaida and the Taliban. The Law of Armed Conflict applies to this war, not the ICCPR. The Laws of Armed Conflict regulate the interactions between belligerent states and the interactions between a state and individual members of enemy forces. The Law of Armed Conflict includes such treaties as the Hague and Geneva Conventions and was negotiated with the exigencies of war in mind. In contrast, the

ICCPR is part of a body of law known as Human Rights Law, a distinctly separate body of law. Treaties under Human Rights Law were not negotiated with the requirements of wartime in mind [1] and therefore cannot apply to the ongoing armed conflict. By placing such emphasis on the ICCPR for relief, Defense is sidestepping the applicable body of law, the Law of Armed Conflict.

(3) The President and the United States Senate at the time of ratification made clear that the ICCPR did not expand protections beyond those already provided under United States *domestic* law and in fact would not be applicable in any area that might conflict with the United States Constitution or laws. *See* Executive Session, International Covenant on Civil and Political Rights, 138 Cong. Rec. S 4781 (April 2, 1992) ("Nothing in this Covenant requires or authorizes legislation, or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.").[2] Despite explicit reservations and mention on the effect ratification of the ICCPR would have on domestic law, no mention is made on the applicability of the ICCPR on the Law of Armed Conflict.[3] This silence indicates that the United States did not contemplate application of the ICCPR to the Law of Armed Conflict and military commissions. To argue otherwise would be to conclude that the President entered into a treaty in which he agreed, without comment, to limit his ability as Commander-in-Chief to wage war and detain enemy combatants. Such an argument is not plausible.

b. International Covenant on Civil and Political Rights is not Self-Executing

The ICCPR has no legal impact on the military commissions. The Senate, in ratifying the ICCPR, specifically stated that "the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing." Senate Foreign Relations Committee, Executive Session, International Covenant on Civil and Political Rights, 138 Cong. Rec. S 4781 (April 2, 1992). As Assistant Secretary of State Richard Schifter explained during the Foreign Relations Committee's hearing on the ICCPR, the non self-executing provision means that "the Covenant provisions **when ratified, will not by themselves create private rights enforceable in U.S. courts**; that could be done by legislation adopted by Congress. **Since U.S. law generally complies with the Covenant, we do not contemplate proposing implementing legislation."**

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[1] See Jean Pictet, *Humanitarian Law and the Protection of War Victims*, 15 (1975) (Humanitarian law is valid only in the case of armed conflict, while human rights are essentially applicable in peacetime...The two systems are complementary, and indeed they complement one another admirably, but they must remain distinct).

[2] See also Senator Clairborne Pell, Chairman, Senate Foreign Relations Committee, Executive Session, International Covenant on Civil and Political Rights, 138 Cong. Rec. S 4781 (April 2, 1992) (the ICCPR is rooted in Western democratic traditions and values and guarantees basic rights and freedoms consistent with our own constitution and Bill of Rights).

[3] The Senate's silence on the applicability of the law of armed conflict on the ICCPR is significant as the treaty was the subject of much debate in the Senate. The ICCPR was adopted by the United Nations General Assembly on December 16, 1966 and entered into force on March 23, 1976. President Carter submitted the ICCPR to the Senate in 1979. The ICCPR was finally ratified by the Senate in 1992. *See* Senate Foreign Relations Committee, Executive Session, International Covenant on Civil and Political Rights, 138 Cong. Rec. S 4781 (April 2, 1992)

ICCPR Hearing at 18 (emphasis added). Treaties are binding agreements between States; individuals are not parties to treaties. The ICCPR, therefore, does not provide individuals with rights enforceable in U.S. courts. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2767 (2004); *Wesson v. Warden*, 305 F.3d 343, 348 (5th Cir. 2002) (relief denied because treaty is not self-executing and Congress has not enacted implementing legislation).

c. Additional Protocol I is not Self-Executing

Additional Protocol I also has no legal impact on the military commissions. United States courts have held that the Geneva Conventions and Additional Protocol I are not self-executing, and therefore provide no basis for the enforcement of private rights in domestic courts. *United States v. Fort*, 921 F. Supp. 523, 526 (N.D. Ill. 1996). In essence, treaties are binding agreements between States. Private individuals have no standing to assert private rights in domestic courts on the basis of international treaties. *Id.* Defense cannot rely on Additional Protocol I for relief.

d. The following arguments are provided in response to Defense's specific assertions:

1) Power to Detain Enemy Combatants

a) The United States has the fundamental authority to capture and detain lawful combatants, and the authority to capture, detain, and try **unlawful** combatants. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004). The capture, detention, and trial of lawful and unlawful combatants "by universal agreement and practice," are "important incident(s) of war." *Id.* (*citing Quirin*, 317 U.S. at 28). The detention of combatants may last as long as active hostilities continue.[4] *Hamdi*, 124 S. Ct. at 2640 *citing* Geneva Convention (III) Relative to the Treatment of Prisoners of War,[5] Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, T.I.A.S. No. 3365. Upon the conclusion of active hostilities the detaining country must release and repatriate detainees **unless** the detainees are "being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences." *Id.* at 2641, *citing* Praust, Judicial Power to Determine the Status and Rights of Persons Detained without Trial, 44 Harv. Int'l L. J. 503, 510-511 (2003).

b) The Supreme Court of the United States has specifically upheld the United States' authority to detain individuals who fought against the United States in Afghanistan as part of the Taliban regime. *Hamdi*, 124 S. Ct. at 2640. The United States' authority to detain members of the al Qaida network or the Taliban regime stems from Executive Authority[6] and from Congress' Authorization to use Military Force

[4] Longstanding international law recognizes that the purpose of detaining enemy combatants is to prevent captured individuals from returning to the field of battle and taking up arms once again. Navqi, *Doubtful Prisoner of War Status*, 84 Int'l Rev. Red Cross 571, 572 (2002)

[5] The United States maintains that members of al Qaida and the Taliban are not entitled to Prisoner of War (POW) status but will be provided many POW privileges. *See* Fact Sheet, White House, Status of Detainees at Guantanamo (Feb. 7, 2002).

[6] The Supreme Court in *Hamdi* chose not to resolve whether the Executive Branch had the authority to detain enemy combatants because it found that Congress had such authority. *Hamdi*, 124 S. Ct. at 2639.

(AUMF) against "nations, organizations, or persons" associated with the September 11, 2001 attacks. *Authorization for Use of Military Force*, 115 Stat. 224 (2001). It is clear, therefore, under the Laws of Armed Conflict and the Supreme Court's interpretation of that law that the United States has the authority to capture and detain the Accused for the duration of the armed conflict against the al Qaida network and the Taliban. Only upon conclusion of the armed conflict must the United States either release and repatriate the Accused or prosecute the Accused as an unlawful combatant. *Hamdi*, 124 S. Ct. at 2640. The Accused's assertion that he may not be held solely to prevent him from rejoining hostilities is contrary to the most fundamental doctrine in the Law of Armed Conflict recently affirmed by the Supreme Court. *See Hamdi*, 124 S. Ct. at 2640 ("the object of capture is to prevent the captured individual from serving the enemy.").

c) Defense bases much of its argument of "unlawful detention" on the notion that the United States' armed conflict in Afghanistan ceased in December 2001, presumably when Hamid Karzai was sworn in as chairman of the interim government in Afghanistan.[7] This assertion is without merit. The Supreme Court, in its recent opinion of 28 June 2004, acknowledged that "active combat operations against Taliban fighters apparently are ongoing in Afghanistan." *Hamdi*, 124 S. Ct. at 2642, (*citing* Constable, *U.S. Launches New Operation in Afghanistan*, Washington Post, Mar. 14, 2004, p. A22 (reporting that 13, 500 United States troops remain in Afghanistan, including several thousand new arrivals); (J. Abizaid, Dept. of Defense, Gen. Abizaid Central Command Operations Update Briefing, Apr. 30, 2004, www.defenselink.mil.transcripts/2004/tr20040430-1402.html (media briefing describing ongoing operations in Afghanistan involving 20,000 United States troops). Since the 28 June 2004 Supreme Court finding, the United States remains in an armed conflict in Afghanistan. *See, e.g.*, Squitieri, *Army begins sending more troops to Afghanistan*, Sept. 22, 2004 (reporting that the arrival of troops from the U.S. Army's 82nd Airborne Division will bring the number of U.S. troops in Afghanistan to more than 16000). The United States, therefore, has the authority to detain the Accused from the time of his initial capture through the conclusion of the war, and beyond that since he is facing lawful prosecution. *Hamdi*, 124 S. Ct. at 2641.

2) "Arbitrary Arrest and Detention"

As discussed, the authority to capture, detain, and try unlawful enemy combatants is well-founded and fundamental. *Quirin*, 317 U.S. at 28; *Hamdi*, 124 S. Ct. at 2640. The Accused's capture and detention as an unlawful combatant incident to the war with al Qaida is far from arbitrary. Furthermore, the United States has undertaken a thorough process to ensure that the Accused and other combatant detainees at Guanatanamo Bay are properly classified. *See* Fact Sheet, Department of Defense, Guantanamo Detainees, (Apr. 13, 2004).[8] The review of the Accused's enemy combatant status began immediately upon the seizure of the Accused on the battlefield near Baghlan, Afghanistan. U.S. armed forces undertook a further review of the Accused's combatant status prior to the Accused's transfer to Guantanamo Bay on 17 January 2002. On 22

[7] Hamid Karzai was sworn in as chairman on 22 Dec. 2001.
[8] Available at www.defenselink.mil/news/Apr2004/d20040406gua.pdf

September 2004, a Combatant Status Review Tribunal, comprised of neutral decision-makers, convened to determine the Accused's combatant status, and determined that the Accused was properly designated as an enemy combatant. Finally, the legality of the Accused's detention is presently in federal court under *habeas corpus* review. *See* Hicks v. Bush, Civil Action No. 1:02-CV-00299 (CKK), United States District Court for the District of Columbia. Given all of these layers of review, it is clear that the Accused is properly detained as an enemy combatant.

3) Right to Be Informed of Reasons for Arrest and Challenge Legality of Detention

a) The provisions from the ICCPR and Additional Protocol I do not pertain. Nevertheless, in the wake of recent decisions of *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (in which the Accused was a Petitioner) and *Hamdi*, the United States established the Combatant Status Review Tribunal (CSRT). Department of Defense News Release, Combatant Status Review Tribunal Order Issues (July 7, 2004). The CSRT supplemented those processes already in place to ensure that a detainee was properly classified as an enemy combatant. In a CSRT, detainees can challenge their enemy combatant classification by testifying before the tribunal, calling witnesses, and introducing evidence. *Id.* The Accused's Combatant Status Review Tribunal convened on 22 September 2004 and determined that the Accused is properly detained as an enemy combatant.

b) Furthermore, the Accused has a pending *habeas corpus* action challenging the legality of his detention. *Hicks v.* Bush, Civil Action No. 1:02-CV-0029. Hence, the Accused is being afforded the right to *habeas corpus* and the opportunity to challenge the legality of his detention in Federal Court.

4) Right to be Informed Promptly of Charges

a) Defense asserts that the government failed to notify him promptly of the charges against him in accordance with the ICCPR. The assertion that an enemy combatant has a right to be "informed promptly of charges" only underscores the absurdity of the notion that the ICCPR applies to international armed conflict. Such a provision clearly contemplates domestic criminal charges, not detention of an enemy combatant to keep him off the battlefield.

b) The rules applicable to service of charges, once approved, are instead found in Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (MCO No. 1). MCO. No. 1 requires the Prosecution to "furnish to the Accused, sufficiently in advance of trial to prepare a defense, a copy of the charges in English, and if appropriate, in another language that the Accused understands." MCO No. 1, para. 5A. *See also* MCO No. 1, para. 6A(3) (Prosecution shall provide copies of the charges approved by Approving Authority to the Accused and Defense Counsel). In the Accused's case, the Approving Authority approved the Accused's charges on 9 June 2004. Per Defense

Counsel's request, the Prosecution served Defense Counsel (rather than the Accused) with the charges on 10 June 2004, well in advance of the scheduled 25 August 2004 initial hearing and well in advance of the scheduled trial date of 10 January 2005. Thus, the government has full complied with MCO No 1.

c) Defense, without citing authority, asserts that a "procedural clock" started on 3 July 2003. As discussed further in the Prosecution's response to Defense's Speedy Trial Motion of 4 October 2004, there is no procedural clock. Active hostilities against the al Qaida network and the Taliban continue; the Accused is being held as an unlawful enemy combatant.

5) Right to be Brought Promptly Before a Judge

Asserting the right to go before a judge and contest the lawfulness of his detention within a "few days" again illustrates that the provisions cannot apply to battlefield conditions. As discussed previously, *Hamdi* and *Rasul* work together to address the opportunity for detainees to challenge judicially their detention. *Hamdi*, 124 S. Ct. at 2648; *Rasul*, 124 S. Ct. 2686. And as discussed, the United States has completed a CSRT with respect to the Accused.

e. Conclusion.

The United States has a fundamental right, if not responsibility, to capture, detain, and try unlawful enemy combatants. The Accused's detention has been reviewed by a number of administrative processes, all confirming that the Accused is properly detained as an enemy combatant. Furthermore, the Accused has had the opportunity to challenge his detention before a U.S. District Court, where his *habeas corpus* petition is pending. The Accused's detention as an enemy combatant is proper and justified; the Defense Motion should therefore be denied.

6. Attached Files. None.

7. List of Legal Authority Cited.

a. 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks upon the United States (2004).

b. *Authorization for Use of Military Force*, 115 Stat. 224 (2001).

c. *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

d. International Covenant on Civil and Political Rights.

e. Additional Protocol I to the Geneva Conventions, Art. 75.

f. Major Timothy C. MacDonnell, Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts, The Army Lawyer, 19, 20 (March 2002).

g. *Ex parte Quirin*, 317 U.S. 1, 27 (1942).

h. Jean Pictet, Humanitarian Law and Protection of War Victims, 15 (1975).

i. Executive Session, International Covenant on Civil and Political Rights, 138 Cong. Rec. S 4781 (Apr. 2, 1992).

j. Assistant Secretary of State Richard Schifter, International Covenant on Civil and Political Rights (ICCPR) Hearing, 18, (1992).

k. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2767 (2004).

l. *Wesson v. Warden*, 305 F.3d 343, 348 (5th Cir. 2002).

m. Law of War Handbook, International & Operational Law Department, The Judge Advocate General's School, U.S. Army, 23-24 (2005).

n. *United States v. Fort*, 921 F. Supp. 523, 526 (N.D. Ill. 1996).

o. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

p. Navqi, Doubtful Prisoner of War Status, 84 Int'l Rev. Red Cross 571, 572 (2002).

q. Fact Sheet, White House, Status of Detainees at Guantanamo (Feb. 7, 2002), www.defenselink.mil.

r. Squitieri, Army begins sending more troops to Afghanistan, USA Today, Sept. 22, 2004, www.usatoday.com/news/washington/2004-09-22-afghan-troops_x.htm.

s. Fact Sheet, Department of Defense Guantanamo Detainees (Apr. 13, 2004), www.defenselink.mil/news/Apr2004/d20040406gua.pdf.

t. Department of Defense News Release, Combatant Status Review Panel Order Issues (July 7, 2004).

u. Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War against Terrorism.

v. Presidential Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 F.R. 57833 (2001).

8. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

9. Witnesses/Evidence. None anticipated.

//Signed//

[redacted]
Lieutenant Colonel, U. S. Marine Corps
Prosecutor

UNITED STATES OF AMERICA	)	
	)	**DEFENSE REPLY TO GOVERNMENT RESPONSE TO MOTION FOR APPROPRIATE RELIEF: IMPOSITION OF IMPROPER PRETRIAL DETENTION**
v.	)	
DAVID M. HICKS	)	
	)	**23 October 2004**

The Defense in the case of the *United States v. David M. Hicks* requests the court dismiss the charges against Mr. Hicks, and in reply to the government's response to its motion for appropriate relief states as follows:

1. Government Position:

The essence of the government's argument in response to the defense motion is that the International Covenant on Civil and Political Rights (ICCPR), and Additional Protocol 1 (Additional Protocal 1) to the Geneva Conventions do not apply to Mr. Hicks' case because the United States is involved "in an armed conflict with al Qaida and the Taliban." (Gov. Res. p.2) They contend that this "armed conflict" causes the Law of Armed Conflict (LOAC) to be in force, which would trump the provisions of the ICCPR and Additional Protocol 1, and other provisions of International Human Rights Law (IHRL) that the United States has ratified or accepted as customary international law. Thus, they contend that the United States government may hold Mr. Hicks until the end of hostilities. This position is incorrect because the LOAC does not apply to the United States' operations against al Qaida, and the international armed conflict with the Taliban regime in Afghanistan has ended.

2. LOAC does not apply to operations against al Qaida:

The plain language of the Geneva Conventions makes it absolutely clear that the LOAC, comes into play during armed conflicts between two "high contracting parties" to the Geneva Conventions.[1] The LOAC is designed to set out rules for the conduct of combatants on the battlefield. It concerns the actions of Sovereign States' armed forces in the conduct of armed conflict to ensure, among other things, the safety of civilians and others not in the fight. and to protect combatants from unfair means and methods of warfare and unnecessary suffering.

LOAC does not apply to military operations against non-State entities or organizations such as al Qaida. Indeed, why would we want these rules to apply to al Qaida--its operatives do not follow them; their operations are designed to cause the

[1] Geneva Convention Common Art. 2 states: "[i]n addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases od 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."

maximum amount of damage to civilians and to cause the maximum amount of unnecessary suffering to their targets. This is one reason we call al Qaida operatives terrorists, not soldiers. As a matter of law, LOAC does not apply to our operations against al Qaida.

3. What law does apply to operations against al Qaida?:

As shown above, the LOAC does not apply to United States' operations against al Qaida. We may label these military operations several ways. We can call them military operations other than war. We can call them counter-terrorist operations. But certainly, they are not an "armed conflict" as that term is defined by the LOAC. This is because under the LOAC, an "armed conflict" can take place only between two State parties (an international armed conflict) or between a State party and an organized rebel group within that State's territory (an non-international or internal armed conflict).[2]

Because al Qaida is neither a State entity nor an rebel group operating within United States territory U.S., operations against al Qaida in 2000 and 2001 in Afghanistan was not an "armed conflict" under the LOAC. That is not to say, however, that the United States government did not have the authority under international law to use military force against al Qaida in Afghanistan, it certainly did have that right. However, that right did not flow from the LOAC, it flowed from the Art. 51 of the United Nations Charter (Art. 51 UNC) which allows States to defend themselves against "armed attack."

Under Art. 51 UNC, if a State is the subject of an "armed attack" by another State, a rebel group within its own borders, or outside non-State organization (like al Qaida), the State may use force, including military force to defend itself against that "armed attack." Al Qaida had made several armed attacks against the United States in the years leading up to 11 September 2001. Al Qaida attacked our embassies. It attacked our warship, the USS Cole. Al Qaida operatives bombed the World Trade center in 1993. And finally of 11 September 2001, al Qaida operatives destroyed the World Trade Center, and attacked the Pentagon. Each of these attacks was an "armed attack" under Art. 51 UNC. Once attacked, the right of self-defense kicks in, and the State that was attacked has a continuing right to defend itself.[3]

When a State is subject to an armed attack by another State and the State that is attacked exercises its right of self-defense under Art. 51 UNC, an international armed conflict may result, and the LOAC would apply to govern the conduct of the States armed forces during that conflict. If attacked by a rebel group operating within that state, a non-international armed conflict may result. If attacked by a non-state organization, such as al Qaida, the attacked State may defend itself with military force, but the LOAC does not apply. The laws that apply are the laws that the State must adhere to all the time—its own domestic law, including treaties, international conventions, and other recognized customary international law.[4]

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[2] See Common Article 3 1949 Geneva Conventions.

[3] See Art. 51 U.N. Charter.

[4] U.S. government policy is that the United States Armed Forces will conduct all operations in which the use of military force is applied in a manner that complies with the principles of the LOAC. This policy does not mean that as a matter of international law, the LOAC is applicable or binding on the United States

4. Ongoing U.S. Operations against Taliban Forces in Afghanistan

The government also asserts that it may continue to hold Mr. Hicks pursuant to the LOAC because currently ". . . the United States is engaged in an armed conflict the Taliban." (Government response p. 2) This statement is true to the extent that there is currently an armed conflict going on in Afghanistan. However, it is an internal armed conflict. The LOAC rules that allow a State to detain enemy combatant until the end of hostilities do not apply to internal armed conflicts.

The United States is currently engaged in combat operations against what are apparently former Taliban regime personnel in Afghanistan along its border with Pakistan. These military operations do not constitute an international armed conflict. Under the LOAC, the international armed conflict the United States was involved with in 2001 and early 2002 has ended. In October 2001, the United States exercised its right of self-defense under Art. 51 UNC against Afghanistan after its government, the Taliban regime, refused to surrender Usama Bin Laden and other al Qaida operatives operating in Afghanistan. The United States, along with a coalition of other nations and armed Afghani groups known as the Northern Alliance conducted military operations in Afghanistan.

This was an international armed conflict. All the rules of the LOAC that govern armed conflict between two State entities were in play. The United States could capture and detain enemy combatants, and could hold them until the armed conflict ended, at which time they should have been released, repatriated, or tried under appropriate law.

The international armed conflict in Afghanistan ended with the collapse of the Taliban regime and the creation of a new government under Mr. Ahmed Karzai called the Transitional Islamic State of Afghanistan (TISA). The TISA is the recognized government of Afghanistan.

Under the LOAC the ongoing U.S. combat operations in Afghanistan are not a continuation of the 2001-2002 international armed conflict against the former government of Afghanistan, the Taliban regime. The Taliban regime, the former government and state entity of Afghanistan no longer exists. That international armed conflict ended with the creation of the predecessor government to the TISA, also headed by Mr. Ahmed Karzai. The ongoing U.S. combat operations in Afghanistan against former Taliban regime personnel may best be characterized as combat operations in support of an internal armed conflict between the TISA and an armed rebel group consisting of former Taliban regime personnel. While the LOAC applies to such a conflict, the rules governing such a conflict are set forth in Common Art. 3 of the Geneva Conventions.

Common Art. 3 requires that the United States turn over to the host nation all rebel group personnel captured by U.S. forces during combat operations to the host nation, in this case the TISA. The TISA may then deal with them under its domestic law. The personnel of the rebel group do not enjoy combatant immunity, so they may be

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during all its military operations. The LOAC only becomes binding on the United States Armed Forces during international armed conflict. In cases where U.S. forces are supporting a host nation government during a non-international armed conflict, the rules set forth in Common Art. 3 are binding on U.S. forces.

prosecuted by the host nation for criminal acts they engaged in during the internal armed conflict.[5] The host nation, however, is constrained by its own domestic law, including the treaties to which it is a party, and customary international law to comply with procedural rules in prosecuting rebel personnel. The United States has no role in this process.

5. Application to Mr. Hicks

The government has asserted that in 2001, Mr. Hicks was an al Qaida operative fighting in Afghanistan. It is also possible that Mr. Hicks may simply have been a foot soldier operating under the direction of the Taliban regime. Either way, the provisions of the LOAC that allow for enemy combatants to be held without trial until the end of hostilities does not apply. The law that applies to Mr. Hicks is the domestic law of either the United States, or TISA, and all the accompanying treaties and recognized customary international law that goes with it.

As stated above LOAC does not apply to operations against al Qaida. Thus, if, as the government asserts, Mr. Hicks was an al Qaida operative, it may not hold him under the LOAC until the "end of hostilities" because that rule of the LOAC does not apply.[6] They must deal with Mr. Hicks under U.S. law. Moreover, because the international armed conflict has ended, the U.S. should have released, repatriated, or taken timely steps to prosecute Mr. Hicks. Since it appears the government has chosen to prosecute Mr. Hicks, it must abide by U.S. law in doing so. The question is what U.S. law applies. The defense asserts that the provisions of the ICCPR and Additional Protocol 1 apply to Mr. Hicks case, and the government has failed to abide by them.

The government could have chosen any one of a number of forums in which to try Mr. Hicks, including the federal district courts or the military justice system.[7] A trial of Mr. Hicks in either of these forums would likely have met the procedural requirements of U.S. law as stated in the ICCPR and Additional Protocol 1[8] because they require the U.S.

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[5] See Common Art. 3 of the Geneva Conventions.

[6] In its response to this defense motion and others, the government has espoused a position that the United States is involved in a "Global War" with al Qaida, or that because this is "wartime" that the government may invoke the LOAC to justify its treatment of Mr. Hicks. While the defense does not deny that combat operations have been ongoing on several fronts over the past 3-4 years, and that the United States has a right to defend itself under Art. 51 of the U.N. Charter, the terms "Global War,""War on Terror," or "wartime" are merely rhetorical or political devices that have no relevance to a legal discussion of the rules applicable to the military operations in which the United States has been involved. Any legal discussions of the LOAC and its implications must start with an analysis of what type of armed conflict, if any, is involved in a military operation, and what, if any rules under the LOAC are implicated by the armed conflict or lack thereof. Any discussion of "Global Wars" or "the War on Terrorism" merely serve to confuse and obfuscate the legal issues relevant to Mr. Hicks', or any other, case before the commission.

[7] Mr. Hicks could also have been tried by Australia for any violation of his law, or by the TISA for violations of its law.

[8] The ICCPR and Additional Protocol 1 are part of U.S. law. The ICCPR has been adopted and ratified by the United States. The relevant article, Art. 75 of Additional Protocol 1 to the Geneva Conventions is considered by the U.S. to be customary international law, and thus, part of U.S. law. See Memorandum to

government to provide certain procedural rights, such as the right to a speedy trial, the right to be timely informed of the charges against him, the right to a timely arraignment, etc., and provides remedies for the accused if the government violates those procedural rights.

The government has chosen, instead, to try Mr. Hicks before a military commission. There is nothing in U.S. law that relieves this commission from the responsibility of providing the procedural safeguards required by U.S. law as stated in the ICCPR and Additional Protocol 1. The government has asserted that these laws do not apply, but as has been shown above, that position is incorrect. The guarantees of an accused's procedural safeguards at trial set forth in these treaties the U.S. has ratified apply to a military commission just as they do to trials in federal court or at a court-martial.

The government contends that these treaties are "not self-executing" and therefore do not create private rights enforceable in U.S. courts. It is true that a citizen may not use a government violation of the ICCPR as basis for a cause of action for damages, but that is not what Mr. Hicks is attempting to do. Mr. Hicks is simply asking the commission to formulate a remedy for the government's violation of procedural safeguards he is granted under U.S. law as stated in the ICCPR, just like he would get in any other criminal tribunal in the United States.

This commission, as a judicial body empowered to hear criminal matters, is just as bound by U.S. law, including the treaties and customary international law that Congress has ratified as the law of the land, as any other U.S. court or court-martial. In this case, the government has violated procedural safeguards for set forth in the law of the land, and this court has the obligation to examine those violations and issue a remedy.

The defense contends the remedy should be similar to that afforded in other U.S. courts. In a court-martial, having an accused confined without charges for almost two years would likely result in a dismissal of all charges. A similar remedy would likely be had in federal courts.

The commission has the power and duty to examine the actions of the government in this case, and formulate a remedy fitting the violations of the procedural rights afforded Mr. Hicks. The defense asks that it do so by dismissing all charges against Mr. Hicks, and releasing him from confinement.

M. D. MORI

Major, U.S. Marine Corps

Detailed Defense Counsel

Mr. John H. McNiell, Assistant General Counsel (International). OSD, dated 9 May 1986, Subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications, pg. 2

J. D. Lippert
Major, U.S. Army
Detailed Defense Counsel

Joshua Dratel
Civilian Defense Counsel

UNITED STATES OF AMERICA	)	
	)	**DEFENSE MOTION TO DISMISS ALL CHARGES AS THE COMMISSION HAS NO JURISDICTION AT GUANTANAMO BAY, CUBA**
v.	)	
DAVID M. HICKS	)	
	)	**1 October 2004**

The defense in the case of the *United States v. David M. Hicks* moves for dismissal of all charges against him because the military commission lacks jurisdiction to try Mr. Hicks at Guantanamo Bay, Cuba for alleged violations of the law of war occurring in Afghanistan, and states in support of this motion:

1. **Synopsis**: The military commission lacks jurisdiction to sit at Guantanamo Bay to try alleged offenses that occurred in Afghanistan.

2. **Facts**: All charges against Mr. Hicks involve alleged conduct within the territorial boundaries of Afghanistan.

3. **Discussion**: The power to convene a military commission as an exercise of military jurisdiction is derived from the customs and practice under the laws of war. As detailed below, military law doctrine and Supreme Court cases, military commissions can be convened by a competent authority to sit: (1) in the zone where an actual armed conflict exists; (2) in an area under martial law; or (3) within the occupied territory that the convening authority commands. The Guantanamo Bay Naval Base falls into none of these categories.

As described by Winthrop, the exercise of military jurisdiction is restricted in several important respects:

> (1) A military commission, (except where otherwise authorized by statute,) can legally assume jurisdiction only of offenses 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 offense committed without such territory.
>
> (2) The place must be the theatre of war or a place where military government or martial law may be legally exercised; otherwise a military commission, (unless specially empowered by statute,) will have no jurisdiction of offenses committed there. The ruling in the leading case of *Ex parte Milligan*, 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 ... 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*."[1]

[1] Winthrop, "Military Law and Precedent," Vol.2. (1896) p. 836.

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Congress has not passed any statute expanding the jurisdiction of military commissions beyond what was authorized in World War II, the last time commissions were employed. The majority of the military commissions used during World War II sat in Germany and areas of the Far East (*i.e.*, Japan, China, Philippines, Guam) to try offenses against the law of war that had occurred in those theatres of war. These commissions were convened under the authority of the military commander responsible for those areas.

For example, General Yamashita, Commanding General of the Fourteenth Army Group of the Imperial Japanese Army, was tried for law of war violations which occurred within the Philippine Islands. The commission sat in Manila and was convened by General Styer, Commander of the United States Armed Forces, Western Pacific (which included the Philippine Islands). The United States Supreme Court reviewed the military commission that tried General Yamashita and found that the exercise of military jurisdiction in the form of a military commission was proper.

The Court specifically noted that General Stryer's authority to appoint the commission was proper, as he was the military commander over the Philippine Islands, "where the alleged offenses were committed, where [Yamashitia] surrendered as a prisoner of war, and where, at the time of the order convening the commission, he was detained as a prisoner in custody of the United States Army."[2] In fact, the Supreme Court found that the location of the commission was a key element to its proper creation and exercise of military jurisdiction over General Yamashita.

Similarly, in 1946, a group of German civilians were tried by military commission in China for violations of the laws of war consisting of assisting the Japanese Army during World War II. The alleged violations occurred within China, the commission was conducted there, and the commission was convened under the military authority commanding the China Theatre.[3]

Even when military commissions have sat within the United States to try enemies, in every case the offenses were alleged to have occurred within the United States, and the commissions were convened by a military commander of the area. During World War II, two military commissions sat within the United States ,in the Eastern Defense Command's area of responsibility, to try alleged law of war violations committed within that area. The commission in *Ex Parte Quirin* was constituted under that authority,[4] and was appointed by the President during a congressionally declared war. The commission in *Quirin* sat in the District of Columbia to try enemy operatives apprehended in the United States in the course of a clandestine sabotage mission. As a principal component of its presentation in *Quirin*, the prosecution introduced evidence that the Eastern Coast, the site of the Germans' infiltration, was within an area under military control. Thus, the prosecution offered, *inter alia*, "Public Proclamation No. 1," in which the Commander of the Eastern Defense Command and First Army established both military control over the geographical region in which the offenses occurred, and punishments for

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[2] See *In Re Yamashita*, 327 U.S. 1, 10 (1946). Available at <http://caselaw.lp.findlaw.com/scripts/getcase.lp?navby=search&court=US&case=/us/327/1.html>.

[3] See *Johnson v. Eisentrager*, 339 U.S. 763 (1950). Available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=3398&invol=763>.

[4] 317 U.S. 1 (1942).

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violations of any restrictions or orders. The site of the trial, Washington D.C., was within the region under military control.[5]

Indeed, a military commission in which alleged violations of the law of war committed in a foreign country, with the accused removed from the country or area where the alleged offense occurred, and brought before a military commission outside the theatre of war, is unprecedented and without legal basis or authority under the customs and laws of war. Proper authority to use military commissions is derived from a valid exercise of military jurisdiction, which can only be established in the theatre of war in which the alleged offenses occurred.

Here, the government removed Mr. Hicks from Afghanistan, the only place military jurisdiction could have been exercised over him, and transported him to Guantanamo Bay Naval Base, a place located far from any theatre of operations. Ironically, while memoranda published subsequently establish that the removal of Mr. Hicks (and others) was designed to place him beyond the reach of federal courts and other lawful, independent courts and process [a ploy the Supreme Court rejected in *Rasul v. Bush*, *Rasul v. Bush*, ___ U.S. ___, 124 S. Ct. 2686 (2004)], all the removal accomplished was to deprive this commission of jurisdiction to try Mr. Hicks for the offenses charged. In addition, this commission is not appointed by a commander possessing authority over military operations in Afghanistan. Accordingly, this military commission lacks jurisdiction to sit in Guantanamo Bay to try the offenses charged against Mr. Hicks.

4. **Evidence**:

A: The testimony of expert witnesses.
B: Attachments
1. Winthrop, "Military Law and Precedent," Vol.2. (1896) p. 836.
2. *In Re Yamashita*, 327 U.S. 1, 10 (1946).

5. **Relief Requested**: The defense requests the charges be dismissed.

6. The defense requests oral argument on this motion.

By: _____
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[5] See Joel Samaha, Sam Root, and Paul Sexton (eds.), "Transcript of Proceedings before the Military Commission to Try Persons Charged with Offenses against the Law of War and the Articles of War, Washington D.C.," 8 to 31 July 1942, University of Minnesota, 2004. Available at <http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi02.htm>.

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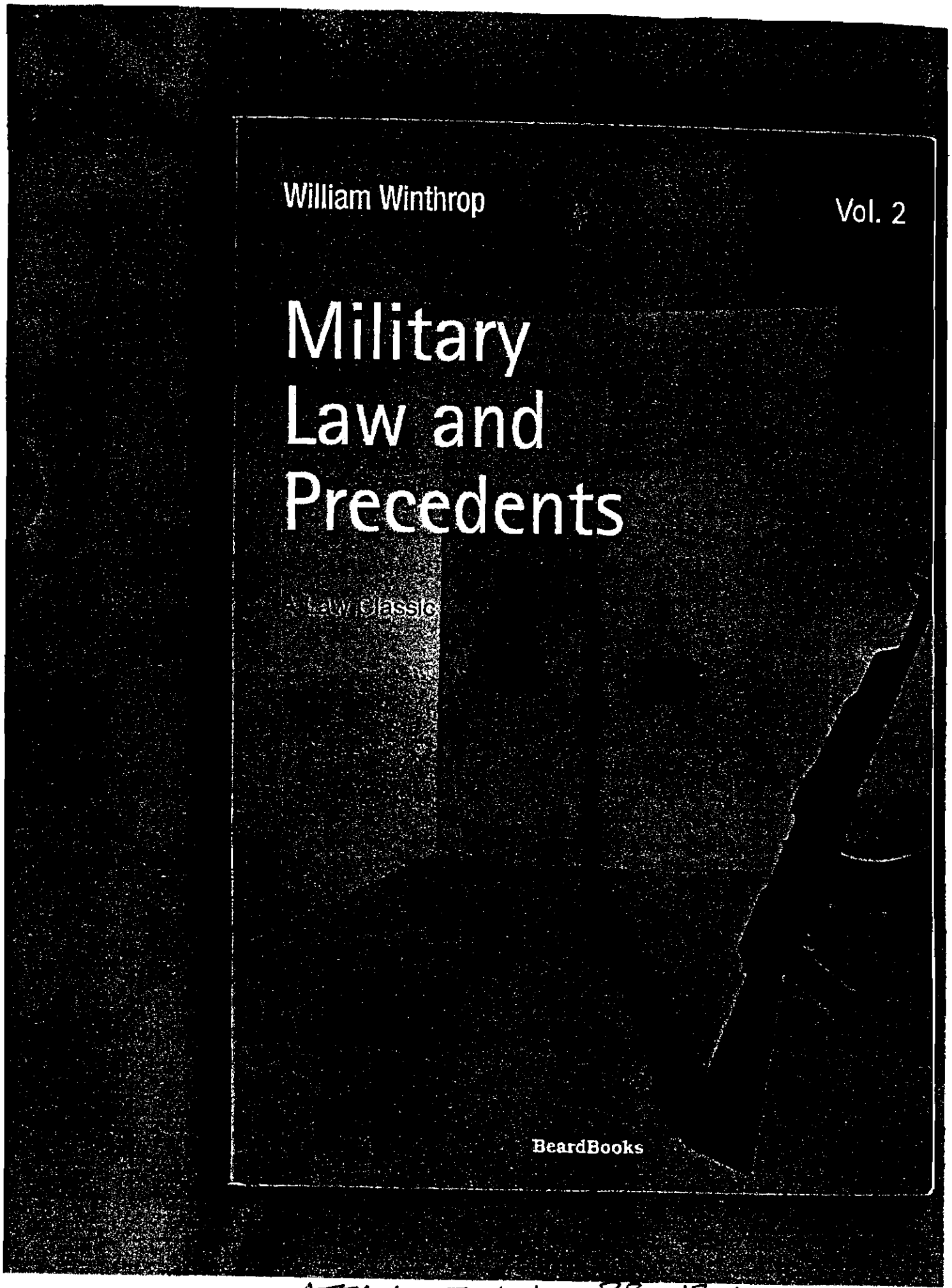

 ATTACHMENT 1 to RB 17-A

more than thirteen officers." In Gen. Halleck's Order of Jan. 1, 1862, heretofor noticed, [88] it was declared:—"They" (military commissions) "will
1804 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
1805 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. 126, 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. 37, 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.

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U.S. Supreme Court

APPLICATION OF YAMASHITA, 327 U.S. 1 (1946)

327 U.S. 1

Application of YAMASHITA.

YAMASHITA
v.
STYER, Commanding General, U.S. Army Forces, Western Pacific.
No. 61
Misc. and No. 672.
Argued Jan. 7, 8, 1946.
Decided Feb. 4, 1946.

[327 U.S. 1, 4] Captain A. Frank Reel, JAGD, of Boston, Mass., Colonel Harry E. Clarke, JAGD, of Altoona, Pa., pro hac vice, by special leave of Court, and Captain Milton Sandberg, JAGD, of New York City, for petitioner.

Solicitor General J. Howard McGrath, and Assistant Solicitor General Harold Judson, both of Washington, D.C., for respondents.

Mr. Justice RUTLEDGE and Mr. Justice MURPHY dissenting.

Attachment 2 to RE 174

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The authority to create the Commission. General Styer's order for the appointment of the commission was made by him as Commander of the United States Armed Forces, Western Pacific. His command includes, as part [327 U.S. 1, 10] of a vastly greater area, the Philippine Islands, where the alleged offenses were committed, where petitioner surrender as a prisoner of war, and where, at the time of the order convening the commission, he was detained as a prisoner in custody of the United States Army. The Congressional recognition of military commissions and its sanction of their use in trying offenses against the law of war to which we have referred, sanctioned their creation by military command in conformity to long established American precedents. Such a commission may be appointed by any field commander, or by any commander competent to appoint a general court martial, as was General Styer, who had been vested with that power by order of the President. 2 Winthrop, Military Law and Precedents, 2d Ed ., *1302; cf. Article of War 8.

Here the commission was not only created by a commander competent to appoint it, but his order conformed to the established policy of the Government and to higher military commands authorizing his action. In a proclamation of July 2, 1942 (56 Stat. 1964, 10 U.S.C.A. 1554 note), the President proclaimed that enemy belligerents who, during time of war, enter the United States, or any territory possession thereof, and who violate the law of war, should be subject to the law of war and to the jurisdiction of military tribunals. Paragraph 10 of the Declaration of Potsdam of July 6, 1945, declared that '... stern justice shall be meted out to all war criminals including those who have visited cruelties upon prisoners.' U.S. Dept. of State Bull., Vol. XIII, No. 318, pp. 137, 138. This Declaration was accepted by the Japanese government by its note of August 10, 1945. U.S. Dept. of State Bull., Vol. XIII, No. 320, p. 205.

Attachment 2 to RE 174

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UNITED STATES OF AMERICA	)	**PROSECUTION RESPONSE TO DEFENSE MOTION CHALLENGING COMMISSION'S JURISDICTION AT GUANTANAMO BAY, CUBA**
v.	)	
DAVID MATTHEW HICKS	)	15 October 2004

1. Timeliness. This response is being filed within the timeline established by the Presiding Officer.

2. Prosecution Position on Defense Motion. The Defense motion should be denied.

3. Facts.

a. The President's Military Order of 13 November 2001, authorizes the Secretary of Defense or his designee to convene military commissions for the trial of certain individuals "for any and all offenses triable by military commission." *See* The President's Military Order of 13 November 2001, concerning the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, (hereinafter "The President's Military Order"). The President's Military Order also provides that military commissions may "sit at any time and place" as the Secretary may provide. *Id.*

b. The President specifically stated that he issued this Military Order "by the authority vested in [him] as President and as Commander in Chief of the Armed Forces ... [including] sections 821 and 836 of Title 10 United States Code." President's Military Order (Preamble); *See also* 10 *United States Code §§821 and 836.*

c. The Accused was captured in Afghanistan on or about December 2001 during Operation Enduring Freedom. On or about 12 January 2002, U. S. Forces transferred the Accused to Guantanamo Bay, Cuba for continued detention.

d. The President determined that the Accused is subject to his Military Order on 3 July 2003.

e. The Appointing Authority approved the charges in this case on 9 June 2004 and on 25 June 2004 referred the same to this military commission in accordance with commission orders and instructions. In the Appointing Authority's 25 June 2004 memorandum appointing military commission members in this case, he stated that "[t]he military commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer." *See* Appointing Authority Appointment of Military Commission Members No. 40001, dated 25 June 2004. On 5 October 2004, the Appointing Authority stated that "[a]ll sessions of the Commission shall be conducted at Guantanamo Bay." *See* Memorandum for the Presiding Officer, dated 5 October 2004, Subject: Request for authority Submitted as "Interlocutory Question 1."

f. With regard to this ongoing operation, on 4 October 2004, The Secretary of Defense Donald H. Rumsfeld marked the "third anniversary of the commencement of Operation Enduring Freedom" stating that we took "the battle to the extremists, and we attacked al Qaeda and The Taliban in Afghanistan," and that we are "[t]hree years into the global war on terror." *See* Remarks as Delivered by Secretary of Defense Rumsfeld, New York City, New York, 4 October 2004 (the war against al Qaida "will likely go on for years") (hereinafter "Secretary Rumsfeld's 4 October 2004 Remarks")

4. Discussion.

a. Military commissions can sit outside of Afghanistan.

Winthrop is an 1896 treatise cited by the Defense, and is in no way authoritative with regard to removing prisoners from the theater of operations and holding trial outside the area of operations. This Winthrop passage which the Defense relies upon was written prior to the creation of jurisdiction for military commissions that was granted in Title 10 of the U. S. Code. See 10. United States Code (hereinafter "U.S.C.") §§ 821 and 836. This statutory authority for military commissions contains no limitation on the situs for military commissions. *See Id.* The Defense motion also suggests that the U.S. Supreme Court held in *In Re Yamashita*, 327 U.S. 1 (1946), and in *Ex Parte Quirin*, 317 U.S. 1 (1942), that military commissions can try cases in some locations but not others. This suggestion is incorrect. While the Supreme Court addressed the jurisdiction of military commissions in those cases, it made no holding regarding any limitation on the permissible locations of military commissions. The Supreme Court also did not announce any limitation on where a military commission may sit when it considered the habeas corpus petitions of persons convicted by military commissions in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), or awaiting trial by military commission in *Rasul*, supra. The Court simply has never held a military commission, which has jurisdiction over the offense and over the accused, must hear cases in a war zone or in any other particular place.

1. This is a Global War, and by definition, the "theater of operations" is larger than Afghanistan.

Beyond the fact that nothing prohibits holding commissions outside the "theater" of conflict, as discussed in paragraph 2 below, the Defense incorrectly attempts to limit the "theater" in our war with al Qaida to Afghanistan. United States courts have addressed the "theater of war" issue. For instance, in the case of a German citizen held in New York awaiting a military trial for spying, the court said:

> World War [I] through which we have just passed, the field of operations which existed ... brought the port of New York within the field of active operations. The implements of warfare and the plan of carrying it on in the last gigantic struggle placed the United States fully within the field of active operations. The term "theater of war," as used in the *Milligan* Case, apparently was intended to mean the territory of activity of conflict. With the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations .... One of the lessons taught by this war is that the ocean is no longer a barrier for safety or an insurance against America's being involved in [foreign] wars.

Weesels v. McDonald, 265 F. 754 at 763 - 64 (E.D.N.Y. 1920) (addressing the advances of warfare tactics during World War I since the decision in *Ex Parte Milligan*, 71 U. S. 2 (1866) and discussing the de facto expansion of the meaning of "theater of war.")

Therefore, to say that Guantanamo Bay, Cuba, lacks jurisdiction because it is far away from the "theater of war," is just plain wrong. The Accused was captured in the context of this global war where he and his co-conspirators hatched plans to attack and or conduct attacks and military operations against the United States and its allies in Europe, Africa, Asia, the Middle East, and in the United States itself, planning and attacks that continue to this day.

2. There is no prohibition in moving detainees from Afghanistan to Guantanamo, Bay for detention and trial.

A well-founded and followed principle of international law regarding a State's authority to take action is found in *The Case of S.S. Lotus (France v. Turkey)*, [1927] P.C.I.J. Ser. A, No. 10 at 19. The *Lotus case* stands for the international law proposition that a State's actions are authorized absent a specific prohibition. *See Id.* In fact, soldiers have a duty to safeguard enemy prisoners. This can be accomplished by moving them from the area of active combat operations. *See e.g. Geneva Convention (III) Relative to the Treatment of Prisoners of War of August 12, 1949,(hereinafter "Geneva Convention (III)") Article 19 et seq. See also e.g. Geneva Convention (IV) Relative to the Protection of Civilian Persons in the Time of War, August 12, 1949, (hereinafter "Geneva Convention (IV)") Article 45.*

Even today, with over 16,000 soldiers on the ground, Operation Enduring Freedom's active combat operations continue against al Qaida in Afghanistan. *See e.g.* Secretary Rumsfeld's 4 October 2004 Remarks. One purpose of evacuating captured persons from areas of ongoing hostilities is for their safety. *See e.g. Geneva Convention (III), supra.* To follow the Defense's suggestion and move the Accused to an active combat zone to hold this military commission would be in contravention to the logic of this safety principal and would risk the safety of, not only the Accused, but also participants in this proceeding.

The United States is engaged in a global war against al Qaida and its associates. *See President's Military Order* §1 (Findings with regard to issuing the order.) *Cf.* Secretary Rumsfeld's 4 October 2004 Remarks. By its very nature, the "theater" of this war is not confined to Afghanistan. Applying the rationale in the *Weesels* case, The US Naval Base at Guantanamo Bay, Cuba, is within the theater of war, and is accordingly a lawful and appropriate location to hold military commissions.

b. Guantanamo Bay, Cuba, is a lawful and proper location to hold military commissions.

1. U.S. statutory authority for military commissions does not limit the location where military commissions can be held.

The Defense's citation to Professor Winthrop is inapposite. Again, this passage upon which the Defense relies was written prior to the creation of jurisdiction for military commissions that was granted in Title 10 of the U. S. Code. See 10. United States Code

(hereinafter "U.S.C.") §§ 821 and 836. This statutory authority for military commissions contains no limitation on the situs for military commissions. *See Id.*

2. The Naval Base at Guantanamo Bay, Cuba is a place under U.S control.

In *Rasul*, the U.S. Supreme Court, after reviewing the pertinent documents, found the following in recognizing U. S. control of Guantanamo Bay:

> The United States occupies the [Naval Base at Guantanamo Bay], which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War. Under the Agreement, 'the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the leased areas,' while 'the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.' In 1934, the parties entered into a treaty providing that, absent an agreement to modify or abrogate the lease, the lease would remain in effect 'so long as the United States of America shall not abandon the naval station of Guantanamo.'

Rasul v. Bush, __ U. S. __ (2004); 124 S. Ct. 2686 at 2690-91 (2004) (original brackets and ellipses omitted) (citing Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418; A supplemental lease agreement, executed in July 1903, obligating the United States to pay annual rent and maintain permanent fences around the base.; Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U. S.-Cuba, Arts. I-II, T. S. No. 426; and Treaty Defining Relations with Cuba, May 29, 1934, U. S.-Cuba, Art. III, 48 Stat 1683, T. S. No. 866.)

3. Mr. Altenburg's authority to convene military commissions at Guantanamo Bay flows from the President and the Secretary of Defense.

Congress has stated that "The Office of the Secretary of Defense is composed of ... [s]uch other offices and officials as may be established by law or the Secretary of Defense may establish or designate in the Office." *10 United States Code ("U. S. C.") §131(b)(8) See also 10 U. S. C. § 113 (d)*. The President's Military Order states that "As a military function and in light of the findings in section 1 [of this order]...the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.[1] *President's Military Order § 4 (b)*. As a result, on 12 March 2002, the Secretary of Defense issued Military Commission Order ("MCO") Number 1 stating that "In accordance with the President's Military Order, the Secretary of

[1] Subsection (a) states that persons subject to the President's Military Order shall, when tried, be tried by military commission for any and all offenses triable by military commission ... and be punished in accordance with the penalties provided under applicable law. *President's Military Order* §4(a).

Defense or a designee *("Appointing Authority")* may issue orders from time to time appointing one or more military commissions to try individuals subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials." MCO No. 1. § 2 (emphasis added). The Secretary of Defense then appointed Mr. John D. Altenburg, Jr., as the Appointing Authority for these military commissions in December 2003. The Secretary of Defense further solidified the position and office of the Appointing Authority within his Department by issuing Department of Defense Directive 5105.70, dated 10 February 2004. Thus, Mr. Altenburg's authority to convene these military commissions and direct that they take place at Guantanamo Bay, Cuba, is lawful and properly flows from the President, through the Secretary of Defense.

c. Conclusion.

The Defense's motion suggests that the Naval Base at Guantanamo Bay is not a place under military control and that Mr. Altenburg lacks the authority to convene these military commissions there. The Defense's position is incorrect. The Defense also hints that the proper location to hold this military commission is in Afghanistan, in or near the theater of operations; this position is also wrong. Were this Commission required to be held in Afghanistan, the proper remedy would be a change of venue, not dismissal as requested here. However, not only do the Geneva Conventions recommend the evacuation of detainees from Afghanistan for safety reasons, but there is no prohibition to holding the Commission in Guantanamo Bay, Cuba, under American or International law. Furthermore, a change of venue from Guantanamo Bay, to Afghanistan, where active operations are ongoing, would only serve to pose unwarranted risk to the Accused and all commission participants. In any event, the "War on Terror" is a global war without geographic boundaries such that a change of venue would not move the proceedings any closer to the "theater of war." Guantanamo Bay, Cuba is well within the global theater of this terror war and a proper place to hold this Commission. The Defense motion should be denied.

5. Oral Argument. The Prosecution requests the opportunity to respond to Defense arguments, if oral argument is granted.

6. Legal Authority.

a. The President's Military Order of 13 November 2001, concerning the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism.

b. Military Commission Order Number 1, dated 21 March 2002

c. 10 U.S.C §131(b)(8)
d. 10 U.S.C. § 113 (d)
e. 10 U.S.C. § 821

f. 10 U.S.C. § 836

g. Department of Defense Directive 5105.70, dated 10 February 2004

h. *Rasul v. Bush*, __ U. S. __ (2004); 124 S. Ct. 2686 at 2690-91 (2004)

i. *In Re Quirin*, 317 U.S. 1 (1942)

j. *In Re Yamashita*, 327 U.S. 1 (1946)
k. *Johnson v. Eisentrager*, 339 U.S. 763 (1950)

l. *The Case of S.S. Lotus (France v. Turkey)*, [1927] P.C.I.J. Ser. A, No.10 , available at <http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/>
m. *Geneva Convention (III) Relative to the Treatment of Prisoners of War of August 12, 1949, Article 19 et seq.*

n. *Geneva Convention (IV) Relative to the Protection of Civilian Persons in the Time of War, August 12, 1949, Article 45*

o. *Weesels v. McDonald*, 265 F. 754 at 763 - 64 (E.D.N.Y. 1920)

7. Witnesses/Evidence.

No witnesses are anticipated as this time.

a. Remarks as Delivered by Secretary of Defense Rumsfeld, October 4, 2004 available at <www.defenselink.mil/speeches/2004/sp20041004-secdef0801.html>

b. Appointing Authority Appointment of Military Commission Members No. 40001, dated 25 June 2004. (Trial Review Exhibit No.1.)

c. Memorandum for the Presiding Officer, dated 5 October 2004, Subject: Request for authority Submitted as "Interlocutory Question 1."

8. Additional Information. None.

/original signed/
[redacted]
Major, U. S. Army
Prosecutor

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

U.S. Department of Defense
Office of the Assistant Secretary of Defense (Public Affairs)

Speech

On the Web:
http://www.defenselink.mil/cgi-bin/dlprint.cgi?
http://www.defenselink.mil/speeches/2004/sp20041004-secdef0801.html
Media contact: +1 (703) 697-5131

Public contact:
http://www.dod.mil/faq/comment.html
or +1 (703) 428-0711

Council on Foreign Relations

Remarks as Delivered by Secretary of Defense Donald H. Rumsfeld, New York City, New York, Monday, October 4, 2004.

Thank you very much, Lou, ladies and gentlemen, Pete, David, Richard. It's good to be back here, and as before it's a very full crowd in a small room, tightly packed in. So I thank all of you for being here as well.

Now, last month we observed the third anniversary of the day that awakened our country to a new world, a day that extremists killed so many innocent men, women and children. Thursday will mark the third anniversary of the commencement of Operation Enduring Freedom, when America resolved to take the battle to the extremists, and we attacked the al Qaeda and Taliban in Afghanistan. Three years into the global war on terror, some understandably ask, "Is the world better off? Is our country safer?" They're fair questions, and today I want to address them by taking a look at the last three years at what the world looked like then, compared to what we find today, and what has been accomplished, and to be sure what remains to be done.

It's been said that the global struggle against extremism will be the task of a generation, a war that could go on for years -- I should say will likely go on for years, much like the Cold War, which of course lasted for decades. We look back at the Cold War now as a great victory for freedom, and indeed it was. But the 50-year span of battle between the free world and the Soviet empire was filled with division, uncertainty, self-doubt, setbacks and indeed failures along the way as well as successes. Territories were seized, wars were fought. There were many times when the enemy seemed to have the upper hand. Remember when euro-communism was in vogue, when the West considered withdrawing. I was ambassador to NATO in the early '70s and had to fly back to testify against an amendment in the Senate to withdraw all of our troops back in the '70s. And a lot of people from time to time over that long span considered withdrawing from the struggle exhausted. The strategies varied -- from co-existence to containment to detente to confrontation. Alliances wavered. In NATO there were disputes over diplomatic policy, weapons deployments, military strategies, the stance against the Soviets.

In the 1960s, France pulled out of the military organization of NATO and asked NATO out of France. In America, columnists and editorialists questioned and doubted U.S. policies. There were vocal showings of support for communist Russia, marches against military build-up, proposed freezes -- even instances where American citizens saw their own government challenges as warmongers and aggressors. Clearly many did not always take seriously the challenge posed by communism or the Soviet appetite for empire. But our country, under leaders of both political parties over a sustained period of time, and with our allies, again of mixed political parties over time, showed perseverance and resolve.

Year after year they fought for freedom. They dared to confront what many thought might be an unbeatable foe, and eventually the Soviet regime collapsed.

That lesson has to be relearned throughout the ages, it seems, the lesson that weakness can be provocative. It can entice people into doing things they otherwise would avoid, that a refusal to confront gathering dangers can increase rather than reduce future peril. That while there are risks to acting, to be sure, there also can be risks to not acting, and that victory ultimately comes to those who are purposeful and steadfast. It's with those lessons in mind that the president and a historic coalition of some 80 or 85 countries have sought to confront a new and perhaps even more dangerous enemy, an enemy without a country or a conscience, and an enemy who seeks no armistice or truce --

with us or with the civilized world.

From the outset of this conflict it was clear that our coalition had to go on the offense against terrorists. The goals included the need to pursue terrorists and their regimes that provide them aid and comfort, havens; to establish relationships with new allies and bolster international coalitions to prosecute the war; to improve considerably America's homeland defense; and to advance freedom and democracy, and to work with moderate leaders to undermine terrorism's ideological foundation.

In the last three years progress has been made in each of these areas. Four years ago al Qaeda was already a growing danger well before 9/11. Terrorists had been attacking American interests for years. The leader, Osama bin Laden, was safe and sheltered in Afghanistan. His network was dispersed around the world. Three years later, more than two thirds of al Qaeda's key members and associates have been detained, captured or killed. Osama bin Laden is on the run. Many of his key associates are behind bars or dead. His financial lines have been reduced, but not closed down. And I suspect he spends a good deal of every day avoiding being caught.

Once controlled by extremists, Afghanistan today is led by Hamid Karzai, who is helping to lead the world in support of moderates against the extremists. Soccer stadiums in Kabul, once used for public executions under the Taliban, today are used for soccer.

Three years ago in Iraq, Saddam Hussein and his sons brutally ruled a nation in the heart of the Middle East. Saddam was attempting regularly to kill American air crews and British air crews that were enforcing the northern and southern no-fly zones. He ignored more than a dozen U.N. Security Council resolutions, and was paying some $25,000 to the families of suicide bombers to encourage and reward them.

Three years later, Saddam Hussein is a prisoner awaiting trial by the Iraqis, his sons are dead, most of his senior associates are in custody. Some 100,000 trained and equipped Iraqis now provide security for their fellow citizens. Under the new prime minister, Mr. Allawi, and his team, Iraq is a new nation, a nation determined to fight terrorists and build a peaceful society.

And Libya has gone from being a nation that sponsored terrorists and secretly sought a nuclear capability to one that has renounced its illegal weapon programs, and now says that it's ready to reenter the community of civilized nations.

The rogue Pakistani scientist A.Q. Khan's nuclear proliferation network was providing lethal assistance to nations such as Libya and North Korea today has been exposed and dismantled, and is no longer in operation.

Pakistan three and a half or four years ago was close to the Taliban regime in Afghanistan. Today under President Musharraf, Pakistan is working effectively and closely with the global coalition against terrorism. Thanks to the coalition, terrorist safe havens have been reduced, major training camps have been eliminated. Their financial support structures have been attacked and disrupted, and intelligence and military cooperation with countries all around the world has dramatically increased.

NATO is now leading the International Security Assistance Force in Afghanistan, and is helping to train Iraqi security forces. This is an historic move for NATO. Not only is it out of the NATO treaty area, but it's out of Europe this activity on their part. The U.N. has taken a role in helping the free elections in both Afghanistan and Iraq, which are coming up very soon in Afghanistan later this week, and we anticipate in Iraq in January.

And over 60 countries have expressed support for an effort to halt the proliferation of weapons of mass destruction.

Here at home the demands of the global war on terror have accelerated the need to transform our armed forces, and to undertake an increasingly complex array of missions around the world. We've increased the size of the active duty army by about 30,000 troops, and we're reorganizing it into more agile, lethal and deployable brigades

with enough protection, fire power and logistics assets to sustain themselves. And we're increasing the number of these brigades from currently 33 to 43 or possibly 48 over the coming two and a half to three years. We're re-training and re-structuring the active and reserve components to achieve a more appropriate distribution of skill sets, to improve the total force responsiveness to crises, and so that individual Reservists and Guardsmen will mobilize less often for shorter periods of time, and with somewhat more predictability.

We're increasing the ability of the branches of the armed services to work seamlessly together. Joint operations are no longer an exception. They must become the rule. Communications and intelligence activities have been improved in the department. We've significantly expanded the capabilities and missions of the special operations forces and much more.

Since the global war on terror began, we have sought to undercut the extremists' efforts to attract new recruits. The world has been divided between regions where freedom and democracy have been nurtured and other areas where people have been abandoned to dictatorship or tyranny. Yet today the talk on the street in Baghdad and Kabul is about coming elections and self-government. In Afghanistan over 10 million people have registered to vote in this month's election. They estimate that some 41.4 percent of them are women. Iraq has an interim constitution that includes a bill of rights and an independent judiciary. There are municipal councils in almost every major city and most towns and villages and provincial councils for the provinces.

Iraqis now are among those allowed to say and write and watch and listen to whatever they want, whenever they want. And I sense that governments and people in the Middle East are taking note of that. Have there been setbacks in Afghanistan and Iraq? You bet. It is often on some bad days not a pretty picture at all. In fact, it can be dangerous and ugly. But the road from tyranny to freedom has never been peaceful or tranquil. On the contrary, it's always been difficult and dangerous. It was difficult for the United States. It was difficult with respect to Germany and Japan and Italy.

The enemy cannot defeat the coalition in a conventional war on any battlefield. But they don't seek conventional war. Their weapons are terror and chaos, and they want us to believe that the coalition cannot win; that the free Iraqi and Afghan governments cannot win; that the fight is not worth it; that the effort will be too hard and too ugly. They attack any sort of hope or progress in an effort to try to undermine morale. They are convinced that if they can win the battle of perception -- and they are very good at managing perceptions -- that we will lose our will and toss it in. I believe they are wrong. Failure in Afghanistan or Iraq would exact a terrible toll. It would embolden the extremists and make the world a far more dangerous place. These are difficult times.

From Baghdad, Kabul, Madrid, Bali, the Philippines, the call to arms has been sounded and the outcome of this struggle will determine the nature of our world for some decades to come. Our enemies will not be controlled, or contained or wished away. They do seek to enslave, and they have shown that they are willing to die to achieve their goals. The deaths of innocent people are not incidental in this war. Innocent people indeed are in fact their targets, and they will willingly kill hundreds and thousands more.

The world has gasped at the brutality of the extremists -- the hundreds of children in Russia who were killed or wounded on their first day of school; the commuters blown up in the trains in Madrid; innocents murdered in a night club in Bali; the cutting off of heads on television. And should these enemies acquire the world's more dangerous weapons, more lethal weapons -- and they are seeking them, to be sure -- the lives of hundreds of thousands could be at stake.

There have been costs, and there will be more. More than 1,000 U.S. soldiers, men and women, have died, killed or in accidents in Iraq, and some number more since the global war on terror began. Every loss is deeply felt. It is in freedom's defense that our country has had the benefit of these wonderful volunteers deployed, these the most courageous among us. And whenever freedom advances, America is safer.

And amid the losses, amid the ugliness, the car bombings, the task is to remain steadfast. Consider the kind of world we would have if the extremists were to prevail.

Today, as before, the hard work of history falls to our country, to our coalition, to our people. We've been entrusted with the gift of freedom. It's ours to safeguard. It's ours to defend. And we can do it, knowing that the great sweep of human history is for freedom, and that is on our side.

Thank you very much. (Applause.)

For a complete transcript, including questions and answers, please visit:
http://www.defenselink.mil/transcripts/2004/tr20041004-secdef1362.html

http://www.defenselink.mil/speeches/2004/sp20041004-secdef0801.html

UNITED STATES OF AMERICA	)	**DEFENSE NOTICE OF MOTION FOR**
v.	)	**Bill of Particulars**
DAVID M. HICKS	)	20 September 2004

1. The Defense in the case of the *United States v. David M. Hicks* moves to compel the government to provide a Bill of Particulars detailing the actions of Mr. Hicks which subject him to criminal liability under the referred charges. As presently constituted, the charges fail to provide specifics with respect to any offense triable by military commission – regarding any agreement under the Conspiracy charged in Count One, and/or the objects of such conspiracy; the conduct underlying the varying theories of liability set forth in Count Two (Attempted Murder by an Unprivileged Belligerent), and/or the intended victims of such alleged conduct, and/or the time frame in which such conduct allegedly occurred; and the conduct underlying the charge of Aiding the Enemy as alleged in Count Three.

2. Consequently, since the charges lack any specificity, they do not adequately inform Mr. Hicks of the nature of the charges against him with sufficient precision to enable the defense to prepare for trial, to discern with any certainty potential theories of Mr. Hicks' alleged criminal liability, and to protect against future re-prosecution for the same offense(s) (double jeopardy).

3. Mr. Hicks, through counsel, has previously requested such a Bill of Particulars. However, the government has summarily refused to provide any of the requested Particulars. Accordingly, this motion is required, and seeks the following Bill of Particulars:

I. With respect to Count One (Conspiracy), Mr. Hicks demands the following Particulars:

   a. identify any and all attacks, and/or planned attacks, upon civilians or civilian objects to which Mr. Hicks is alleged to have agreed;
   b. identify the person or persons whom Mr. Hicks allegedly agreed to murder, or
   c. identify where and when any and all alleged overt acts in furtherance of the alleged conspiracy occurred;
   d. set forth any and all facts that would establish Mr. Hicks's alleged status as an unprivileged belligerent;
   e. identify the specific property Mr. Hicks allegedly agreed to destroy;
   f. identify the specific acts of terrorism that Mr. Hicks agreed to commit, and/or in which he agreed to participate, and/or of which he had advance knowledge, and to the commission of which he agreed in advance;
   g. state the precise date and time for each of the occurrences referred to in the foregoing Particulars; and
   h. state the location for each occurrence referred to in the foregoing Particulars;

Review Exhibit 18A

i. identify how the alleged conduct of Mr. Hicks set forth in subparagraphs a-m of Count One contributed to any offense triable by military commission, and/or any conspiracy to commit any such offense(s).

II. With respect to Count Two (Attempted Murder by an Unprivileged Belligerent), Mr. Hicks demands the following Particulars:

a. identify the specific conduct by Mr. Hicks that would establish his liability for Count Two under each of the five (5) potential theories of liability set forth in Count Two;
b. identify the person or persons that Mr. Hicks allegedly attempted to murder;
c. identify the specific conduct in which Mr. Hicks allegedly engaged to cause the death of such person or persons, and/or attempted to do so;
d. identify the facts that establish that Mr. Hicks did not enjoy "combatant immunity;"
e. identify the precise date and time for each such instance of conduct referred to in the foregoing Particulars; and
f. identify the location of each such instance of conduct referred to in the foregoing Particulars.[1]

III. With respect to Count Three (Aiding the Enemy), Mr. Hicks demands the following Particulars:

a. identify the conduct Mr. Hicks performed that constitute, and/or would subject him to criminal liability for, "aiding the enemy;"
b. identify the precise date and time for each such instance of conduct referred to in the foregoing Particulars; and
c. identify the location of each such instance of conduct referred to in the foregoing particulars.

4. Relief Requested: The defense requests the Commission compel the government to provide the Bill of Particulars as set forth above regarding the three charged offenses. Such a Bill of Particulars is necessary to inform Mr. Hicks adequately of the nature of the charges against him, and the precise theories upon which the government seeks to rely with respect to those allegations, to permit him sufficient opportunity to prepare for trial, and to enable him to avoid subsequent prosecution for the same offense(s).

5. Oral Argument: The Defense requests oral argument on this motion.

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

[1] Count Two alleges that Mr. Hicks "did not enjoy combatant immunity" at the time he allegedly attempted to murder unknown person or persons. Whether or not Mr. Hicks "enjoy[ed] combatant immunity" is a question of law and fact for the Military Commission to decide. As such, the government has the burden of proving beyond a reasonable doubt that Mr. Hicks did not "enjoy combatant immunity." Count Two fails to specify why Mr. Hicks did not "enjoy combatant immunity," *i.e.*, any factual or legal basis for that conclusion. Again, without knowledge of the specific facts upon which the government intends to rely to attempt to prove that Mr. Hicks "did not enjoy combatant immunity," the defense cannot adequately prepare a defense to the charge.

Review Exhibit 18A

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UNITED STATES OF AMERICA	)	
	)	
	)	**PROSECUTION**
v.	)	**RESPONSE TO DEFENSE**
	)	**MOTION FOR A BILL OF**
	)	**PARTICULARS**
DAVID MATTHEW HICKS	)	
	)	4 October 2004
	)	

1. Timeliness. This response is being filed within the timeline established by the Presiding Officer.

2. Prosecution Position on Defense Motion. The Defense request should be denied in its entirety.

3. Facts

a. The President's Military Order of 13 November 2001, concerning the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, authorizes the Secretary of Defense or his designee to convene military commissions for the trial of certain individuals "for any and all offenses triable by military commission."

b. The President determined that the Accused is subject to this Military Order on 3 July 2003.

c. The Appointing Authority approved the charges in this case on 9 June 2004 and on 25 June 2004 referred the same to this military commission in accordance with commission orders and instructions.

d. From December 2003 until the present, the Defense has been provided over 2,400 unclassified and classified documents in discovery, including audio, video, and CD ROMs containing multiple items.

4. Discussion

a. Indictments Generally

(1) U.S. Courts.

American federal criminal practice is guided by the Federal Rules of Criminal Procedure. These rules state that "the indictment ... shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." *Fed. R Crim P. Rule 7 (c) (1).* Case law has explained that the charging indictment must inform defendants of the nature and cause of the accusation to permit preparation of a defense and must equip defendants with sufficient facts to

plead former jeopardy in a subsequent prosecution for the same offense. *United States v. Contris, 592 F.2d 893 (5th Cir. 1979). See also* 8 Moore's Federal Practice P 7.04 at 7-15 (rev. 2d ed. 1978).

> [The US Supreme Court] has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is to be measured. These criteria are, first, whether the indictment 'contains the elements of the offense intended to be charged,' and sufficiently apprises the defendant of what he must be prepared to meet,' and, secondly, 'in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

Russell v. United States, 369 U.S. 749 at 764 (quoting *Cochran and Sayre v. United States*, 157 U.S. 286, 290; *Rosen* v. *United States*, 161 U.S. 29, 34. *Hagner* v. *United States*, 285 U.S. 427, 431. See *Potter* v. *United States*, 155 U.S. 438, 445; *Bartell* v. *United States*, 227 U.S. 427, 431; *Berger* v. *United States*, 295 U.S. 78, 82; *United States* v. *Debrow*, 346 U.S. 374, 377-378).

(2) International Criminal Courts

The standard 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 pre-trial 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). At this hearing, the Prosecutor gives the accused person a copy of the charges against him, and informs that person and the pre-trial chamber of the evidence intends for use at trial.[1] This review or approval process of the charges is akin to our commission law process

[1] The ICC's Rome Statute also provides that the arrest warrant for a person to be summoned before the Court shall contain "[a] concise statement of the facts with are alleged to constitute the crime." See Rome Statute Article 58 §§ 2 (c), 3(c) and 7(d). This requirement essentially tracks the language and notice requirements found in US, ICTY, and ICTR law regarding indictments. *Supra.*

whereby the Prosecutor transmits the charges to the appointing authority for approval. *See* MCO No. 1 §§ 4(B)(2)(a) and 6(A)(1) *et. seq.*

b. Requests for Bills of Particular

In American law, "a bill of particulars is not a matter of right." 1 Charles Alan Wright, Federal Practice and Procedure § 129, at 648 (3d ed. 1999) (citations omitted). The decision to order a requested bill of particulars is a decision that rests within the sole discretion the court. See *United States v. Walsh*, 194 F.3d 37, 47 (2d Cir. 1999) (citing *United States v. Barnes*, 158 F.3d 662, 665-66 (2d Cir. 1998)). In deciding whether a bill of particulars is needed, the standard that the court must apply is "*whether the information sought has been provided elsewhere, such as in other items provided by discovery,* responses made to requests for particulars, prior proceedings, and the indictment itself." *United States v. Strawberry*, 892 F. Supp. 519, 526 (1995) (emphasis added) (citing *United States v. Feola*, 651 F. Supp. 1068,1133).

US courts have specifically noted that the proper scope and function of a bill of particulars is not to obtain disclosure of evidence or witnesses to be offered by the Government at trial, but to minimize surprise, to enable an accused to obtain such ultimate facts as are needed to prepare his defense, and to permit a defendant successfully to plead double jeopardy if he should be prosecuted later for the same offense. See *United States v. Salazar,* 485 F.2d 1272, 1278 (2d Cir. 1973), cert. denied, 415 U.S. 985, 94 S. Ct. 1579, 39 L. Ed. 2d 882 (1974). A bill of particulars should be required only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused. See *United States v. Ramirez*, 602 F. Supp. 783 (S.D.N.Y. 1985). Thus, courts have refused to treat a bill of particulars as a general investigative tool for the defense, or as a device to compel disclosure of the Government's evidence or its legal theory prior to trial. See *United States v. Gottlieb*, 493 F.2d 987, 994 (2d Cir. 1974).

Specifically addressing requests for a bill of particulars in conspiracy cases, U.S. Courts have opined that a motion for bill of particulars as to precisely when, where, and with whom a conspiracy agreement was formed, detailed facts, and precise parts which defendant and his alleged coconspirators played in forming and executing the conspiracy should be denied because the information sought by defendant was evidentiary in nature and that it is not function of bill of particulars to provide detailed disclosure of the government's evidence in advance of trial. *Wong Tai v. United States*, 273 U.S. 77, 82, 47 S. Ct. 300, 71 L. Ed. 545 (1927); *Overton v. United States*, 403 F.2d 444, 446 (5th Cir. 1968); *United States v. Rosenfeld*, 264 F. Supp. 760, 762 (N.D.Ill.1967); *United States v. Trownsell*, 117 F. Supp. 24, 26 (N.D.Ill.1953); *United States v. Bozza*, 234 F. Supp. 15, 16-17 (E.D.N.Y.1964); *United States v. Gilboy*, 160 F. Supp. 442, 456 (M.D.Pa.1958). *United States v Cullen* 305 F Supp 695, (E.D. Wis. 1969).

International courts follow an identical analysis when reviewing challenges to indictments where defendants request more particulars about the charges against them. For example, the ICTY has opined that the primary purpose of the indictment is to notify the accused the nature of the charges, "in a summary manner," and present the accused with a factual basis of the charges. *See e.g. Prosecutor v. Blaskik,* IT-95-14, *Decision on the Accused's form of the Indictment Motion,* 4 Apr. 1997. But, the Tribunal has also endorsed the notion of a motion for particulars when necessary. *See Tadic at* 8. In the *Tadic* case, *inter alia.,* the defense argued that

several paragraphs of the indictment were vague because they only listed approximate dates thereby depriving the accused of a clear indication of the charges against him. *Id.* The Trial Chamber found that the approximate dates listed fulfilled the requirement of the Rules. *Id.* In arriving at its decision, the *Tadic* Trial Chamber stated that requests for particulars must "specify the counts in question, the respect in which it is said that the *material already in the possession of the Defence is inadequate*, and the particulars necessary to remedy that inadequacy." *Id.* (emphasis added). ICTY Trial Chambers have often utilized the analysis of this *Tadic* decision when addressing the need for further particulars. *See eg. Prosecutor v. Dukic,* IT-96-20-T *Decision on Preliminary Motions of the Accused,* 26 Apr. 1996; *Delalic et. al,* IT-96-21-T, *Decision on the Accused Mucic's Motion for Particulars,* 26 Jun. 1996.

As in American law, the ICTY is also of the opinion that a "request for particulars is not, and may not be used as, a device to obtain discovery of evidentiary matters" and that requests for particulars "is not a substitute for pre-trial discovery." *Delalic et. al,* 26 Jun. 1996 at ¶ 9. It is the process of providing discovery that assures the defense of protection against prejudicial surprise at trial and gives it adequate information to properly prepare its defense at trial. *Id.*

In the case at bar, not only has the charge sheet been transmitted to the Appointing Authority, and been reviewed for legal sufficiency by his legal advisor, but it is also a concise statement of the charges and the underlying facts for which the accused is charged in accordance with Commission Law. *See e.g.* MCO No.1 and MCI No. 2. Commission Law does not require a more definite charge sheet, but clearly, as it has been drafted, approved and referred to this Commission, the charge sheet meets and exceeds the standards followed in American Law (the rules of criminal procedure and federal case law) and in International Law, specifically the ICTY, ICTR, and the ICC discussed above.

From December 2003 until the present, the Defense has been provided with over 2,400 documents. Some of the documents provided are digital media, including video, audio, and CD ROMs containing multiple pages of documents. As such, there is no surprise awaiting the defense as to the dates, locations, and persons related to the accused regarding the crimes in which he is charged. The Prosecution has given the Defense all statements which the Accused has made, to include his written, sworn confession. These statements, along with all the other evidence, provides the defense with more than adequate information necessary to prepare a Defense clear of double jeopardy type concerns or surprise at trial. The Defense's request for a bill of particulars is unwarranted and therefore should be denied.

5. Oral Argument. The Prosecution requests the opportunity to respond to Defense arguments, if oral argument is granted.

6. Legal Authority.

Commission Law

MCO No. 1

MCI No. 2.

US Law

Fed. R Crim P, Rule 7 (c) (1).

United States v. Contris, 592 F.2d 893 (5th Cir. 1979

Russell v. United States, 369 U.S. 749 at 764

United States v. Walsh, 194 F.3d 37, 47 (2d Cir. 1999)

United States v. Strawberry, 892 F. Supp. 519, 526 (1995)

United States v. Salazar, 485 F.2d 1272, 1278 (2d Cir. 1973)

United States v. Ramirez, 602 F. Supp. 783 (S.D.N.Y. 1985)

United States v. Gottlieb, 493 F.2d 987, 994 (2d Cir. 1974)

Wong Tai v. United States, 273 U.S. 77, 82, 47 S. Ct. 300, 71 L. Ed. 545 (1927);

Overton v. United States, 403 F.2d 444, 446 (5th Cir. 1968)

United States v. Rosenfeld, 264 F. Supp. 760, 762 (N.D.Ill.1967)

United States v. Townsell, 117 F. Supp. 24, 26 (N.D.Ill.1953)

United States v. Bozza, 234 F. Supp. 15, 16-17 (E.D.N.Y.1964)

United States v. Gilboy, 160 F. Supp. 442, 456 (M.D.Pa.1958)

United States v Cullen 305 F Supp 695, (1969, ED Wis.)

ICTY/ICTR Law

ICTR Article 17(4) < http://www.un.org/icty/legaldoc/index.htm>

ICTY Article 18(4). < http://www.un.org/icty/legaldoc/index.htm>

ICTY Article 47(c) <http://www.ictr.org/ENGLISH/basicdocs/statute.html>

Prosecutor v Tadic, IT-94-1-PT, *Decision on Defence Motion on Form of Indictment*, 14 Nov. 1995. <http://www.un.org/icty/tadic/trialc2/judgement/ >

Prosecutor v. Delalic et al, IT-96-21-A, *Decision on Defence Motion on Form of Indictment,* 15 Nov. 1996 <http://www.un.org/icty/celebici/trialc2/decision-e/61115FI2.htm>

Delalic et. al, IT-96-21-T, *Indictment Decision, 2 Oct. 1996, p. 11*
< http://www.un.org/icty/celebici/trialc2/decision-e/61002FI2.htm>

Prosecutor v. Blaskik, IT-95-14, *Decision on the Accused's form of the Indictment Motion,* 4 Apr. 1997. < http://www.un.org/icty/blaskic/trialc1/decisions-e/70404DC113291.htm>

P*rosecutor v. Dukic,* IT-96-20-T *Decision on Preliminary Motions of the Accused,* 26 Apr. 1996 <http://www.un.org/icty/transe20/960426MH.htm>

Delalic et. al, IT-96-21-T, *Decision on the Accused Mucic's Motion for Particulars,* 26 Jun. 1996. < http://www.un.org/icty/celebici/trialc2/decision-e/60626MS2.htm>

ICC Law

International Criminal Court's Rome Statute 56 – 61
<http://www.un.org/law/icc/statute/romefra.htm>

Treatises

8 Moore's Federal Practice P 7.04 at 7-15 (rev. 2d ed. 1978).

1 Charles Alan Wright, Federal Practice and Procedure § 129, at 648 (3d ed. 1999)

7. Witnesses/Evidence. The Prosecution does not foresee the need to present any witnesses or further evidence in support of this motion.

8. Additional Information. None.

/original signed/
[redacted]
Major, U. S. Army
Prosecutor

UNITED STATES OF AMERICA v. DAVID M. HICKS	)	**DEFENSE REPLY TO GOVERNMENT RESPONSE TO MOTION FOR A BILL OF PARTICULARS** **31 October 2004**

The Defense in the case of the *United States v. David M. Hicks* requests the court direct the government to provide the defense with a bill of particulars sufficient for the defense to prepare a defense, and in reply to the government's response to the defense motion states as follows:

1. The government's response to the defense motion for a bill of particulars boils down to the following two assertions:

a. The charge sheet is sufficient; and

b. All the details necessary have been provided in discovery already given to defense.

2. In making these assertions the government relies on case law arising out of prosecutions of crimes set forth in various criminal codes, i.e. the UCMJ, and/or the United States Criminal Code. This reliance is misplaced. Case law makes it clear the government must be very specific when it levels "terrorist" charges at individuals as it has done to Mr. Hicks in this case.

3. The case of *U.S. v. Bin Laden*, 92 F.Supp.2d 225 (S.D.N.Y. 200) the court analyzed the requirements for charges in terrorist cases. The court stated:

> Once one focuses, however, on the details of a particular case, it becomes apparent that the foregoing, oft-repeated generalities [regarding when bills of particulars should be granted] provide little guidance. The line that distinguishes one defendant's request to be apprised of necessary specifics about the charges against him from another's request for evidentiary detail is one that is quite difficult to draw. It is no solution to rely solely on the quantity of information disclosed by the government; sometimes, the large volume of material disclosed is precisely what necessitates a bill of particulars.
>
> Moreover, to whatever limited degree prior decisions are helpful as a general matter when resolving demands for a bill of particulars, they are particularly unilluminating in this case. The geographical scope of the conspiracies charged in the Indictment is unusually vast. The Indictment alleges overt acts in furtherance of those conspiracies that occurred in Afghanistan, Pakistan, the Sudan, Somalia, Kenya, Tanzania, Malaysia, the Philippines, Yemen, the United Kingdom, Canada, California, Florida, Texas, and New York.

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> The breadth and duration of the criminal conduct with which the alleged conspirators are accused is similarly widespread. The Indictment alleges activity, occurring over a period of nearly ten years, that ranges from detonating explosives, to training Somali rebels, to transporting weapons, to establishing businesses, to lecturing on Islamic law, to writing letters, and to traveling, as overt acts in furtherance of the charged conspiracies.
>
> We are hesitant, therefore, to place any significant weight on the conclusions reached in earlier cases in which courts were presented with an indictment alleging a more specific type of criminal conduct, occurring over a shorter period of time, in a more circumscribed geographical area. Although we express no view at this time as to whether the Indictment comports with the requirements of due process, we recognize that it does impose a seemingly unprecedented and unique burden on the Defendants and their counsel in trying to answer the charges that have been made against them.[1]

4. The above quote from *Bin Laden* is squarely on point with this case. The charge sheet includes allegations covering a time period beginning in 1989. It alleges actions by many individuals other than the accused. It alleges actions by other people that may or may not be criminal, and of which the accused may or may not have had knowledge. It fails to provide any specific times, dates, places, victims, or other information sufficient to allow counsel or Mr. Hicks to prepare a defense. Indeed, it is impossible to tell from the charge sheet exactly in what way Mr. Hicks's actions were criminal.

5. To make matters worse, the charges against Mr. Hicks have never before been leveled by the government in a military tribunal. In this unique context, the government should at the very least be compelled to provide the requested Particulars in this case of first impression.

6. Thus, counsel and Mr. Hicks cannot prepare a defense in this case without having more specifics regarding Mr. Hicks's alleged criminal conduct. The government's charge sheet is insufficient, and the commission should order the government to produce a bill of particulars, just as the military commission did in *In re Yamashita*.[2]

By: _____

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

Joshua L. Dratel, Esq.
Law Offices of Joshua L. Dratel, P.C.

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[1] *U.S. v. Bin Laden*, 92 F.Supp. 2d 225, 233-235 (S.D.N.Y. 2000)(citations and footnotes omitted).

[2] *See In re Yamashita*, 327 U.S. 1, 12 (1946).

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14 Wall Street
28th Floor
New York, New York 10005

Jeffery D. Lippert
Major, U.S. Army
Detailed Defense Counsel

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UNITED STATES OF AMERICA	)	
	)	**DEFENSE MOTION TO DISMISS FOR DENIAL OF THE RIGHT TO A SPEEDY TRIAL**
v.	)	
	)	**4 October 2004**
DAVID M. HICKS	)	

The defense in the case of the *United States v. David M. Hicks* moves for dismissal of all charges on the ground that Mr. Hicks has been irremediably denied his right to a speedy trial, and states in support of this motion:

1. **Synopsis**: Mr. Hicks has been denied the right to a speedy trial--a right protected under military law, civilian law under all domestic jurisdictions, and under international law. The only appropriate and sufficient remedy for such a violation is dismissal of all charges against Mr. Hicks.

2. **Facts**: Mr. Hicks was detained in Afghanistan in or around November 2001. The armed conflict in Afghanistan concluded in December 2001. On 3 July 2003, Mr. Hicks was designated as eligible for trial by military commission. Mr. Hicks was transferred to pre-commission confinement on 9 July 2003. Military counsel arrived at the Pentagon to be assigned to represent Mr. Hicks during the week of 14 July 2003. At that point, the Office of the General Counsel for the Department of Defense prevented the detailing of defense counsel. The Office of General Counsel then began negotiations with the Australian Government with regard to the military commission system that was slated to try Mr. Hicks. Agreements between the U.S. and Australian governments (without participation of or notice to Mr. Hicks or any representatives of his) were announced on 25 November 2003. Mr. Hicks was finally assigned military counsel on 28 November 2003. Charges were instituted against Mr. Hicks on 10 June 2004, and he first appeared before the military commission 25 August 2004.

3. **Discussion**:

A: The Right to a Speedy Trial

In many material respects, the government has been demonstrably dilatory in its implementation of the President's Military Order of 13 November 2001. The glacial establishment of the military commission and the prolonged pretrial detention of detainees at Guantanamo Bay Naval Base have been roundly and nearly unanimously criticized by the international community. Prominent U.S. senators have also publicly criticized the delay in the establishment of the commission process.[1] In a letter to the Secretary of Defense in December

[1] One year after detainees had been transferred to Guantanamo Bay Naval Base, the basic procedures of the military commission still had not been established. For example, the Instruction identifying the crimes triable by military commission, and their elements, were not promulgated until 30 April 2003. *See* Military Commission Instruction

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2003, Senator McCain, joined by Senators Graham and Cantwell, expressed their concerns regarding the process' failure to move forward.[2] Senator McCain was quoted saying: "The bureaucratic process has been unnecessarily slow . . . These cases have to be disposed of one way or another. After keeping someone for two years, a decision should be made."[3] The Government was clearly on notice from multiple sources that implementation of the commission process was not adequately "speedy."

The detention of individuals like Mr. Hicks at Guantanamo Bay Naval Base throughout the commission's extended gestation process has contravened Article 10 of the Uniform Code of Military Justice (UCMJ). The UCMJ speedy trial requirement reflects an important human and civil right that is recognized as an essential element of a fair trial in civilian and military jurisdictions throughout the world, and is also recognized in important instruments in international law.[4] Article 10 provides that any arrest or confinement of an accused must be terminated unless charges are instituted promptly and made known to the accused, and speedy trial afforded for a factual determination of such charges:

> When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and try him or dismiss the charges and release him.

The UCMJ speedy trial requirement is more stringent than that expressed in the Sixth Amendment of the United States Constitution. For example, in *United States v. Calloway*, the court found that Article 10 had been violated in part because the accused had spent twenty days in pretrial confinement before the government took any action on his case.[5] The Court in *United States v. Hatfield*,[6] affirmed the Military Judge's ruling that the passage of 106 days before trial, 48 days of which were deemed inordinate delay, constituted a violation of Article 10. In

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No. 2. The first of the Military Instructions was published on 30 April 2003, and eight others were published over the following eight months.

[2] Available at <http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=1200>.

[3] *See* San Juan, "Guantanamo Trials Coming Too Slowly, Says McCain after Visit," USA Today, 1 December 2003. Available at <http://www.usatoday.com/news/washington/2003-12-11-mccain-guantanamo_x.htm>.

[4] *See, e.g.*, the Sixth Amendment of the United States Constitution. For international protections of the right to a speedy trial, see Articles 9 and 14 of the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Available at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>. Ratified by the US on 8 June 1992. And see Article 75 of *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). Available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>. These international human rights to a speedy trial are discussed in Defense Motion for Appropriate Relief: Imposition of Improper Pre-Trial Detention under International Law.

[5] 47 M.J. 782, 784 (N.M.C.C.A. 1998).

[6] 44 M.J. 22 (C.A.A.F. 1996).

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addition, the Navy and Marine Corps require that the assignment of defense counsel to persons confined be accomplished within ten days.[7]

B: Delays Assigning Military Counsel to Mr. Hicks

Mr. Hicks was designated 3 July 2003, as eligible for prosecution by military commission. He was transferred to pre-commission solitary confinement six days later, 9 July 2003. Yet even at that stage, the government had not completed the formulation of the commission system. In addition, despite Mr. Hicks' request for an attorney and the availability of military defense counsel to be detailed, the government inexplicably and inexcusably ignored those requests, and detailed counsel's readiness, and failed to provide counsel until 28 November 2003, when military defense counsel was assigned.

Continuing the snail's pace of developing the commission system, Mr. John D. Altenburg was not officially designated as Appointing Authority until 17 March 2004.[8] Nor was Mr. Hicks charged until 10 June 2004, almost a year after he was designated as eligible for trial by military commission. Those charges were referred to this military commission on 25 June 2004.

The five-month delay in detailing military defense counsel hardly meets Article 10's requirement that "immediate steps" be taken towards trial. In addition, the delay can be attributed only to the desire of the government to gain a "tactical advantage" over Mr. Hicks by denying him access to counsel, enabling the government to gain further illegitimate fruits of continued uncounseled interrogation, as well as the ability to begin preparing a defense.

1. Negotiations between the United States and Australia—During the week of 14 July 2003, detailed military defense counsel was flown from Hawaii to the Pentagon to be assigned to represent Mr. Hicks. On the day of planned detailing, the Office of the General Counsel for the Department of Defense interceded to stop the detailing of counsel to Mr. Hicks. Concurrently, the Office of the General Counsel was preparing to meet with an Australian delegation "to discuss and review potential options for the disposition of Australian detainee cases."[9] Lack of counsel prevented Mr. Hicks from participating at all in these discussions. While negotiations took place between the Australian and United States Governments in relation to Mr. Hicks, Mr. Hicks sat in solitary confinement, incommunicado, without counsel. A substantial opportunity was lost to influence the Australian Government in its agreements over the commission process and the fate of Mr. Hicks. These discussions concluded on 25 November 2003,[10] and three days later counsel was detailed to Mr. Hicks.

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[7] *See* Commander, Naval Legal Service Command Instruction, 5800(1)(E).

[8] The designation was brought about by Military Commission Order No. 5. It revoked Military Commission Order No. 2, which had designated the Deputy Secretary of Defense, Dr. Paul D. Wolfowitz, as Appointing Authority on 21 June 2003, then designated Mr. Altenburg.

[9] DOD News Release, "DOD Statement on Australian Detainee Meetings." Available at <http://www.defenselink.mil/releases/2003/nr20030723-0220.html>.

[10] See DOD News Release, "U.S. and Australia Announce Agreements on Guantanamo Detainees." Available at <http://www.defenselink.mil/releases/2003/nr20031125-0702.html>.

2. Interrogations without Presence of Counsel—During the course of these delays, Mr. Hicks was interrogated without the presence of counsel. Prior to his designation for prosecution, Mr. Hicks, after asking for counsel, was told that he did not have the right to counsel.[11] While held incommunicado between June and December 2003, Mr. Hicks was unable to contact counsel nor represent himself. Both his Australian civilian counsel, Mr. Stephen Kenny, and his U.S. civilian lawyers (who represented Mr. Hicks in a federal habeas corpus action beginning in February 2002) were refused access to him by the U.S. Government.[12] Throughout this period (and even after he had been designated for prosecution), interrogations continued; interrogations that would not have occurred had military counsel been assigned, or civilian counsel allowed access.

C: Delays Assigning Counsel Amount to Denial of Right to a Speedy Trial

The case of *Baker v Wingo*[13] identified three ways in which the denial of the right to a speedy trial could prejudice a defendant:

i. through oppressive pretrial incarceration;
ii. through causing anxiety and concern to the accused; and
iii. through allowing the possibility that the defense will be impaired.

The delays in providing Mr. Hicks with either detailed military counsel, or access to civilian counsel, has prejudiced Mr. Hicks in all three of the above ways. Mr. Hicks has been subjected to pretrial solitary detention for over two and a half years. Prolonged incommunicado and solitary detention, and the uncertainty as to his fate, has caused Mr. Hicks extreme anxiety and concern. The denial of access to counsel has also had a serious impact on Mr. Hicks' ability to prepare his defense while evidence was still attainable.

Over the period of delays, memories faded and potential witnesses dispersed across the world. In addition, once military counsel was assigned and granted access to Mr. Hicks, the government still did not grant access to other detainees at Guantanamo for defense interviews.[14] This type of prejudice has been described by courts as "the most serious":

> If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.[15]

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[11] See Defense Motion for Access to Counsel in *Rasul et al v. Bush et al*, in the United States District Court, District of Columbia (4 March 2002).

[12] *Id.* See also Letter from Stephen Kenny, addressed to President George W. Bush (8 February 2002).

[13] 407 U.S. 514, 532 (1972).

[14] Additionally, the government has released well over one hundred detainees from Guantanamo, without defense being granted access to them prior to their release. See DOD News Release, "Transfer of French Detainees Complete." Available at <http://www.defenselink.mil/releases/2004/nr20040727-1062.html>.

[15] Baker v Wingo, 407 U.S. 514, 532 (1972).

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There has been a clear violation of the right to a speedy trial in the case of Mr. Hicks. Delays with respect to each step in the prosecution process, and more specifically the assignment of counsel, have been unacceptably lengthy. The combination of such delays with solitary and incommunicado detention, and interrogations, has allowed such delays to have a considerable impact on the ability of Mr. Hicks to prepare a defense. The military appellate courts have found that the only remedy for a violation of Article 10 is dismissal of charges with prejudice.[16] Such a remedy is particularly appropriate in the case of Mr. Hicks. The defense therefore urges this commission to refuse to condone the denial of a speedy trial to Mr. Hicks caused by interference by the government in the assignment of counsel, and dismiss all charges against him.

4. **Evidence:**

A: The defense reserves the right to call witnesses after examining the Government reply to this motion.

B: Attachments

1. "Senators Urge Decision on Disposition of Guantanamo Detainees," 12 December 2003.
2. "Guantanamo Trials Coming Too Slowly, Says McCain after Visit," USA Today, 1 December 2003.
3. *International Covenant on Civil and Political Rights*, Articles 9 and 14.
4. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, Article 75.
5. Commander, Naval Legal Service Command Instruction, 5800(1)(E).
6. DOD News Release, "DOD Statement on Australian Detainee Meetings."
7. DOD News Release, "U.S. and Australia Announce Agreements on Guantanamo Detainees."
8. Defense Motion for Access to Counsel in *Rasul et al v. Bush et al*, in the United States District Court, District of Columbia (4 March 2002).
9. Letter from Stephen Kenny, addressed to President George W. Bush (8 February 2002).
10. DOD News Release, "Transfer of French Detainees Complete."

5. **Relief Requested**: The defense requests that all charges be dismissed.

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[16] United States v. Kossman, 38 M.J. 258, 262 (C.M.A. 1993).

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Page 5 of 6

6. The defense requests oral argument on this motion.

By: _____
for M.D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel

JEFFERY D. LIPPERT
Major, U.S. Army
Detailed Defense Counsel

JOSHUA L. DRATEL
Joshua L. Dratel, P.C.
14 Wall Street
28th Floor
New York, New York 10005
(212) 732-0707
Civilian Defense Counsel for David M. Hicks

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Page 6 of 6

Office of the High Commissioner for Human Rights

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

***entry into force* 23 March 1976, in accordance with Article 49**

Attachment 1 to RE 19-A

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Article 9 ▶▶ ***General comment on its implementation***

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 14 ⏩ ***General comment on its implementation***

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and 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;

(e) 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;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and

Attachment 1 to RE PA

when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

[redacted]

fulltext

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Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

Attachment 2 to RE 19A

Page 1 of 3

Art 75. Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
(a) violence to the life, health, or physical or mental well-being of persons, in particular:
(i) murder;
(ii) torture of all kinds, whether physical or mental;
(iii) corporal punishment; and
(iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
(c) the taking of hostages;
(d) collective punishments; and
(e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with an offence is presumed innocent until proved guilty according to law;
(e) anyone charged with an offence shall have the right to be tried in his presence;
(f) no one shall be compelled to testify against himself or to confess guilt;
(g) anyone charged with an offence shall have the right to examine, or have examined,

Attachment 2 to RE PA

the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
(j) a convicted person shall be advised on conviction or his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:
(a) persons who are accused or such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
(b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1

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DEPARTMENT OF THE NAVY
NAVAL LEGAL SERVICE COMMAND
WASHINGTON NAVY YARD
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON DC 20374-5066

IN REPLY REFER TO:

COMNAVLEGSVCCOMINST 5800.1E
JAG 63
19 Feb 02

COMNAVLEGSVCCOM INSTRUCTION 5800.1E

From: Commander, Naval Legal Service Command

Subj: NAVAL LEGAL SERVICE COMMAND (NLSC) MANUAL

1. Purpose. To issue policy for the operation of Naval Legal Service Offices, Trial Service Offices, the Naval Justice School, and their respective detachments, branch offices, and satellite offices.

2. Cancellation. COMNAVLEGSVCCOMINST 5800.1D.

3. Background. This publication provides guidance and Naval Legal Service Command (NLSC) policy for the operation and administration of Naval Legal Service Offices (NLSOs), Trial Service Offices (TSOs), the Naval Justice School (NJS), and their respective detachments, branch offices, and satellite offices. This instruction confers no individual rights for which there is an enforceable remedy.

4. Discussion. There have been a number of significant changes in Navy and NLSC policy since COMNAVLEGSVCCOMINST 5800.1D was issued. These include changes in reporting requirements, training, the Naval Reserve Law Program, courts-martial costs, legal assistance, and security matters. Additionally, this instruction now applies to the NJS except for those sections specifically dealing with departments and missions of NLSOs and TSOs. It should be considered a complete revision of the Naval Legal service Office and Trial Service Office Manual and read in its entirety.

5. Action. Commanding officers and officers-in-charge shall comply with this instruction as operational demands, organizational needs, and local conditions permit. As needed to address local circumstances, commanding officers and officers-in-charge may promulgate internal local command policies, operating procedures, regulations, and organizational structures consistent with this instruction by formal written instructions.

Attachment 3 to RE RAA

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g. See also paragraphs 1101 - 1103, and 1401 for additional policy regarding assignment of counsel.

1002 TRIAL DATE

Military judges are primarily responsible for docketing and trying courts-martial. TSOs are primarily responsible for expeditious case processing, but all parties have a responsibility to ensure the accused is afforded a speedy trial. TSOs shall coordinate with the convening authority for the timely attendance of the accused, members, bailiff, and witnesses.

1003 PREPARING AND FORWARDING GENERAL AND SPECIAL COURTS-MARTIAL RECORDS OF TRIAL

TSOs are responsible for preparing records of trial. See paragraph 1403. Defense counsels are authorized to examine records before authentication by the military judge, unless such examination will cause unnecessary delay. Records of trial shall be authenticated and forwarded to the convening authority promptly. Trial and defense counsel shall accord high priority to examining records of trial.

1004 RESPONSIBILITIES FOR THE CUSTODY OF DETAINEES AND PRISONERS

Under SECNAVINST 1640.9[series] (Subj: Department of the Navy Corrections Manual), brig personnel are generally accountable for prisoners and detainees during appointments outside the brig. However, there will be occasions during visits to NLSOs/TSOs when prisoners or detainees will be out of the sight and physical custody of brig personnel, such as when they are being counseled in private by defense counsel. On these occasions, NLSO/TSO personnel must ensure brig personnel are at all times in a position to exert positive control over detainees and prisoners. NLSO/TSO COs will prescribe procedures assigning responsibility and accountability for liaison with brigs, shore patrol, and other activities, concerning the transport, custody, and delivery of prisoners and detainees.

Attachment 3 to RE AA

Page 2 of 2

Pursuant to Senate policy this homepage may not be updated for the 60 day period immediately before the date of a primary or general election.

News Center

Press Releases

SENATORS URGE DECISION ON DISPOSITION OF GUANTANAMO DETAINEES

For Immediate Release
Friday, Dec 12, 2003

Washington, D.C. - U.S. Senators John McCain (R-AZ), Lindsey Graham (R-SC), and Maria Cantwell (D-WA), today se following letter to Secretary of Defense Donald Rumsfeld asking the Secretary to provide specific information abou disposition of detainees being held at U.S. Naval Base Guantanamo Bay.

The Honorable Donald H. Rumsfeld
Secretary
Department of Defense
1000 Defense Pentagon
Washington, D.C. 20301-1000

Dear Mr. Secretary:

As you know, we recently visited Guantanamo Bay, Cuba, to get a first-hand look at the situation regarding the confinem detainees from the conflict in Afghanistan.

We commend you on the outstanding efforts taken thus far to treat all individuals detained at Guantanamo humanely ar appropriate and in accordance with military necessity, in a manner consistent with the principles of the Third World G Convention of 1949. We are particularly impressed by the professionalism of our military personnel.

The treatment of the detainees is not an issue. However, a serious concern arises over the disposition of the detainee considerable number of whom have been held for two years. Given this concern, we respectfully ask that you provide e information on two critical issues. First, we ask that you advise us as to when you will make a determination on the disposition of the detainees' status. Second, we request that you state specifically when you will begin the process pursu the Order of the Military Commissions that the President signed in November 2001, and how it will work in practice.

Mr. Secretary, our recent visit to see the detainee situation for ourselves provided an enormously useful opportur understand the essential work that has been done there, which we have supported. Yet, we firmly believe it is now time to a decision on how the United States will move forward regarding the detainees, and to take that important next step. A s process must be established in the very near term either to formally treat and process the detainees as war criminals return them to their countries for appropriate judicial action.

We look forward to your reply, and thank you in advance for your prompt attention to this important issue.
Sincerely,

John McCain Lindsey Graham Maria Cantwell
U.S. Senator U.S. Senator U.S. Senator
JM/cjp
~ end ~

[back to press releases]

Attachment 4 to RE 111

Guantanamo trials coming too slowly, says McCain after visit

SAN JUAN, Puerto Rico (AP) — Sen. John McCain said Thursday he is concerned about the failure to move ahead with prisoners' trials at Guantanamo Bay, Cuba, where after nearly two years the military has allowed just one detainee to meet his lawyers.

Speaking by phone from Washington a day after touring Guantanamo, McCain said "bureaucratic inertia and fear of making a wrong decision" led to delays in the cases of some 660 people held on suspicion of links to Afghanistan's ousted Taliban government or the al-Qaeda terror network.

"I think the conditions are adequate, in some cases more than adequate. But my concern is the disposition of the prisoners," McCain told The Associated Press.

"The bureaucratic process has been unnecessarily slow," said McCain, who was a prisoner of war for nearly six years in Vietnam. "These cases have to be disposed of one way or another. After keeping someone two years, a decision should be made."

The Arizona Republican's comments came as an Australian prisoner, David Hicks, was expected to become the first detainee at the base to be allowed to meet with defense lawyers.

His Australian lawyer, Stephen Kenny, said this week that he planned a five-day visit starting Thursday, along with Hicks' military-appointed attorney, Marine Corps Maj. Michael Mori.

Hicks, 28, is one of six prisoners designated by President Bush as possible candidates for trial by military tribunals.

He was allegedly fighting with the Taliban when captured in Afghanistan, and also allegedly threatened to kill an American at Guantanamo. He still faces no formal charges.

Kenny said in Washington on Monday that he hopes to discuss with Hicks "what has happened, what his rights are, what may happen in the future, and to advise him of what his options are."

U.S. officials assured Australia that Hicks would not face the death penalty or have his conversations with lawyers monitored.

McCain said he will be "communicating with the Pentagon my concerns about the failure to move the process forward."

"I plan to urge that we have hearings," McCain said. He said some detainees are surely "killers" and that "there are others who should clearly be released."

McCain, a member of the Senate Armed Services Committee, visited along with Sen. Lindsey Graham, R-S.C., and Sen. Maria Cantwell, D-Wash.

Attachment 5 to RE 19-A

McCain noted the Bush administration is under pressure from other countries, such as Britain and Australia, to deal with the cases of the detainees from 44 nations.

Sweden, which has one citizen at Guantanamo, announced Wednesday it will seek to host an international seminar in the coming months on whether the United States is violating international law by keeping prisoners without charge.

U.S. officials classify the captives as unlawful combatants and say important intelligence is still being gleaned in interrogations.

Kenny says he believes a U.S. Supreme Court decision to hear a case involving Hicks and other British and Kuwaiti detainees may have prompted the U.S. government to allow Hicks to see lawyers. The court agreed last month to consider whether foreigners held at Guantanamo should have access to American courts.

Find this article at:
http://www.usatoday.com/news/washington/2003-12-11-mccain-guantanamo_x.htm

☐ Check the box to include the list of links referenced in the article.

Attachment 5 to RE 94

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Updated 24 Jul 2003

United States Department of Defense

News Release

On the web: http://www.defenselink.mil/cgi-bin/dlprint.cgi?
http://www.defenselink.mil/releases/2003/nr20030723-0220.html
Media contact: +1 (703) 697-5131
Public contact: http://www.dod.mil/faq/comment.html or +1 (703) 428-0711

No. 540-03
July 23, 2003

IMMEDIATE RELEASE

DOD STATEMENT ON AUSTRALIAN DETAINEE MEETINGS

The General Counsel of the Department of Defense, Hon. William J. Haynes II, met Monday through Wednesday with an Australian legal delegation, led by Minister of Justice Chris Ellison, to discuss and review potential options for the disposition of Australian detainee cases.

The discussions were productive and led to a number of assurances from the U.S. about the military commission process based on the principles of fairness contained in President Bush's Military Order of November 13, 2001, and Military Commission Order No. 1. Those principles include the presumption of innocence, proof of guilt beyond a reasonable doubt, representation by defense counsel, no adverse inference for choosing to remain silent, and the overall requirement that any commission proceedings be full and fair.

Among other things, the U.S. assured Australia that the prosecution had reviewed the evidence against David Hicks, and that based on the evidence, if that detainee is charged, the prosecution would not seek the death penalty. Additionally, the circumstances of his case are such that it would not warrant monitoring of conversations between him and his defense counsel.

This week's visits follow a July 18 decision by President Bush to discuss and review potential options for the disposition of Australian detainee cases and not to commence any military commission proceedings against Australian nationals pending the outcome of those meetings.

Individual enemy combatants held by the U.S. in the war on terrorism will continue to be assessed on a case-by-case basis based on their specific circumstances for an appropriate disposition of their case. To date, no enemy combatant has been charged for trial before a military commission. No military commission proceedings will begin against any Australian nationals until after further discussions planned for the near future.

Discussions with British legal representatives are ongoing and no military commission proceedings will begin against any British nationals until completion of those discussions.

http://www.defenselink.mil/releases/2003/nr20030723-0220.html

Attachment 6 to RE MA

United States Department of Defense

News Release

On the web: http://www.defenselink.mil/cgi-bin/dlprint.cgi?http://www.defenselink.mil/releases/2003/nr20031125-0702.html
Media contact: +1 (703) 697-5131
Public contact: http://www.dod.mil/faq/comment.html or +1 (703) 428-0711

No. 892-03
IMMEDIATE RELEASE November 25, 2003

U.S. AND AUSTRALIA ANNOUNCE AGREEMENTS ON GUANTANAMO DETAINEES

WASHINGTON, D.C. -- The United States and Australian governments announced today that they agree the military commission process provides for a full and fair trial for any charged Australian detainees held at Guantanamo Bay Naval Station.

Following discussions between the two governments concerning the military commission process, and specifics of the Australian detainees' cases, the U.S. government provided significant assurances, clarifications and modifications that benefited the military commission process.

After examining the specific facts and circumstances surrounding each Australian detainee case, the Department of Defense was able to provide the following assurances, which are case specific:

The prosecution has reviewed the evidence against the Australian detainees, and based on that evidence, the prosecution would not seek the death penalty;

The security and intelligence circumstances of Mr Hick's case are such that it would not warrant monitoring of conversations between him and his counsel;

If David Hicks is charged, the prosecution does not intend to rely on evidence in its case-in-chief requiring closed proceedings from which the accused could be excluded; and

The U.S. and Australian government will continue to work towards putting arrangements in place to transfer Hicks, if convicted, to Australia to serve any penal sentence in accordance with Australian and U.S. law.

Subject to any necessary security restrictions, military commissions will be open, the media present and appropriately cleared representatives of the accused's government may observe the proceedings;

If an accused is convicted, the accused's government may make submissions to the Review Panel;

If eligible for trial, and subject to security requirements and restrictions, an accused may be permitted to talk to appropriately cleared family members via telephone, and two appropriately cleared

Attachment 2 to RE FA

Page 1 of 2

family members would be able to attend their trial; and,

An accused may choose to have an appropriately cleared foreign attorney as a consultant to the Defense Team. Foreign attorney consultant access to attorney-client information, case material or the accused will be subject to appropriate security clearances and restrictions and determined on a case-by-case basis.

The assurances are in addition to other military commission procedures which already provide for the presumption of innocence, proof of guilt beyond a reasonable doubt, representation by a competent and zealous defense counsel free of charge, no adverse inference for choosing to remain silent and the overall requirement that any commission proceedings be full and fair.

The Department of Defense is in the process of drafting clarifications and additional military commission rules that will incorporate the assurances where appropriate.

http://www.defenselink.mil/releases/2003/nr20031125-0702.html

Attachment 1 to RE 9A

Page 2 of 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COPY

RASUL, et al., Petitioners, v. **BUSH, et al.** Respondents.	Civil Action: 02-299 (CKK)

MOTION FOR ACCESS TO COUNSEL

COME NOW, PETITIONERS, by counsel, and respectfully move this Court pursuant to the Fifth, Sixth, and Eighth Amendments to the United States Constitution, and such other law as is set forth below, to allow immediate access to counsel pending resolution of the other matters involved in this case. In support of the motion, Petitioners state as follows:

1. Petitioners are being held in Camp X-Ray, on Guantanamo Bay, and have not had access to any family member or counsel. The only messages they have been allowed to send have been on forms provided by the Red Cross for "family and/or private news."

2. Petitioners have sent messages specifically requesting that their family seek counsel for them. *See* Petition for Writ of Habeas Corpus at Paras. 6, 15.

3. Counsel must have access to their clients to respond to the Government's jurisdictional challenge. On a number of issues, the clients can provide reliable information responsive to the Government's unsworn allegations. For example, the manner in which the detained clients were taken into custody will be relevant to this Court's jurisdiction; manifestly, however, unless the dispute is to be resolved based on Respondents' information alone, the

Attachment 8 to RE 9-A

Page 1 of 3

clients must be provided access to counsel. We develop these factual issues, and the Court's authority to order the requested relief, in the accompanying Memorandum in Support, incorporated herein by reference.

4. The right to counsel is fundamental both to the United States Constitution and to international law. There can be no reasonable objection, let alone a compelling one, to contact between counsel and the clients.

5. Pursuant to LCvR 7.1(m), counsel for the Petitioners discussed with AUSA Robert Okun, counsel for the Respondents, whether his clients would oppose providing Petitioners with the relief sought by this Motion. AUSA Okun stated that the Respondents would oppose this Motion.

CONCLUSION

WHEREFORE Petitioners respectfully move that they expeditiously be allowed contact with counsel.

Respectfully submitted,

Joe Margulies
Minnesota Bar No. 208528
MARGULIES & RICHMAN, plc
2520 Park Avenue, South
Minneapolis, MN 55404
612.872.4900
612.872.4967 (FAX)
Counsel for Terry and David Hicks

Michael Ratner
William Goodman
Anthony DiCaprio
Center for Constitutional Rights
666 Broadway
New York, NY 10012
212.614.6464
Counsel for Terry and David Hicks

Attachment 8 to RE 9-1
Page 2 of 3

Clive A. Stafford Smith
Louisiana Bar No. 14444
P.O. Box 50753
New Orleans, LA 70150-0753
504.558.0440
Counsel for Shafiq Rasul, Skina Bibi, Asif Iqbal, and Mohammed Iqbal

L. Barrett Boss
Asbill, Moffitt & Boss, Chtd.
1615 New Hampshire Ave., N.W.
Suite 200
Washington, D.C. 20009
202.234.9000
Local Counsel for All Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent via facsimile and hand delivery this 4th day of March 2002, to the following:

Roscoe C. Howard, Jr.
United States Attorney for the District of Columbia
c/o AUSA Robert Okun
555 Fourth Street, N.W.
Room 11-858
Washington, D.C. 20001
202.514.8784

L. Barrett Boss

Attachment 8 to RE 19-A
Page 3 of 3

Our Ref: 120542/SK
Please reply to **Adelaide** office

8 February 2002

CAMATTA LEMPENS
P T Y L T D
ABN 34 008 140 232
BARRISTERS AND SOLICITORS

Directors
FRANCO CAMATTA LLB (Hons) LLM (Companies & Securities))
ROBERT LEMPENS LLB Dip Corp M
DYMPHNA J. ESZENYI BA LLB
STEPHEN J. KENNY LLB

Associates
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Facsimile: (08) 8268 2142

DX 329 Adelaide

Mr George W Bush
The President
United States of America
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500
USA

Dear Sir

Detention of Australian Citizen David Matthew Hicks

We refer to our letter of 25 February 2002.

We confirm that we act for Terry Hicks and have been requested by our client to act for and on behalf of his son David Hicks. As you are aware David is currently being detained, apparently under your authority, at Guantanamo Bay in Cuba.

We note that in this morning's press, there were reports that members of the Taliban would be granted Prisoner of War status.

We enquire as follows:

1. Will David Hicks be afforded the Prisoner of War status and have the Geneva Convention rights applied to him?

2. If he is not so classified, could you please confirm the basis on which he is being detained, in accordance with our previous request?

3. Has David Hicks been advised of his legal rights?

4. Will you allow access by legal counsel to David Hicks?

To date, Mr Terry Hicks has only been able to receive one short note from his son via the Red Cross. He is most anxious to be able to speak to his son and we would be grateful if you would allow direct contact between David and his father. Mr Hicks would be willing to travel to Cuba to visit his son and we would be grateful if you could assist in making arrangements for such a visit.

Attachment 9 to RE 19-A

Page 1 of 2

In the meantime, we enquire whether Mr Terry Hicks may speak to his son on the telephone.

Mr Hicks is extremely concerned about his son's mental welfare and particularly notes the press reports as to his son's agitation in Cuba. Mr Hicks is of the opinion that if he were able to speak to his son, he may be able to reassure his son of the support of his family and he believes that this will assist in easing David's anxiety and lessen the risk of any potential incident involving David.

We advise that Mr Terry Hicks has no involvement with al Quaeda or any associated organisation and does not in any way support those organisations.

As you will appreciate, this is a matter great concern to the Hicks family and a prompt response would be appreciated.

We thank you in anticipation.

Yours faithfully
CAMATTA LEMPENS PTY LTD

STEPHEN KENNY
email: kenny@camattalempens.com.au

cc. Mr Donald Rumsfeld, Secretary of Defence
Mr John Ashcroft, Attorney General of the United States
The Hon. Daryl Williams AM QC MP, Attorney General of Australia

Attachment 9 to RE 19-A
Page 2 of 2

United States Department of Defense

News Release

On the web: http://www.defenselink.mil/cgi-bin/dlprint.cgi?http://www.defenselink.mil/releases/2004/nr20040727-1062.html
Media contact: +1 (703) 697-5131
Public contact: http://www.dod.mil/faq/comment.html or +1 (703) 428-0711

No. 714-04
July 27, 2004

IMMEDIATE RELEASE

TRANSFER OF FRENCH DETAINEES COMPLETE

The Department of Defense announced today that it transferred four detainees from Guantanamo Bay, Cuba to the control of the government of France.These detainees are French nationals.

The decision to transfer or release a detainee is based on many factors, including whether the detainee is of further intelligence value to the United States and whether he is believed to pose a threat to the United States if released.

There are ongoing processes to review the status of detainees. A determination about the continued detention or transfer of a detainee is based on the best information and evidence available at the time. The circumstances in which detainees are apprehended can be ambiguous, and many of them are highly skilled in concealing the truth. The process of evaluation and detention is not free of risk – at least five detainees have gone back to the fight.

During the course of the war on terrorism, the department expects that there will be other transfers or releases of detainees. This transfer was not part of the recently announced Combatant Status Review Tribunal; it was coordinated prior to that announcement.

Because of operational and security considerations, no further details can be provided.

Previously, 129 detainees were transferred for release and 18 others were transferred to the control of other governments (seven to Russia, four to Saudi Arabia, one to Spain, one to Sweden and five to Great Britain). 151 detainees have now departed Guantanamo. As a result of today's transfer, there are now approximately 590 detainees at Guantanamo Bay, Cuba.

http://www.defenselink.mil/releases/2004/nr20040727-1062.html

Attachment 10 to RE RA

UNITED STATES OF AMERICA v. DAVID MATTHEW HICKS	)	**PROSECUTION RESPONSE TO DEFENSE MOTION FOR DISMISSAL FOR DENIAL OF A RIGHT TO A SPEEDY TRIAL** 18 October 2004

1. Timeliness: This response is filed within the timeline established by the Presiding Officer.

2. Position on Motion: The Prosecution requests that the Defense's Motion be denied.

3. Facts Agreed upon by the Prosecution: The Prosecution admits the following: the Accused was captured in Afghanistan around November 2001; on 3 July 2003, the President designated the Accused subject to trial by military commission in accordance with the President's Military Order dated 13 November 2001; the United States and Australian governments did have diplomatic discussions regarding military commissions of Australian detainees (without input from the Accused); the Chief Defense Counsel detailed military appointed defense counsel to the Accused on 28 November 2003; the charges in the case were approved on 9 June 2004; and the first hearing in this military commission occurred on 25 August 2004.

4. Facts:

a. The Accused was captured in Afghanistan on or about December 2001 during Operation Enduring Freedom. On or about 12 January 2002, U. S. Forces transferred the Accused to Guantanamo Bay, Cuba for continued detention as an "enemy combatant."

b. The President determined that the Accused is subject to his Military Order on 3 July 2003.

c. On 8 July 2003, the Acting Chief Prosecutor issued a "target letter" to the Acting Chief Defense counsel regarding the Accused. This letter informed the Acting Chief Defense that the Prosecution was considering charges against the Accused, and discussed the idea of detailing a defense counsel to assist the Accused in pre-trial discussions.

d. On 10 July 2003, in anticipation of the assignment of a military defense counsel, the Accused was moved to Camp Echo in an effort to uphold camp security measures and intelligence safeguards in place with the Joint Task Force Guantanamo Bay, the unit charged with detainee operations at the US Naval Base at Guantanamo Bay. The 8 July 2003 target letter expired on 30 July 2003, without appointment of a defense counsel.

e. On 28 November 2003, a second target letter was issued by the Chief Prosecutor to the Chief Defense Counsel regarding the Accused

f. The Chief Defense Counsel detailed a military appointed counsel to the Accused on 28 November 2003.

g. The target letter was subsequently extended beyond its original expiration date and subsequent extensions to allow continued discussions between the Defense and the Prosecution.

d. On 9 June 2004, charges were approved against the Accused, and the first hearing in this case occurred at Guantanamo Bay, Cuba, on 25 August 2004.

e. The United States is engaged in a global war with al Qaida. In late June 2004, the Supreme Court of the United States also expressly recognized the existence of hostilities sufficient to continue application of the laws of war in Afghanistan: "Active combat operations against Taliban fighters apparently are ongoing in Afghanistan." *Hamdi*, 124 S.Ct. at 2642 (2004).[1] Stating that hostilities in Afghanistan continue in date, the Secretary of Defense on 4 October 2004 marked the third anniversary of Operation Enduring Freedom. *See* Remarks as Delivered by Secretary of Defense Rumsfeld, New York City, New York, 4 October 2004 (marking the third anniversary of Operation Enduring Freedom, and stating the war against al Qaida "will likely go on for years"), attached.

5. Legal Authority Cited:

a. Article 10 UCMJ

b. Article 2(a)(12) UCMJ

c. In re Yamashita, 327 U.S. 1 (1946)

d. Article 21 UCMJ

e. Madsen v. Kinsella, 343 U.S. 341 (1952)

f. Reid v. Covert, 354 U.S. 1 (1957)

g. Article 36 UCMJ

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[1] In making this observation in Hamdi, The Supreme Court cited *e.g.*, Constable, U. S. Launches New Operation in Afghanistan, Washington Post, Mar. 14, 2004, p A22 (reporting that 13,500 United States troops remain in Afghanistan, including several thousand new arrivals); J. Abizaid, Dept. of Defense, Gen. Abizaid Central Command Operations Update Briefing, Apr. 30, 2004, http://www.defenselinkmil/transcripts/2004/tr20040430-1402.html. "If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF." *Id.*

h. Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004)

i. United States v. Cooper, 58 M.J. 54 (C.A.A.F. 2003)

j. United States v. Goode, 54 M.J. 836 (N-M. Ct. Crim. App. 2001)

k. United States v. Kossman, 38 M.J. 258 (C.M.A. 1993)

l. Barker v. Wingo, 407 U.S. 514 (1972)

m. United States v. Manning, 56 F.3d 1188 (9th Cir. 1995)

n. United States v. Verdugo Urquidez, 494 U.S. 259 (1990)

o. United States v. Reed, 41 M.J. 449 (C.A.A.F. 1995)

p. United States v. Hatfield, 44 M.J. 22 (C.A.A.F. 1996)

q. United States v. Reeves, 34 M.J. 1261 (N-M. Ct. Crim. App. 1992)

6. Discussion:

The Defense moves to dismiss the charge against the Accused pursuant to Article 10 of the Uniform Code of Military Justice (hereinafter "UCMJ"). The Defense's claim lacks merit for numerous reasons. First, the President has designated the Accused for trial by a military commission for violation of the laws of war or other crimes triable by military commission, so provisions of the UCMJ governing courts-martial do not apply to him. Second, as a combatant who is subject to detention for the duration of the ongoing armed conflict, the Accused has no legal basis to raise a speedy trial claim. Third, even if Article 10 were applicable to the Accused, he would not be entitled to any relief because he has failed to show that the military did not act with "reasonable diligence" in bringing and approving charges against him, much less that he has been prejudiced by the alleged delay.

a. United States Supreme Court case law establishes that Article 10 does not apply to military commissions.

The Defense argues that the Accused's detention is subject to the constraints of Article 10 of the UCMJ. This argument is simply incorrect. The rules set out in the UCMJ, except where expressly states otherwise, apply to courts-martial, not military commissions. While the UCMJ recognizes the jurisdiction of military commissions to try violations of the laws of war[2] or other statutes, it does not purport to subject such commissions to its comprehensive set of rules governing courts-martial.

[2] Article 21 UCMJ

Indeed, the Supreme Court has repeatedly recognized that while Congress has prescribed the jurisdiction and procedures governing courts-martial, it properly has allowed the President, as Commander-in-Chief, to set the procedures for wartime military commissions, by recognizing and approving their use but not regulating their procedures.

In In re Yamashita, 327 U.S. 1 (1946), the Supreme Court expressly rejected the contention that a military commission convened to try General Yamashita was subject to the procedures in the Articles of War (the precursor to the UCMJ) governing courts-martial. The Court explained that, by Article 15 of the Articles of War (now Article 21, UCMJ[3]), Congress "recognized military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles," and "gave sanction . . . to any use of the military commission contemplated by the common law of war." Id. at 19. Although the Court relied in part on the fact that General Yamashita did not fall within the categories of persons made subject to the jurisdiction of the courts-martial by the Articles of War, the Court also based its holding on the fact that "the military commission before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, *was not convened by virtue of the Articles of War, but pursuant to the common law of war.*" Id. (emphasis added). Moreover, the Court in Madsen v. Kinsella, 343 U.S. 341 (1952), subsequently rejected any suggestion that the Articles of War would apply to the trial by commission of a person subject to court-martial, upholding the trial by military commission of a U.S. citizen subject to the jurisdiction of courts-martial, notwithstanding that the commission trial was not conducted in strict accordance with the specific Articles of War governing courts-martial.[4]

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[3] Article 15 of the Articles of war reads:

> The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

Id. The text of UCMJ Article 21 reads:

> The provisions of this chapter conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

Id.

[4] In Reid v. Covert, 354 U.S. 1 (1957), a plurality of the Supreme Court ruled that a U.S. citizen civilian spouse of a serviceman could not be subjected to the jurisdiction of a court-martial during peacetime. The Reid plurality concluded that Madsen was not controlling because Madsen involved a trial in occupied enemy territory, where "the Army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area." Reid at 35, note 63. Madsen remains good law today, and the Supreme Court has limited Reid to its facts. See United States v. Verdugo Urquidez, 494 U.S. 259, 270 (1990).

The Madsen Court characterized the unique nature and purpose of military commissions:

> Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common law war courts. They have taken many forms and borne many names. *Neither their procedure nor their jurisdiction has been prescribed by statute.* It has been adapted in each instance to the need that called it forth.

Id. at 346-348 (footnotes omitted)(emphasis added). The Court went on to hold that, "in the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions . . ." Id. at 348. The Court explained that, in contrast to Congress' active regulation of "the jurisdiction and procedure of the United States courts-martial," Congress had shown "evident restraint" with respect to making rules for military commissions. Id. at 349. The Court further explained that Article 15 (now Article 21 UCMJ) reflected Congress' intent to allow the Executive Branch to exercise its discretion as to what form of tribunal to employ during wartime. Id. at 353.

When the President established military commissions to try members of al Qaida and set out the procedures that will govern them, he exercised the very discretion that the Madsen Court held was implicit in his powers as Commander-in-Chief and was left unrestricted by Congress. Because, as Madsen explained, Congress did not purport to apply the numerous UCMJ provisions regulating courts-martial to the common law military commissions, Article 10 of the UCMJ, which sets out a speedy trial standard for courts-martial, is inapplicable to the military commission of the Accused.

Additionally, the President invoked the provisions of the UCMJ that recognize his authority to use military commissions to try violations of the laws of war, Article 21, and to create a set of procedures to govern them, Article 36. Reliance on that authority, which the Supreme Court has construed to set military commissions apart from courts-martial and the UCMJ rules that govern them, could not logically trigger application of the entire UCMJ. Indeed, that is essentially the argument the Court rejected in Yamashita and Madsen.[5] In any event, that those subject to military commission do not receive the protection of Article 10 is not "contrary to or inconsistent with" the UCMJ because, as Congress recognized in taking a hands-off approach, military commissions convened during wartime to try violations of the laws of war must deal with military exigencies in

[5] It should be noted that Article 38 of the Articles of War during the Yamashita and Madsen cases was the forerunner of the current Article 36, UCMJ. Like Article 36 UCMJ, Article 38 of the Articles of War prohibited commission procedures contrary to or inconsistent with the Articles of War. Yet Yamashita and Madsen still allowed substantial differences between courts-martial and military commission procedure. As such, no argument can be made that Article 36 requires the application of Article 10 UCMJ to current military commissions.

administering justice. Because of the unique context in which the commissions operate, and the need for flexibility that context presents, it is not "contrary to or inconsistent with" the UCMJ for the commissions to try persons subject to its jurisdiction for violations of the laws of war without adhering to the speedy trial rules that apply to courts-martial.

b. Assuming Article 10 applicability, there is no violation.

Moreover, assuming Article 10 did apply to the military commissions, the Accused's claim for dismissal would also fail because the Defense cannot establish any violation. In order to prevail on an Article 10 claim, the Accused must establish that the Government has failed to proceed against him with "reasonable diligence." United States v. Cooper, 58 M.J. 54, 58 (2003). All that petitioner states on this score is that "the Government simply did not need over two years to gather evidence." That conclusive statement is patently insufficient. To begin with, to the extent that there is any relevant time period for an individual lawfully detained as a combatant, the Article 10 clock would not begin to run until the detainee is "ordered into arrest or confinement" pursuant to a charge. Article 10, UCMJ. To date the Accused has not been so ordered. He is and remains an enemy combatant and is first and foremost, detained as such. While lacking merit, the best position the Defense can assert is that any speedy trial clock would not have begun to run until July 2003, when the Accused was placed in Camp Echo to facilitate his ability to meet with counsel in connection with the impending charges[6] and to ensure the intelligence gathering function was not tainted.

Additionally, the amount of time that has elapsed, standing alone, does not suggest, much less establish, the absence of reasonable diligence. As the military courts have made clear, "there is no 'magic number' of days in pretrial confinement which would give rise to a presumption of an Article 10, UCMJ, speedy trial violation." United States v. Goode, 54 M.J. 836 (N-M Ct. Crim. App. 2001); United States v. Kossman, 38 M.J. 258 (C.M.A. 1993). In the Goode case, the court held that a defendant who spent 337 days in pretrial confinement failed to make out an Article 10 or constitutional speedy trial violation. Id. at 838-840. Here, the Accused is charged with participating in a foreign-based, far-reaching conspiracy spanning a large time period. The breadth and complexity of the charge as well as the fact that it was brought during the ongoing war against terror refutes the overtone in Defense's motion that the government was engaged in delay tactics. See Barker v. Wingo, 407 U.S. 514, 531 (1972) ("The delay that can be

[6] It is the Prosecution's position that there is no relevant time period for consideration regarding an Article 10 UCMJ claim. The simple fact is that the Accused is not being detained because he is awaiting trial, but because he is an unlawful combatant. As mentioned above, that means that the Accused could be held until the end of hostilities under the existing laws of war. Whether or not the Accused was facing a military commission at this time and place, he would still be detained by U.S. forces. The fact that the Accused was moved after the President found him eligible for trial by military commission does not change the underlying reason for his confinement. In United States v. Reed, 41 M.J. 449 (C.A.A.F. 1995), the Court of Appeals for the Armed Forces made clear that Article 10 is triggered either by "*pretrial* restraint or preferral of charges." Id. at 451. Because, according to Reed the Prosecution is not required to file charges as soon as probable cause exists and because the Accused is not in *pretrial* restraint there is no Article 10 violation.

tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.").

Indeed, a far longer period would be justified in the current instance. The United States has undertaken painstaking intelligence-gathering and interrogation with respect to hundreds of enemy combatants and suspected members of al Qaida, a highly disciplined organization whose agents span the globe and operate in total secrecy. See generally al Qaida Training Manual ("Manchester Manual"), available at www.usdoj.gov/ag/trainingmanual.htm. It should, therefore, come as no surprise that more time has been required in this case than in courts-martial involving forcible sodomy, Goode, adultery, United States v. Hatfield, 44 M.J. 22, 23 (C.A.A.F. 1996), rape, Reed, or molestation, United States v. Reeves, 34 M.J. 1261 (N-M. Ct. Crim. App. 1992) (462-day delay).

The Defense's claim also founders on its failure to show prejudice from the alleged delay. See Barker at 533-534. A speculative claim cannot form the basis for a finding of prejudice." United States v. Manning, 56 F.3d 1188, 1194 (9th Cir. 1995). Such "generalized assertions of the loss of memory, witnesses, or evidence are insufficient to establish actual prejudice."

c. Delay in Detailing Defense Counsel does not Constitute Unreasonable Delay.

The Defense imputes the delay in detailing of Defense counsel to the Prosecution as a violation of Article 10, UCMJ. As stated earlier, Article 10, UCMJ does not apply to the Accused. Even if Article 10 was applicable to the Accused, the cause for delays in detailing of Defense counsel is misplaced. The Prosecution was under no obligation to serve a target letter on the Chief Defense Counsel. It did so purely as a means to obtain a Defense Counsel with whom to discuss the case. With or without a target letter, the Accused would have continued to be detained as an enemy combatant.

For the above-stated reasons, the Accused's motion to dismiss due to violation of Article 10, UCMJ should be dismissed.

7. Attachments:

a. Remarks as Delivered by Secretary of Defense Rumsfeld, New York City, New York, 4 October 2004 (the war against al Qaida "will likely go on for years")

8. Oral Argument: Although the Prosecution does not specifically request oral argument, we are prepared to engage in oral argument if so required.

9. Witnesses:

a. Major [redacted]
b. Captain [redacted]

c. Special [redacted] (already Protected Information pursuant to Presiding Officer Order of August 27 2004).

We ask that the names contained in (a) and (b) above also be considered Protected Information. A proposed Protective Order has been sent via separate correspondence.

/original signed/
[redacted]
Major, U.S. Army
Prosecutor

U.S. Department of Defense
Office of the Assistant Secretary of Defense (Public Affairs)
Speech

On the Web:
http://www.defenselink.mil/cgi-bin/dlprint.cgi?http://www.defenselink.mil/speeches/2004/sp20041004-secdef0801.html
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Council on Foreign Relations

Remarks as Delivered by Secretary of Defense Donald H. Rumsfeld, New York City, New York, Monday, October 4, 2004.

Thank you very much, Lou, ladies and gentlemen, Pete, David, Richard. It's good to be back here, and as before it's a very full crowd in a small room, tightly packed in. So I thank all of you for being here as well.

Now, last month we observed the third anniversary of the day that awakened our country to a new world, a day that extremists killed so many innocent men, women and children. Thursday will mark the third anniversary of the commencement of Operation Enduring Freedom, when America resolved to take the battle to the extremists, and we attacked the al Qaeda and Taliban in Afghanistan. Three years into the global war on terror, some understandably ask, "Is the world better off? Is our country safer?" They're fair questions, and today I want to address them by taking a look at the last three years at what the world looked like then, compared to what we find today, and what has been accomplished, and to be sure what remains to be done.

It's been said that the global struggle against extremism will be the task of a generation, a war that could go on for years -- I should say will likely go on for years, much like the Cold War, which of course lasted for decades. We look back at the Cold War now as a great victory for freedom, and indeed it was. But the 50-year span of battle between the free world and the Soviet empire was filled with division, uncertainty, self-doubt, setbacks and indeed failures along the way as well as successes. Territories were seized, wars were fought. There were many times when the enemy seemed to have the upper hand. Remember when euro-communism was in vogue, when the West considered withdrawing. I was ambassador to NATO in the early '70s and had to fly back to testify against an amendment in the Senate to withdraw all of our troops back in the '70s. And a lot of people from time to time over that long span considered withdrawing from the struggle exhausted. The strategies varied -- from co-existence to containment to detente to confrontation. Alliances wavered. In NATO there were disputes over diplomatic policy, weapons deployments, military strategies, the stance against the Soviets.

In the 1960s, France pulled out of the military organization of NATO and asked NATO out of France. In America, columnists and editorialists questioned and doubted U.S. policies. There were vocal showings of support for communist Russia, marches against military build-up, proposed freezes -- even instances where American citizens saw their own government challenges as warmongers and aggressors. Clearly many did not always take seriously the challenge posed by communism or the Soviet appetite for empire. But our country, under leaders of both political parties over a sustained period of time, and with our allies, again of mixed political parties over time, showed perseverance and resolve.

Year after year they fought for freedom. They dared to confront what many thought might be an unbeatable foe, and eventually the Soviet regime collapsed.

That lesson has to be relearned throughout the ages, it seems, the lesson that weakness can be provocative. It can entice people into doing things they otherwise would avoid, that a refusal to confront gathering dangers can increase rather than reduce future peril. That while there are risks to acting, to be sure, there also can be risks to not acting, and that victory ultimately comes to those who are purposeful and steadfast. It's with those lessons in mind that the president and a historic coalition of some 80 or 85 countries have sought to confront a new and perhaps even more dangerous enemy, an enemy without a country or a conscience, and an enemy who seeks [illegible] or truce --

with us or with the civilized world.

From the outset of this conflict it was clear that our coalition had to go on the offense against terrorists. The goals included the need to pursue terrorists and their regimes that provide them aid and comfort, havens; to establish relationships with new allies and bolster international coalitions to prosecute the war; to improve considerably America's homeland defense; and to advance freedom and democracy, and to work with moderate leaders to undermine terrorism's ideological foundation.

In the last three years progress has been made in each of these areas. Four years ago al Qaeda was already a growing danger well before 9/11. Terrorists had been attacking American interests for years. The leader, Osama bin Laden, was safe and sheltered in Afghanistan. His network was dispersed around the world. Three years later, more than two thirds of al Qaeda's key members and associates have been detained, captured or killed. Osama bin Laden is on the run. Many of his key associates are behind bars or dead. His financial lines have been reduced, but not closed down. And I suspect he spends a good deal of every day avoiding being caught.

Once controlled by extremists, Afghanistan today is led by Hamid Karzai, who is helping to lead the world in support of moderates against the extremists. Soccer stadiums in Kabul, once used for public executions under the Taliban, today are used for soccer.

Three years ago in Iraq, Saddam Hussein and his sons brutally ruled a nation in the heart of the Middle East. Saddam was attempting regularly to kill American air crews and British air crews that were enforcing the northern and southern no-fly zones. He ignored more than a dozen U.N. Security Council resolutions, and was paying some $25,000 to the families of suicide bombers to encourage and reward them.

Three years later, Saddam Hussein is a prisoner awaiting trial by the Iraqis, his sons are dead, most of his senior associates are in custody. Some 100,000 trained and equipped Iraqis now provide security for their fellow citizens. Under the new prime minister, Mr. Allawi, and his team, Iraq is a new nation, a nation determined to fight terrorists and build a peaceful society.

And Libya has gone from being a nation that sponsored terrorists and secretly sought a nuclear capability to one that has renounced its illegal weapon programs, and now says that it's ready to reenter the community of civilized nations.

The rogue Pakistani scientist A.Q. Khan's nuclear proliferation network was providing lethal assistance to nations such as Libya and North Korea today has been exposed and dismantled, and is no longer in operation.

Pakistan three and a half or four years ago was close to the Taliban regime in Afghanistan. Today under President Musharraf, Pakistan is working effectively and closely with the global coalition against terrorism. Thanks to the coalition, terrorist safe havens have been reduced, major training camps have been eliminated. Their financial support structures have been attacked and disrupted, and intelligence and military cooperation with countries all around the world has dramatically increased.

NATO is now leading the International Security Assistance Force in Afghanistan, and is helping to train Iraqi security forces. This is an historic move for NATO. Not only is it out of the NATO treaty area, but it's out of Europe this activity on their part. The U.N. has taken a role in helping the free elections in both Afghanistan and Iraq, which are coming up very soon in Afghanistan later this week, and we anticipate in Iraq in January.

And over 60 countries have expressed support for an effort to halt the proliferation of weapons of mass destruction.

Here at home the demands of the global war on terror have accelerated the need to transform our armed forces, and to undertake an increasingly complex array of missions around the world. We've increased the size of the active duty army by about 30,000 troops, and we're reorganizing it into more agile, lethal and deployable brigades

with enough protection, fire power and logistics assets to sustain themselves. And we're increasing the number of these brigades from currently 33 to 43 or possibly 48 over the coming two and a half to three years. We're re-training and re-structuring the active and reserve components to achieve a more appropriate distribution of skill sets, to improve the total force responsiveness to crises, and so that individual Reservists and Guardsmen will mobilize less often for shorter periods of time, and with somewhat more predictability.

We're increasing the ability of the branches of the armed services to work seamlessly together. Joint operations are no longer an exception. They must become the rule. Communications and intelligence activities have been improved in the department. We've significantly expanded the capabilities and missions of the special operations forces and much more.

Since the global war on terror began, we have sought to undercut the extremists' efforts to attract new recruits. The world has been divided between regions where freedom and democracy have been nurtured and other areas where people have been abandoned to dictatorship or tyranny. Yet today the talk on the street in Baghdad and Kabul is about coming elections and self-government. In Afghanistan over 10 million people have registered to vote in this month's election. They estimate that some 41.4 percent of them are women. Iraq has an interim constitution that includes a bill of rights and an independent judiciary. There are municipal councils in almost every major city and most towns and villages and provincial councils for the provinces.

Iraqis now are among those allowed to say and write and watch and listen to whatever they want, whenever they want. And I sense that governments and people in the Middle East are taking note of that. Have there been setbacks in Afghanistan and Iraq? You bet. It is often on some bad days not a pretty picture at all. In fact, it can be dangerous and ugly. But the road from tyranny to freedom has never been peaceful or tranquil. On the contrary, it's always been difficult and dangerous. It was difficult for the United States. It was difficult with respect to Germany and Japan and Italy.

The enemy cannot defeat the coalition in a conventional war on any battlefield. But they don't seek conventional war. Their weapons are terror and chaos, and they want us to believe that the coalition cannot win; that the free Iraqi and Afghan governments cannot win; that the fight is not worth it; that the effort will be too hard and too ugly. They attack any sort of hope or progress in an effort to try to undermine morale. They are convinced that if they can win the battle of perception -- and they are very good at managing perceptions -- that we will lose our will and toss it in. I believe they are wrong. Failure in Afghanistan or Iraq would exact a terrible toll. It would embolden the extremists and make the world a far more dangerous place. These are difficult times.

From Baghdad, Kabul, Madrid, Bali, the Philippines, the call to arms has been sounded and the outcome of this struggle will determine the nature of our world for some decades to come. Our enemies will not be controlled, or contained or wished away. They do seek to enslave, and they have shown that they are willing to die to achieve their goals. The deaths of innocent people are not incidental in this war. Innocent people indeed are in fact their targets, and they will willingly kill hundreds and thousands more.

The world has gasped at the brutality of the extremists -- the hundreds of children in Russia who were killed or wounded on their first day of school; the commuters blown up in the trains in Madrid; innocents murdered in a night club in Bali; the cutting off of heads on television. And should these enemies acquire the world's more dangerous weapons, more lethal weapons -- and they are seeking them, to be sure -- the lives of hundreds of thousands could be at stake.

There have been costs, and there will be more. More than 1,000 U.S. soldiers, men and women, have died, killed or in accidents in Iraq, and some number more since the global war on terror began. Every loss is deeply felt. It is in freedom's defense that our country has had the benefit of these wonderful volunteers deployed, these the most courageous among us. And whenever freedom advances, America is safer.

And amid the losses, amid the ugliness, the car bombings, the task is to remain steadfast. Consider the kind of world we would have if the extremists were to prevail.

Today, as before, the hard work of history falls to our country, to our coalition, to our people. We've been entrusted with the gift of freedom. It's ours to safeguard. It's ours to defend. And we can do it, knowing that the great sweep of human history is for freedom, and that is on our side.

Thank you very much. (Applause.)

For a complete transcript, including questions and answers, please visit:
http://www.defenselink.mil/transcripts/2004/tr20041004-secdef1362.html

http://www.defenselink.mil/speeches/2004/sp20041004-secdef0801.html

UNITED STATES OF AMERICA	)	
	)	**DEFENSE MOTION TO DISMISS ALL CHARGES FOR DENIAL OF FUNDAMENTAL RIGHTS IN CRIMINAL PROCEEDING**
v.	)	
DAVID M. HICKS	)	
	)	**4 October 2004**

The Defense in the case of the *United States v. David M. Hicks* moves the military commission for dismissal of all charges on the ground that adequate facilities for a defense have not been provided, and states in support of this motion:

1. **Synopsis**: Mr. David Hicks' right to an adequate defense has been violated in three respects. First, he has not been given the benefit of the presumption of innocence. Second, Mr. Hicks has not been given adequate facilities for his defense as he has been denied access to counsel at critical points after he was taken into custody by U.S. forces. Third, according to the rules as presently constituted, Mr. Hicks may not be allowed to be present during all phases of his hearing, preventing him from having adequate access to evidence and witnesses. For these reasons, the procedures of the military commission deny Mr. Hicks the right to adequate facilities for a defense, which is an essential component to the right to a fair trial.

2. **Facts**: Mr. Hicks was taken into custody by U.S. forces in or around November 2001, at which point he was subjected to prolonged and uncounseled interrogation coupled with physically abusive and unconscionable treatment. After he was moved to Guantanamo Bay Naval Base, the interrogations and coercive conditions persisted. Throughout, and from at least 27 February 2002, the interrogations of Mr. Hicks were for the purpose of preparing a prosecution against him. At that point, Mr. Hicks still was not permitted have access to counsel. Ultimately, Mr. Hicks was not assigned military counsel 28 November 2003 (at the very least, 21 months after interrogation for the purposes of prosecution began).

3. **Discussion**:

A: The Presumption of Innocence

Article 14(2) of the *International Covenant on Civil and Political Rights* (ICCPR)[1] and article 75(4)(d) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Additional Protocol I)[2] state that anyone charged with an offence shall have the right to be presumed innocent until proved guilty according to law. Thus, the burden of proof in a criminal trial is shouldered by the prosecution, and the accused is afforded the benefit of the doubt. The ICCPR does not specify

[1] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Ratified by the US on 8 June 1992

[2] Opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

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the standard of proof required. However, it is generally accepted that the standard under national law applies (*i.e.*, guilt must be proved "beyond a reasonable doubt").[3]

The United Nations Human Rights Committee, the expert body set up by the ICCPR to monitor that treaty's implementation, discusses the presumption of innocence in General Comment No. 13 on the ICCPR. That Comment states that "the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial."[4] US public authorities have failed in this duty and have undermined the presumption of innocence by making public statements in regard to the detainees, including Mr. Hicks.

Detainees at Guantanamo Bay Naval Base have been labeled as "killers," "terrorists" and "bad people" by various United States public officials, including President Bush[5] and Attorney General, John Ashcroft.[6] Secretary of Defense, Donald Rumsfeld, referred to them as "hard-core, well-trained terrorists,"[7] and "among the most dangerous, best-trained, vicious killers on the face of the earth."[8] He also explicitly linked detainees to the attacks of 11 September 2001, stating that he would prefer them to be prosecuted rather than "having them go get into more airplanes and fly into the Pentagon and the World Trade Centre."[9] Vice President Dick Cheney stated that detainees were "the worst of a very bad lot. They are very dangerous. They are devoted to killing millions of Americans." Senior Pentagon officials have also made statements to undermine the presumption of innocence. Rear Admiral John Stufflebeem stated "These are the worst of the worst and if let out on the street, they will go back to the proclivity of trying to kill Americans and others. So that is well established."[10]

These public officials have been involved in convening the military commissions and appointing Panel members. Furthermore, some of them will be carrying out the review process, the only "appeal" provided (under the commission rules) to detainees who are convicted by the commission.

B: The Right to Access to Counsel

Article 14(3)(b) of the ICCPR states that in the determination of any criminal charge, an accused shall have "adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing." Article 75(4)(a) of Additional Protocol I states

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[3] UN Human Rights Committee, 'General Comment No. 13', in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.7 (12 May 2004), [7]. *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002), art 66.

[4] See General Comment No. 13, above n 3, [7].

[5] Labeled 'killers' and 'terrorists' during a speech in the White House, Meeting with Afghan Interim Authority Chairman, 28 January 2002. Labeled as 'terrorists' during the State of Union address on 29 January 2002. Labeled 'killers' again in a speech on 20 March 2002.

[6] He also described them as being part of a 'conspiracy', and as 'uniquely dangerous': *CNN Late Edition*, 20 January 2002. See also Joint Press Conference by Tony Blair and George W Bush, British Embassy, Washington DC, 17 July 2003, available at <http://www.britainusa.com/sections/articles_show.asp?SarticleType=1&Article_ID=3925&i=122>.

[7] NBC, 20 January 2002.

[8] *Rumsfeld visits, thanks US troops at Camp X-ray in Cuba*, American Forces Information Service, 27 January 2002.

[9] Interview with *The Telegraph*, 23 February 2002.

[10] Department of Defense News Briefing, 28 January 2002.

that the procedure of the court "shall afford the accused before and during his trial all necessary rights and means of defense."[11]

The Human Rights Committee has stressed that "all persons who are arrested must immediately have access to counsel. . ."[12] The Special Rapporteur on the Independence of Judges and Lawyers, in considering the presence of an attorney during police interrogations, stated that "[t]he absence of legal counsel gives rise to the potential for abuse, particularly in a state of emergency where more serious criminal acts are involved." In the case of Northern Ireland "the harsh conditions found in the holding centres ... and the pressure exerted to extract confessions further dictate that the presence of a solicitor is imperative."[13]

The Rules of Procedure and Evidence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda respect the right of suspects to the assistance of counsel during detention and interrogation.[14] Questioning of suspects cannot proceed without the presence of counsel, unless the suspect has voluntarily waived the right to counsel. The right of access to counsel is also preserved by the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,[15] and the Basic Principles on the Role of Lawyers (which requires access to counsel within 48 hours).[16]

Interrogations are reported to have started 23 January 2002, at Camp X-Ray at Guantanamo Bay Naval Base. On 27 February 2002 the Secretary of Defense stated that the government had begun conducting interviews of detainees with a view to possible prosecution (as opposed to earlier interrogation purportedly for intelligence purposes).[17] At that stage, Mr.

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[11] This right can also be found in the Basic Principles on the Role of Lawyers (principles 1, 5, 7 and 8) and the Body of Principles on the Protection of All Persons under Any Form of Detention or Imprisonment (principle 17). Principle 1 states that 'All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings'. Principle 5 states that 'Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence'. Principle 7 states that 'Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention'. Principle 8 states that 'All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials'. Principle 17(1) states 'A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.'

[12] Human Rights Committee, "Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Georgia," U.N. Doc. CCPR/C/7/Add.75, 5 May 1997, para. 27.

[13] Commission on Human Rights, "Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment: Report of the Special Rapporteur on the Independence of Judges and Lawyers," U.N. Doc. E/CN.4/1998/39/Add.4, 5 March 1998, para. 47.

[14] See Articles 42, 44–6, 63. Rules and Procedures of Evidence: available at <http://www.un.org/icty/basic/rpe/IT32_rev22.htm>; <http://www.ictr.org/ENGLISH/rules/240404/240404.pdf>.

[15] See Principles 11, 12, 15, 17 and 18. Adopted by General Assembly Resolution 43/173 of 9 December 1988. Available at <http://www.unhchr.ch/html/menu3/b/h_comp36.htm>.

[16] See Principles 5 to 8. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. Available at <http://www.unhchr.ch/html/menu3/b/h_comp44.htm>.

[17] The Secretary of Defense stated that "We are now starting the process of doing a series of interrogations that involve law enforcement": Interview with KSTP-ABC, St Paul, Minnesota.

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Hicks had not yet been assigned military counsel, and he had been refused access to his civilian counsel (both military and civilian counsel met with Mr. Hicks for the first time in December 2003). Allowing these interrogations to go ahead without providing Mr. Hicks with access to, and the presence of, counsel violates Mr. Hicks's right to adequate facilities for a defense.[18] Furthermore, the admission of any statements or evidence gained from such interrogations to the military commission would also violate this requirement.

C: The Right to Be Present at the Hearing

Article 14(3)(d) of the ICCPR, and article 75(4)(e) of Additional Protocol I provide that anyone charged with an offence shall have the right to be "tried in his presence." The International Committee of the Red Cross (ICRC) Commentary to Additional Protocol I,[19] the authoritative interpretation of these conventions, stresses that in abiding by this provision, the accused must be present at the sessions of the hearing at which the prosecution presents its case, when oral arguments are heard, and when witnesses and experts are heard. Furthermore, the accused should be given the opportunity to ask questions, make objections and propose corrections.

Article 14(3)(e) of the ICCPR, and article 75(4)(g) of Additional Protocol I state that anyone charged with an offence shall have 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." The right to examine witnesses is referred to in the ICRC Commentary on Additional Protocol I as being an "essential prerequisite for an effective defense." It is also considered by academics to be essential to the right to equality of arms,[20] which requires that the parties be treated equally with respect to the introduction of evidence by means of interrogation of witnesses. It has also been interpreted to mean that the prosecution must inform the defense of the witnesses it intends to call within reasonable time before the trial so that the detainee may have sufficient time to prepare his defense. Finally, it also means that the defendant has the right to be present during the testimony of a witness. This right can only be taken away in exceptional circumstances (*i.e.*, only in cases where there is reasonable fear of reprisal by the defendant, which is not applicable in the case of Mr. Hicks). Similarly, the use of the testimony of anonymous witnesses at trial is considered impermissible.

Procedures for the military commission allow for Mr. Hicks to be excluded from portions of his hearing. The military commission may deny him access to secret evidence and exclude him from *in camera* hearings.[21] Mr. Hicks has already been excluded from portions of the hearing in relation to Voir Dire. Such closure of proceedings to Mr. Hicks may be authorized by the presiding officer or the Appointing Authority, for such purposes as the protection of classified information or intelligence sources, methods and activities, or other "national security interests." The military commission procedures, by allowing the prosecution to present and argue secret evidence, in the absence of the accused, violate Mr. Hicks's right to be present at all material proceedings. These procedures would also violate Mr. Hicks' right to the assistance of counsel, because his military counsel would be prevented from disclosing any evidence

[18] The evidentiary implications of the interrogations – that their fruits are inadmissible – will be addressed in a separate to be filed at the appropriate time.
[19] Claude Pilloud et al, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987).
[20] Ibid., [3115].
[21] While generally he 'may' be present at every stage of the trial, his presence must be consistent with s 6(B)(3).

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presented during a closed session to individuals, including the accused (Mr. Hicks), who would be excluded from such proceedings.

D: Conclusion

Mr. Hicks's right to an adequate defense has been violated in three respects. First, he has not been afforded the benefit of the presumption of innocence, to which he is indisputably entitled. Public, widely disseminated (by design) statements by political leaders and other officials involved in the military commission process have completely undermined the presumption. Second, Mr. Hicks has been denied access to counsel at critical points after he was taken into custody by U.S. forces. Third, Mr. Hicks may not be allowed to be present during all phases of his hearing. Therefore, he will not have adequate access to evidence and witnesses for the purpose of cross-examination and rebuttal. For these reasons, the procedures of the military commission deny Mr. Hicks the right to adequate facilities for a defense, an essential component to the right to a fair trial.

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

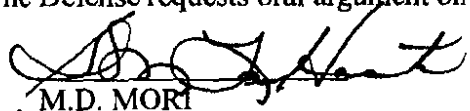
5. **Evidence**:

A: The testimony of expert witnesses.
B: Attachments
1. *International Covenant on Civil and Political Rights*, Article 14.
2. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Prosecution of Victims of International Armed Conflicts*, Article 75.
3. UN Human Rights Committee, 'General Comment No. 13' (2004).
4. *Rome Statute of International Criminal Court*, Article 66.
5. President Bush, Meeting with Afghan Interim Authority Chairman, the Whitehouse, 28 January 2002.
6. Joint Press Conference with Tony Blair at the British Embassy in Washington D.C., 17 July 2003.
7. CNN, "Ashcroft Defends Detainees' Treatment," 20 January 2002.
8. "Britain and US in Rift Over Terrorist Prisoners," *The Daily Telegraph*, 21 January 2002.
9. "Rumsfeld visits, thanks US troops at Camp X-ray in Cuba," American Forces Information Service, 27 January 2002.
10. DOD News Transcript, "Secretary Rumsfeld Interview with The Telegraph," 23 February 2002.
11. Fox News, "Rumsfeld: Afghan Detainees at Gitmo Bay Will Not Be Granted POW Status," 28 January 2002.
12. DOD News Briefing, "ASD PA Clarke and Rear Adm. Stufflebeem," 28 January 2002.
13. Human Rights Committee, "Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Georgia" (1997).

14. Commission on Human Rights, "Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment: Report of the Special Rapporteur on the Independence of Judges and Lawyers" (1998).
15. International Criminal Tribunal for the Former Yugoslavia, Rules and Procedures of Evidence.
16. International Criminal Tribunal for Rwanda, Rules and Procedures of Evidence.
17. United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.
18. United Nations Basic Principles on the Role of Lawyers.
19. DOD News Transcript, "Rumsfeld Interview with KSTP-ABC, St Paul, Minn."
20. Claude Pilloud et al, Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949 (1987).

6. **Relief Requested**: The Defense requests that all charges before the commission be dismissed.

7. The Defense requests oral argument on this motion.

By: 
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Office of the High Commissioner for Human Rights

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

***entry into force* 23 March 1976, in accordance with Article 49**

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Article 14 ***General comment on its implementation***

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and 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;

(e) 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;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and

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when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

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[redacted]

fulltext

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Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

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Art 75. Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
(a) violence to the life, health, or physical or mental well-being of persons, in particular:
(i) murder;
(ii) torture of all kinds, whether physical or mental;
(iii) corporal punishment; and
(iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
(c) the taking of hostages;
(d) collective punishments; and
(e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with an offence is presumed innocent until proved guilty according to law;
(e) anyone charged with an offence shall have the right to be tried in his presence;
(f) no one shall be compelled to testify against himself or to confess guilt;
(g) anyone charged with an offence shall have the right to examine, or have examined,

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the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
(j) a convicted person shall be advised on conviction or his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:
(a) persons who are accused or such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
(b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1

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UNITED
NATIONS

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International
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Instruments

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COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES

Note by the Secretariat

This document contains a compilation of the general comments or general recommendations adopted, respectively, by the Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee against Torture and the Committee on the Rights of the Child. The Committee on Migrant Workers has not yet adopted any general comments.

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case may a people be deprived of its own means of subsistence". This right entails corresponding duties for all States and the international community. States should indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph and to what extent that affects the enjoyment of other rights set forth in the Covenant.

6. Paragraph 3, in the Committee's opinion, is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. The general nature of this paragraph is confirmed by its drafting history. It stipulates that "The States parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations". The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination. Such positive action must be consistent with the States' obligations under the Charter of the United Nations and under international law: in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination. The reports should contain information on the performance of these obligations and the measures taken to that end.

7. In connection with article 1 of the Covenant, the Committee refers to other international instruments concerning the right of all peoples to self-determination, in particular the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970 (General Assembly resolution 2625 (XXV)).

8. The Committee considers that history has proved that the realization of and respect for the right of self-determination of peoples contributes to the establishment of friendly relations and cooperation between States and to strengthening international peace and understanding.

Twenty-first session (1984)

General comment No. 13: Article 14 (Administration of justice)

1. The Committee notes that article 14 of the Covenant is of a complex nature and that different aspects of its provisions will need specific comments. All of these provisions are aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as 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. Not all reports provided details on the legislative or other measures adopted specifically to implement each of the provisions of article 14.

2. In general, the reports of States parties fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law. Laws and practices dealing with these matters vary widely from State to State. This diversity makes it all the more necessary for States

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parties to provide all relevant information and to explain in greater detail how the concepts of "criminal charge" and "rights and obligations in a suit at law" are interpreted in relation to their respective legal systems.

3. The Committee would find it useful if, in their future reports, States parties could provide more detailed information on the steps taken to ensure that equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice. In particular, States parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.

4. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.

5. The second sentence of article 14, paragraph 1, provides that "everyone shall be entitled to a fair and public hearing". Paragraph 3 of the article elaborates on the requirements of a "fair hearing" in regard to the determination of criminal charges. However, the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1.

6. The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons. It should be noted that, even in cases in which the public is excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public.

7. The Committee has noted a lack of information regarding article 14, paragraph 2 and, in some cases, has even observed that the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.

8. Among the minimum guarantees in criminal proceedings prescribed by paragraph 3, the first concerns the right of everyone to be informed in a language which he understands of the charge against him (sub-para. (a)). The Committee notes that State reports often do not explain how this right is respected and ensured. Article 14 (3) (a) applies to all cases of criminal charges, including those of persons not in detention. The Committee notes further that the right to be informed of the charge "promptly" requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based.

9. Subparagraph 3 (b) provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is "adequate time" depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter.

10. Subparagraph 3 (c) provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place "without undue delay". To make this right effective, a procedure must be available in order to ensure that the trial will proceed "without undue delay", both in first instance and on appeal.

11. Not all reports have dealt with all aspects of the right of defence as defined in subparagraph 3 (d). The Committee has not always received sufficient information concerning the protection of the right of the accused to be present during the determination of any charge against him nor how the legal system assures his right either to defend himself in person or to be assisted by counsel of his own choosing, or what arrangements are made if a person does not have sufficient means to pay for legal assistance. The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.

12. Subparagraph 3 (e) states that the accused shall be entitled 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. This provision is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.

13. Subparagraph 3 (f) provides that if the accused cannot understand or speak the language used in court he is entitled to the assistance of an interpreter free of any charge. This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence.

14. Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

15. In order to safeguard the rights of the accused under paragraphs 1 and 3 of article 14, judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution.

16. Article 14, paragraph 4, provides that in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. Not many reports have furnished sufficient information concerning such relevant matters as the minimum age at which a juvenile may be charged with a criminal offence, the maximum age at which a person is still considered to be a juvenile, the existence of special courts and procedures, the laws governing procedures against juveniles and how all these special arrangements for juveniles take account of "the desirability of promoting their rehabilitation". Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14.

17. Article 14, paragraph 5, provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. Particular attention is drawn to the other language versions of the word "crime" ("infraction", "delito", "prestuplenie") which show that the guarantee is not confined only to the most serious offences. In this connection, not enough information has been provided concerning the procedures of appeal, in particular the access to and the powers of reviewing tribunals, what requirements must be satisfied to appeal against a judgement, and the way in which the procedures before review tribunals take account of the fair and public hearing requirements of paragraph 1 of article 14.

18. Article 14, paragraph 6, provides for compensation according to law in certain cases of a miscarriage of justice as described therein. It seems from many State reports that this right is often not observed or insufficiently guaranteed by domestic legislation. States should, where necessary, supplement their legislation in this area in order to bring it into line with the provisions of the Covenant.

19. In considering State reports differing views have often been expressed as to the scope of paragraph 7 of article 14. Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of ne bis in idem as contained in paragraph 7. This understanding of the meaning of ne bis in idem may encourage States parties to reconsider their reservations to article 14, paragraph 7.

Twenty-third session (1984)

General comment No. 14: Article 6 (Right to life)

1. In its General comment No. 6 [16] adopted at its 378th meeting on 27 July 1982, the Human Rights Committee observed that the right to life enunciated in the first paragraph of article 6 of the International Covenant on Civil and Political Rights is the supreme right from which no derogation is permitted even in time of public emergency. The same right to life is enshrined in article 3 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948. It is basic to all human rights.

2. In its previous general comment, the Committee also observed that it is the supreme duty of States to prevent wars. War and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year.

3. While remaining deeply concerned by the toll of human life taken by conventional weapons in armed conflicts, the Committee has noted that, during successive sessions of the General Assembly, representatives from all geographical regions have expressed their growing concern at the development and proliferation of increasingly awesome weapons of mass destruction, which not only threaten human life but also absorb resources that could otherwise be used for vital economic and social purposes, particularly for the benefit of developing countries, and thereby for promoting and securing the enjoyment of human rights for all.

4. The Committee associates itself with this concern. It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.

5. Furthermore, the very existence and gravity of this threat generates a climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights.

6. The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.

7. The Committee accordingly, in the interest of mankind, calls upon all States, whether Parties to the Covenant or not, to take urgent steps, unilaterally and by agreement, to rid the world of this menace.

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ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*

Article 66
Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Attachment 4 to RE 20A

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the White House
President George W. Bush

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For Immediate Release
Office of the Press Secretary
January 28, 2002

President Meets with Afghan Interim Authority Chairman

Remarks by the President and Chairman of the Afghan Interim Authority Hamid Karzai
The Rose Garden

- Joint Statement on New Partnership Between U.S. and Afghanistan
- Fact Sheet

1:58 P.M. EST

THE PRESIDENT: It's a great honor for me to welcome to the White House the Chairman of the Afghan Interim Authority, Hamid Karzai.

Mr. Chairman, welcome.

CHAIRMAN KARZAI: Thank you very much.

THE PRESIDENT: I also want to welcome the ministers of the Interim Authority who have accompanied him to Washington. Chairman Karzai is a determined leader, and his government reflects the hopes of all Afghans for a new and better future; a future free from terror, free from war, and free from want.

The United States strongly supports Chairman Karzai's interim government. And we strongly support the Bonn agreement that provides the Afghan people with a path towards a broadly-based government that protects the human rights of all its citizens.

The Afghan people have already taken the first steps along this path by committing to rid their country of al Qaeda terrorists, and remnants of the Taliban regime who supported the terrorists. Yet, even as the war against terrorism continues, the world has also begun to help the Afghan people win the peace they deserve.

The United States is committed to building a lasting partnership with Afghanistan. We'll help the new Afghan government provide the security that is the foundation for peace. Today, peacekeepers from around the world are helping provide security on the streets of Kabul. The United States will continue to work closely with these forces and provide support for their mission. We will also support programs to train new police officers, and to help establish and train an Afghanistan national military.

The United States is also committed to playing a leading role in the reconstruction of Afghanistan. Today, I announce the United States Overseas Private Investment Corporation will provide an additional $50-million line of credit for Afghanistan to finance private-sector projects. This announcement builds on the United States' pledge in Tokyo earlier this month to provide $297 million this year to create jobs and to start rebuilding Afghanistan's agricultural sector, its health care system, and its educational system. Yet these efforts are only the beginning.

Two days ago, for the first time since 1979, an American flag was raised over the U.S. Agency for International Development's mission in Kabul. That flag will not be lowered. It will wave long into the future, a symbol of America's enduring commitment to Afghanistan's future.

Chairman Karzai, I reaffirm to you today that the United States will continue to be a friend to the Afghan people in all the challenges that lie ahead. Welcome to Washington.

CHAIRMAN KARZAI: Thank you very much.

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Well, thank you very much, Mr. President. Although we are here, as I mentioned in my meeting with you, invited by you, for which we are very grateful, but we are also here in a way to thank you and the American people for the great help that we were given to liberate our country once again -- this time from terrorism from the Taliban. The Afghan people recognize this help. They know that, without this help, we would have still probably been under that rule. So thank you very much to you and, through you, to the American people.

Afghanistan is a good partner. It will stay a good partner. And I'm sure that the future of the two countries will be good and a wonderful relationship should be expected to come in the future. Thank you very much for the help that you gave us during the Turkey conference, and thank you for organizing that, as well, together with other co-organizers, and thank you for the help that you announced today.

Afghanistan does need help in reconstruction. Afghanistan does need help in the rebuilding of its national army. And thank you very much for doing that, too.

I assure you, Mr. President, that Afghanistan, with your help and the help of other countries, friends, will be strong and will stand eventually on its own feet, and it will be a country that will defend its borders and not allow terrorism to return to it, or bother it, or trouble it. We'll be self-reliant. We'll do good in business. We'll be a strong country.

Afghanistan knows, Mr. President, the suffering of those people in America that saw and went through the horrors of the Twin Tower incident, the terrorism there. I believe the Afghans are the best people to see the pain exactly the way it was felt there then, at the time, because the Afghans have suffered exactly in the same way. We have sympathy, we know that pain, we understand it. Our families know that pain.

Therefore, this joint struggle against terrorism should go to the absolute end of it. We must finish them. We must bring them out of their caves and their hideouts, and we promise we'll do that.

Thank you very much, again, for having us here. It was an honor and we enjoy our trip to the U.S, myself and my colleagues. Thank you very much.

THE PRESIDENT: Thank you, Mr. Chairman.

We'll answer a couple of questions. Steve, Sonya.

Q On the issue of the detainees at Guantanamo Bay, what's wrong with formally applying the Geneva Convention to them?

THE PRESIDENT: I have -- the question is about the detainees in Guantanamo Bay. I had a very interesting meeting this morning with my national security team. We're discussing all the legal ramifications of how we -- what we -- how we characterize the actions at Guantanamo Bay. A couple of things we agree on. One, they will not be treated as prisoners of war. They're illegal combatants. Secondly, they will be treated humanely.

And then, I'll figure out -- I'll listen to all the legalisms and announce my decision when I make it. But we're in total agreement on how to -- on whether or not -- on how these prisoners -- or detainees, excuse me, ought to be treated. And they'll be treated well.

And yesterday, the Secretary of Defense went down to Guantanamo Bay with United States senators from both political parties. The senators got to see the circumstances in which these detainees were being held. They -- I don't want to put words in their mouth, but according to the Secretary of Defense -- I'll let him puts words in their mouth -- they felt like, one, that our troops were really valiant in their efforts to make sure that these killers -- these are killers -- were held in such a way that they were safe. I noticed one of our troops last night was commenting that they are receiving very good medical care. But I'll make my decision about -- on how to legally interpret the situation here pretty soon.

Sonya.

Q Sir, are you prepared to go to court with the General Accounting Office to keep secret the records of your energy task force meetings?

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THE PRESIDENT: Well, the question about the General Accounting Office is this: Should an administration be allowed to have private conversations in this office without everybody knowing about it. This is part of how you make decisions, is to call people in and say, what's your opinion. What's your opinion on stem cell? What's your opinion on energy? What's your opinion on the war?

And in order for me to be able to get good, sound opinions, those who offer me opinions or offer the Vice President opinions must know that every word they say is not going to be put into the public record. And so I view the GAO like the Vice President does. It's an encroachment on the Executive Branch's ability to conduct business.

Now, as far as the specific case of the Energy Report goes, there is an energy report that is now in the public arena. People are free to read it. I hope they do, because it's a comprehensive report, one based upon the opinions of members of the exploration sector of the energy business; some about the infrastructure, opinions from those involved with the infrastructure; some opinions obviously from those in the environmental community. This is a report that collected a lot of opinions. And it was done in such a way that people felt free to come in and express their opinion.

And so, to answer your question, we're not going to let the ability for us to discuss matters between ourselves to become eroded. It's not only important for us, for this administration, it is an important principle for future administrations.

Gregory.

Q Mr. President, on the Middle East --

THE PRESIDENT: Medium-size Stretch. (Laughter.)

Q When you spoke to President Mubarak today and expressed your disappointment in Yasser Arafat, what did he say? And secondly, are you worried that the level of disappointment in the region is not as high as your own? Does that complicate your efforts to build a coalition against Arafat that's necessary?

THE PRESIDENT: I think members -- I think -- first of all, Mr. Mubarak can characterize the conversation the way he sees fit. I will just tell you what I told him. And I told him that in order for there to be peace in the Middle East, we must rout out terror, wherever it exists. And the U.S. effort to rout out terror around the world is going to benefit the Middle East in the long-term.

It is important for Mr. Arafat to not only renounce terror, but to arrest those who would terrorize people trying to bring peace. There are people in the region that want there to be a peaceful settlement, and yet, obviously, terrorists are trying to prevent that from happening by wanton murder. And Mr. Arafat must join the effort to arrest them.

And when the ship showed up with weapons, obviously aimed at terrorizing that part of the world, I expressed my severe disappointment because I was led to believe that he was willing to join us in the fight on terror. I took him for his word when he -- at Oslo. And so I made this very clear to my friend, Hosni Mubarak, that ridding the Middle East of terror is going to make it more likely that there be peace and stability in the region.

Q Mr. President, going to the issue of the GAO lawsuit --

THE PRESIDENT: Yes.

Q -- some in Congress, particularly Congressman Waxman, suggested that the Energy Report represented a wish list for Enron.

THE PRESIDENT: The Energy Report represented a wish -- in other words, we were doing favors for Enron?

Q That's his representation. Do you agree with that, sir?

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THE PRESIDENT: Well, Enron went bust. Shortly after the report was put out, Enron went broke. And it went broke because, it seems like to me -- and we'll wait for the facts to come out -- it went broke because there was not full disclosure of finances. This is a -- what we're talking about here is a corporate governance issue. This is a business problem that our country must deal with and must fix. That is, full disclosure of liabilities, full understanding of the effects of decisions on pension funds, reform of a pension system, perhaps.

There are some on Capitol Hill who want to politicize this issue. This is not a political issue. It is a business issue that this nation must deal with. And, you know, Enron had made contributions to a lot of people around Washington, D.C. And if they came to this administration looking for help, they didn't find any.

Now, obviously, we're interested in people's opinions about energy -- those in the energy business, those in the conservation world, those who know how to develop infrastructure. And so we solicited a lot of opinions from people. And the report is now public; everybody can read it to determine our vision about how to make our country less dependent on foreign sources of crude oil, which we must do.

Yes, Jim.

Q Mr. President, we understand that you do now want to commit American troops to peacekeeping forces in Afghanistan. Why not, sir? And do you have any concerns that there will be enough forces to give Mr. Karzai the kind of security he needs?

THE PRESIDENT: We are committing help to the ISIF in the form of logistical help, in the form of kind of a bailout -- if the troops get in trouble, we stand ready to help; in the form of intelligence. Plus, I have just made in my remarks here a significant change of policy, and that is that we're going to help Afghanistan develop her own military. That is the most important part of this visit, it seems like to me, besides the fact of welcoming a man who stands for freedom, a man who stood for freedom in the face of tyranny.

We have made a decision -- both of us have made the decision that Afghanistan must, as quickly as possible, develop her own military. And we will help. We'll help train, and Tommy Franks, our general, fully understands this and is fully committed to this idea. So, better yet than peacekeepers -- which will be there for a while, with our help -- let's have Afghanistan have her own military.

Major.

Q Mr. President, along the issue of politicizing Enron, the Majority Leader, Tom Daschle, with whom you in the past have said you have a good working relationship, said over the weekend that he was afraid your budget would Enron-ize Social Security and Medicare. That is to say, put them in specific jeopardy of collapsing. I wonder if you could comment on that, sir, and if there's any way to make this --

THE PRESIDENT: Well, sometimes there's political hyperbole here in this town. The budget I submitted is one -- will submit soon -- is one that says that the war on terror is going on and we're going to win, and we've got to make sure we spend enough money to win. It's also one that prioritizes homeland security. It is also one that wants to do something about our economy, let's get a stimulus bill. It's a bill that sets priorities.

And it is -- I think there are some still upset with the tax cut. But I want to remind you that we were in recession in March of last year. That's when they officially declared recession. The slowdown was obviously significant to reach a point where we were -- where the economists said we were in recession. And so the tax cuts came at the right time.

Now, there are some who believe if you raise taxes it makes the economy stronger. As I've told the American people several times, I don't understand what textbook they're reading. I believe by reducing taxes it makes the economy stronger. The tax relief came right at the right time. Now, our economy is still not as strong as it should be. There's still some weakness. But surely people aren't suggesting raising taxes at this point makes sense. I don't believe it does make any sense.

And so the budget I've submitted is a good, strong budget. It sets priorities and it's realistic, and the American people will understand it when I explain it tomorrow night.

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Q Mr. President, in holding the detainees in Cuba in the manner in which the United States is, is one of the signals you're sending that, in this new kind of war, as you've described it, the Geneva Conventions are outdated and don't apply in the conflict with al Qaeda?

THE PRESIDENT: No, the Geneva Conventions are not outdated, and it's a very important principle. First of all, Terry, we are adhering to the spirit of the Geneva Convention. When you say you're holding the prisoners in the manner you are -- we're giving them medical care, they're being well-treated.

There is no allegation -- well, there may be an allegation -- there's no evidence that we're treating them outside the spirit of the Geneva Convention. And for those who say we are, they just don't know what they're talking about.

And so --

Q Mr. President --

THE PRESIDENT: Let me finish. And so I am looking at the legalities involved with the Geneva Convention. In either case, however I make my decision, these detainees will be well-treated. We are not going to call them prisoners of war, in either case. And the reason why is al Qaeda is not a known military. These are killers. These are terrorists. They know no countries. And the only thing they know about countries is when they find a country that's been weak and they want to occupy it like a parasite. And that's why we're so pleased to join with Chairman Karzai to rout them out.

And so the prisoners, detainees, will be well-treated. They just won't be afforded prisoner of war status. I'll decide beyond that whether or not they can be noncombatants under the Geneva Convention, or not. I'll make that legal decision soon. But this administration has made the decision they'll be well-treated. Long before they arrived at Guantanamo Bay did we make that decision.

Plante.

Q Mr. President, the Saudi Interior Minister today said that a majority of those being held at Guantanamo, more than 100, are Saudi citizens, and asked that they be returned to Saudi Arabia for questioning.

THE PRESIDENT: Well, I appreciate his request. And we will, of course -- we'll take it under consideration. There are a lot of detainees around the world as a result of this first phase in the war against terror. There's a lot in Pakistan, there's a lot in Afghanistan, and there are 179, I believe, or whatever the number is, in Guantanamo Bay. So there's a lot Saudi citizens that chose to fight for al Qaeda, and/or the Taliban, that we want to know more about. And so we'll make a decision on a case-by-case basis as to whether they go back to Saudi Arabia, or not. I appreciate his suggestion.

Listen, I want to thank you all very much. Mr. Chairman, it's good to have you --

Q May I ask Chairman Karzai a question?

THE PRESIDENT: Ask who?

Q May I ask Chairman Karzai something about --

THE PRESIDENT: Of course you can ask Chairman Karzai a question. Thank you.

Q Mr. President, I have a question --

THE PRESIDENT: No, I'm sorry.

Q Chairman Karzai, given Afghanistan's history of fighting foreign invaders, and its pride and independence, are you concerned about any political sensitivity -- in establishing an Afghan military? And how would you describe

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the ideal partnership between the United States?

CHAIRMAN KARZAI: Well, we have no concerns there. As I mentioned in my remarks earlier, the Afghans are grateful that we were helped twice, once during the Soviet occupation by the U.S., and now to fight terrorism and liberate ourselves from that menace. We are a fiercely independent country, and the world knows that. Our neighbors know that very well, and the countries in the region know that.

The Afghan request for training of our army is nothing new. Our prime ministers were here even back in the 1950s to ask this kind of training. And it's training and a relationship between two independent, sovereign countries, and nothing to worry others.

Q Chairman Karzai, have you discussed in regards with Osama bin Laden and what can you do to gather more information to capture him?

CHAIRMAN KARZAI: We are looking for him. He's a fugitive. If we find him, we'll catch him.

Thank you very much.

END 2:22 P.M. EST

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Joint Press Conference by Tony Blair and George W Bush

British Embassy, Washington D.C., 17 July 2003

Speakers: George W Bush, President of the United States and Tony Blair, British Prime Minister, followed by Questions and Answers.

George W Bush: Good afternoon. It is once again a pleasure to welcome the Prime Minister, Tony Blair, and Cheri Blair to the White House.

Mr. Prime Minister, fabulous speech. Congratulations.

(APPLAUSE)

In his address this afternoon, Prime Minister Blair once again showed the qualities that have marked his entire career. Tony Blair is a leader of conviction, of passion, of moral clarity and eloquence. He is a true friend of the American people.

The United Kingdom has produced some of the world's most distinguished statesmen, and I'm proud to be standing with one of them today.

The close partnership between the United States and Great Britain has been and remains essential to the peace and security of all nations. For more than 40 years of the Cold War, we stood together to ensure that the conflicts of Europe did not once again destroy the peace of the world.

The duties we accepted were demanding, as we found during the Berlin Blockade and other crises. Yet British and American leaders held firm, and our cause prevailed.

Now we are joined in another great and difficult mission. On September the 11th, 2001, America, Britain and all free nations saw how the ideologies of hatred and terror in a distant part of the world could bring violence and grief to our own citizens.

We resolved to fight these threats actively wherever they gather,

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before they reach our shores. And we resolved to oppose these threats by promoting freedom and democracy in the Middle East, a region that has known so much bitterness and resentment.

From the outset, the prime minister and I have understood that we are allies in this war, a war requiring great effort and patience and fortitude.

The British and American peoples will hold firm once again and we will prevail.

The United States and Great Britain have conducted a steady offensive against terrorist networks and terror regimes. We are dismantling the Al Qaida network leader by leader. And we are hunting down the terrorist killers one by one.

In Afghanistan, we removed the cruel and oppressive regime that had turned that country into a training camp for Al Qaida. And now we are helping the Afghan people to restore their nation and regain self-government.

In Iraq, the United States, Britain and other nations confronted a violent regime that armed to threaten the peace, that cultivated ties to terror and defied the clear demands of the United Nations Security Council.

Saddam Hussein produced and possessed chemical and biological weapons, and was trying to reconstitute his nuclear weapons program. He used chemical weapons in acts of murder against his own people.

The U.N. Security Council, acting on information, it had acquired over many years, passed more than a dozen resolutions demanding that the dictator reveal and destroy all of his prohibited weapons. A final Security Council resolution promised serious consequences if he continued his defiance.

The former dictator of Iraq chose his course of action and, for the sake of peace and security, we chose ours.

The prime minister and I have no greater responsibility than to protect the lives and security of the people we serve.

The regime of Saddam Hussein was a grave and growing threat. Given Saddam's history of violence and aggression, it would have been reckless to place our trust in his sanity or his restraint.

As long as I hold this office I will never risk the lives of American citizens by assuming the good will of dangerous enemies.

Acting together, the United States, Great Britain and our coalition partners enforced the demands of the world. We ended the threat

from Saddam Hussein's weapons of mass destruction. We rid the Middle East of an aggressive destabilizing regime. We liberated nearly 25 million people from decades of oppression. And we are now helping the Iraqi people to build a free nation.

In Iraq, as elsewhere, freedom and self-government are hated and opposed by a radical and ruthless few.

American, British and other forces are facing remnants of a fallen regime and other extremists. Their attacks follow a pattern. They target process and success. They strike at Iraqi police officers who have been trained to enforce order. They sabotage Iraqi power grids that we're rebuilding. They are the enemies of the Iraqi people.

Defeating these terrorists is an essential commitment on the war on terror. This is the duty we accept. This is the fight we will win.

We are being tested in Iraq. Our enemies are looking for signs of hesitation. They are looking for weakness. They will find none. Instead, our forces in Iraq are finding these killers and bringing them to justice.

And we will finish the task of helping Iraqis make the challenging transition to democracy.

Iraq's governing council is now meeting regularly. Soon the council will nominate ministers and propose a budget. After decades of tyranny, the institutions of democracy will take time to create. America and Britain will help the Iraqi people as long as necessary.

Prime Minister Blair and I have the same goal: The government and future of Iraq will be in the hands of the people of Iraq.

The creation of a strong and stable Iraqi democracy is not easy, but it's an essential part on the war against terror. A free Iraq will be an example to the entire Middle East. And the advance of liberty in the Middle East will undermine the ideologies of terror and hatred and will help strengthen the security of America and Britain and many other nations.

By helping to build and secure a free Iraq, by accepting the risks and sacrifice, our men and women in uniform are protecting our own countries and they are giving essential service in the war on terror.

This is the work history has given us, and we will complete it. We're seeing movement toward reform and freedom in other parts of the Middle East. The leadership and courage of Prime Minister Abbas and Prime Minister Sharon are giving their peoples new hope for progress.

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Other nations can add to the momentum of peace by fighting terror in all its forms. A Palestinian state will be built upon hope and reform, not built upon violence.

Terrorists are the chief enemies of Palestinian aspirations. The sooner terrorism is rooted out by all the governments in the region, the sooner the Palestinian flag will rise over a peaceful Palestinian state.

The spread of liberty in Afghanistan and Iraq and across the Middle East will mark a hopeful turn in the history of our time.

Great Britain and America will achieve this goal together.

One of the reasons I'm confident in our success is because of the character and the leadership of Prime Minister Tony Blair.

Mr. Prime Minister?

Tony Blair: Thank you, Mr. President. And first of all, as I did a short time ago, I would like to pay tribute to your leadership in these difficult times, because ever since September the 11th the task
of leadership has been an arduous one. And I believe that you have fulfilled it with tremendous conviction, determination and courage.

George W Bush: Thank you, sir.

Tony Blair: And I think it's as well that we understand how this has all come about. It came about because we realized that there was a new source of threat and insecurity in our world that we had to counter. And as I was saying in my speech to Congress, this threat is sometimes hard for people to understand because it's such a different nature than the threats we have faced before.

But September the 11th taught us it was real.

And when you lead countries, as we both do, and you see the potential for this threat of terrorism and weapons of mass destruction to come together, I really don't believe that any responsible leader could ignore the evidence that we see and the threat that we face.

And that's why we've taken the action that we have, first in Afghanistan and now in Iraq.

And in Afghanistan, we acted to remove the Taliban and we still pursue the Al Qaida terrorist network there and in other parts of the world. But there is no doubt at all that but for that action Al Qaida would have retained its central place of command and control which now is denied to it.

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And in respect of Iraq, we should not forget Resolution 1441 -- it was passed in the United Nations -- in which the entire international community accepted the threat that Iraq constituted.

I think it's just worth pointing out, in these last few days Iraq has had a governing council established with the help of the United Nations representative, Sergio de Mello.

And in the last two weeks the United Nations has spoken about the numbers of missing people and mass graves. And that number, just on the present count, is around about 300,000 people.

So let us be clear, we have been dealing with a situation in which the threat was very clear and the person, Saddam Hussein, wielding that threat, someone of total brutality and ruthlessness with no compunction about killing his own people or those of another nation.

And, of course, it's difficult to reconstruct Iraq. It's going to be a hard task; we never expected otherwise.

But as the president has said to you a moment or two ago, the benefit of that reconstruction will be felt far beyond the territory of Iraq. It is, as I said earlier today, an indispensable part of bringing a new settlement in the whole of the Middle East.

And I would also pay tribute to the president's leadership in the Middle East and in rekindling the prospect of the Middle East peace process. And if I can remind people, I think many people were cynical as to whether this could ever be rekindled. Many people doubted whether the commitment was there to fairness for Palestinian people as well as the state of Israel.

And yet the president has stated very clearly the goal of a two-state solution, and now we actually have the first steps, albeit tentative, towards achieving that.

And when I met Prime Minister Sharon in London a few nights ago, I was more than ever convinced that if we can provide the right framework within which these tentative steps are made, then we do genuinely have the prospect of making progress there.

And then again as I was saying earlier, the commitment that America has now given, that the president has given, in respect of Africa and tackling some of the poorest parts of our world, is again a sign of hope.

And all these things are changing our world. And however difficult the change may be, I genuinely believe it is change for the better.

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So I am honored once again to be here in the White House with you, Mr. President. As I said earlier, we are allies and we are friends. And I believe that the work that we are embarked upon is difficult but is essential. And so far as we are concerned, we shall hold to it right the way through.

George W Bush: We'll take a couple of questions.

QUESTION: Mr. President, others in your administration have said that your words on Iraq and Africa did not belong in your State of the Union address. Will you take responsibility - personal responsibility for those words?

And to the both of you, how is that two major world leaders such as yourselves have had such a hard time persuading other major powers to help stabilize Iraq?

George W Bush: Well, first, I take responsibility for putting our troops into action. And I made that decision because Saddam Hussein was a threat to our security, and a threat to the security of other nations.

I take responsibility for making the decision, the tough decision, to put together a coalition to remove Saddam Hussein, because the intelligence -- not only our intelligence, but the intelligence of this great country -- made a clear and compelling case that Saddam Hussein was a threat to security and peace.

I say that because he possessed chemical weapons and biological weapons. I strongly believe he was trying to reconstitute his nuclear weapons program. And I will remind the skeptics that in 1991 it became clear that Saddam Hussein was much closer to developing a nuclear weapon than anybody ever imagined.

He was a threat. I take responsibility for dealing with that threat.

We are in a war against terror and we will continue to fight that war against terror. We're after Al Qaida, as the prime minister accurately noted. And we're dismantling Al Qaida. The removal of Saddam Hussein is an integral part of winning the war against terror.

A free Iraq will make it much less likely that we'll find violence in that immediate neighborhood. A free Iraq will make it more likely we'll get a Middle Eastern peace. A free Iraq will have incredible influence on the states that could potentially unleash terrorist activities on us.

And, yeah, I take responsibility for making the decisions that I made.

Tony Blair: First of all, before I answer the question you put to me about other countries helping us, let me just say this on the

issue to do with Africa and uranium.

The British intelligence that we have we believe is genuine. We stand by that intelligence.

And one interesting fact, I think, people don't generally know, in case people should think that the whole idea of a link between Iraq and Niger was some invention: In the 1980s we know for sure that Iraq purchased around about 270 tons of uranium from Niger. So I think we should just factor that into our thinking there.

As for other countries, actually other countries are coming in.

We have with us now around about nine other countries, who will be contributing or are contributing literally thousands of troops. I think I'm right in saying the Poles, in their sector, have somewhere in the region of 20 different countries offering support. And I've got no doubt at all we will have international support in this.

Indeed to be fair even to those countries that opposed the action, I think they recognize the huge importance of reconstructing Iraq.

And it is an interest thing, I was at a European meeting just a couple of weeks ago where, as you know, there were big differences between people over the issue of Iraq. And yet I was struck by the absolutely unanimous view that whatever people felt about the conflict, it was obviously good that Saddam was out. And most people now recognize that the important thing is that we all work together to reconstruct Iraq for the better, so that it is a free and stable country.

QUESTION: I want to ask you both about one aspect of Iraq and freedom and justice, which is, as you know, is causing a great deal of concern in Britain and the British Parliament, that is what happens now in Guantanamo Bay to the people detained there, particularly whether there's any chance that the president will return the British citizens to face British justice, as John Walker Lindh faced regular American justice.

And just on a quick point, could the prime minister react to the decision of the Foreign Affairs Committee tonight that the BBC reporter, Andrew Gilligan, is a, quote, "unsatisfactory witness"?

George W Bush: You probably ought to comment on that one.

(LAUGHTER)

Tony Blair: Well, can I just say to you on the first point, obviously, this is an issue that we will discuss when we begin our talks tonight. And we will put out a statement on that tomorrow

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for
you.

George W Bush: We will work with the Blair government on this issue. And we're about to -- after we finish answering your questions, we're going to go upstairs and discuss the issue.

QUESTION: Do you have concerns that they'll get justice, the people detained there?

George W Bush: No, the only thing I know for certain is that these are bad people. And we look forward to working closely with the Blair government to deal with the issue.

Tony Blair: On your other point, the issue here is very, very simple. The whole debate for weeks revolved around a claim that either I or a member of my staff had effectively inserted intelligence into the dossier we put before the British people against the wishes of the intelligence services.

Now that is a serious charge. It never was true. Everybody now knows that that charge is
untrue. And all we are saying is those who made that charge should simply accept that it is untrue. It's as simple as that.

QUESTION: Mr. President, in his speech to Congress, the prime minister opened the door to the possibility that you may be proved wrong about the threat from Iraq's weapons of mass destruction.

George W Bush: Yes.

QUESTION: Do you agree? And does it matter whether or not you find...

George W Bush: Well, you might ask the prime minister that -- we won't be proven wrong.

Tony Blair: No.

George W Bush: I believe that we will find the truth. And the truth is he was developing a program for weapons of mass destruction.

Now, you say, "Why didn't it happen all of a sudden?" Well, there was a lot of chaos in the country, one. Two, Saddam Hussein has spent over a decade hiding weapons and hiding materials. Three, we're getting, we're just beginning to get some cooperation from some of the high-level officials in that administration, or that regime.

But we will bring the weapons, and, of course, we will bring the

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information forward on the weapons when they find them. And that'll end up -- end all this speculation.

As I understand, there's been a lot of speculation over in Great Britain, we got a little bit of it here, about whether or not the -- whether or not the actions were based upon valid information.

We can debate that all day long until the truth shows up. And that's what's going to happen. And we based our decisions on good, sound intelligence, and the -- our people are going to find out the truth. And the truth will say that this intelligence was good intelligence; there's no doubt in my mind.

Tony Blair: Yes, if I could just -- if I could just correct you on one thing, I certainly did not say that I be would proved wrong. On the contrary, I said with every fiber of instinct and conviction I believe that we are right.

And let me just say this one other thing to you, because sometimes, again, in the debate in the past few weeks it's as if prior to the early part of this year the issue of Saddam Hussein and weapons of mass destruction was some sort of unknown quantity, and on the basis of some speculative intelligence we go off and take action.

The history of Saddam Hussein and weapons of mass destruction is a 12-year history, and is a history of him using the weapons and developing the weapons and concealing the weapons and not complying with the United Nations inspectors who were trying to shut down his programs.

And I simply say -- which is why I totally agree with the president -- it's important we wait for the Iraq survey group to complete their work. Because the proposition that actually he was not developing such weapons and such programs rests on this rather extraordinary proposition: that having for years obstructed the United Nations inspectors and concealed his programs, having finally effectively got rid of them in December '98, he then took all the problems and sanctions and action upon himself, voluntarily destroyed them but just didn't tell anyone.

I don't think that's very likely as a proposition. I really don't.

QUESTION: Mr. President, do you realize that many people hearing you say that we know these are bad people in Guantanamo Bay will merely fuel their doubts that the United States regards them as innocent until proven guilty and do a fair, free and open trial?

George W Bush: Let me just say, these were illegal combatants. They were not trying to try them in front of your cameras or in

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your newspaper.

But we will talk with the prime minister about this issue. He's asked -- prior to his arrival, said, "I want to talk about this in a serious way. Can we work with you?" And the answer is, "Absolutely."

I understand the issue. And we will. We'll have a very good discussion about it right after he finishes answering this aspect of your question.

(LAUGHTER)

Tony Blair: I just think you should realize -- I mean, of course, as I said a moment or two ago, we will discuss this together and we'll put out a statement for you tomorrow.

But I think, again, it's important just to realize the context in which all this arises, without saying anything about any specific case at all. And the context was a situation in which the Al Qaida and the Taliban were operating together in Afghanistan against American and British forces.

So, as I say, we will discuss this issue, we will come back to it and you'll have a statement tomorrow.

But I want to say just in concluding, once again, that the conviction that this threat of terrorism and weapons of mass destruction is the security threat our world faces has never left me. It's with me now. And I believe it to be the threat that we have to take on and defeat. I really do.

George W Bush: Good job. Thank you. Appreciate your country.

Thank you all.

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Ashcroft defends detainees' treatment

January 22, 2002 Posted: 12:09 AM EST (0509 GMT)

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GUANTANAMO BAY, Cuba (CNN) -- Another 14 detainees arrived here Monday, bringing the total to 158 who have been transferred to this makeshift prison from Afghanistan.

The 14 new detainees were taken off the plane on stretchers. One U.S. official said the military is now focusing on bringing wounded detainees from Afghanistan to the base, where they can receive better medical attention.

U.S. officials have been careful to refer to the men as "war criminals."

That has rankled some critics. "Secretary of Defense [Donald] Rumsfeld and others insist that these are not prisoners of war and there, frankly, he's wrong," said Kenneth Roth, executive director of Human Rights Watch. "The Geneva Conventions require all prisoners to be treated as presumptive prisoners of war until a competent tribunal determines otherwise."

The 1949 Geneva Conventions, ratified but not signed by the United States, require that prisoners of war receive humane treatment, adequate food and delivery of relief supplies, and forbid anyone to pressure prisoners to supply more than a minimum of information.

But Attorney General John Ashcroft defended his classification of the detainees as "war criminals."

"These people are terrorists, they haven't fought like soldiers, they don't wear uniforms, they don't reveal themselves," Ashcroft said Sunday. "This is a part of the conspiracy where innocent women and children, innocent Americans, were destroyed not as an act of conventional war, but in the context of what I consider to be war criminality."

He defended the conditions at the U.S. naval base, saying they were necessary to protect troops stationed there.

"These individuals are being restrained and

VIDEO

Detainees at Camp X-Ray in Guantanamo Bay, Cuba, live under intense floodlights and 24-hour monitoring. CNN's Bob Franken reports (January 21)

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properly so. They are terrorists. They are uniquely dangerous," Ashcroft told CNN's Late Edition With Wolf Blitzer.

The detainees are being housed in outdoor cells surrounded by chain-link fences until other facilities are constructed. They receive three meals a day -- including one meal that meets Muslim religious requirements -- and have all other basic needs met, U.S. military officials said.

"Their basic needs are regarded, they have the right food, they have the right shelter, the right capacity to avoid injury," Ashcroft said.

Asked about a photograph in Sunday editions of the New York Times showing detainees -- crouched, wearing goggles, some with ear covers and chains on their arms -- a spokesman for the U.S. Southern Command said the pictures were taken upon their arrival at the base and that they are not similarly shackled while inside their cells.

Col. Ron Williams, director of public affairs for U.S. Southern Command, said the detainees are blindfolded, shackled and forced to wear surgical masks only when they are moved.

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Williams said the measures are taken to ensure prisoners cannot hatch a plot, or pick up information about U.S. forces simply by watching.

He added that the detainees are shackled, but not blindfolded, during exercise.

U.S. soldiers have placed signs near their cells pointing eastward so the Muslim prisoners can pray in the direction of Mecca.

Williams added that a delegation from the International Committee of the Red Cross has delivered mail to the some of the detainees.

ICRC officials have been allowed access to the camps and are discussing conditions at the base, said U.S. Marines spokesman Brig. Gen. Michael Lehnert. The Red Cross has not issued a report yet, Rumsfeld said.

A total of 269 prisoners remain in Afghanistan. Another one -- American Taliban fighter John Walker -- remains aboard the USS Bataan in the Arabian Sea.

Walker is expected to be transported in the next few days to the United States, where the Department of Justice will take custody of the 20-year-old, who has admitted to fighting alongside the Taliban.

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"Ashcroft and I and the president have agreed [Walker] will be transferred from military detention over to the Department of Justice for deposition in the criminal court system of the United States, very likely in the northern district of Virginia," Rumsfeld said Sunday. "He'll arrive in that jurisdiction sometime in the days ahead."

CNN Correspondent Bob Franken and Producer Silvio Carrillo and Correspondent Jeff Levine at the Pentagon contributed to this story.

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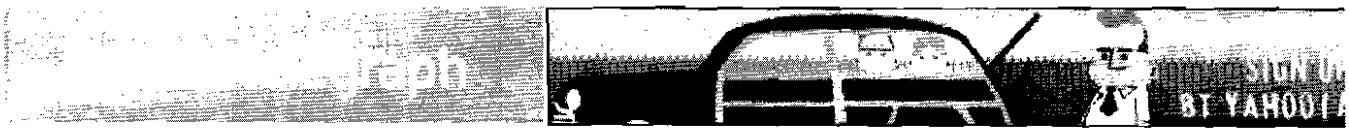

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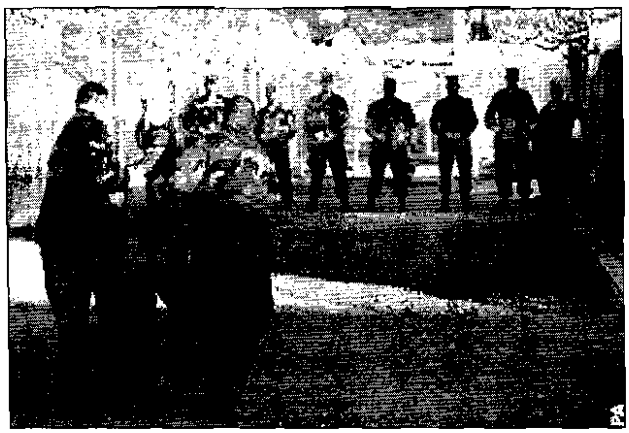
Britain and US in rift over terrorist prisoners

By Toby Harnden in Washington, Andrew Sparrow, Sean O'Neill and Hamida Ghafour
(Filed: 21/01/2002)

A RIFT between the Government and the Bush administration opened up last night after Donald Rumsfeld dismissed criticism of the treatment of detainees held at Camp X-Ray at Guantanamo Bay, Cuba, as ill-informed.



US Army Military Police escort an al-Qa'eda detainee to his cell in Camp X-ray

"The people who have been the most shrill, once they have more knowledge of the subject will stop being so shrill," the American defence secretary told reporters.

Jack Straw, the Foreign Secretary, earlier expressed his concern about photographs showing shaven-headed Taliban and al-Qa'eda prisoners kneeling and tightly manacled.

"I have asked our officials in Guantanamo Bay to establish with America the circumstances in which these photographs were taken," he said.

"Prisoners, regardless of their technical status, should be treated humanely and in accordance with customary international law."

Three inmates at Guantanamo Bay are said to have claimed to be British. There have been unconfirmed reports that one is Feroz Abbasi, 22, a former computer studies student, from Croydon, south London.

Abassi vanished more than a year ago after becoming involved with Muslim extremists at Finsbury Park mosque, north London, and telling his mother that he was going to fight in Afghanistan.

Related Links
- Daily Telegraph: Not Mr Straw's business
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External Links
- US Naval Station, Guantanamo Bay, Cuba - US Navy
- Newsroom 10 Downing Street
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- Secretary Rumsfeld interview with NBC Meet the Press [20 Jan '02] - US Department of Defence
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- International Committee of the Red Cross
- America at war - Washington Post
- Geneva Convention - UN Office of the High Commissioner for Human Rights
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- Follow the Geneva Convention [17 Jan '02] - Washington Post

Mr Rumsfeld's remark last week that he did not feel "even the slightest concern" about the prisoners angered Labour MPs.

Robin Cook, the former foreign secretary, irritated senior Bush officials by describing Mr Rumsfeld witheringly as a "man of robust views" and saying: "The secretary of state for defence is an honourable post and we pay respect to that post, but it is not an independent post."

While the issue is worrying Britain and much of Europe, the American public and the opposition Democrats have accepted the White House view that the harsh measures are needed for security reasons.

Mr Rumsfeld, describing the 110 al-Qa'eda and Taliban captives at the base as "very tough, hard-core, well-trained terrorists", said yesterday it was wrong to suggest that they were being treated inhumanely.

"Obviously anyone would be concerned if people were suggesting that treatment were not proper," he said. "The fact is that treatment is proper. There is no doubt in my mind that it is humane and appropriate and consistent with the Geneva convention for the most part."

The prisoners were receiving excellent medical care and "culturally appropriate food" three times a day.

"They are being allowed to practise their religion, which is not something that they encouraged on the part of others. They are clothed cleanly and they are dry and safe."

Mr Rumsfeld suggested that criticism of their treatment was an insult to the troops guarding them.

"They are fine young people and they are doing a wonderful job and it is not fair or appropriate to suggest that the conduct they are engaged in, in detaining those prisoners, is anything other than humane and appropriate.

"I am darned proud of those folks down there for the fine job they are doing." A team from the International Committee of the Red Cross has been at the base since Thursday to inspect the prison camp and interview detainees.

The men are being held in 6ft by 8ft cages with roofs and floors but only chain-link walls until more permanent structures are built.

Downing Street urged critics not to "rush to judgment". They should wait until British officials visiting the camp, who are understood to include MI5 officers, filed a report on the conditions there.

But Tony Lloyd, a former Labour Foreign Office minister, questioned whether the treatment of the captives accorded with the Geneva convention, as London and Washington claimed.

Another former Labour minister, Tony Banks, reminded the

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Government that it had said: "We are not going to allow terrorists to reduce us to the level of barbarians."

Abbasi's Labour MP, Geraint Davies, said that ministers should consider seeking his extradition to Britain.

"I have raised with the Prime Minister the issue of those being held in Cuba having their human rights observed."

Friends of Abbasi said he had been interested in rollerblading, music and girls until he started studying the Koran three years ago.

Michael Driver, 18, said: "He said he would take up the religion. He was a bit messed up. I don't think his life was that good. He did not have a lot of friends and he has not spoken to his father for a long time."

Mr Driver, an apprentice mechanic, said that he and Abbasi used to go on trips to central London and spend time in cafes and amusement arcades.

"We talked about school and general teenage things. He was older, so when I had a bit of trouble in a relationship he was the one I spoke to. He helped me out. He was a really good listener."

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Rumsfeld Visits, Thanks U.S. Troops at Camp X-Ray in Cuba

By Gerry J. Gilmore
American Forces Press Service

U.S. NAVAL BASE, GUANTANAMO BAY, CUBA, Jan. 27, 2002 -- Defense Secretary Donald H. Rumsfeld flew here today to visit Joint Task Force 160 troops at Camp X-Ray, where 158 Taliban and Al Qaeda detainees are now under U.S. military control.

The U.S. servicemen and women at Camp X-Ray "are doing a first-rate job," Rumsfeld noted during an afternoon press conference at the facility. "I came down to say 'thank you,'" he added.

Four U.S. senators accompanied Rumsfeld to Guantanamo: Hawaii Sen. Daniel Inouye, Alaska Sen. Ted Stevens, California Sen. Dianne Feinstein and Texas Sen. Kay Bailey Hutchison. Air Force Gen. Richard B. Myers, chairman of the Joint Chiefs of Staff, also accompanied Rumsfeld on the trip. A previous congressional delegation visited the camp Jan. 25.

During the flight to Cuba Rumsfeld told reporters he has "absolutely full confidence in the way the detainees are being handled and treated" at Camp X-Ray. U.S. service members pulling duty are performing "a tough job," the secretary said.

"There has been a lot of confusion and misinformation about what they're doing down there. These are terrific young men and women doing an excellent job, and I want to tell them that," Rumsfeld said.

The secretary noted he also wanted to talk to Camp X-Ray's senior officers about construction plans for additional, more permanent facilities for detainees. Rumsfeld also said he'd speak with members of the International Committee of the Red Cross now visiting the camp.

Rumsfeld told reporters on the flight to Cuba that Taliban and Al Qaeda detainees at the Guantanamo Bay and Kandahar, Afghanistan, facilities "are not POWs" and characterized them instead as "unlawful combatants." He emphasized the detainees are being treated humanely.

"Don't forget, he said, "we're treating these people as if the Geneva Convention applied."

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However, he added, the strict security rules in place at Camp X-Ray are warranted. He called the detainees at Guantanamo "among the most dangerous, best-trained, vicious killers on the face of the earth. This is very, very serious business."

More than 200 other detainees who are considered less dangerous than those at Guantanamo are under U.S. control at a facility near Kandahar.

Upon arrival at Guantanamo, Rumsfeld and party traveled to the camp and went inside the detainee compound to speak with guards, medical officers and other support personnel.

Afterward, the group visited other task force troops supporting the detention mission. Marine Corps Maj. Steve Cox, task force spokesman, noted that 1,500 JTF-160 service members have joined the 2,400 troops and families already at Guantanamo before the detention operation began 21 days ago.

The senators and Rumsfeld then held a press conference. All concurred that the detainees were being treated well. Feinstein said the detainees live better than inmates in some California prisons she's seen. Stevens and Inouye seemed to suggest that the detainees were getting better treatment than perhaps they deserved.

"This is not an egregious situation," said Feinstein, noting that the Guantanamo detainees are not being mistreated.

Hutchison said the Joint Task Force 160 troops are doing a good job providing religious materials and medical care to the detainees -- the same type of medical care available to U.S. troops and their family members, she noted.

Cox noted the detainees receive three meals a day -- including two hot -- have medical care, receive Korans and have the opportunity to practice their religion.

"The detainees are not being mistreated," Cox emphasized.

Rumsfeld and the senators noted that they didn't speak to the detainees and the detainees didn't speak to them.

Navy Dr. (Cmdr.) James Gallagher is an eye specialist who said he has treated Guantanamo detainees for old eye injuries, none combat-related. The detainees, he remarked, seem grateful for the medical attention.

Navy Muslim Chaplain (Lt.) Saiful Islam, who called the detainees to afternoon prayer during Rumsfeld's visit, said he has spoken with some of the detainees.

"They ask me what is going to happen to them," the chaplain said, adding he tells them, "I don't know."

Rumsfeld thanked the troops for their good work at Guantanamo, adding that information provided from interrogations of detainees has helped to prevent terrorist acts.

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The defense secretary said it was fortunate that the United States went to Afghanistan and worked with its people "to liberate that country from the Al Qaeda and the Taliban."

"We were able to capture and detain a large number of people who had been through terrorist training camps and had learned a whole host of skills as to how they could kill innocent people -- not how they could kill other soldiers. ...

"We've got a good slug of those folks off the street where they can't kill more people," he said.

Rumsfeld told reporters on the plane trip en route to Guantanamo that he would make recommendations tomorrow to President Bush about the possibility of forming a military organization that would oversee homeland defense operations.

Related Sites of Interest:

- Secretary Rumsfeld Media Availability en route to Guantanamo Bay, Cuba, Jan. 27, 2002
- Secretary Rumsfeld Media Availability en route to Camp X-Ray, Jan. 27, 2002
- Secretary Rumsfeld Media Availability after Visiting Camp X-Ray, Jan. 27, 2002

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United States Department of Defense.

News Transcript

On the web: http://www.defense.gov/cgi-bin/dlprint.cgi?
http://www.defense.gov/transcripts/2002/t02262002_t0223lt.html
Media contact: +1 (703) 697-5131
Public contact: http://www.dod.mil/faq/comment.html or +1 (703) 428-0711

Presenter: Secretary of Defense Donald H. Rumsfeld Saturday, Feb. 23, 2002

Secretary Rumsfeld Interview with The Telegraph

(Interview with Charles Moore, Editor of The Daily Telegraph; Sir John Keegan, Defence Editor; Toby Harnden, Washington Bureau Chief; and David Wastell, Sunday Telegraph Washington Correspondent.)

Wastell: I'm curious as to how long they're likely to be held, or do we know when the military tribunals, if there are going to be such things, will be instituted?

Rumsfeld: A short answer is that the President has issued the military order allowing commissions to be held. He has retained the authority to assign to the commissions the individuals who might be tried by the commissions and he has assigned no one yet. We have fashioned sort of preliminary rules that we're now circulating for discussion as to how they might be conducted. When the President will decide to assign someone to be tried by a commission, I do not know.

Moore: They could have capital punishment, could they?

Rumsfeld: Sure.

Second, the detainees. My goal is to have as few of them as is humanly possible. We are taking only those that we believe there is a prospect of gathering intelligence from that can save people's lives, and we have been successful. We are gaining a good deal of intelligence information that is enabling us to weave a fabric as to how this al Qaeda functions, where it functions, who's involved, how it's financed, and along with the support of dozens of countries, arresting people and interrogating them and closing bank accounts, the totality of that body of knowledge is growing every day.

When we have gotten out of them the information that we feel is appropriate and possible, very likely we'll let as many countries as possible have any of their nationals they would like and they can handle the law enforcement prosecution. I have no desire to fill up our jails and spend time and money holding people. We have let a great many people loose who seemed either to not have been appropriately detained in the first place, or whom we have looked at that the Afghans and the Pakistanis particularly have held and decided we didn't need or want.

If we do transfer people back to the countries of their national origin, needless to say we'd be interested in finding out what additional intelligence those countries might find.

But conceivably, if connections are later developed, having a chance to go back and interrogate those same people, and we'd prefer to only give them back to countries that have an interest in prosecuting people that ought to be prosecuted rather than simply turning them loose, putting them back out on the street and having them go get in more airplanes and have them fly into the Pentagon and the World Trade Center again.

Attachment 10 to RE 264

Rumsfeld: Afghan Detainees at Gitmo Bay Will Not Be Granted POW Status

Monday, January 28, 2002
FOX NEWS

GUANTANAMO BAY NAVAL BASE, Cuba — Touring Camp X-Ray where Al Qaeda and Taliban prisoners are being interrogated under U.S. custody, Defense Secretary Donald H. Rumsfeld on Sunday ruled out any possibility of granting prisoner of war status to the suspected terrorists held in the makeshift prison.

BACKGROUND

- Iran Backs Afghan Interim Government
- Journalist Held Hostage by Pakistani Militants
- Afghan Refugees Continue Australian Hunger Strike
- Karzai May Accompany King Back to Country
- Prisoner Hierarchy Developing at Guantanamo

"They are not POWs. They will not be determined to be POWs," Rumsfeld told reporters accompanying him on his first visit to the detention facility on a U.S. Naval Base.

The Bush administration considers the captured fighters to be "unlawful combatants" and "detainees" because their method of terror violates internationally accepted laws and specifically targets civilians.

The distinction is significant because under the Geneva Convention, written after World War II, a POW has certain legal rights that would govern the U.S. military's interrogations of the detainees and would require that they be released when the hostilities in Afghanistan are over.

If there is any ambiguity about whether a captive should be considered a prisoner of war, the Geneva Convention says a special three-person military tribunal should be convened to decide.

Rumsfeld said that is irrelevant at Guantanamo Bay.

"There is no ambiguity in this case," he said.

Vice President Dick Cheney said Sunday that officials agree the detainees aren't prisoners of war. But administration lawyers are debating whether the Geneva Convention, which has provisions that deal with unlawful combatants, applies in this case.

"These are the worst of a very bad lot," Cheney told *Fox News Sunday*. "They are very dangerous. They are devoted to killing millions of Americans, innocent Americans, if they can, and they are perfectly prepared to die in the effort. And they need to be detained, treated very cautiously, so that our people are not at risk."

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The detainee issue is likely to come up Monday at the regularly scheduled National Security Council meeting, which President Bush attends, a senior administration official said.

Rumsfeld and Gen. Richard Myers, chairman of the Joint Chiefs of Staff,

traveled to the Camp X-Ray detention facility by plane, boat and bus, accompanied by four senators: Democrats Dianne Feinstein of California and Daniel Inouye of Hawaii, and Republicans Ted Stevens of Alaska and Kay Bailey Hutchison of Texas.

They came to get a firsthand look at the facilities and procedures used in handling the 158 prisoners being detained in 8-by-8 foot, open air cells.

Feinstein and the other senators told reporters after touring the camp that they agreed with the Bush administration's handling of the prisoners and saw nothing to suggest mistreatment.

Inouye, in fact, said they are being treated "in some ways better than we treat our people."

Feinstein said she once worked at a California prison and has visited many others around the world. To those abroad who have suggested the Guantanamo Bay prisoners have been treated improperly she said, "Take another look."

As members of a Navy construction battalion pounded away, building new holding cells in the distance, Rumsfeld walked through an area of the camp and got to see many of the detainees in their cells.

Reporters who accompanied Rumsfeld from Washington were kept about 100 yards away from the camp, close enough to see prisoners — some wearing white towels on their heads — moving about in their cells.

Rumsfeld, dressed in olive green dress slacks and blue open-neck dress shirt, told reporters that as he walked by a row of cells he could hear some of the captured fighters speaking to each other. Members of his party said none were seen gesturing toward him or giving any indication they recognized him.

The defense secretary got a look at five small, newly erected buildings on the perimeter of the camp that soon will be used for prisoner interrogations. The questioning so far has been done in a tent adjacent to the cells.

Rumsfeld also met with representatives of the International Committee of the Red Cross at the camp. He said they told him that any information from Red Cross interviews of prisoners would be released to the U.S. government only on condition that the government not make it public.

Last week, Rumsfeld halted the transfer of prisoners from Afghanistan, citing a shortage of cells. On Sunday, he said he was considering when to begin building more permanent facilities.

Rumsfeld said the purpose of the trip was not to investigate the treatment of the captured Al Qaeda and Taliban fighters, although some U.S. allies have raised questions about it.

Last week, the Defense Department released a photograph of some of the prisoners in manacles, kneeling and wearing goggles and ear muffs. That triggered protests in Europe and elsewhere about the conditions at Guantanamo Bay.

Rumsfeld said he came mainly to thank the U.S. troops guarding the

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prisoners and to meet with their commanders.

"I have absolutely full confidence in the way the detainees are being handled and treated," Rumsfeld said. "It is a tough job," he added, noting that Al Qaeda has vowed to kill Americans anywhere and wherever possible. The United States blames Al Qaeda and its leader Usama bin Laden for the Sept. 11 terrorist attacks on the World Trade Center and the Pentagon.

Military officials said Saturday that the distinctions between the leaders and followers among the prisoners at Camp X-Ray are beginning to emerge, giving U.S. interrogators a peek at the structure of the machinery of terror.

"These are among the most dangerous, best trained, vicious killers on the face of the earth," Rumsfeld said.

Rumsfeld said there has been a lot of misinformation and confusion about the handling of the prisoners and distortion of the conditions under which they are living here.

The Associated Press contributed to this report.

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United States Department of Defense.
News Transcript
On the web: http://www.defenselink.mil/transcripts/2002/t01282002_t0128asd.html

Media contact: +1 (703) 697-5131
Public contact: http://www.dod.mil/faq/comment.html or +1 (703) 428-0711

Presenter: Victoria Clarke, ASD PA Monday, January 28, 2002 - 11:29

DoD News Briefing - ASD PA Clarke and Rear Adm. Stufflebeem

(Also participating; Rear Adm. John Stufflebeem, Joint Staff)

QYeah. To go to the issue of the identity of the detainees, particularly the ones in Cuba, if you're not sure who they are, how could they have been characterized as the worst of the worst? What did you know about them that allowed you to make that characterization?

ADM. STUFFLEBEEM: Remember again, this is an extremely -- I'm using a strong adjective, I'm sorry, and it's a "e" word, too -- this is a fully vetted process. If this is an individual who previously was under Afghani control, then there is a level of interrogation and a level of confidence that is built by those that hold them. They are then offered to the Americans. If they were captured by the Americans outright, the same process works into it. It's going to be a series of interrogations. I think I read this morning that in terms of the numbers of interrogations, where we have more than 6,000 -- now, that's not individuals that you've interrogated, that's a relatively small number compared to the force you're looking for, but you're repeatedly rescreening and determining different levels whom this individual is or what this individual has done.

So by the time it gets to a process where Afghanis have screened an individual, our folks at Bagram and at Kandahar would have screened them, the process continues till you get to a level of confidence that this individual was found or picked up in this location, he had previously been associated with involvement of these people, and these were the operations that they were known to be associated with.

Since being under detention, some have lied, some have changed their stories, some have tried to attack our people. It would appear, as you had seen yesterday, that they are working to organize an organization down there, probably for no good. They've made death threats against all Americans, and those including their captors.

So these are not unknowns in the sense that they are bad guys. These are the worst of the worst, and if let out on the street, they will go back to the proclivity of trying to kill Americans and others. So that is well established. The names of who they are -- if you were to go ask an individual what his name is, he might tell you one and he tells us something different. We're cataloguing all the names, you know, for this particular detainee, but --

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UNITED NATIONS

CCPR

International Covenant on Civil and Political Rights

Distr.

GENERAL

CCPR/C/79/Add.75
5 May 1997

Original: ENGLISH

Concluding Observations of the Human Rights Committee : Georgia. 05/05/97. CCPR/C/79/Add.75. (Concluding Observations/Comments)

Convention Abbreviation: CCPR
HUMAN RIGHTS COMMITTEE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

Concluding observations of the Human Rights Committee

GEORGIA

1. The Human Rights Committee considered the initial report of Georgia (CCPR/C/100/Add.1) at its 1564th, 1565th and 1566th meetings, on 26 and 27 March 1997, and adopted at its 1583rd meeting, on 9 April 1997, the following concluding observations:

A. Introduction

2. The Committee notes with interest the initial report submitted by Georgia and welcomes the dialogue it has had with a high-level delegation. It notes with satisfaction that the delegation of Georgia was able to supplement the report and provide clarifications concerning the legal provisions in force and their scope, and on the reform that is under way, which has enabled the Committee to have a somewhat clearer picture of the human rights situation in Georgia.

B. Factors and difficulties affecting the implementation of the Covenant

3. The Committee notes that Georgia is still experiencing the influence of the totalitarian past, which has created feelings of mistrust and insecurity among the citizens. In addition, the State party is still suffering from the effects of conflicts in South Ossetia (1992) and Abkhazia (1993-1994), which gave rise to serious violations of human rights, including massive population displacements, and the

Amch 13 Review Exhibit 204 Page 1 of 5

Government is having difficulty exercising its jurisdiction in those areas in respect of the protection of human rights.

C. Positive aspects

4. The Committee notes the assurances given by the head of State that the enjoyment of human rights would become a priority in Georgia.

5. The entry into force of the 1995 Constitution - even though it does not fully reproduce the rights guaranteed under the Covenant - and the establishment of the Constitutional Court, to which any citizen alleging a violation of his constitutional rights can have recourse, are viewed by the Committee as encouraging signs.

6. The Committee notes with satisfaction the abolition of the internal passport (propiska), which was an impediment to freedom of movement as provided for under article 12 of the Covenant.

7. The reform of the Criminal Code and the Criminal Procedure Code, coupled with the restructuring of the Prokuratura with the aim of limiting its role to that of a prosecuting body stripped of the prerogatives it formerly enjoyed, which enabled it to interfere in judicial decisions, are viewed by the Committee as signs of progress.

8. While regretting the under-representation of women in the organs of government and the inequalities which persist in the economic and social spheres, the Committee is pleased that discrimination against women before the law and in education has lessened.

9. The Committee welcomes the State party's efforts to afford more active protection for the human rights of minorities with a view to guaranteeing them the free expression of their cultures and use of their languages.

D. Principal subjects of concern

10. The Committee deplores the fact that no remedies were available to victims of events occurring in 1992, 1993 and 1994 enabling them to seek redress for violations of their rights as provided under article 2 of the Covenant. In that connection, the Committee notes that the State party was bound by the provisions of the Covenant from the date on which the country became independent, and hence also during the period preceding its declaration of accession, since it must be considered to have succeeded to the obligations undertaken by the former Soviet Union, of which it was an integral part until the time it proclaimed its independence.

11. The Committee regrets that the Covenant, although directly applicable under domestic law, is not invoked before the courts. In addition, it considers that the failure to nominate anyone to the post of Ombudsman, which was established in May 1996, denies an effective remedy to persons alleging a violation of their fundamental rights.

12. The Committee regrets that, in spite of the elimination of inequalities before the law, women continue to be the victims of inequal treatment and discrimination in the political, economic and social spheres. It further notes with concern that methods of contraception other than abortion are very difficult to obtain.

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13. The Committee fears that the moratorium that has been instituted on the carrying out of death sentences is a weak palliative. In spite of the reduction in the number of offences carrying the death penalty, these are still too numerous and some of them do not come within the category of the most serious crimes envisaged in article 6 of the Covenant. It also deplores the fact that some capital sentences appear to have been imposed in cases where confessions were obtained under torture or duress or following trials where the guarantees provided under article 14 of the Covenant were not respected, particularly the right to have a case reviewed by a higher court (art. 14, para. 5, of the Covenant).

14. The Committee is deeply concerned by cases of torture inflicted on individuals deprived of their liberty, including for the purpose of extracting confessions. It deplores the fact that these and other acts of torture usually go unpunished and that in many cases a lack of confidence in the authorities keeps the victims from lodging complaints.

15. The Committee deplores the abuse of pre-trial detention and police custody. The limits placed on those measures by the Constitution, are often not observed in practice, in disregard also of the provisions of article 9 of the Covenant.

16. The Committee is deeply concerned at the disastrous prison situation; crowding, poor sanitary conditions and lack of medical care have resulted in a high rate of infectious disease and a very alarming mortality rate, in particular among juvenile detainees. The Committee stresses that the State party does not comply with the provisions of article 10 of the Covenant according to which all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

17. The Committee is concerned at the continuing close relationship between the procurator and the judges; it fears that, in the absence of any statute enforcing the independence of the judiciary, the impartiality of decisions cannot be guaranteed and that the executive may exert pressure on the judiciary.

18. The Committee notes with disquiet that court proceedings do not meet the conditions required by article 14 of the Covenant for example, although the law provides for access to the assistance of counsel, in practice this is made difficult because of excessive bureaucracy.

19. The Committee regrets that, despite the elimination of the propiska, there remain obstacles to freedom of movement within the country. It notes with concern that there continues to be a great deal of corruption in this area.

20. The Committee emphasizes that the vague and overly general characterizations of crimes and the difficulty of determining their constituent elements (insubordination, sabotage, etc.) have allowed political opponents of the Government to be prosecuted.

21. The Committee regrets that because of the absence of legislation concerning the exercise of the freedom of association, it has not been possible to establish free trade unions so that workers may exercise their rights under article 22 of the Covenant.

22. The Committee is concerned at the increase in the number of children affected by poverty and social dislocation and the concomitant increase in the number of street children, delinquents and drug addicts.

Attach 13 Review Exhibit 20-A Page 3 of 5

E. Suggestions and recommendations

23. The Committee invites the Government to provide all individuals under its jurisdiction with an effective remedy and compensation for violations of their human rights found to have occurred since independence in 1991.

24. The Committee recommends that the State party appoint an ombudsman as soon as possible and that procedures be established to give effect to the Committee's findings under the Optional Protocol. The Committee urges the Government to ensure the legitimacy and authority of the Committee for Human Rights and Ethnic Relations and to define the relationship between that Committee and the Ombudsman.

25. The Committee urges the authorities to continue the moratorium on executions and to continue the serious efforts that have been made towards abolishing the death penalty.

26. The Committee recommends that the State Party undertake systematic and impartial investigations into all complaints of ill-treatment and torture, bring to trial persons charged with violations as a result of these investigations, and compensate the victims. Confessions obtained under duress should be systematically excluded from judicial proceedings and, given the admission of the State party that torture had been widespread in the past, all convictions based on confessions allegedly made under torture should be reviewed.

27. The Committee recommends that detention and pre-trial detention should be carried out in accordance with the requirements of the Constitution and the Covenant. It stresses, inter alia, that all persons who are arrested must immediately have access to counsel, be examined by a doctor without delay and be able to submit promptly an application to a judge to rule on the legality of the detention.

28. The Committee urges the State party to take urgent steps to improve the situation in prisons, in particular, sanitary conditions. It invites the State party to cut down on the use of imprisonment as a punishment for minor violations and on pre-trial detention for excessive periods.

29. The Committee recommends that the authorities put an end, once and for all, to the restrictions on freedom of movement within the country and on the right to leave the country.

30. The Committee urges the State party to enact a law guaranteeing the independence of the judiciary and providing for its total autonomy vis-à-vis the procurator and the executive.

31. The Committee urges the State party to guarantee the rights set forth in article 14 of the Covenant, in particular by remedying the deficiencies with regard to the exercise of the right to defence and the right to appeal. The creation of an independent legal profession is, in the Committee's view, a necessary precondition for the effective enjoyment of such rights.

32. The Committee earnestly recommends that the State party, in connection with the revision of the Penal Code, repeal those provisions which make it possible to prosecute political opponents for their beliefs under cover of upholding the law.

33. The Committee invites the State party to enact laws making it possible for trade unions to be formed and to carry out their activities freely in defence of the rights of workers.

34. The Committee urges the State party to take urgent steps to protect children in accordance with the provisions of article 24 of the Covenant.

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35. The Committee recommends that educational and training programmes be drawn up with a view to developing a culture of respect for human rights in all sectors of the population, inter alia, judges, the security forces and prison personnel. These programmes should also emphasize that women are entitled to full enjoyment of their fundamental rights.

36. The Committee recommends that the report of the State party, together with the concluding observations adopted by the Committee, should be widely disseminated and that the text of the Covenant be disseminated in all languages commonly used in the country.

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UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/1998/39/Add.4
5 March 1998

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Fifty-fourth session
Item 8 of the provisional agenda

QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy, submitted pursuant to Commission on Human Rights resolution 1997/23

Addendum

Report on the mission of the Special Rapporteur to the United Kingdom of Great Britain and Northern Ireland

GE.98-10716 (E)

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Practice issued under section 61 of the 1991 Act was to the same effect. Nowhere was there reference to any right for a person arrested under terrorism provisions to have a solicitor present during interview. The House of Lords concluded that the differential treatment of persons suspected of having committed offences under the terrorism provisions in Northern Ireland was plainly part of a deliberative legislative policy.

45. The United Nations Basic Principles on the Role of Lawyers do not explicitly address the issue as to whether a detainee has the right to have a lawyer present during a police interrogation. Principle 7 provides that "Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than 48 hours from the time of arrest or detention." Principle 8 provides that "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials."

46. Similarly, the jurisprudence of the Human Rights Committee provides little guidance on this question. Article 14 (3) (b) provides that "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing." While the Human Rights Committee has found impermissible interference with the right to preparation of defence in a large number of cases, none address the issue as to whether a detainee has the right to have counsel present during police interrogations.

47. In the view of the Special Rapporteur, it is desirable to have the presence of an attorney during police interrogations as an important safeguard to protect the rights of the accused. The absence of legal counsel gives rise to the potential for abuse, particularly in a state of emergency where more serious criminal acts are involved. In the case at hand, the harsh conditions found in the holding centres of Northern Ireland and the pressure exerted to extract confessions further dictate that the presence of a solicitor is imperative.

C. Closed visits

48. In England and Wales, but not Northern Ireland, the Home Office has instituted a policy under which certain prisoners are designated as exceptional high risk category and are allowed legal visits in prisons only where the prisoner was separated from his lawyers by a transparent screen. In particular, the closed visits have been put in place in the Special Secure Units (SSUs) of Belmarsh, Full Sutton and Whitemoor prisons. They are applied to any prisoner who has been designated as being at "exceptional high risk" of escape. Elaborate security measures are in place, with lawyers being searched several times as they enter and exit SSUs and prisoners are strip-searched before and after visits, despite the fact that they had no contact with their lawyers or anyone apart from the prison staff.

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RULES OF PROCEDURE AND EVIDENCE

(Adopted On 11 February 1994)
(As Amended 5 May 1994)
(As Further Amended 4 October 1994)
(As Revised 30 January 1995)
(As Amended 3 May 1995)
(As Further Amended 15 June 1995)
(As Amended 6 October 1995)
(As Further Amended 18 January 1996)
(As Amended 23 April 1996)
(As Amended 25 June and 5 July 1996)
(As Amended 3 December 1996)
(As Further Amended 25 July 1997)
(As Revised 12 November 1997)
(As Amended 10 July 1998)
(As Amended 4 December 1998)
(As Amended 25 February 1999)
(As Amended 2 July 1999)
(As Amended 17 November 1999)
(As Amended 14 July 2000)
(As Amended 1 and 13 December 2000)
(As Amended 12 April 2001)
(As Amended 12 July 2001)
(As Amended 13 December 2001)
(Incorporating IT/32/Rev. 22/Corr.1)
(As Amended 23 April 2002)
(As Amended 12 July 2002)
(As Amended 10 October 2002)
(As Amended 12 December 2002)
(As Amended 24 June 2003)
(As Amended 17 July 2003)
(As Amended 12 December 2003)
(As Amended 6 April 2004)
(As Amended 10 June 2004)
(As Amended 28 July 2004)

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Rule 42
Rights of Suspects during Investigation
(Adopted 11 Feb 1994, revised 30 Jan 1995, revised 12 Nov 1997)

(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect speaks and understands:

(i) the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it;

(ii) the right to have the free assistance of an interpreter if the suspect cannot understand or speak the language to be used for questioning; and

(iii) the right to remain silent, and to be cautioned that any statement the suspect makes shall be recorded and may be used in evidence.

(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

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Section 2 : Of Counsel

Rule 44
Appointment, Qualifications and Duties of Counsel

Adopted 11 Feb 1994, amended 25 July 1997, revised 12 Nov 1997, amended 14 July 2000, amended 1 Dec 2000 and 13 Dec 2000, amended 13 Dec 2001, amended 12 July 2002, amended 28 July 2004)

(A) Counsel engaged by a suspect or an accused shall file a power of attorney with the Registrar at the earliest opportunity. Subject to any determination by a Chamber pursuant to Rule 46 or 77, a counsel shall be considered qualified to represent a suspect or accused if the counsel satisfies the Registrar that he or she:

(i) is admitted to the practice of law in a State, or is a university professor of law;

(ii) has written and oral proficiency in one of the two working languages of the Tribunal, unless the Registrar deems it in the interests of justice to waive this requirement, as provided for in paragraph (B);

(iii) is a member in good standing of an association of counsel practicing at the Tribunal recognised by the Registrar;

(iv) has not been found guilty or otherwise disciplined in relevant disciplinary proceedings against him in a national or international forum, including proceedings pursuant to the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal, unless the Registrar deems that, in the circumstances, it would be disproportionate to exclude such counsel;

(v) has not been found guilty in relevant criminal proceedings;

(vi) has not engaged in conduct whether in pursuit of his or her profession or otherwise which is dishonest or otherwise discreditable to a counsel, prejudicial to the administration of justice, or likely to diminish public confidence in the International Tribunal or the administration of justice, or otherwise bring the International Tribunal into disrepute; and

(vii) has not provided false or misleading information in relation to his or her qualifications and fitness to practice or failed to provide relevant information.

(B) At the request of the suspect or accused and where the interests of justice so demand, the Registrar may admit a counsel who does not speak either of the two working languages of the Tribunal but who speaks the native language of the suspect or accused. The Registrar may impose such conditions as deemed appropriate, including the requirement that the counsel or accused undertake to meet all translations and interpretation costs not usually met by the Tribunal, and counsel undertakes not to request any extensions of time as a result of the fact that he does not speak one of the working languages. A suspect or accused may seek the President's review of the Registrar's decision.

(C) In the performance of their duties counsel shall be subject to the relevant provisions of the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Tribunal, the Host Country Agreement, the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel adopted by the Registrar and approved by the permanent Judges.

(D) An Advisory Panel shall be established to assist the President and the Registrar in all matters relating to defence counsel. The Panel members shall be selected from representatives of professional associations and from counsel who have appeared before the Tribunal. They shall have recognised professional legal experience. The composition of the Advisory Panel shall be representative of the different legal systems. A Directive of the Registrar shall set out the structure and areas of responsibility of the Advisory Panel.

Rule 45

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Assignment of Counsel

(Adopted 11 Feb 1994, revised 30 Jan 1995, amended 25 June 1996 and 5 July 1996, revised 12 Nov 1997, amended 10 July 1998, amended 14 July 2000, amended 12 Apr 2001, amended 28 July 2004)

(A) Whenever the interests of justice so demand, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel. Such assignments shall be treated in accordance with the procedure established in a Directive set out by the Registrar and approved by the permanent Judges.

(B) For this purpose, the Registrar shall maintain a list of counsel who:

(i) fulfil all the requirements of Rule 44, although the language requirement of Rule 44 (A)(ii) may be waived by the Registrar as provided for in the Directive;

(ii) possess established competence in criminal law and/or international criminal law/international humanitarian law/international human rights law;

(iii) possess at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings; and

(iv) have indicated their availability and willingness to be assigned by the Tribunal to any person detained under the authority of the Tribunal lacking the means to remunerate counsel, under the terms set out in the Directive.

(C) The Registrar shall maintain a separate list of counsel who, in addition to fulfilling the qualification requirements set out in paragraph (B), are readily available as "duty counsel" for assignment to an accused for the purposes of the initial appearance, in accordance with Rule 62.

(D) The Registrar shall, in consultation with the permanent Judges, establish the criteria for the payment of fees to assigned counsel.

(E) Where a person is assigned counsel and is subsequently found not to be lacking the means to remunerate counsel, the Chamber may, on application by the Registrar, make an order of contribution to recover the cost of providing counsel.

(F) A suspect or an accused electing to conduct his or her own defence shall so notify the Registrar in writing at the first opportunity.

Rule 45 *bis*

Detained Persons

(Adopted 25 June 1996 and 5 July 1996)

Rules 44 and 45 shall apply to any person detained under the authority of the Tribunal.

Attachment 15 to RE 20A

Rule 63
Questioning of Accused
(Adopted 11 Feb 1994, amended 3 Dec 1996)

(A) Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused's counsel is present.

(B) The questioning, including any waiver of the right to counsel, shall be audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42 (A)(iii).

Attachment 15 to RE 20A

RULES OF PROCEDURE AND EVIDENCE

RÈGLEMENT DE PROCÉDURE ET DE PREUVE

Adopted on 29 June 1995; as amended on

12 January	1996	
15 May	1996	
4 July	1996	
5 June	1997	
8 June	1998	
1 July	1999	
21 February	2000	
26 June	2000	
3 November	2000	
31 May	2001	
6 July	2002	
27 May	2003	and
14 May	2004	

Adopté le 29 juin 1995 et modifié successivement les

12 janvier	1996	
15 mai	1996	
4 juillet	1996	
5 juin	1997	
8 juin	1998	
1 juillet	1999	
21 février	2000	
26 juin	2000	
3 novembre	2000	
31 mai	2001	
6 juillet	2002	
27 mai	2003	et
14 mai	2004	

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Rule 42: Rights of Suspects during Investigation

(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:

(i) The right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it;

(ii) The right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning; and

(iii) The right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

Attachment 16 to RE 20A

Page 2 of 4

Rule 44 *bis*: Duty Counsel

(A) A list of duty counsel who speak one or both working languages of the Tribunal and have indicated their willingness to be assigned pursuant to this Rule shall be kept by the Registrar.

(B) Duty counsel shall fulfill the requirements of Rule 44, and shall be situated within reasonable proximity to the Detention Facility and the Seat of the Tribunal.

(C) The Registrar shall at all times ensure that duty counsel will be available to attend the Detention Facility in the event of being summoned.

(D) If an accused, or suspect transferred under Rule 40 *bis*, is unrepresented at any time after being transferred to the Tribunal, the Registrar shall as soon as practicable summon duty counsel to represent the accused or suspect until counsel is engaged by the accused or suspect, or assigned under Rule 45.

(E) In providing initial legal advice and assistance to a suspect transferred under Rule 40 *bis*, duty counsel shall advise the suspect of his or her rights including the rights referred to in Rule 55 (A).

Rule 45: Assignment of Counsel

(A) A list of counsel who speak one or both of the working languages of the Tribunal, meet the requirements of Rule 44, have at least 10 years' relevant experience, and have indicated their willingness to be assigned by the Tribunal to indigent suspects or accused, shall be kept by the Registrar.

(B) The criteria for determination of indigence shall be established by the Registrar and approved by the Judges.

(C) In assigning counsel to an indigent suspect or accused, the following procedure shall be observed:

- **(i)** A request for assignment of counsel shall be made to the Registrar;
- **(ii)** The Registrar shall enquire into the financial means of the suspect or accused and determine whether the criteria of indigence are met;
- **(iii)** If he decides that the criteria are met, he shall assign counsel from the list; if he decides to the contrary, he shall inform the suspect or accused that the request is refused.

(D) If a request is refused, a further reasoned request may be made by the suspect or the accused to the Registrar upon showing a change in circumstances.

Attachment 16 to RE 204

Page 3 of 4

Rule 63: Questioning of the Accused

(A) Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused's counsel is present.

(B) The questioning, including any waiver of the right to counsel, shall be audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42 (A)(iii).

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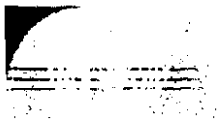
Page 4 of 4



Office of the High Commissioner for Human Rights

Français | Español

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Adopted by General Assembly resolution 43/173 of 9 December 1988

Attachment 17 to RE 20A

P: 1 of 4

Principle 11

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 12

1. There shall be duly recorded:

(a) The reasons for the arrest; (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;

(c) The identity of the law enforcement officials concerned;

(d) Precise information concerning the place of custody.

2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

Attachment 17 to RE 20A

Page 2 of 4

Principle 15

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

Attachment 17 to RE 20A

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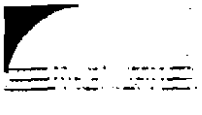

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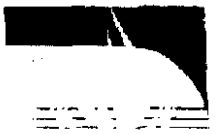

Basic Principles on the Role of Lawyers

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

Attachment 18 to RE 20A

Page 1 of 2

Access to lawyers and legal services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.

4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Special safeguards in criminal justice matters

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

Attachment 18 to RE 204

Page 2 of 2

United States Department of Defense.

News Transcript

On the web: http://www.dod.mil/cgi-bin/dlprint.cgi?http://www.dod.mil/transcripts/2002/t02282002_t0227sd6.html
Media contact: +1 (703) 697-5131
Public contact: http://www.dod.mil/faq/comment.html or +1 (703) 428-0711

Presenter: Secretary of Defense Donald H. Rumsfeld Wednesday, February 27, 2002

Rumsfeld Interview with KSTP-ABC, St. Paul, Minn.

(Interview with Cale Ramaker, KSPT-ABC, St. Paul, Minn.)

Question: And the situation in Camp X-Ray right now in Guantanamo Bay, Cuba with the detainees, give us an update on where that's at in terms of the investigation, interrogating all of them, and then what happens to the detainees once you're done with them.

Rumsfeld: You bet. There are, I don't know, 300 or 400 people down there at the present time, I suppose 300 something, and they have all now, except for one or two, been questioned and interrogated, looking for intelligence information so that we could stop other terrorist threats, people from attacking our country and our friends and allies and our deployed forces.

We're now starting the process of doing a series of interrogations that involve law enforcement. That is to say to determine exactly what these individuals have done. Not what they know of an intelligence standpoint, but what they've done from a law enforcement standpoint. That process is underway.

Question: What can the average American person assume is going to happen to these detainees? Are they going to be let go eventually? Or you talk about law enforcement, you're talking about investigating them for crimes?

Rumsfeld: Well, they will fall into four or five baskets. One is if we find that someone's an innocent and shouldn't have been brought there, why they would be released. If we find that someone is very low level and we simply want to keep them off the streets so they don't go out and kill more people but that they're not masterminds, we might turn them back to Afghanistan to be imprisoned or Pakistan. We might send them back to their country of origin, whatever their nationality may be, to be detained and processed.

Those that their behavior suggests that they should be put through some justice system, criminal justice system, they might very well be put in the U.S. criminal justice system; they might be put into the U.S. military justice system; or they might be sent to another country to be put in a criminal justice system; or last, the President may decide that the more important ones conceivably could be tried by a so-called military commission.

Attachment 19 to RE 20A

commentaries

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Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

Introduction to the Commentary on the Additional Protocols I and II of 8 June 1977

Claude PILLOUD† - Jean DE PREUX -
Yves SANDOZ - Bruno ZIMMERMANN -
Philippe Eberlin - Hans-Peter Gasser - Claude F. Wenger
(Protocol I)
Philippe EBERLIN *(Annex I)*
Sylvie-S. JUNOD *(Protocol II)*

with the collaboration of
Jean PICTET

—

Commentary
on the Additional Protocols
of 8 June 1977
to the Geneva Conventions
of 12 August 1949

—

Editors
Yves SANDOZ - Christophe SWINARSKI -
Bruno ZIMMERMANN

—

International Committee of the Red Cross

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Martinus Nijhoff Publishers

—

Geneva 1987

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3100 Admittedly, ' stricto jure, ' these provisions are only applicable to grave breaches of the Conventions and the Protocol, but they do provide useful indications to determine whether or not there is an individual penal responsibility.

' Sub-paragraph ' (c)

3101 This provision reproduces almost word-for-word paragraph 1 of Article 15 of the Covenant on Civil and Political Rights. According to Article 4 of that Covenant, there is no possibility of derogation from this provision in time of armed conflict. Article 6 of Protocol II ' (Penal prosecutions), ' paragraph 2(c), contains the same provision. However, the paragraph under consideration here uses a slightly different expression at the beginning: "no one shall be accused or convicted of", while in the Covenant and in Protocol II the sentence starts as follows: "No one shall be held guilty of". There is a minor difference between Protocol II and the Covenant in the French text (not in English) which is of no practical significance. On the other hand, by adding the word "accused" the drafters of Article 75 had a specific purpose in mind: several delegations had expressed the fear that the provision would lead persons to be considered guilty before being tried. (23)

3102 Several delegations considered that the reference to "national or international law" was clear. During the debates which took place on this subject in Committee I with regard to an identical provision in Protocol II (Article 6 -- ' Penal prosecutions, ' paragraph 2(c)), some delegations suggested replacing that expression by "under the applicable law" (24) or alternatively by "under applicable [p.882] domestic or international law", (25) but Committee I retained the present text and Committee III adopted it without further discussion to include it in this article.

3103 In matters of criminal law national courts apply primarily their own national legislation; in many countries they can only apply provisions of international conventions insofar as those provisions have been incorporated in the national legislation by a special legislative act. Thus in several European countries the punishment of war crimes and crimes against humanity has, since the Second World War, frequently encountered obstacles which could only be overcome by invoking the need to repress crimes rightly condemned by all nations, even in the absence of rules of application. This reference to international law has often been called the "Nuremberg clause". The European Human Rights Convention, which contains the same phraseology, clarifies this expression in paragraph 2 of Article 7: "This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations."

3104 In fact, although the principle of legality ' (nullum crimen, nulla poena sine lege) ' is a pillar of domestic criminal law, the lex should be understood in the international context as comprising not only written law, but also unwritten law, since international law is in part customary law. Thus the second "principle of Nuremberg" reads: "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law" (26)

3105 Let us stress that it is in a government's own interests to adopt the necessary legislation, even in peacetime, for the repression of certain crimes punishable under international law. In this way they can avoid the criticism of acting arbitrarily by

Attachment 20
Review Exhibit 20 A
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promulgating retroactive penal laws, even though international law may authorize them to do so.

3106 The second and third sentences of this sub-paragraph express generally recognized principles.

' Sub-paragraph ' (d)

3107 This rule is found in all human rights documents. (27) It is also included in Article 6 ' (Penal prosecutions) ' of Protocol II.

3108 It is a widely recognized legal principle that it is not the responsibility of the accused to prove he is innocent, but of the accuser to prove he is guilty. This concept may play an important role when criminal prosecutions are brought against persons on the basis of their membership of a group. (28)

[p.883] ' Sub-paragraph ' (e)

3109 This rule is contained in a slightly different form in Article 14, paragraph 3(d), of the Covenant ("to be tried in his presence") and in identical wording in Protocol II, Article 6 ' (Penal prosecutions) ', paragraph 2(e). The Rapporteur of Committee III noted that it was understood that persistent misconduct by a defendant could justify his removal from the courtroom. (29) This sub-paragraph does not exclude sentencing a defendant in his absence if the law of the State permits judgement in absentia.

3110 In some countries the discussions of the judges of the court are public and take place before the defendant; in other countries the discussion is held in camera, and only the verdict is made public. Finally, there are countries where the court's decision is communicated to the defendant by the clerk of the court in the absence of the judges. This sub-paragraph does not prohibit any such practices: the important thing is that the defendant is present at the sessions where the prosecution puts its case, when oral arguments are heard, etc. In addition, the defendant must be able to hear the witnesses and experts, to ask questions himself and to make his objections or propose corrections. (30)

' Sub-paragraph ' (f)

3111 The majority of national judiciary systems contain provisions of this nature, but it took many centuries before the legality of torturing defendants to obtain confessions and information on their accomplices was abandoned. However, it was appropriate to include here a reminder of this legal guarantee, which is recognized today, as all too often the police or examining magistrates tend to use questionable means to extract a confession which they consider to be the "final proof".

3112 The Geneva Conventions as a whole are aimed at preventing victims of war from becoming the object of brutality intended to extract information from them or from third parties (Article 17 , Third Convention; Article 31 , fourth Convention). Protocol II contains the same rule (Article 6 -- ' Penal prosecutions, ' paragraph 2(f)) as does the Covenant (Article 14, paragraph 3(g)).

[p.884] ' Sub-paragraph ' (g)

3113 This clause has the same wording as the corresponding clause of the Covenant (Article 14, paragraph 3(e)).

3114 According to the Rapporteur of Committee III, this provision was worded so as to be compatible with both the system of cross-examination of witnesses and with the inquisitorial system in which the judge himself conducts the interrogation.

3115 It is clear that the possibility of examining witnesses is an essential prerequisite for an effective defence.

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MWH MWH

UNITED STATES OF AMERICA v. DAVID MATTHEW HICKS	)	**PROSECUTION RESPONSE TO DEFENSE MOTION TO DISMISS ALL CHARGES FOR DENIAL OF FUNDAMENTAL RIGHTS IN CRIMINAL PROCEEDINGS** 18 October 2004

1. Timeliness. This response is being filed within the timeline established by the Presiding Officer.

2. Prosecution Position on Defense Motion. The Defense motion should be denied.

3. Facts.

a. On September 11, 2001, the al Qaida terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks.

b. One week later, in response to these "acts of treacherous violence," Congress passed a joint resolution which states, in part, "that the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force ('the AUMF'), 115 Stat 224.

c. On October 7, 2001, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.[1]

d. The President issued his Military Order of November 13, 2001 ("Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism").[2] In doing so, the President expressly relied on the authority vested in him as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the AUMF and Sections 821 and 836 of Title 10, United States Code.[3]

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[1] http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html

[2] 66 Fed. Reg. 222 (November 16, 2001)

[3] Sections 821 and 836 are, respectively, Articles 21 and 36 of the Uniform Code of Military Justice ("UCMJ"). These sections provide, in relevant part:

Art. 21. Jurisdiction of courts-martial not exclusive

e. In his Order, the President determined that "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals."[4]

f. The President ordered, "Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed . . . ."[5] He directed the Secretary of Defense to "issue such orders and regulations . . . as may be necessary to carry out" this Order.[6]

g. Pursuant to this directive by the President, the Secretary of Defense on March 21, 2001, issued Department of Defense Military Commission Order (MCO) No. 1 establishing jurisdiction over persons (those subject to the President's Military Order and alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority)[7] and over offenses (violations of the laws of war and all other offenses triable by military commission).[8] The Secretary directed the Department of Defense General Counsel to "issue such instructions consistent with the President's Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions . . . ."[9]

h. The Accused was captured in Afghanistan on or about December 2001 during Operation Enduring Freedom, and on or about 12 January 2002, U. S. Forces transferred the Accused to Guantanamo Bay, Cuba for continued detention.

g. On February 7, 2002, the President of the United States issued a memorandum in which he determined that none of the provisions of the Geneva Conventions "apply to our conflict with Al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a high contracting party to Geneva." (President's memorandum dated February 7, 2002, attached)

The provisions of this chapter conferring jurisdiction upon courts-martial 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.

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 commission and other military tribunals . . . 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.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

[4] 66 Fed. Reg. 222 (November 16, 2001), Section 1(e).
[5] *I.d.* at Section 2(a).
[6] *I.d.* at Section 2(b).
[7] Militiary Commission Order (MCO) No. 1, para. 3(A).
[8] *I.d.* at para. 3(B).
[9] *I.d.* at para. 8(A).

h. The President determined that the Accused is subject to his Military Order on 3 July 2003.

i. The Appointing Authority approved the charges in this case on 9 June 2004 and on 25 June 2004 referred the same to this military commission in accordance with commission orders and instructions. The case was thereafter docketed to be heard at the U.S. Naval Base at Guantanamo Bay, Cuba.

j. On June 28, 2004, a plurality of the Supreme Court of the United States, in the case of *Hamdi v. Rumsfeld*, held "the capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, 'by universal agreement and practice', are 'important incident[s] of war.'" 124 S.Ct. 2633, 2639 (2004).

4. Discussion

The Defense assertions are unsupported and speculative. The Defense asserts that the Accused's right to an adequate defense "*has been*" violated in three respects. (Emphasis added). First, the Accused has not been given the presumption of innocence. Second, the Accused has not been given adequate facilities for his defense as he has been denied access to counsel at critical points after he was taken into custody by U.S. forces. Finally, the Accused may not be allowed to be present during all phases of his hearing. The arguments of the Defense for each of these claims are speculative and ignore the language and requirements of the President's order and Military Commission orders and instructions.

1. The Accused enjoys the presumption of innocence

The assertion that the Accused has been deprived the presumption of evidence is based on general public statements by the President, Secretary of Defense and other Administration officials to the effect that persons detained at Guantanamo Bay include "killers, terrorists, and bad people." The Defense cites to commentary to the International Covenant of Civil and Political Rights (ICCPR) that it is the duty of public authorities not to prejudge the outcome of a trial. The Defense fails to point out how these public officials have prejudged the outcome of this Commission against this Accused, how the statements offered by the Defense prejudice the Accused, or why such statements require the drastic remedy of dismissal.

Paragraph 5(B) of Military Commission Order No. 1 (MCO No.1) states that the Accused shall be presumed innocent until proven guilty. Paragraph 5(C) of that Order follows with the direction that "[a] Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense." The remainder of the rights and obligations consistent with the conduct of a full and fair trial follow in paragraph 5. The obligation and duty of the Commission members to consider the guilt or innocence of the Accused based solely of the evidence before them could not be more clear. To assert that the members would forsake their oaths as military officers and as members of the Military Commission because of a few public, political statements by members of the administration is totally unfounded and ignores the unequivocal statements by the Commission members elicited during *voir dire* regarding their understanding of, and commitment to, their duty as members.

Similarly, the rights and requirements in the review process, as well as the obligations and duties of the individuals who will conduct that process, more than provide for a fair process that will protect the Accused's right to a presumption of innocence. As stated in MCO No. 1, once a trial is completed (including sentencing in the event of a guilty verdict), the Presiding Officer must "transmit the authenticated record of trial to the Appointing Authority," id. at § 9.6(h)(1), which "shall promptly perform an administrative review of the record of trial," id. § 9.6(h)(3). If the Appointing Authority determines that the commission proceedings are "administratively complete," the Appointing Authority must transmit the record of trial to the Review Panel, which consists of three military officers, at least one of whom has experience as a judge. Id. § 9.6(h)(4). The Review Panel must return the case to the Appointing Authority for further proceedings when a majority of that panel "has formed a definite and firm conviction that a material error of law occurred." Id. § 9.6(h)(4)(ii); Military Commission Instruction No. 9, Review of Military Commission Proceedings, December 26, 2003, § 4C(1) (hereinafter MCI No. 9). On the other hand, if a majority of the panel finds no such error, it must forward the case to the Secretary with a written opinion recommending that (1) each finding of guilt "be approved, disapproved, or changed to a finding of Guilty to a lesser-included offense" and (2) the sentence imposed "be approved, mitigated, commuted, deferred, or suspended." MCI No. 9, § 4C(1)b. "An authenticated finding of Not Guilty," however, "shall not be changed to a finding of Guilty." MCO No. 1, 32 C.F.R. § 9.6(h)(2). The Secretary must review the trial record and the Review Panel's recommendation and "either return the case for further proceedings or . . . forward it to the President with a recommendation as to disposition," if the President has not designated the Secretary as the final decision maker. MCI No. 9, § 5. In the absence of such a designation, the President makes the final decision; if the Secretary of Defense has been designated, he may approve or disapprove the commission's findings or "change a finding of Guilty to a finding of Guilty to a lesser-included offense, [or] mitigate, commute, defer, or suspend the sentence imposed or any portion thereof."

All the rights set forth above are more than sufficient to protect the Accused's right to the presumption of innocence. The Defense claim that simply because senior members of the Administration have made general public statements characterizing detainees as terrorists in the context of justifying continued detention, the individuals charged with administering the Military Commission Process will forsake their sworn obligations is unsupportable and incorrect.

2. The Accused has been given adequate facilities for his defense

Once again, the Defense chooses to ignore the rights and obligations established by the orders and instructions applicable to Military Commissions, and instead looks to international conventions that do not apply. Under Military Commission procedures a Counsel for the Accused is detailed at the point where the decision is reached that the Accused is to be charged. MCO No. 1, paragraph 5(D) requires that "[a]t least one Detailed Defense Counsel shall be made available to the Accused sufficiently in advance of trial to prepare a defense and until any findings and sentence become final in accordance with Section 6(H)(2)." That provision is entirely consistent with the generally recognized standards for effective assistance of trial. There is no provision in the orders or instructions allowing for the assignment of counsel for purposes of interrogations, nor is it required in order to ensure a full and fair trial. As the Defense notes in its motion, if they believe that something in the interrogation process renders the Accused's statements inadmissible, then the appropriate time to raise that objection is when, and if, the statements are offered by the Prosecution.

The Defense citation to provisions of international conventions is inapposite here, as they do not apply to these military commissions. The inapplicability of the ICCPR is covered in detail in response to other motions in this case, so we will not repeat that same information here. (*See, e.g.*, Prosecution Response to Defense Motion for Dismissal (Lack of Jurisdiction – President's Military Order Violates Equal Protection Clause of the U.S. Constitution)).

As to the Additional Protocols to the Geneva Conventions, the Accused may not claim any protection from them for two reasons. First, as an illegal combatant, the Accused is not entitled to the protections of the Geneva Conventions. Second, the Geneva Conventions do not create privately enforceable rights. As the U.S. Supreme Court recognized in Eisentrager with respect to the 1929 Geneva Convention – the predecessor treaty to the current Geneva Conventions – the "obvious scheme" of the Geneva Conventions is that the "responsibility for observance and enforcement" of their provisions is "upon political and military authorities," not the courts. 339 U.S. at 789. Indeed, the courts are virtually unanimous in the conclusion that the Geneva Conventions are not self-executing. See Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 434, 439 (D.N.J. 1999); see Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-09 (D.C. Cir. 1984) (Bork, J., concurring) (concluding that the Third Geneva Convention is not self-executing); Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978) (concluding that there is "no evidence" that the Fourth Geneva Convention was "intended to be self-executing or to create private rights of action in the domestic courts of the signatory countries"); Handel v. Artukovic, 601 F. Supp. 1421, 1424-25 (C.D. Cal. 1985) (concluding that the Third Geneva Convention is not self-executing); see also Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989) (holding that the Geneva Convention on the High Seas, which provides that an illegally boarded merchant ship "shall be compensated for any loss or damage that may have been sustained" does "not create private rights of action" enforceable in United States courts); FTC v. A.P.W. Paper Co., 328 U.S. 193, 203 (1946) (holding that with respect to the Geneva Convention of 1929, the "undertaking 'to prevent the use by private persons' of the words or symbol [of the Red Cross] is a matter for the executive and legislative departments").

This conclusion is supported by the text of the treaties, which contain no explicit provision for enforcement by any form of private petition. Furthermore, the terms of the treaties relating to enforcement focus on vindication by the various diplomatic means available to sovereign nations. See, e.g., Third Geneva Convention, art. 11 (stating that "in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement"); Fourth Geneva Convention, 1956 WL 54810 (U.S. Treaty), T.I.A.S. No. 3365, 6 U.S.T. 3516, art. 12. Put simply, "the corrective machinery specified in the treaty itself is nonjudicial." Holmes v. Laird, 459 F.2d 1211, 1222 (D.C. Cir. 1972). Consequently, the Accused cannot look to the Conventions in order to obtain relief.

3. Absence of the Accused during closed sessions is not violative of a full and fair hearing.

In its final argument, the Defense once again relies on speculation. It is not clear whether there will be any closed sessions in the Accused's trial on the merits that require his absence. The mere possibility that it might occur is an insufficient basis on which to entertain a motion, let alone to grant a motion. Second, the presence of an Accused at all proceedings is not an absolute

requirement in any system and would not necessarily violate the requirement that the military commission be full and fair. For example, it is permissible in U.S. and other national courts, and in international tribunals, to exclude an accused from the courtroom during the presentation of evidence where the Accused is so disruptive as to interfere with the proceedings. Also, it is permissible under the law of the U.S. and other nations, and the international tribunals, to conduct trials without the accused, where the accused has absented himself from the proceedings. The relevant point is that the presence of an accused is not an absolute requirement or right; it can be waived where a strong public policy interest exists. That determination has been made for the Military Commissions by the President in his Military Order, where he deemed the risk to national security too great automatically to allow Guantanamo Bay detainees to be present when classified or other protected information is presented.

As stated above, however, whether that situation exists in the present case is entirely speculative at this point. If, as the trial progresses, it appears that closed sessions may be necessary, the parties and the Commission Members can consider alternatives in the presentment of evidence to ensure that the requirement for a full an fair trial is necessary. As stated by Ambassador Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues during his testimony before the Senate Judiciary Committee, ". . . . there are different approaches that can be used to achieve justice. I recognize that different procedures are allowed and that different procedures are appropriate. No one approach is exclusive and the approaches need not be identical for justice to be administered fairly. But in all approaches what is important is that the procedures ensure fundamental fairness. And that is what the President's order calls for."

5. Oral Argument. The Prosecution requests the opportunity to respond to Defense arguments, if oral argument is granted.

6. Legal Authority.

a. Military Commission Order No. 1, 32 C.F.R. § 9.3(a) (2003)

b. Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004)

c. Johnson v. Eisentrager, 339 U.S. 763 (1950)

c. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 434, 439 (D.N.J. 1999)

d. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-09 (D.C. Cir. 1984)

e. Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978)

f. Handel v. Artukovic, 601 F. Supp. 1421, 1424-25 (C.D. Cal. 1985)

g. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989)

h. FTC v. A.P.W. Paper Co., 328 U.S. 193, 203 (1946)

j. Holmes v. Laird, 459 F.2d 1211, 1222 (D.C. Cir. 1972

7. Witnesses/Evidence. The Prosecution does not foresee the need to present any witnesses or further evidence in support of this motion.

8. Additional Information. None.

//Original Signed//

[redacted]
Lieutenant Colonel, U.S. Marine Corps
Prosecutor

UNITED STATES OF AMERICA v. DAVID M. HICKS	)	**DEFENSE REPLY TO GOVERNMENT RESPONSE TO MOTION TO DISMISS FOR DENIAL OF FUNDAMENTAL RIGHTS** **26 October 2004**

The Defense in the case of the *United States v. David M. Hicks* moves to dismiss the charges against Mr. Hicks, and in reply to the government's response to the defense motion states as follows:

1. **Synopsis**: Mr. Hicks has been denied fundamental rights in criminal procedure. All charges against him should be dismissed.

2. **Facts**: The question raised is a question of law.

3. **Discussion**:

In essence, the government's argument in its response is that the President's Military Order and the government-issued Military Commission Orders (MCO) and Instructions (MCI) are sufficient to ensure Mr. Hicks receives a full and fair hearing. The government then lists the provisions of the MCOs and MCIs it believes will effect a full and fair hearing.

The government misses the point. Regardless whether or not the MCO's and MCI's provide some protections for Mr. Hicks (and to what extent), the military commission process the government has created, and continues to develop even though the prosecution is well underway, to try Mr. Hicks is fundamentally flawed because, from top to bottom, it is stacked against Mr. Hicks. Indeed, it is respectfully submitted that not a single member of the U.S. military, including the members of the commission, would, if a defendant in such a system, consider it full, fair or impartial, and willingly submit to such a system for adjudication of *any* case, much less one that might subject him or her to life imprisonment.

Also, the defects in the rules, procedures, and proceedings that have been enumerated in this motion operate not only independently to establish that they cannot afford Mr. Hicks the requisite full and fair trial, but also in combination to compel the same conclusion. Indeed, the cumulative effect of the serious flaws in the commission system are far graver than the impact of any single deficiency noted below and/or in the initial motion papers.

Statements by Senior U.S. Government Officials

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The President, the Attorney General, and the Secretary of Defense (the official who is charged with providing a full and fair trial for Mr. Hicks) have all made public and widely disseminated statements to the effect that Mr. Hicks and the other Guantanamo detainees are killers, and terrorists, and all of the other statements listed in the defense motion. That prejudgment, particularly from officials with authority over members of the commission, preclude a fair trial for Mr. Hicks.

The commander in chief told the entire world that the people being held at Guantanamo are terrorists and killers. The government then, dutifully, charged one of them, Mr. Hicks, with both "terrorism" and attempted murder. All of the commission members are military officers. Such statement by the commander in chief would influence any military officer to believe Mr. Hicks was guilty of that offense, and would certainly completely undermine confidence in a guilty verdict.

In response, the prosecution attempts to minimize the importance and influence of these statements by labeling them as political rhetoric.[1] That attempted distinction is simple sophistry, for regardless of how they are labeled, such statements constitute *per se* unlawful command influence (UCI). Such blatant UCI strikes at the very heart of fairness in any military tribunal. Such statements from a military commander convening a court-martial would not be tolerated, and here the prejudice is even more acute considering the general unpopularity of the detainees due to their alleged affiliation with the Taliban and al Qaeda, and the source of the statements – the Commander-in-Chief and his principal subordinate(s). In that light, the commission members cannot help but have been influenced by such statements, and that such influence is fatal to Mr. Hicks receiving a full and fair trial.

The Lack of Even Rudimentary Rules of Evidence

While the MCOs and MCIs purport to set out some procedural protections for the accused (some of which, like the presumption of innocence, have already been irreparably impaired by UCI), the rules for the admission of evidence (and lack thereof) in commission proceedings are totally irreconcilable with a full and fair trial. The prosecution has announced its intention to use in its direct case the rankest hearsay, including coerced statements by Mr. Hicks and other detainees. Use of such statements will deprive Mr. Hicks of his rights to confront the evidence and cross-examine – fundamental rights firmly rooted in the traditions of Western jurisprudence, *see Crawford v. Washington*, ___ U.S. ___, 124 S. Ct. 1354 (2004) – and expose the commission to information that was not

[1] The government apparently puts great stock in some political rhetoric. In several of its responses to defense motions, it has cited to the President's statement that "we are at war," and we are in a "Global War with al Qaeda," or we are involved in a "Global War on Terrorism" for the proposition that we are involved in an international armed conflict with al Qaeda, a non-state entity. These terms are rhetorical, or political phrases that have no legal effect on the applicability of the Law of Armed Conflict. The government's use of them to support its legal arguments is disingenuous at best.

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illegitimately obtained, but which is of dubious, if any, reliability. Such a system cannot be fair.

Unprecedented Charges that are Impermissibly Vague and Not Cognizable Under the Pre-Existing Law of War or International Law

The government has invented for this commission the offenses it alleges Mr. Hicks committed. He is not charged with any violations of the law of war as it existed at the time he committed the conduct.2 The charges are all from a group of offenses created by MCI No. 2 and denominated "offenses triable by military commission." These "offenses," with the exception of the charge of "aiding the enemy" were created by the government, and first published in MCI No. 2. They are without precedent or legal authority beyond the self-fulfilling MCI No. 2.

Further, the charges themselves are vague. For example, Mr. Hicks is charged with "attempted murder." But the government does not allege one specific fact that would identify the place or manner of such an attempt, or at whom it was directed. Such vague charges make it impossible for Mr. Hicks to prepare a defense, and are fatal to Mr. Hicks' chance to receive a full and fair trial.

Conclusion

Under this commission system, the commission acts as finder of both law and fact. The commission has the power and responsibility to ensure the system the government has created to try Mr. Hicks will give him a full and fair trial. Mr. Hicks is facing a trial in which he could be sentenced to prison for the rest of his life. Given the above, and other significant faults with the government's system, it is clear that the commission system denies Mr. Hicks his fundamental rights – rights that are essential to the full and fair trial to which he is entitled under all U.S. and international norms, and under the express terms of the Presidential Order constituting the commission. As a result, the charges against Mr. Hicks must be dismissed.

4. Evidence:

    1. The testimony of expert witnesses.
    2. Attachments: *Crawford v. Washington*, __ U.S. __, 124 S. Ct. 1354 (2004)

5. Relief Requested: The defense requests that all charges be dismissed.

6. The defense requests oral argument on this motion.

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[2] While it would not matter whether the law of war has since been changed to incorporate such offenses, as such application to Mr. Hicks would constitute an *ex post facto* law, in fact the law of war has not been expanded to include the charged offenses. Thus, each of the charged offenses is entirely a creature of MCI No. 2, without any other foundation or precedent in military or international law.

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