MILITARY COMMISSION

UNITED STATES OF AMERICA	)	
	)	**RULING: D-023 DEFENSE MOTION FOR ARTICLE 5 STATUS DETERMINATION, OR, ALTERNATIVELY, DISMISSAL FOR LACK OF PERSONAL JURISDICTION**
v.	)	
	)	**Dated: 3 December 2009**
IHRAHM AHMED MOHMOUD al QOSI	)	

On 19 December 2008, the Defense filed a motion requesting the Commission order an Article 5 status determination, or, alternatively, dismiss the charges for lack of jurisdiction. On 9 January 2009, the Government filed a response to the motion. On 14 January 2009, the Defense filed a reply to the Government's response and, on 24 November 2009, the Defense filed an addendum to their original motion. Essentially, the Defense now asserts that the Commission lacks personal jurisdiction over the Accused under the Military Commissions Act (MCA) of 2009 as it has not yet been determined that the Accused is an alien unprivileged enemy belligerent. The Government opposed the original motion arguing, in part, that the military judge may determine the Accused's status at trial. No written response was provided by the Government as to the Defense amended motion. All documents submitted to the Commission, as well as arguments presented by both sides, were considered in making the following finding.

FACTS

1. On 8 February 2008, the Convening Authority referred the charges and specifications against the Accused to trial by military commission, alleging he was subject to trial by military commission as an alien unlawful enemy combatant under the Military Commission Act (MCA) of 2006.

2. On 28 October 2009, changes to the MCA were enacted and the MCA of 2009 changed the jurisdiction of a Military Commission to offenses committed by an alien unprivileged enemy belligerent.

3. On 24 November 2009, the Government requested that they be allowed to amend the charges to conform with the new jurisdictional requirements of the MCA of 2009. The Commission had ruled that the Government is allowed to make a change to the charge sheet by deleting the words "alien unlawful enemy combatant" and substituting therefore the words "alien unprivileged enemy belligerent." Thus, it is likely that the Government

will be alleging the Accused is subject to trial by military commission as an alien unprivileged enemy belligerent.

LAW AND DISCUSSION

4. The burden is on the Government to show by a preponderance of the evidence that the Accused is subject to the jurisdiction of this Commission.

5. As discussed above, 10 U.S.C. § 948c, MCA of 2009, states that Military Commissions have personal jurisdiction over any alien unprivileged enemy belligerent. 10 U.S.C. § 948a, MCA of 2009, defines as unprivileged enemy belligerent as an individual (other then a privileged belligerent) who (A) has engaged in hostilities against the United States or its coalition partners: (B) has purposely and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the offense alleged. It further defines privileged belligerent as an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War.

6. To date, no military commission or any other forum has found the Accused to be an alien unprivileged enemy belligerent. The Accused is within his rights to request such a determination. He is, in essence, properly challenging the personal jurisdiction of the Military Commission through this motion to dismiss.

7. 10 U.S.C. § 948d, MCA of 2009, states that a military commission is a competent tribunal to make a finding sufficient for jurisdiction. While the defense asserts that the only competent authority to make such a determination is an Article 5 hearing, applying the procedures set forth in Army Regulation (AR) 190-8, **Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees,** this Commission does not concur. While AR 190-8 may provide useful guidance, that regulation is not determinative of jurisdiction in a Military Commission. Additionally, this Commission does not concur with the Government's assertion that the military judge should defer determination on the Accused's status until conclusion of the presentation of the evidence at trial.

8. Under the MCA of 2009 and current Commission case law, the military judge has the power and authority to hear evidence concerning and ultimately decide the Accused's status and whether jurisdiction attaches. When challenged by the Accused, a determination regarding personal jurisdiction should be made by the military judge prior to presentation of any evidence on the merits. In addition, under Rule for Military Commissions 201, a military commission always has the authority to determine whether it has jurisdiction.

9. The determination of an individual's combatant status for purposes of establishing a commission's jurisdiction does not preclude him from raising any affirmative defenses, nor does it obviate the government's obligation to prove beyond a reasonable doubt the elements of each substantive offense. In other words, a pretrial finding by the military

judge by a preponderance of the evidence that the Accused is an alien unprivileged enemy belligerent does not eliminate the requirement for the Commission members to find beyond reasonable doubt the Accused's status if an element of the offense.

CONCLUSION

Wherefore, based on the above, the Defense position that an Article 5 status tribunal is a prerequisite to establishing the jurisdiction of this Commission is rejected, and the relief sought from that position is denied. The Government request that this Commission defer ruling on its personal jurisdiction over the Accused until after the presentation of proof at trial is also denied. A hearing will be held 6 Jan 2010 at which time the Government will be required to establish personal jurisdiction of the Accused by a preponderance of the evidence.

Nancy J. Paul

NANCY J. PAUL, Lt Col, USAF
Military Judge

UNITED STATES OF AMERICA v. IBRAHIM AHMED MAHMOUD AL QOSI	**Defense Motion** for Article 5 Status Determination, or, Alternatively, Dismissal for Lack of Personal Jurisdiction 19 December 2008

1. **<u>Timeliness</u>:** This motion is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court.

2. **<u>Relief Sought</u>:** The defense respectfully requests that this Commission order a "status determination hearing" under Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"), 6 U.S.T. 3316, at which the government will be required to prove Mr. Al Qosi's "unprivileged belligerent" status. If the government fails to prove he is not entitled to the protections afforded under the GPW, the defense requests the Court at that time dismiss the charges for lack of jurisdiction.

3. **<u>Overview</u>:** Mr. Ibrahim al Qosi, a Sudanese citizen, [redacted] Under the GPW, as explained in U.S. Army Field Manual (FM) 27-10,[1] an enemy population is divided in war into two general classes. One class are persons who are entitled to treatment as Prisoners of War (POW, or in AR 190-8, EPW) upon capture, as defined in GPW Article 4. The other class is the civilian population, who benefit to varying degrees from the provisions of the Geneva Conventions. The presumption is at anyone "captured" as a combatant in an international armed conflict merits POW status. However, if the detaining nation fails to categorize the

[1] FM 27-10, Chap. 3, para. 60.

person correctly, such as treating a civilian as a soldier or failing to treat a soldier as a soldier, with the rights that they have as a POW, the captured individual has a right to a “fair trial” by a competent tribunal, under GPW Article 5, i.e., an “Article 5 hearing,” to resolve the question of POW status correctly. The individual cannot be penalized for acts by any judicial proceeding until it is determined in the Article 5 hearing that the individual is not entitled to POW status.[2] In fact, officials of detaining nations who have failed to provide a fair trial for a status determination, even in WW II before the Geneva Conventions were adopted, were charged and convicted for the commission of war crimes, largely at the instigation and insistence of the United States.

Mr. Al Qosi’s capture occurred in the context of an international armed conflict between signatories to the GPW (the United States and Afghanistan). The government alleges he is an “enemy combatant,” but yet it has not accorded him an “Article 5 hearing” that complies with the requirements of the GPW. At present, there is sufficient doubt concerning whether Mr. al Qosi is a combatant or non-combatant such that GPW Article 5 requires that he be afforded POW protections, at least until such time as a competent tribunal determines that he does not fall within any category of protected persons. In the absence of such a status determination, Mr. al Qosi must be afforded the protections of GPW Article 102, which requires parity in criminal prosecutions, i.e., trial "by the same courts according to the same procedure" as would be used to try members of the U.S. armed forces. Because members of the U.S. armed forces would be tried in a court-martial rather than a military commission, this Commission currently lacks jurisdiction to try Mr. al Qosi, and will continue to lack such jurisdiction absent an Article 5 status determination.

[2] FM 27-10, Chap. 3, para. 71.

Accordingly, Mr. al Qosi moves for an Article 5 status determination, or alternatively, dismissal of this case for lack of personal jurisdiction.

4. <u>Burden and Standard of Proof</u>: Jurisdiction over the accused under the Military Commissions Act is predicated on the accused being categorized as an unlawful enemy combatant. *See* 10 U.S.C. 948a(1)(A)(i). The burden of proof is on the Prosecution to establish that the Commission has jurisdiction over the accused. RMC 905(c)(2)(B). Because Mr. Al Qosi asserts that he falls in the category of persons protected by the Geneva Conventions, in order to establish jurisdiction over him, it must be determined whether he belongs to any of the categories enumerated in GPW Article 4.[3] Preponderance of evidence shall be the standard used in reaching this determination, in accordance with AR 190-8.

5. <u>Facts</u>:

A. Mr. al Qosi, [redacted] has now been detained continuously for approximately seven years. Mr. al Qosi is now held at the U.S. Naval Station, Guantanamo Bay.

B. Mr. al Qosi has never been provided with a status determination before a competent tribunal as required by GPW Article 5, and other applicable law. His case was presented to a Combatant Status Review Tribunal (CSRT). He was not afforded the opportunity to be present at the hearing. The CSRT process itself has been shown to be systemically deficient, as addressed below, and therefore does not meet the requirements of Article 5.

[3] *See* Attachment A.

6. <u>Law and Argument</u>:

I. MR. AL QOSI IS NOT SUBJECT TO TRIAL BY COMMISSION IN THE ABSENCE OF AN ARTICLE 5 STATUS DETERMINATION

A military commission under the Military Commissions Act does not have jurisdiction to try any offense unless it is "committed by an alien unlawful enemy combatant."[4] GPW Article 5 creates the presumption that a captive, such as Mr. al Qosi, is a prisoner of war and not an "unlawful combatant," and is entitled to all the protections afforded a prisoner of war under the GPW. As Mr. al Qosi is presumed to be a prisoner of war, and entitled to the protections of the GPW, he cannot be tried by a military commission unless, and until, a "competent tribunal," as provided under GPW Article 5, determines that he does not merit the status of a prisoner of war.

Largely at the instigation and insistence of the United States, the Geneva Conventions were adopted after WWII to mitigate harsh treatment by the captors of enemy combatants and non-combatants. Articles 4 and 5 of the GPW set up a framework whereby persons captured on the battlefield can be correctly categorized as prisoners of war (soldiers or others meriting this designation) or civilians, and accorded the protections associated with membership in each group. An additional group, comprised of persons who fall outside these categories, consisting of certain civilians who have taken up arms, or soldiers who lose their "privileged" status through the commission of recognized war crimes (such as perfidy), has been described as "unprivileged belligerent." Specifically, under GPW Article 4, prisoners of war are persons belonging to any of a number of enumerated categories, who have fallen into the power of the enemy.[5]

If a captured person asserts that they are not correctly categorized under Article 4, or that

[4] *See* 10 U.S.C. 948d(a).
[5] *See* GPW Article 4, ("Attachment A" to this motion).

they are a non-combatant civilian, GPW Article 5 mandates that they be brought before a tribunal to determine their status, as follows:

> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

GPW Article 5.

Notwithstanding these settled categorizations of persons during armed conflicts, in February 2002, the President issued a Memorandum stating that "none of the provisions of Geneva apply, and that detainees captured in the Global War on Terrorism (GWOT) are "unlawful combatants and, therefore, do not qualify as prisoners of war."[6] As a consequence, no detainees were given Article 5 hearings, and their legal status remains in doubt.

While Mr. al Qosi does not admit or concede to having committed any belligerent acts or hostile actions against any party, he claims the protections of the GPW for all purposes applicable to him. He specifically demands that a determination of his status be made, as required by GPW Article 5. To comply with these legal requirements, any determination must comply with Army Regulation (AR) 190-8, para. 1-6.[7]

Army Regulation (AR) 190-8 is the only domestic authority that governs the process of status determination for persons referred to in GPW Article 4. It implements international law, both customary and codified, particularly the 1949 Geneva Convention Relative to the Treatment

---

[6] Memorandum of the President, *Humane Treatment of al Qaeda and Taliban Detainees*, dated 7 February 2002; *see also* Presidential Military Order, *The Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, dated 13 November 2001.
[7] *See* AR 190-8 ("Attachment B" to this motion).

of Prisoners of War (GPW). Under AR 190-8, para. 1-6, a tribunal may determine a subject belongs to four possible categories of persons, which parallel the categories enumerated in Article 4 of the Geneva Conventions: Enemy Prisoner of War (EPW), retained personnel (RP), civilian internees (CI) and innocent civilians who should be immediately released.[8] All, except innocent civilians, may be detained during hostilities and these detainees must be treated in accordance with the laws governing POWs.

In this case, Mr. al Qosi asserts that he is a person protected by the GPW, and that he must therefore be afforded those relevant protections, pursuant to GPW Article 5. GPW Article 102 provides that "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed." GPW, Article 102. Because this Commission is not the "same court" and does not have the "same procedure" as a court-martial, where a member of the U.S. armed forces would be tried, a POW in American custody cannot be tried by military commission. The Military Commissions Act recognizes this point. *See* 10 U.S.C. § 948d(b) ("Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title.") It has been held that the MCA can and should be interpreted in a manner consistent with the Geneva Conventions, which "form a part of American law, and are binding in federal courts under the Supremacy Clause." *Khadr*, CMCR 07-001 at 4 n.4; *see also id.* at 25, citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (whenever possible, acts of Congress are generally construed in a manner consistent with international law). That being the case, MCA section (2)(a) must be read to be synonymous with GPW Article 4(A)(1).

[8] *See* Attachment B.

Therefore, Mr. al Qosi asserts that he must be afforded the protections of GPW Article 5, protections he has so far been denied. A status determination must be made under AR 190-8 before he can be subject to the jurisdiction of the Commission.

II. MR. AL QOSI'S COMBATANT STATUS REVIEW TRIBUNAL DID NOT COMPLY WITH A GPW ARTICLE 5 STATUS DETERMINATION

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court mandated a review tribunal be held for each detainee in custody at Guantanamo, to ensure each receives the process he is entitled to under the Due Process Clause. As a result of this ruling, the Department of Defense established Combatant Status Review Tribunals. The sole purpose of these proceedings, however, is to determine whether those persons detained at Guantánamo Bay are unlawful enemy combatants; the CSRTs do not pass on whether detainees are entitled to POW status. Following *Hamdi*, the Supreme Court found the CSRTs inadequate, asserting that these hearings afford "some process" but by no means all that is necessary to constitute a meaningful adversary proceeding. *Boumediene v. Bush*, 553 U.S. ___, U.S. LEXIS 4887, No. 06-1195, slip op. (June 12, 2008). The Supreme Court thus found that the CSRT process was not an adequate substitute for habeas corpus. *Id.* The problems the Court identified with CSRT proceedings call into question the validity of any findings made in the course of any such hearing.

Just like the CSRT hearings at issue with the petitioners in *Boumediene*, Mr. al Qosi's CSRT hearing lacked the necessary procedural safeguards. He did not have an attorney, but rather a "personal representative" with little involvement in his case, so Mr. al Qosi chose not to attend. *Id.* at 38. Regardless of Mr. al Qosi's choice not to attend the CSRT, the Government's evidence was afforded a presumption of validity, and hearsay evidence was deemed admissible by default. *Id.* at 55. He had the opportunity to rebut the evidence against him with "reasonably available" evidence of his own, but due to his confinement and lack of counsel, even if he had

attended the CSRT, he would have been unable to do so effectively. *Id.* The appeals process from the CSRT, established in the MCA, would allow the District of Colombia Circuit Court of Appeals to review his case, but only to determine whether "the 'standards and procedures specified by the Secretary of Defense' [were followed] and whether those standards and procedures [were] lawful," but not to determine whether his detention was proper. *Id.* at 48 (citing Detainee Treatment Act §1005(e)(2)(C), 119 Stat. 2742). Petitioners in *Boumediene* also identified other problems with the CSRTs, which the Court did not address in detail in its decision, that further illustrate the deficiency of these hearings, including: the CSRT's lack of authority to order a detainee's release, s*ee* Reply Brief of Petitioners at 17, *Boumediene v. Bush*, No. 06-1195 (U.S. Nov. 13, 2007); inordinate delay, *see id.* at 18; the outright ban on assistance of counsel, *see id.* at 19; and the admissibility of evidence adduced by questionable coercive techniques. *See id.* at 13. The cumulative effect of these shortfalls of the CSRT system led the Court to assert that "even when all the parties in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's finding of fact." *Boumediene v. Bush*, 553 U.S. ___, No. 06-1195, slip op. at 56 (U.S. June 12, 2008).

This "considerable risk of error" makes jurisdiction based solely on the findings of Mr. al Qosi's CSRT hearing improper. As it was apparent to Mr. al Qosi that the CSRT process as applied to him was defective, his choice to decline to be present at the CSRT was not a voluntary waiver of his presence. Therefore, in that the CSRT process is defective ab initio, regardless of Mr. al Qosi's presence or absence, a new hearing is required that complies with GPW Article 5 to determine whether Mr. al Qosi is entitled to POW status.

III. FAILURE TO PROVIDE AN ARTICLE 5 HEARING IS A WAR CRIME

Failure to provide a review tribunal that is fair and in compliance with GPW Article 5 is,

in itself, a grave breach of the Geneva Conventions.

Article 130 of GPW provides, in relevant part:

> Grave breaches to which the preceding Article (129 –Penal Sanctions) relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: . . . *willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention*.

(*Emphasis* added.) GPW, Art. 130 (Codified at 18 U.S.C. § 2441(c)(1).

Officials have been cited in the past for failing to provide the now well-accepted procedures delineated in the Geneva Conventions. *See United States v. Uchiyama*, Case-35-46, War Crimes Branch Case Files, Records of The Judge Advocate General, Record Group 153 (Yokohama, 18 July 1947). A U.S. military commission tried Japanese officials involved in the Japanese military commission which had tried two captured Americans during the war. [9] Among those charged were the commanding general of the Japanese Fifteenth Area Army, his judicial officer, the three members of the Japanese commission, the prosecutor, and the executioner. The American prosecutor stated in his opening remarks: "We are now charging the accused with having failed to have applied to these prisoners of war the type of procedure that they were entitled to." The United States military legal review of the tribunal found the Japanese hearing process that was afforded to the American POWs so unfair as to constitute a war crime.[10] In particular, unfair procedures of the defendants cited was that an interrogation report was allowed as evidence "without any attempt to verify the genuineness of the document"; the members . . . did not exercise free and independent judgment; and no attempt was made by the tribunal to ascertain the facts concerning the offenses alleged against the accused. The actions that were found to be unfair by the United States Commission were many of the same that are

[9] Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander? The Army Lawyer, Evan J. Wallach, November 2003.
[10] *Id.*

now alleged to be unfair in the CSRTs by military officers who have participated in the CSRTs.[11]

In the aforementioned article, the author concludes: "Clearly, an unfair war crimes trial of a POW violates both the GPW and current U.S. and international law. To imagine otherwise would set the law of nations back to the dark days of history when the fate of the captive rested on the whim of their captors."[12]

7. <u>Conclusion</u>

Mr. al Qosi asserts that he is within the categories of protected persons identified in the Geneva Conventions, and currently entitled to the protections of the GPW pursuant to Article 5. The CSRT process, as it was established and applied, is defective *ab initio.* Therefore, a new hearing is required that complies with GPW Article 5 to determine whether Mr. al Qosi is entitled to POW status. To comply with GPW Article 5, a hearing by a competent tribunal must be conducted in accordance with Army Regulation (AR) 190-8.

Accordingly, Mr. al Qosi respectfully moves for an Article 5 status determination, or alternatively, dismissal of this case for lack of personal jurisdiction.

8. <u>Request for Oral Argument</u>: The Defense requests oral argument. RMC 905(h).

9. <u>Request for Witnesses</u>: The Defense anticipates the need to call witnesses in connection with this motion.

10. <u>Conference with Opposing Counsel</u>: The Defense has conferred with opposing counsel, who stated the government opposes this motion.

---

[11] See Attachments C and D.

[12] Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander? The Army Lawyer, Evan J. Wallach, November 2003.

12. **<u>Additional Information</u>:** In making this motion, or any other motion, Mr. al Qosi does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, 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 all appropriate forums.

13. Attachments:

A. GPW Articles 4 and 5.
B. Army Regulation 190-8, Chap. 1 (in relevant part).
C. Declaration of LTC Abraham.
D. Declaration of William J. Teesdale.

Respectfully submitted,

By: /s/
S. Lachelier, JAGC, USN
T. Pierce, JA, USA
T. Owens, JAGC, USN
Detailed Defense Counsel for
Ibrahim al Qosi
Office of the Chief Defense Counsel
Office of Military Commissions
1600 Defense Pentagon, Room 3B688
Washington, DC 20301

P. Reichler
L. Martin
S. Altschuller
Foley, Hoag, LLP
C*ivilian Defense Counsel for Ibrahim al Qosi*
Foley Hoag, LLP
1875 K Street, NW
Washington, DC 20006
(202) 223-1200

ATTACHMENT A

Attachment A
(This includes only GPW Article 4 and GPW Article 5, copied from the websites cited herein on 17 Dec 08)

Article 4 located at: http://www.icrc.org/ihl.nsf/WebART/375-590007?OpenDocument

Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
Article

Part I : General provisions
ARTICLE 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, incuding those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card

similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

Article 5 located at:
http://www.icrc.org/ihl.nsf/WebART/375-590008?OpenDocument

Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

Part I : General provisions
ARTICLE 5

> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.
> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Commentary to Art. 5 located at:
http://www.icrc.org/ihl.nsf/COM/375-590008?OpenDocument

ATTACHMENT B

Attachment B

(This includes only sections of AR 190-8 relevant to the Motion to which it is attached.)

***Army Regulation 190-8**
***OPNAVINST 3461.6**
***AFJI 31-304**
***MOC 3461.1**

1 October 1997

Effective date: 1 November 1997

UNCLASSIFIED

Military Police

Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees

---

Chapter 1
Introduction

1-1. Purpose

a. This regulation provides policy, procedures, and responsibilities for the administration, treatment, employment, and compensation of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI) and other detainees (OD) in the custody of U.S. Armed Forces. This regulation also establishes procedures for transfer of custody from the United States to another detaining power.

b. This regulation implements international law, both customary and codified, relating to EPW, RP, CI, and ODs which includes those persons held during military operations other than war. The principal treaties relevant to this regulation are:

(1) The 1949 Geneva Convention Relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GWS).

(2) The 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GWS SEA).

(3) The 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW).

(4) The 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC), and In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence.

1-2. References

Required and related publications and prescribed and referenced forms are listed in appendix A .

1-3. Explanation of abbreviations and terms

Abbreviations and special terms used in this regulation are explained in the glossary .

1-4. Responsibilities

a. The Secretaries of the Military Departments. The Secretaries will —

(1) Develop internal policies and procedures consistent with this regulation in support of the Department of Defense (DOD), EPW/CI and other detainee programs.

(2) Ensure that appropriate training, as required, pursuant to DOD Directive 5100.77 is provided so that the principles of the Geneva Conventions, and the rights and obligations thereunder, are known by members of their service.

(3) Ensure that suspected or alleged violations of the international law of war are promptly reported and investigated per DOD Directive 5100.77.

(4) Conduct a periodic review of the EPW, CI and RP Program and training to ensure compliance with the law of war.

b. The Secretary of the Army (SA). The Secretary of the Army is the DOD Executive Agent (EA) for administering the DOD EPW, CI and RP Program. The SA, in coordination with the Assistant Secretary of Defense, International Security Affairs (ASD-ISA), will plan and develop the policy and coordinate the operation of the programs.

c. The Army Deputy Chief of Staff for Operations and Plans (DCSOPS). DCSOPS has primary Headquarters, Department of the Army (HQDA) staff responsibility for the EPW, CI and RP programs. The DCSOPS will-

(1) Develop and disseminate policy guidance for the treatment, care, accountability, legal status, and processing of EPW, CI, RP, and ODs.

(2) Report suspected or alleged violations of law committed by or against military personnel or civilians.

(3) Provide HQDA staff supervision for National Prisoner of War Information Center (NPWIC).

(4) Develop plans for the initial assignment and replacement of block internment serial numbers (ISNs) from the NPWIC to the Branch PWIC and for the assignment of the theater code section of the ISN.

(5) Provide necessary reports, coordination, technical advice, and staff assistance to:

(a) The Office of the Secretary of Defense (OSD).

(b) The Joint Chiefs of Staff (JCS).

(c) The military departments.

(d) Unified commands.

(e) Department of State and other Federal agencies.

(f) The International Committee of the Red Cross (ICRC).

(g) Protecting powers.

d. The Army Judge Advocate General (TJAG). The TJAG will provide HQDA guidance and advice to commanders on the legal aspects of the EPW, CI and RP program. TJAG will-

(1) Conduct liaison in coordination with the ASA-ISA, the Department of State, the Department of Justice, and other Federal agencies; the JCS; the Defense Intelligence Agency (DIA); the military departments; the ICRC; the Protecting Powers; and other detaining powers, as required.

(2) Provide advice and assistance to commanders on legal aspects of reported violations by EPW, CI, RP, and ODs.

(3) Provide theater guidelines for any EPW, CI and RP claims against the U.S. Government.

(4) Provide guidance regarding GPW Article 5 Tribunals.

e. Deputy Chief of Staff for Logistics (DCSLOG). The DCSLOG will ensure logistical resources are available to support EPW operations.

f. The Assistant Secretary of the Army Financial Management (ASA-FM&C). The ASA-FM&C will establish the policies and procedures governing entitlement, control, and accounting for pay, allowances, and personal funds for EPW, CI, RP, and ODs per the provisions of the GPW and GC.

g. Combatant Commanders, Task Force Commanders and Joint Task Force Commanders. Combatant Commanders, Task Force Commanders and Joint Task Force Commanders have the overall responsibility for the EPW, CI and RP program, operations, and contingency plans in the theater of operation involved to ensure compliance with international law of war. DOD Directive 2310.1 provides that persons captured or detained by the U.S. Military Services shall normally be handed over for safeguarding to U.S. Army Military Police, or to detainee collecting points or other holding facilities and installations operated by U.S. Army Military Police as soon as practical. U.S. Army Military Police have units specifically organized to perform the long-term functions associated with EPW/CI internment. Commanders must ensure the proper force structure is included in any joint operational plans. Commanders at all levels will ensure that all EPW, CI, RP, and ODs are accounted for and humanely treated, and that

collection, evacuation, internment, transfers, release, and repatriation operations are conducted per this regulation. Combatant Commanders, Task Force Commanders and Joint Task Force Commanders will —

(1) Provide for an EPW, CI and RP camp liaison and assistance program to ensure the protection of U.S. interests per the Geneva Conventions upon the capture and transfer of EPW, CI, RP, and ODs to a host or other nation.

(2) Plan and procure logistical support to include: transportation, subsistence, personal, organizational and Nuclear, Biological & Chemical (NBC) clothing and equipment items, mail collection and distribution, laundry, and bath for EPW, CI and RP.

(3) Collect and dispose of captured enemy supplies and equipment through theater logistics and Explosive Ordnance Disposal (EOD) channels.

(4) Coordinate for acquisition of real estate, and as required, for planning, design, contracting, and construction of facilities for EPW, CI and RP with the Theater or JTF Engineer.

(5) Establish guidance for the use, transport, and evacuation of EPW, CI, RP, and ODs in logistical support operations.

(6) Identify requirements and allocations for Army Medical units in support of the EPW, CI and RP Program, and ensure that the medical annex of OPLANs, OPORDs and contingency plans includes procedures for treatment of EPW, CI, RP, and ODs. Medical support will specifically include:

(a) First aid and all sanitary aspects of food service including provisions for potable water, pest management, and entomological support.

(b) Preventive medicine.

(c) Professional medical services and medical supply.

(d) Reviewing, recommending, and coordinating the use and assignment of medically trained EPW, CI, RP and OD personnel and medical material.

(e) Establishing policy for medical repatriation of EPW, CI and RP and monitoring the actions of the Mixed Medical Commission.

h. U.S. Army Criminal Investigation Command (USACIDC). USACIDC will provide criminal investigative support to EPW, CI and RP Camp Commanders per AR 195-2 .

1-5. General protection policy

a. U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows:

(1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.

(2) All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.

(3) The punishment of EPW, CI and RP known to have, or suspected of having, committed serious offenses will be administered IAW due process of law and under legally constituted authority per the GPW, GC, the Uniform Code of Military Justice and the Manual for Courts Martial .

(4) The inhumane treatment of EPW, CI, RP is prohibited and is not justified by the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).

b. All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment.

c. All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind. They will not be subjected to medical or scientific experiments. This list is not exclusive. EPW/RP are to be protected from all threats or acts of violence.

d. Photographing, filming, and video taping of individual EPW, CI and RP for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited. No group, wide area or aerial photographs of EPW, CI and RP or facilities will be taken unless approved by the senior Military Police officer in the Internment Facility commander's chain of command.

e. A neutral state or an international humanitarian organization, such as the ICRC, may be designated by the U.S. Government as a Protecting Power (PP) to monitor whether protected persons are receiving humane treatment as required

by the Geneva Conventions. The text of the Geneva Convention, its annexes, and any special agreements, will be posted in each camp in the language of the EPW, CI and RP.

f. Medical Personnel. Retained medical personnel shall receive as a minimum the benefits and protection given to EPW and shall also be granted all facilities necessary to provide for the medical care of EPW. They shall continue to exercise their medical functions for the benefit of EPW, preferably those belonging to the armed forces upon which they depend, within the scope of the military laws and regulations of the United States Armed Forces. They shall be provided with necessary transport and allowed to periodically visit EPW situated in working detachments or in hospitals outside the EPW camp. Although subject to the internal discipline of the camp in which they are retained such personnel may not be compelled to carry out any work other than that concerned with their medical duties. The senior medical officer shall be responsible to the camp military authorities for everything connected with the activities of retained medical personnel.

g. Religion.

(1) EPW, and RP will enjoy latitude in the exercise of their religious practices, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities. Adequate space will be provided where religious services may be held.

(2) Military chaplains who fall into the hands of the U.S. and who remain or are retained to assist EPW, and RP, will be allowed to minister to EPW, RP, of the same religion. Chaplains will be allocated among various camps and labor detachments containing EPW, RP, belonging to the same forces, speaking the same language, or practicing the same religion. They will enjoy the necessary facilities, including the means of transport provided in the Geneva Convention, for visiting the EPW, RP, outside their camp. They will be free to correspond, subject to censorship, on matters concerning their religious duties with the ecclesiastical authorities in the country of detention and with international religious organizations. Chaplains shall not be compelled to carry out any work other than their religious duties.

(3) Enemy Prisoners of War, who are ministers of religion, without having officiated as chaplains to their own forces, will be at liberty, whatever their denomination, to minister freely to the members of their faith in U.S. custody. For this purpose, they will receive the same treatment as the chaplains retained by the United States. They are not to be obligated to do any additional work.

(4) If EPW, RP, do not have the assistance of a chaplain or a minister of their faith. A minister belonging to the prisoner's denomination, or in a minister's absence, a qualified layman, will be appointed, at the request of the prisoners, to

fill this office. This appointment, subject to approval of the camp commander, will take place with agreement from the religious community of prisoners concerned and, wherever necessary, with approval of the local religious authorities of the same faith. The appointed person will comply with all regulations established by the United States.

1-6. Tribunals

a. In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

b. A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

c. A competent tribunal shall be composed of three commissioned officers, one of whom must be of a field grade. The senior officer shall serve as President of the Tribunal. Another non-voting officer, preferably an officer in the Judge Advocate General Corps, shall serve as the recorder.

d. The convening authority shall be a commander exercising general courts-martial convening authority.

e. Procedures.

(1) Members of the Tribunal and the recorder shall be sworn. The recorder shall be sworn first by the President of the Tribunal. The recorder will then administer the oath to all voting members of the Tribunal to include the President.

(2) A written record shall be made of proceedings.

(3) Proceedings shall be open except for deliberation and voting by the members and testimony or other matters which would compromise security if held in the open.

(4) Persons whose status is to be determined shall be advised of their rights at the beginning of their hearings.

(5) Persons whose status is to be determined shall be allowed to attend all open sessions and will be provided with an interpreter if necessary.

(6) Persons whose status is to be determined shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. Witnesses shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In these cases, written statements, preferably sworn, may be submitted and considered as evidence.

(7) Persons whose status is to be determined have a right to testify or otherwise address the Tribunal.

(8) Persons whose status is to be determined may not be compelled to testify before the Tribunal.

(9) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine the status of the subject of the proceeding in closed session by majority vote. Preponderance of evidence shall be the standard used in reaching this determination.

(10) A written report of the tribunal decision is completed in each case. Possible board determinations are:

(a) EPW.

(b) Recommended RP, entitled to EPW protections, who should be considered for certification as a medical, religious, or volunteer aid society RP.

(c) Innocent civilian who should be immediately returned to his home or released.

(d) Civilian Internee who for reasons of operational security, or probable cause incident to criminal investigation, should be detained.

f. The recorder shall prepare the record of the Tribunal within three work days of the announcement of the tribunal's decision. The record will then be forwarded to the first Staff Judge Advocate in the internment facility's chain of command.

g. Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed. The record of every Tribunal proceeding resulting in a determination denying EPW status shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.

Terms

Civilian Internee(s)

A civilian who is interned during armed conflict or occupation for security reasons or for protection or because he has committed an offense against the detaining power.

Detainee

A term used to refer to any person captured or otherwise detained by an armed force.

Enemy Prisoner of War

A detained person as defined in Articles 4 and 5 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949. In particular, one who, while engaged in combat under orders of his or her government, is captured by the armed forces of the enemy. As such, he or she is entitled to the combatant's privilege of immunity from the municipal law of the capturing state for warlike acts which do not amount to breaches of the law of armed conflict. For example, a prisoner of war may be, but is not limited to, any person belonging to one of the following categories who has fallen into the power of the enemy: a member of the armed forces, organized militia or volunteer corps; a person who accompanies the armed forces without actually being a member thereof; a member of a merchant marine or civilian aircraft crew not qualifying for more favorable treatment; or individuals who, on the approach of the enemy, spontaneously take up arms to resist invading forces.

EPW Camp

A camp set up by the U.S. Army for the separate internment and complete administration of EPW.

Other Detainee (OD)

Persons in the custody of the U.S. Armed Forces who have not been classified as an EPW (article 4, GPW), RP (article 33, GPW), or CI (article 78, GC), shall be treated as EPWs until a legal status is ascertained by competent authority.

Protected Person

Persons protected by the Geneva Convention who find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Retained Personnel

Enemy personnel who come within any of the categories below are eligible to be certified as retained personnel (RP).

a. Medical personnel who are members of the medical service of their armed forces.

b. Medical personnel exclusively engaged in the —

(1) Search for, collection, transport, or treatment of, the wounded or sick.

(2) Prevention of disease.

(3) Staff administration of medical units and establishments exclusively.

c. Chaplains attached to enemy armed forces.

d. Staff of National Red Cross societies and other voluntary aid societies duly recognized and authorized by their governments. The staffs of such societies must be subject to military laws and regulations.

ATTACHMENT C

STATEMENT OF

STEPHEN E. ABRAHAM
LIEUTENANT COLONEL, U.S. ARMY RESERVE

BEFORE THE

ARMED SERVICES COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

UPHOLDING THE PRINCIPLE OF HABEAS CORPUS FOR DETAINEES

PRESENTED

THURSDAY, JULY 26, 2007

STATEMENT OF STEPHEN E. ABRAHAM
LIEUTENANT COLONEL, U.S. ARMY RESERVE

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
ARMED SERVICES COMMITTEE

UPHOLDING THE PRINCIPLE OF HABEAS CORPUS FOR DETAINEES

THURSDAY, JULY 26, 2007

Mr. Chairman and Members of the Committee, it is my privilege to have the opportunity to testify today concerning my experiences as a participant in the Combatant Status Review Tribunal ("CSRT") process. I was assigned to the Office for the Administrative Review of the Detention of Enemy Combatants ("OARDEC") from September 11, 2004 to March 9, 2005, the period of time in which nearly all of the CSRTs for detainees in Guantanamo were performed. (Only a few detainees have been transferred to Guantanamo since). OARDEC is the organization within the Defense Department responsible for conducting CSRTs and other administrative reviews of detainees in Guantanamo. While at OARDEC, in addition to other duties, I worked as an agency liaison, responsible for coordinating with government agencies, including certain Department of Defense ("DoD") and non-DoD organizations, to gather or validate information relating to detainees for use in CSRTs. I also served as a member of a CSRT panel, and had the opportunity to observe and participate in all aspects of the CSRT process.

I came to OARDEC as an Army Reserve lieutenant colonel [redacted]

[redacted] I am a founding member of the law firm Fink & Abraham LLP in Newport Beach, California.

Firstly, Mr. Chairman, let me say that it is fitting that the Committee is considering the issues raised by the denial of habeas corpus rights of individuals held by the United States as enemy combatants. There is no question that individuals who have attacked the United States should be punished, and that those who are preparing to attack the United States must be stopped. I have devoted my military career to identifying such individuals and their organizations, and to helping our country counter such threats.

We cannot protect our security unless we identify those individuals who have harmed or are preparing to harm us. Just as importantly, incorrectly concluding that an individual fits one of these categories does nothing to help keep us secure. Detaining such an individual only misdirects our resources and causes damage to our reputation as a nation that may take decades to repair. Imprisoning the wrong man is also antithetical to the Constitutional values that commissioned officers swear to support and defend.

As I will explain, the process put in place by the Executive Branch to review its detention of the prisoners at Guantanamo was designed not to ascertain the truth, but to legitimize the detentions while appearing to satisfy the Supreme Court's mandate in *Rasul v. Bush* that the government be required to justify the detentions. The process was nothing more than an effort by the Executive to ratify its exercise of power to detain anyone it pleases in the war against terror.

The CSRT process was designed to rubber-stamp detentions that the Executive Branch either believed it should not have to justify, could not be bothered to justify, or could not justify.

The CSRT process was initially created in haste immediately following the Supreme Court's decision in *Rasul v. Bush* that federal courts had jurisdiction to hear habeas corpus actions brought by Guantanamo detainees requiring the government to justify the detentions. The Supreme Court decided *Rasul* on June 30, 2004, and the order establishing the CSRT process was issued eight days later on July 8, 2004.

Contemporaneous with the consideration of several cases relating to the Guantanamo detainees in the U.S. District Court for the District of Columbia, OARDEC established a goal of completing CSRTs for all of the more than 500 detainees then in Guantanamo by December, 2004. Although a small number of CSRTs were being conducted at about the time of my arrival at OARDEC in mid-September, 2004, almost all of the remaining tribunals were conducted during my assignment there.

In my observation, the system was designed to fail. This Committee should place no reliance on the procedures or the outcomes of those tribunals. The CSRT panels were an effort to lend a veneer of legitimacy to the detentions, to "launder" decisions already made. The CSRTs were not provided with the information necessary to make any sound, fact-based determinations as to whether detainees were enemy combatants. Instead, the OARDEC leadership exerted considerable pressure, and was under considerable pressure itself, to confirm prior determinations that the detainees in Guantanamo were enemy combatants and should not be released.

The CSRT process had two essential components: an information-gathering component, conducted almost entirely in Washington, and the panel proceedings, which took place either in

Guantanamo or in Washington, depending on whether the detainee decided to appear. The Recorders (military officers who presented the cases to the CSRT panels), personal representatives (who met with detainees briefly prior to the panel proceedings), and panel members had no role in the gathering of information to support an "enemy combatant" determination. Although the Recorders were required by DoD procedures to gather relevant information and present all exculpatory information to the CSRT panels, in practice they did not do so. Rather, the information was typically aggregated by individuals in Washington identified as "case writers." These case writers, in most instances, had only a limited degree of knowledge and experience relating to the intelligence community and evaluation of intelligence products. The case writers, and not the Recorders, were primarily responsible for accumulating documents, including assembling documents to be used in the drafting of an unclassified summary of the factual basis for a detainee's designation as an enemy combatant.

These case writers depended entirely on government agencies to supply the information they used. The case writers and Recorders did not have access to the vast majority of information sources generally available within the intelligence community, all of which had been made available to me in my prior assignments.

The information used to prepare the files to be used by the Recorders frequently consisted of finished intelligence products of a generalized nature - often outdated, often "generic," rarely specifically relating to the individual subjects of the CSRTs or to the circumstances related to those individuals' status. Beyond "generic" information, the case writers would frequently rely on information contained within the Joint Detainee Information Management System ("JDIMS"). The subset of that system available to the case writers was limited in terms of the scope of information, typically excluding information that was characterized as highly sensitive

law enforcement information, highly classified information, or information not voluntarily released by the originating agency. Like the information provided by intelligence agencies, the information in JDIMS to which OARDEC case writers had access lacked information relating to the reliability of the source. In that regard, JDIMS did not constitute a complete repository, although this limitation was frequently not understood by individuals with access to or who relied upon the system as a source of information. Other databases available to the case writers were similarly deficient.

Beyond the physical and technological limitations that constrained the research teams, the content of intelligence products, including databases, made available to case writers, Recorders, or liaison officers, was often left entirely to the discretion of the organizations providing the information. The scope of information *not* included in the bodies of intelligence products was typically unknown to the case writers and Recorders, as was the basis for limiting the information. In other words, the persons preparing materials for use by the CSRT panel members did not know whether they had examined all available information or why they possessed some pieces of information but not others.

The limited information provided by intelligence agencies ordinarily consisted only of distilled summaries and conclusory statements. Team members were rarely provided any information about the source of the information. Often, the source was not identified at all. Other times, the source was identified, but with no information allowing us to assess the source's reliability. For example, a summarized document might say that a detainee "is a member of Al Qaeda," but would not include any information about who determined that the detainee is a member of Al Qaeda, the nationality or allegiance of the source, whether the source was paid for the information, whether the source was detained or subjected to coercive interrogation

techniques, or whether the source had given reliable information on other occasions. The only exception to the rule of withholding source material, in my experience, was that information was sometimes identified as having been provided by the detainee himself. In such cases, OARDEC would not be advised as to whether information had been provided under duress.

The importance of source information cannot be overemphasized. An integral part of the duties of intelligence officers is to assess the reliability of sources and the validity of information received. To be effective, the intelligence professional must be capable of distinguishing between instances where a source provides valid, reliable information and instances where the source intends to influence or even to deceive. Without such information about the reliability of the source or the information provided, it is impossible to evaluate the weight to be given the information. It was impossible to know whether the information to which I was permitted access was trustworthy. Yet the CSRT regulations required the panel members to presume that it was all "genuine and accurate."

Following "quality assurance review," a process that focused more on format and grammar than on substance, the unclassified summary and the information assembled by the case writer in support of the summary would then be forwarded to the Recorder. It was very rare that a Recorder or a personal representative would seek additional information beyond that information provided by the case writer.

As one of only a few intelligence-trained and suitably cleared officers, I served as a liaison while assigned to OARDEC, acting as a go-between for OARDEC and various intelligence organizations. In that capacity, I was tasked to review or obtain information relating to individual subjects of the CSRTs. More specifically, I was asked to confirm and represent in a

statement to be relied upon by the CSRT board members that the organizations did not possess "exculpatory information" relating to the subject of the CSRT.

During my trips to the participating organizations, I was allowed only limited access to information, typically prescreened and filtered. I was not permitted to see any information other than that specifically prepared in advance of my visit to the intelligence agencies. I was not permitted to request that further searches be performed. I was given no assurances that the information provided for my examination represented a complete compilation of information or that any summary of information constituted an accurate distillation of the body of available information relating to the subject. I was specifically told on a number of occasions that the information provided to me was all that I would be shown, but I was never told that the information that was provided constituted all available information. Each time that I asked that a representative of the organization provide a written statement that there was no exculpatory evidence, the request was summarily denied.

For example, at one point, following a review of information, I asked the Office of General Counsel of the intelligence organization that I was visiting for a statement that no exculpatory information had been withheld. I explained that I was tasked to review all available materials and to reach a conclusion regarding the non-existence of exculpatory information, and that I could not do so without knowing that I had seen all information. The General Counsel's Office denied my request and refused even to confirm or deny the existence of information that I was not permitted to review. In short, based upon the selective review that I was permitted, I was left to infer, from the absence of exculpatory information in the materials I was allowed to review, that no such information existed in materials I was not allowed to review.

Following that particular exchange, I communicated to the Director of OARDEC, [redacted], and the Deputy Director of OARDEC, [redacted], the fundamental limitations imposed upon my review of the organization's files and my inability to state conclusively that no exculpatory information existed relating to the CSRT subjects. It was not possible for me to certify or validate the non-existence of exculpatory evidence as related to any individual undergoing the CSRT process. The responses by [redacted] and [redacted] were dismissive and did nothing to address my concerns.

All CSRT panel members were assigned to OARDEC and reported ultimately to [redacted]. Any time a CSRT panel determined that a detainee was not properly classified as an enemy combatant, the panel members would have to justify their finding to the senior leadership, including [redacted] and [redacted]. There would be intensive scrutiny of the finding that [redacted] would, in turn, have to explain to his superiors, including the Under Secretary of the Navy. Similar scrutiny was not applied to a finding that a detainee was "properly" classified as an Enemy Combatant. In each of the meetings that I attended with OARDEC leadership following a NEC finding, the question asked by the leadership was, "What went wrong?"

There was a constant push by [redacted] and [redacted] to complete CSRT hearings quickly. [redacted] routinely issued reports showing how many hearings had been completed, and he continually demanded that the hearings be conducted at a faster pace. The only thing that would slow down the process was a finding that a detainee was not an enemy combatant. Therefore, there was a strong incentive on the part of the panel members and other participants in the process to find the detainees to be enemy combatants.

On one occasion, I was assigned to a CSRT panel, Panel 23, with two other officers, an Air Force Colonel and an Air Force Reserve Major in the Judge Advocate General's Corps. We reviewed evidence presented to us regarding the recommended status of detainee [redacted], who was accused in the unclassified summary of being a member of the Libyan Islamic Fighting Group.

There was no credible evidence supporting the allegation. All of us found the information presented to lack substance. What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence. Statements allegedly made by percipient witnesses lacked detail. Reports presented generalized, indirect statements in the passive voice without stating the source of the information or providing a basis for establishing the reliability or the credibility of the source. Statements of interrogators presented to the panel offered surmises from which we were expected to draw conclusions favoring a finding of "enemy combatant." When we asked the Recorder the most limited questions about these statements, the only response the Recorder could give was, "We'll have to get back to you." He never did. The personal representative, the non-attorney assigned to assist the detainee through the process, did not participate in any meaningful way.

On the basis of the paucity and weakness of the information provided both during and after the CSRT hearing, we determined that there was no factual basis for concluding that the individual should be classified as an enemy combatant. OARDEC leadership, including [redacted], immediately questioned the validity of our findings and directed us to write out the specific questions that we had raised concerning the evidence to allow the Recorder an opportunity to provide further responses. We were then ordered to leave the hearing open to allow the Recorder to present further argument as to why the detainee should be classified as an

enemy combatant. Ultimately, in the absence of any substantive response to the questions and no basis for concluding that additional information would be forthcoming, we did not change our determination that the detainee was not properly classified as an enemy combatant.

OARDEC's response to the outcome of our case was consistent with the few other instances in which a finding of "Not an Enemy Combatant" (NEC) had been reached by CSRT boards. I was not assigned to another CSRT panel.

I subsequently learned, based on the government's factual return in [redacted] habeas corpus case, that he was subjected, without his knowledge or participation, to a second CSRT panel two months later that reversed my panel's unanimous determination that he was not an enemy combatant. I also learned that this particular panel, Panel 32, also reconsidered and reversed the finding of Panel 18 that detainee [redacted] in his court filings, was not properly designated as an enemy combatant. So it appears that Panel 32 was convened precisely for the purpose of overturning prior findings that were favorable to the detainees.

In short, the CSRT process was not structured to yield reliable determinations as to whether the detainees held in Guantanamo were properly detained as enemy combatants. Rather, the Executive put in place a process to legitimize, without substantial corroborated evidence or any meaningful independent review, earlier determinations that were not the product of a thoughtful, deliberative process directed to the ascertainment of truth. The process ensured that panels would rubber-stamp decisions already made rather than applying independent judgment as to whether those decisions were correct. Under the guise of implementing the Supreme Court's decision in *Rasul*, the CSRT process completely frustrated it. In my opinion, it is time

for Congress to restore the judicial mechanism – habeas corpus – that will both honor our commitment to justice and keep America secure.

Mr. Chairman, thank you for the opportunity to testify today. I would be pleased to answer any questions the Committee may have.

Steven T. Wax, OSB #85012
Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
Tel: 503-326-2123
Fax: 503-326-5524
steve_wax@fd.org

Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ADEL HASSAN HAMAD, Petitioner, v. GEORGE W. BUSH, DONALD RUMSFELD, JAY HOOD, and BRICE GYURISKO, Respondents.	CV 05-1009 JDB DECLARATION OF WILLIAM J. TEESDALE, ESQ. (REDACTED)

I, William J. Teesdale, declare:

1. I am an investigator and attorney employed by the Federal Public Defender for the District of Oregon. I am a member of the bars of Oregon and England. Since October 2005 I have conducted a wide range of investigative and legal work on behalf of Mr. Hamad and several of our other Guantanamo detainee clients. In Mr. Hamad's case this has included collecting 15 sworn statements from witnesses in Afghanistan, Pakistan, and Sudan.

2. The evidence collected during this investigation has been provided to OARDEC, both through a submission to the Administrative Review Board on October 13, 2006, and pursuant to the new OARDEC procedure for review of new evidence, requesting a new CSRT hearing for Mr. Hamad. More than 90 days have passed since this new evidence has been provided to OARDEC and more than ten months have passed since the information was submitted through the ARB process. Mr. Hamad has repeatedly told the military authorities that he was not, and is not, an enemy combatant, a statement that is corroborated by the witness statements I have obtained.

3. On July 9, 2007, after several consultations with the Court Security Office and a member of the privilege team, Federal Defender Steve Wax and I had a preliminary conversation with one of the tribunal members, , who had originally sat on Mr. Hamad's Combatant Status Review Tribunal ("CSRT"). The tribunal member indicated that he/she was willing to speak to us and contacted the Department of the Army in Washington, D.C., in order to find out the procedure for making a formal request for a meeting. The tribunal officer provided me with the name of the appropriate official to whom to send the request.

4. On July 10, 2007, I made a written request to the Department of the Army to interview the officer. Permission for that interview was granted on July 24, 2007, by the Chief of the General Litigation Branch of the Department of the Army. That permission was limited in that it did not allow the officer to provide any opinion testimony or other statements that could be considered expert testimony. The officer was therefore unable to respond to my request for comment upon the new evidence discovered during counsel's investigation of Mr. Hamad's case or our request for a new CSRT pursuant to Office for the

Administrative Review of the Detention of Enemy Combatants ("OARDEC") instruction 5241.1, which allows for a new CSRT hearing in cases where there is new evidence.

5. On August 15, 2007, chief counsel for Mr. Hamad, Steve Wax, and I met with the officer and another officer acting as his representative. All of the participants at the meeting held security clearances at the Secret level. Approval in advance was received from the Court Security Office to discuss Hamad classified material, although no substantive discussion of such material took place at the meeting.

6. Prior to, and during, our meeting with the officer we indicated that his/her identity is protected from disclosure in our litigation and that we agreed, among other things, not to release the officer's name publicly without written permission. Mr. Wax and I agreed to file this declaration consistent with the protective order and memorandum of understanding in Mr. Hamad's case.

7. The information provided in the following subparagraphs (a) through (cc) in the next section of this declaration is the information provided to us by the tribunal officer on August 15, 2007. The tribunal officer has reviewed subparagraphs (a) through (cc) and agrees that they are accurate.

INFORMATION FROM HAMAD CSRT TRIBUNAL OFFICER

a. This declaration is limited to unclassified matters relating to my personal observations and experiences as a member of OARDEC. This declaration does not discuss any of the specific evidence used in any particular tribunal hearing.

b. I am presently on full-time duty as a JAG officer with the I am on full-time military leave from a

District Attorney's Office in and have been since 2003. I attended the University of and was a member of the ROTC. I was commissioned as a 2nd Lieutenant in the Army Reserves in I then attended School of Law, graduating in . I was admitted to the Bar in 1996. After three years working at . I was hired as a Deputy District Attorney in 2000. I have experience prosecuting a wide range of criminal cases, from misdemeanors to attempted murder.

c. In September or October 2004 I volunteered for duty at OARDEC after reading there was a need for officers to work on Guantanamo detainee issues.

d. I was initially sent to training in Washington, D.C., for approximately one week before being transferred to Guantanamo. The training was minimal and solely involved being given a binder of documents to read and being told that I would be assigned to sit on CSRT panels in Guantanamo.

e. I have been shown the 7/7/2004 order establishing the CSRT tribunal and the Memorandum dated 7/29/2004 implementing the CSRT procedures. I recognize those documents as forming the major part of the training binder I was provided. The CSRT process was not well defined.

f. When I arrived in Guantanamo in September or October 2004, I was briefed on security matters. I also spoke informally to other CSRT

panel members, who gave me insight into the process, but mostly on logistical matters. During my first few days, I shadowed a Navy Reserve officer for 3 or 4 tribunals. That officer showed me the computer system and how to use it. There was no other training.

g. It was not clear to me what the JAG officer's role was on the tribunal. The CSRT rules required having a JAG officer on each CSRT panel but were silent as to the role. Some of the other JAG officers said that the JAG's were informal legal advisors to the other board members and in my experience that was generally the case.

h. From approximately October 2004 until my deployment ended in February 2005, I sat on 49 (this number is listed in my officer evaluation report) CSRT tribunals. In general the CSRT panels would begin as early as 7:00 a.m. and work sometimes as late as 9:00 p.m, six or seven days a week. There would sometimes be as many as three CSRT hearings in a day, although the average would be less than that. Some of the hearings would take an hour or so but others could take much longer if the detainee testified and called witnesses.

i. When a detainee called witnesses, they would always be other men in the prison in Guantanamo. I never saw any external witness presented for any detainee. There were requests made for such witnesses but that was an area for the State Department, who determined the availability of the requested witness or witnesses.

j. In Mr. Hamad's CSRT tribunal proceeding, the tribunal members had very little discussion of the evidence in his case. My primary concern in Mr. Hamad's case was that there was insufficient evidence to determine him to be an enemy combatant. After I drafted my dissenting opinion in that case I discussed it with the Navy Commander who was on the same CSRT panel. That officer's response, which I believe came from a lack of legal training, questioned the meaning of some of the definitions used in my dissenting report. I responded that reasonable people can differ and left it at that, but his response set me back a bit.

k. There was no separate exculpatory evidence presented in Mr. Hamad's case.

l. There was no exculpatory evidence presented separately, as required in the CSRT rules, in any CSRT hearing that I sat on. From time to time the CSRT panels did encounter exculpatory evidence by accident because some of the evidence presented by the recorder would contradict the allegations made against the detainee.

m. Sometimes the CSRT panel members would request more evidence. I believe that I did so approximately 6 times.

n. The role of the recorder differed from hearing to hearing. The general role of the recorder was to generate the evidence to present to the CSRT panel. Some of the recorders would just present a stack of documentary evidence and ask the panel members to review it. Other recorders took a much more prosecutorial position.

o. Some of the first recorders were JAG officers but a concern was raised that it might violate some state bar rules for JAG officers to question detainees who had appointed counsel, so it was decided that JAG officers should not take that role.

p. It was generally known that the recorders had the most difficult job in the process and were overwhelmed, starting earlier in the morning than the CSRT panel members and finishing later.

q. The recorders did not have much control over the content of the information to be presented to the CSRT hearings. Much of the material presented was supplied by intelligence agencies and were summaries that were not necessarily justified by the underlying evidence.

r. There was a sentiment among the JAG officers that many of the CSRT officers did not understand the distinction between conclusory statements and actual evidence.

s. The CSRT rules afforded the Government evidence a presumption of correctness. For me as a tribunal member this meant that when I had a piece of evidence with some small corroboration, then I had to view that with great significance and it would also have made it difficult for any detainee to rebut.

t. Some tribunal members did not understand that the presumption was to be given to evidence.

u. The role of the Personal Representative was also unclear. Some PR's did little while there was one Air Force Major who strongly

advocated for the detainees he was assigned to assist. I heard some CSRT tribunal members say that they did not appreciate the zeal with which he tried to assist the detainees.

v. I sat on up to 6 CSRT hearings where there was a unanimous decision that the detainee was a Non Enemy Combatant ("NEC"). In all of those NEC cases, the Command directed that a new CSRT be held or the original CSRT was ordered reopened. In each of those cases, the "new evidence" that was presented was in fact a different conclusory intelligence finding, which was not justified by the underlying evidence.

w. I sat on all but one of the new CSRT's that were ordered after an NEC finding.

x. I participated in two meetings with many other tribunal members in which we were briefed by CID (intelligence) agents who were brought in by Command to explain why the NEC results were wrong.

y. There were discussions after these briefings among the CSRT members and between the JAG officers that this was an attempt to influence the results of CSRT hearings.

z. One of the briefings organized by the Command focused on the Uighur cases. We were told that some tribunals were finding the Uighurs NEC and some EC based on evidence that was essentially the same. During one briefing the CID agents made a PowerPoint presentation using facts that I recognized to be from a Uighur case where the finding had been that the detainee was an NEC. The CID agents used those facts to attempt

to explain why the CSRT panel was mistaken in finding the person to be an NEC. There was some acrimony in the meeting. Some CSRT panel members argued with the CID agents saying that their presentation used conclusory findings that were not justified by the underlying evidence.

aa. At the briefing, we were told that inconsistent results in the Uighur cases were a problem. I stated that the DOD view that there should be uniformity was misguided.

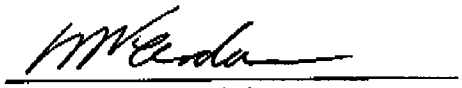
bb. In addition to the two general briefings, I participated in a heated conference that included [redacted] on the telephone. This occurred after the inconsistent decisions in the Uighur cases. [redacted] was the officer assigned to be the chief administrator of the CSRT process. I understand that [redacted] reported to the Secretary of the Navy on the CSRT's. Participating in the conference were senior officers at Guantanamo and [redacted] in Washington, D.C., and possibly other participants. The conference was to discuss the NEC findings in Uighur cases. The Admiral expressed the desire to obtain more uniformity of result across the spectrum of those cases. I recall that I suggested that inconsistent results were good for the system. I explained that based upon my experience of the criminal justice system, with different panels, recorders and personal representatives one could expect different results and that was not a bad thing and would show that the system was working correctly. There was no response from [redacted] to that statement.

cc. In addition to serving on 49 CSRT's, I spent one and a half months as a legal advisor in the CSRT's. I was stationed in Guantanamo for this work. As a legal advisor, I was never told that I could review the sufficiency of the evidence and write to or discuss that issue with a CSRT.

8. The tribunal officer approved the language contained in subparagraphs (a) through (cc) on August 29, 2007, and was provided this declaration in final form on September 4, 2007.

I hereby swear under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 4th day of September, 2007.



William J. Teesdale

MILITARY COMMISSION

UNITED STATES OF AMERICA	)	**D-023**
	)	**Government Response to Defense Motion for Article 5 Status Determination, or, Alternatively, Dismissal for Lack of Personal Jurisdiction**
v.	)	**9 January 2009**
IBRAHIM AHMED MAHMOUD AL QOSI a/k/a ABU KHOBAIB al SUDANI	)	

1. **Timeliness:** This response is timely filed.

2. **Relief Requested:** The Defense motion should be denied to the extend it demands this court to compel a hearing under Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"), 6 U.S.T. 3316 as well as deny the Defense request to dismiss the charges against the accused for lack of personal jurisdiction.

3. **Overview:** There is *prima facia* evidence of personal jurisdiction in this case from the charge sheet wherein the government alleges the accused is an "unlawful alien enemy combatant." *United States* v. *Khadr,* CMCR No. 07-001, at 20 (Sept. 24, 2007). If jurisdiction is challenged, the court must determine whether it has jurisdiction over the accused in accordance with the Military Commissions Act of 2006 ("MCA"), 10 U.S.C. § 948a *et. seq.* Contrary to the accused's assertions, the Commission is not required to determine whether the GPW applies to the accused in order to establish personal jurisdiction over the accused at this commission. Jurisdiction is determined by statute--the MCA.

4. **Burden of Persuasion:** In a motion to dismiss for lack of jurisdiction, the burden of persuasion shall be upon the prosecution. R.M.C. 905(c)(1), 905(c)(2)(B).

5. **Facts:** This is a legal motion only and no facts are necessary to its resolution.

6. **Argument:** The Defense ignores the principal source of law governing jurisdiction here--namely, the MCA. Congress had the constitutional authority to define and punish criminal acts and has expressly done so with enactment of the MCA. Instead of addressing the statute's text, structure, and history, the Defense purports to invoke the protections of the GPW, albeit without actually explaining why those protections apply here. Without any legal or factual support for doing so, the Defense claims that GPW applies. It does not.

a. Congress has expressly stated that a military commission shall have jurisdiction to try unlawful alien enemy combatants

1. The Constitution vests Congress with the exclusive authority "[t]o define and punish . . . Offences against the Law of Nations." U.S. Const. art. I, § 8, cl. 10. Exercising that authority, Congress enacted the M.C.A., and unequivocally defined the persons subject to military commissions, "alien unlawful enemy combatant." 10 U.S.C. § 948c.

2. Moreover, the M.C.A. defined "unlawful enemy combatant" as a "person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associate forces)." 10 U.S.C. § 948a(1)(A)(i). Military commissions have personal jurisdiction over persons meeting this definition.

3. It is a bedrock principle of statutory interpretation that "the plain language of the enacted text is the best indicator of intent." *Nixon v. United States*, 506 U.S. 224, 232 (1993). Here, Congress expressly provided in the M.C.A.'s plain text that this Commission has personal jurisdiction to try unlawful enemy combatants. There is no requirement for this Commission to determine whether an accused is subject to the GPW or had an Article 5 hearing under the GPW. Congress has defined the jurisdiction of this Commission and there is no obligation to look outside the text of the MCA to establish the prerequisites for personal jurisdiction.

b. **This Military Commission Has Prima Facie Jurisdiction Over the Accused**

1. To establish that a military commission has *prima facie in personam* jurisdiction over an accused, the military commission must find that the Prosecution properly swore charges, that the Convening Authority received pre-trial advice that determined that the military commission had jurisdiction over the accused and the charges prior to referral, and that each offense referred for trial clearly alleges the express jurisdictional language used in the M.C.A.; namely that the accused is "a person subject to trial by military commission as an alien unlawful enemy combatant." *U.S .v. Khadr*, CMCR (2007-001) at 21.

2. Compliance with the above-described pre-referral criteria, combined with an unambiguous allegation in the pleadings that the accused is "a person subject to trial by military commission as an alien unlawful enemy combatant," entitles this military commission to initially and properly exercise *prima facie* personal jurisdiction over the accused. This jurisdiction exists until such time as that jurisdiction is challenged by a motion to dismiss for lack thereof, or lack of jurisdiction becomes apparent on the merits. *Id.* There is no requirement under the MCA for a GPW Article 5 hearing in order to determine personal jurisdiction even if jurisdiction is challenged.

c. **The Accused May Not Challenge This Commission Jurisdiction Based on the Geneva Conventions**

1. The Defense argues this commission must comply with the GPW, Article 5. Defense Motion (Def. Mtn.) at 4. Not so. Jurisdiction in this case is governed by statute, the MCA, not the GPW or any other international treaty or agreement. 10 U.S.C. § 948b(a).

2. Even if the GPW requires the United States to afford the accused a GPW Article 5 hearing, Congress always retains the authority to abrogate or repeal a treaty by a later-enacted statute. *See, e.g.*, *Edye v. Roberston (Head Money Cases)*, 112 U.S. 580, 599 (1884); *see also Reid v. Covert*, 354 U.S. 1, 18 (1957) ("This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."). Nothing in customary international law prohibits Congress from doing so.[1] Thus, even if Article 4 and Article 5 of the GPW were somehow in tension with the MCA, the MCA would remain lawful and enforceable, notwithstanding anything in the Geneva Conventions or any other earlier-enacted treaty to the contrary.

3. Moreover, contrary to the Defense's suggestion, the GPW is not enforceable through individual claims. A treaty constitutes "a compact between independent nations" and its enforcement depends "on the interest and the honor of the governments which are parties to it." *Head Money Cases*, 12 U.S. at 598. Importantly, it is not binding domestic law unless Congress has enacted statutes implementing it or "the treaty itself conveys an intention that it be 'self-executing' and is ratified" on that basis. *Medellin v. Texas*, 128 S.Ct. 1346, 1356 (2008) (*citing Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005)). Thus, the proper resolution of treaty violations is through "international negotiations and reclamations" not court action. *Head Money Cases*, 12 U.S. at 598.

4. Even "when treaties are self-executing" the legally binding "presumption is that international agreements, even those directly benefiting a private person, generally do not create private rights or provide for a private cause of action in domestic courts." *Medellin*, 128 S.Ct. at 1357, n.3 (*citing 2 Restatement (Third) of Foreign Relations Law of the Untied States*, ¶ 907, Comment *a*, p. 395 (1986)). Indeed, the federal circuit courts of appeal overwhelmingly have held that unless the treaty expressly grants enforcement of its provisions to individuals, or Congress passes legislation granting a right to judicial enforcement, the treaty does not create privately enforceable rights.[2] Accordingly, the Accused cannot complain before this Commission about any purported violations of Article 5.

---

[1] *See, e.g.*, *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005) ("Never does customary international law prevail over a contrary federal statute."); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) ("[C]lear congressional action trumps customary international law and previously enacted treaties."); *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) ("Statutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency.").

[2] *See, e.g.*, *United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001); *United States v. Jiminez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001); *United States v. Li*, 206 F.3d 56, 60-61 (1st Cir. 2000); *Goldstar (Panama) S.A. v.*

5. In military commissions under the MCA, Congress stated in unambiguous terms that the GPW was *not* a source of rights in for an accused: "No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights." 10 U.S.C. § 948b(g). This Congress may constitutionally do, and it has done so.

6. Finally, the government is not relying on the CSRT determination to prove personal jurisdiction as authorized by 10 U.S.C. § 948a(1)(A)(ii). The government is prepared and ready to prove the accused is an unlawful enemy combatant in accord with 10 U.S.C. § 948a(1)(A)(i). This is the only standard to determine personal jurisdiction under the MCA; not the GPW or any other international treaty or agreement.

7. **Conclusion:** For the foregoing reasons, this Commission should deny the Defense's Motion to Compel an Article 5 hearing and should deny the request to dismiss the charges for lack of personal jurisdiction.

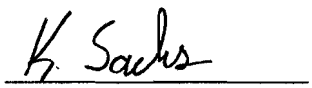
8. **Oral Argument:** This Commission should readily deny the Defense's motion, but the Government will be prepared to argue this motion if this Commission deems it necessary.

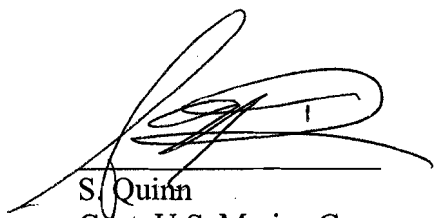
9. **Witnesses:** The government does not intend to call any witnesses in support of this response. However, if the court orders a hearing to determine whether the accused is an unlawful enemy combatant, the government will call witnesses in support of its position.

10. **Certificate of Conference:** As stated in the Defense Motion.

11. **Attachments:** None

Respectfully submitted,





K. Sachs
Maj, U.S. Air Force
Trial Counsel
Office of Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301-1610

S. Quinn
Capt, U.S. Marine Corps
Assistant Trial Counsel
Office of Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301-1610

T. Cox
Capt, U.S. Air Force
Assistant Trial Counsel
Office of Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301-1610

United States, 967 F.2d 965, 968 (4th Cir. 1992); *Candian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979).

UNITED STATES OF AMERICA v. IBRAHIM AHMED MAHMOUD AL QOSI	**D-023** **Defense Reply** To Government Response to Defense Motion for Article 5 Status Determination, or, Alternatively, Dismissal for Lack of Personal Jurisdiction 14 January 2009

1. <u>Timeliness</u>: This motion is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court.

2. <u>Law and Argument in Reply to the Government Response</u>:

A. Congress has explicitly provided that a military commission shall <u>only</u> have jurisdiction to try an unlawful alien enemy combatant.

In its first argument, the prosecution acknowledges that a military commission only has jurisdiction to try an unlawful alien enemy combatants, and no one else. The prosecution states that they are "not relying on the CSRT determination to prove personal jurisdiction," so there is no need to discuss the disabilities of the CSRT process here. Gov't Response at 4. However, the prosecution fails to show how this commission then has jurisdiction over Mr. al Qosi, other than to recite the definition of "unlawful enemy combatant,' with a conclusory declaration that "military commissions have personal jurisdiction over persons meeting this definition." However, the prosecution argues that there is no requirement for an Article 5 hearing under the GPW, which is the only legal process remaining, now that the CSRT process has been discredited, to determine whether or not this commission has jurisdiction over Mr. al Qosi.

With the presumption of POW status, as previously described; until it is determined that by a competent tribunal that Mr. al Qosi is not entitled to POW status under the Third Geneva Convention ("GPW"), he cannot be considered an "unlawful enemy combatant" subject to trial by commission under the MCA. Trying him for alleged crimes while he is entitled to POW

status would be in violation of GPW Article 102, a grave breach, which provides that a POW must be tried in the "same courts according to the same procedure" as a member of the U.S. armed services (i.e., a court-martial, *not* a military commission).

B. This Military Commission does not have Prima Facie Jurisdiction over Mr. al Qosi.

The Prosecution's next argument is that, with the pre-referral criteria which they recite, and an allegation in the pleadings that the person is subject to trial by commission, a military commission is entitled to exercise jurisdiction over the accused. The Prosecution then acknowledges, however, that this jurisdiction only exists "until such time as that jurisdiction is challenged by a motion to dismiss for lack thereof," or until it "becomes apparent on the merits.

Mr. al Qosi has challenged that jurisdiction by this motion. The Prosecution is correct that there is no requirement under the MCA for a GPW Article 5 hearing to determine personal jurisdiction. In addition, the Prosecution concedes that jurisdiction does not exist once it has been challenged; and they contest having a lawful process to determine whether or not this military commission has jurisdiction over Mr. al Qosi. Consequently, without that lawful process, all charges against Mr. al Qosi must be dismissed for lack of personal jurisdiction.

C. Only an Alien Unlawful Enemy Combatant Subject to Trial by Military Commission is Denied the Geneva Conventions as a Source of Rights.

The Prosecution's final argument is that Congress, through the MCA, abrogated the Geneva Conventions. Their argument is that even if the GPW requires an Article 5 hearing, Congress has the authority to abrogate or repeal a treaty by a later enacted statute. Interpreting the MCA to permit a POW to be tried by a commission assumes that it was the intention of Congress to abrogate the GPW. Such an interpretation is untenable in light of language in the MCA revealing Congress's intention to comply with the Geneva Conventions. *See, e.g.*, 10

U.S.C. § 948b(f).

Moreover, "[a]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). It is certainly possible to read the MCA in a manner consistent with the GPW in this case. The Prosecution has identified no provision in the MCA that would be offended by conducting an Article 5 hearing. On the contrary, an Article 5 hearing regarding POW status is entirely consistent with the MCA inquiry into whether an individual is an "unlawful enemy combatant." The Defense motion does not depart from the statutory scheme. Rather, it calls for a simple procedure to ensure that the MCA is applied in a manner consistent with both U.S. and international law.

Furthermore, that interpretation is contradicted by the legislative history of the MCA. On the Senate floor, Senator Lindsay Graham, in describing the CSRTs, stated:

> Okay, now we have a CSRT procedure that Senator Levin and myself and others worked on that deals with determining enemy combatant status. This is a non-criminal procedure that is designed to comply with . . . Article 5 of the Geneva Conventions, a competent tribunal.[1]

Finally, the Prosecution states they are not relying on the CSRT determination, as authorized under 10 U.S.C. § 948a(1)(A)(ii), but are prepared to prove that Mr. al Qosi is an unlawful enemy combatant under the provisions of 10 U.S.C. § 948a(1)(A)(i). Presumably, their reliance is on the bare assertion that Mr. al Qosi falls under a group assessment. However, the need for an individual status assessment was reaffirmed by the United States Court of Military Commission Review ("CMCR") in the *Khadr* decision:

> Summary determinations of a group's unlawful combatant status

[1] Hearings before the Senate Committee on Armed Services, Military Commissions in Light of the Supreme Court Decision in Hamdan v. Rumsfeld, S.Hrg. 1090-881, at 62-63 (July 13, 2006)

> would appear to violate the Supreme Court's ruling in *Hamdi v. Rumsfeld*, 541 U.S. 507, 533 (2004), which recognized the fundamental right to notice and an opportunity to be heard on matters affecting a detainee's "enemy combatant" status determination.

United States of America v. Omar Ahmed Khadr, No. 07-001 at 14 n.21 (C.M.C.R. 2007).

Moreover, in its analysis of the MCA's jurisdictional provisions, the CMCR noted that "Congress never stated that mere membership in or affiliation with the Taliban, al Qaeda, or associated forces was a sufficient basis for declaring someone to be an 'unlawful enemy combatant' for purposes of exercising criminal jurisdiction over that person." *Id.* at 16. Accordingly, the Prosecution's seeming argument that a group assessment has already been made by someone precluding any need for an Article 5 hearing should be rejected.

It has been held that the MCA can and should be interpreted in a manner consistent with the Geneva Conventions, which "form a part of American law, and are binding in federal courts under the Supremacy Clause." *Khadr*, CMCR 07-001 at 4 n.4; *see also id.* at 25, citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (whenever possible, acts of Congress are generally construed in a manner consistent with international law).

Accordingly, Mr. al Qosi respectfully moves for an Article 5 status determination, or alternatively, dismissal of this case for lack of personal jurisdiction.

Respectfully submitted,

By: /s/
T. Pierce, JA, USA
Detailed Defense Counsel for
Ibrahim al Qosi
Office of the Chief Defense Counsel
Office of Military Commissions
1600 Defense Pentagon, Room 3B688
Washington, DC 20301

UNITED STATES OF AMERICA v. IBRAHIM AHMED MAHMOUD AL QOSI	**Addendum to** **D- 023 Defense Motion** for Article 5 Status Determination, or, Alternatively, Dismissal for Lack of Personal Jurisdiction 24 November 2009

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court.

2. **Relief Sought:** This Motion is an addendum to the Defense Motion for Article 5 Status Determination, filed with this Commission 19 December 2008. This motion is filed in light of changes to the Military Commissions Act which were enacted on 28 October 2009 ("MCA of 2009").

3. **Overview:**

Taking note of the changes to the Military Commissions Act of 2006 by the Military Commissions Act of 2009, this addendum iterates the requirement that Mr. al Qosi be afforded an Article 5 hearing, as required by the Geneva Conventions and United States law. Accordingly, Mr. al Qosi continues to move for an Article 5 status determination, or alternatively, dismissal of this case for lack of personal jurisdiction.

4. **Burden and Standard of Proof:**

Jurisdiction over the accused under the Military Commissions Act of 2009 is predicated on the accused being categorized as an alien unprivileged enemy belligerent. *See* § 948c, MCA of 2009. The burden of proof is on the Prosecution to establish that the Commission has jurisdiction over the accused. RMC 905(c)(2)(B).[1] In order to establish jurisdiction over Mr. al

[1] The RMC cited herein are the rules promulgated pursuant to the MCA of 2006. New regulations have not yet been promulgated under the MCA of 2009. The defense references the earlier rules only for purposes of this motion.

Qosi, the government must prove that he is an "alien unprivileged enemy belligerent."[2] But, before that jurisdictional element is even addressed, a competent tribunal must determine whether Mr. al Qosi belongs to any of the categories enumerated in Article 4 of the Geneva Conventions Relative to the Treatment of Prisoners of War (6 UST 3316) ("GPW"); if he does, then he cannot be an unprivileged enemy belligerent, and this Commission lacks jurisdiction over him.

Preponderance of evidence shall be the standard used in reaching this determination, in accordance with Army Regulation (AR) 190-8.

5. Facts:

The MCA of 2009 was signed into law as part of the National Defense Authorization Act on 28 October 2009. The new MCA contains some substantive changes which are addressed in this motion addendum.

6. Law and Argument:

I. THIS COMMISSION DOES NOT HAVE JURISDICTION OVER MR. AL QOSI IN THE ABSENCE OF AN ARTICLE 5 STATUS DETERMINATION

The Motion for an Article 5 Status Determination and the arguments therein remain in effect, notwithstanding revisions made in the Military Commissions Act of 2009. In fact, those revisions affirm Mr. al Qosi's position in his original Motion; that the GPW Article 5 requirement, must be complied with.

In the MCA of 2006, Congress appeared to equivocate regarding the applicability of the Geneva Conventions to Guantanamo detainees. The MCA of 2006 defined certain persons as

---

Notwithstanding § 1804(d)(2) of the MCA of 2009 (which declares that earlier rules remain in effect until new ones are promulgated), Mr. al Qosi does not waive any challenge to the rules or their applicability.

[2] The MCA of 2006 claimed jurisdiction over "unlawful enemy combatants." The MCA of 2009 claims jurisdiction over "unprivileged enemy belligerents." In recognizing this statutory change for the limited purpose of this motion, Mr. al Qosi does not waive any eventual challenge he may raise to the charges in this case, nor does he waive any other challenges to the new MCA.

"lawful enemy combatants," loosely paralleling GPW Article 4, but reducing the list of categories of who are "privileged" as belligerents from eight (8) to three (3). These three categories included a provision that only the armed forces of hostile governments recognized by the United States would be accorded status as lawful combatants. This declaration contravened GPW Article 4. The MCA of 2006 went on to confer jurisdiction of the Commissions upon any one deemed to have engaged in hostilities against the United States who is not a lawful enemy combatant, or anyone who has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal – again, in contravention of the Geneva Conventions. *See* GPW Article 5, Article 102. Despite instances where it seemed to disregard the Geneva Conventions, however, Congress also repeatedly affirmed, in congressional debates, that the United States would abide by the Geneva Conventions.[3] The abrogation of a treaty must be clear and unequivocal. *See Cook v. U.S.*, 288 U.S. 102, 53 S. Ct. 305 (1933). Since Congress did not clearly and unequivocally abrogate the Geneva Conventions, the provisions relevant to the present motions have always remained in effect.

Now, in the Military Commissions Act of 2009, Congress affirms its intent that GPW is to be complied with, both explicitly and implicitly. Congress demonstrated its intent to comply with GPW by defining "privileged belligerent" as an individual "belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War."[4] This definition conforms with GPW Article 4. *See* GPW Article 4, paragraphs A. and B. The MCA of 2009 then defines "unprivileged enemy belligerent" only as

---

[3] 152 Cong. Rec. S10413 (statement of Sen. McCain) ("I am pleased that this legislation before the Senate does not amend, redefine, or modify the Geneva Conventions in any way. The conventions are preserved intact.")
[4] § 948a(6), MCA of 2009

an individual who, first, is someone who is "other than a privileged belligerent"[5] – analogous, again, to the GPW.

Congress has thus made clear that the GPW is United States law and must be complied with. Consequently, establishing Commissions jurisdiction over an individual requires a two-step process. First, in compliance with GPW (and as Mr. al Qosi argued in his Motion on this issue), an Article 5 hearing must be conducted, in accordance with the procedures set out in Army Regulation (AR) 190-8. Only then, if it is found that Mr. al Qosi does not belong to any of the eight categories enumerated in Article 4, can the Military Commission take the next step, and determine whether Mr. al Qosi is subject to Commission jurisdiction as an "unprivileged enemy belligerent." § 948a(7), MCA of 2009. If, however, Mr. al Qosi belongs to any of the categories enumerated in Article 4, he cannot be subjected to the jurisdiction of this Commission.

7. Conclusion

Mr. al Qosi continues to assert that he is within the categories of protected persons identified in the Geneva Conventions, and currently entitled to the protections of the GPW. To comply with GPW Article 5, and consistent with the Military Commissions Act of 2009, a hearing by a competent tribunal must be conducted in accordance with AR 190-8.

Accordingly, Mr. al Qosi respectfully moves for an Article 5 status determination, or alternatively, dismissal of this case for lack of personal jurisdiction.

8. Request for Oral Argument: The Defense requests oral argument. RMC 905(h).

9. Conference with Opposing Counsel: On the initial filing of this motion, in December 2008, the Defense conferred with opposing counsel, who stated the government opposes this motion.

---

[5] § 948a(7), MCA of 2009

10. **Additional Information:** In making this motion, or any other motion, Mr. al Qosi does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, 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 all appropriate forums. In particular, Mr. al Qosi does not waive any claims, motions or arguments regarding the application of the Military Commissions Act of 2009 to his case.

Respectfully submitted,

By: _____

S. Lachelier, JAGC, USNR
T. Pierce, JA, USA
T. Owens, JAGC, USN
Detailed Defense Counsel for
Ibrahim al Qosi
Office of the Chief Defense Counsel
Office of Military Commissions
1600 Defense Pentagon, Room 3B688
Washington, DC 20301

P. Reichler
L. Martin
S. Altschuller
Foley, Hoag, LLP
Civilian Defense Counsel for Ibrahim al Qosi
Foley Hoag, LLP
1875 K Street, NW
Washington, DC 20006
(202) 223-1200