

**In the United States Military Commission at
Guantanamo Bay Naval Base, Cuba**

UNITED STATES OF AMERICA)	
)	
v.)	MOTION TO DISMISS:
)	IMPOSSIBILITY
)	OF AN ARMED CONFLICT
IBRAHIM AHMED MAHMOUD AL QOSI)	WITH A NON-STATE ACTOR¹

COMES NOW THE ACCUSED, by and through his detailed defense counsel, and requests the Military Commission to dismiss the charge against him or in the alternative, issue an order restricting the charge of conspiracy to commit war crimes to that time period from 11 September 2001 until his capture at some time in December 2001. The Defense asserts that the United States was not engaged in an international armed conflict or in a state of war with any state to whom Mr. al Qosi was affiliated by citizenship, residence, or voluntary service. In addition, the charge against Mr. al Qosi alleges war crimes that were committed by al Qaeda, not by a sovereign state. Therefore, as a matter of law, he was not capable of committing war crimes punishable by this tribunal.

STATEMENT OF FACTS

In the single charge of conspiracy at issue in this case, Mr. al Qosi is alleged to have conspired to commit a variety of war crimes as a member of al Qaeda in the context

¹ **TIMING:** This motion is filed in a timely manner, as the Defense gave written notice of its intent to file the same on 15 September 2004.

of and associated with armed conflict, from June 1989 to December 2001. However, al Qaeda, a shadowy and amorphous organization clearly not constituting a state actor, cannot be considered a party to an international armed conflict under existing international law. According to international treaties and most jurists, an “international armed conflict” to which the law of war (or in more contemporary usage, the law of armed conflict) can occur by definition is only between states. In addition to this legal requirement, there are sound policy bases why the definition should not be expanded to include non-state actors such as al Qaeda.

LEGAL ANALYSIS

I. THE UNITED STATES WAS NOT ENGAGED IN AN INTERNATIONAL ARMED CONFLICT WITH ANY ENTITY OR STATE RELATED TO THE CHARGE IN THIS CASE PRIOR TO THE ATTACKS OF 11 SEPTEMBER 2001.

1. During a recent press conference held on 6 March 2004, President Bush stated, “I will continue to speak about the effects of 9/11 on our country and my presidency... The terrorists declared war on us on that day, and I will continue to pursue this war.”² In remarks made on 18 June 2004, the President told a crowd of on-lookers, “On that day, the enemy declared war on the United States of America, and war is what they got.”³

2. In her testimony before the 9/11 Commission, the National Security Advisor, Dr. Condoleezza Rice, testified, “And for all of the rhetoric of war prior to 9/11, people who said we’re at war with the jihadis network, people who said that they’ve declared war on us and we’re at war with them, we weren’t at war. We weren’t on war footing.

² Press Conference of President Bush and Mexican President Fox, 6 March 2004, Prairie Chapel Ranch, Crawford, Texas

³ President Bush Salutes Soldiers in Fort Lewis, Washington, 18 June 2004

We weren't behaving in that way. We were still very focused on rendition of terrorists, on law enforcement. And yes, from time to time we did military plans or used a cruise missile strike here or there but we did not have a sustained systematic effort to destroy Al Qaeda, to deal with those who harbored Al Qaeda.”⁴

3. What is clear from the President's own public remarks and Dr. Rice's testimony before the 9/11 Commission is that prior to the tragic events of September 11, the administration did not see itself in an armed conflict, international or otherwise. As Dr. Rice pointed out in her testimony, in the administration's early days from 20 January to 10 September 2001, President Bush had a broad foreign policy agenda, to include confronting the proliferation of weapons of mass destruction, improving America's relations with the world's great powers, changing its' policy on Iraq, and confronting occasional crises. The administration simply was not on a war footing with al Qaeda. As Dr. Rice testified, “We also moved to develop a new and comprehensive strategy to try and eliminate the Al Qaeda network. President Bush understood the threat and [he] understood its importance. He made clear to us that he did not want to respond to Al Qaeda one attack at a time. He told me he was tired of swatting flies.”⁵

4. Even Congress put terrorism on the back burner. After the Cold War ended, there was no conscious effort by Congress to reorganize to address new threats. Indeed,

The Senate undertook no appreciable changes. Traditional issues – foreign policy, defense, intelligence – continued to be handled by committees whose structure remained largely unaltered, while issues such as transnational terrorism fell between the cracks. Terrorism came under the jurisdiction of at least 14 different committees in the House alone, and budget and oversight functions in the House and Senate concerning terrorism were also splintered badly among

⁴ Testimony of Condoleezza Rice before 9/11 Commission, 8 April 2004, page 34 of transcript.

⁵ *Id.* at page 3 of transcript.

committees. Little effort was made to consider an integrated policy toward terrorism...⁶

5. Indeed, one need only peruse the Patterns of Global Terrorism produced by the U.S. Department of State to see that prior to 9/11, U.S. policy concerning terrorists and terrorist networks concentrated on law enforcement and bringing them to justice for their crimes. The U.S. plainly and simply was not engaged in an international armed conflict with any entity or state related to the charge in this case prior to the attacks of 11 September 2001.

II. ANY VIOLENT ACTIONS UNDERTAKEN BY OR AGAINST THE ENTITY KNOWN AS AL QAEDA DO NOT CONSTITUTE AN INTERNATIONAL ARMED CONFLICT AS A MATTER OF LAW AND THEREFORE CANNOT FORM THE JURISDICTIONAL BASIS FOR ANY CRIMES AGAINST THE LAWS AND CUSTOMS OF WAR.

Meaning of International Armed Conflict

6. Most international legal experts define “international armed conflict” as a conflict between states. For example, Gabor Rona, Legal Advisor to the International Committee of the Red Cross (ICRC), writes: “An international armed conflict is one in which two or more states are parties to the conflict.”⁷ In a recent article, Assistant Professor of Law Derek Jinks states, “In general, the laws of war are applicable only in the context of an international armed conflict—that is, an armed conflict between two or more nation states.”⁸ Treatises similarly define international armed conflict as “armed

⁶ The 9/11 Commission Report, Authorized Edition, at 105

⁷ Gabor Rona, *Interesting Times For International Humanitarian Law: Challenges From The “War On Terror”*, 27-FALL FLEWA 55, 57 (2003).

⁸ Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 11 (2003), citing Edward Kwakwa, THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION (1992) (analyzing the triggering conditions for the Hague Rules and the Geneva Conventions).

conflicts between two or more states.”⁹ Another treatise explains that a “distinction has historically been drawn between international and non-international armed conflicts, founded upon the differences between *interstate* relations—the proper focus on international law—and *intrastate* matters which traditionally fell within the domestic jurisdiction of states and were thus in principal impervious to international legal regulation.”¹⁰

7. Authorities that define international armed conflict invariably begin with the Geneva Conventions as their primary source. As one author explains, “Armed conflict is a term of art that refers to the 1977 Protocol I Additional to the Geneva Convention, where it is used in the sense of war as well as hostilities short of war between states.”¹¹ The ICRC Commentary to common Article 2 of the four 1949 Geneva Conventions clarifies that “[a]ny difference arising between two States and leading to the intervention of armed forces... is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the

⁹ Francois Bouchet-Saulnier, *THE PRACTICAL GUIDE TO HUMANITARIAN LAW* 162 (Roman & Littlefield 2002); see also Hilaire McCoubrey & Nigel D. White, *INTERNATIONAL LAW AND ARMED CONFLICT* 194 (1992) (defining international armed conflict as “resort by states to active and hostile military measures ...”). Another commentator has written: “Should the events of September 11 be considered an ‘act of war’? It depends on whether a government was involved.” Eyal Benvenisti, *Terrorism and the Laws of War: September 11 and its Aftermath*, Crimes of War Project (Sept. 21, 2001), <<http://crimesofwar.org/expert/attack-apv.html>> (accessed April 5, 2003).

¹⁰ Malcolm N. Shaw, Q.C., *INTERNATIONAL LAW* 1068-69 (5th ed., Cambridge University Press, 2003) (the article goes on to note that the distinction has been breaking down to some extent as international humanitarian law has been applied to some internal armed conflicts).

¹¹ Yoram Dinstein, *Discussion—Bringing Terrorists to Justice*, in *INTERNATIONAL LAW AND THE WAR ON TERROR* 382 (Fred L. Borch & Paul S. Wilson, eds., Naval War College, Newport, Rhode Island, 2003), citing Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, arts. 51.5(a) & 57.2(a)(iii) & (b), Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977).

conflict lasts, or how much slaughter takes place.”¹² The 1907 Hague Conventions are also applicable only in the case of war between two or more of the contracting states.¹³

8. The primary reason non-state actors cannot be parties to international armed conflicts is that they do not meet the criteria for belligerent or insurgent status.¹⁴ Article 1 of the Annex to the 1907 Hague Convention (No. IV) Respecting the Laws and Customs of War on Land expressly states that belligerent status will “apply... to armies” and expressly sets forth additional criteria to be met by “militia.”¹⁵ The now customarily authoritative 1863 Lieber Code also affirmed, “So soon as a man is *armed by a sovereign government* and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses.”¹⁶ Today, Article 4(A)(1) of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW) has expanded prisoner of war (PW) status to include members of “armies” or “armed forces” and members of certain militia forming part of the armed forces of a party to an armed conflict.¹⁷ Thus, all sources link belligerent status to membership in a *sovereign country’s* armed forces.

9. The U.S. Army Operational Law Handbook adopts this definition of international armed conflict. It states, “The Law of War applies to all cases of declared war or any other armed conflicts that arise between the U.S. and other nations, even if the

¹² Rona, *supra* note 1 at 58.

¹³ Jinks, *supra* note 2 at 11-12.

¹⁴ Rona, *supra* note 1 at 61.

¹⁵ Jordan J. Paust, *Power To Determine The Status And Rights Of Persons Detained Without Trial*, 44 Harv. Int’l L.J. 503, 510 n. 23 (2003).

¹⁶ *Id* (italics added).

¹⁷ Jordan J. Paust, *War and Enemy Status After 9/11: Attacks On The Laws Of War*, 28 Yale J. Int’l L. 325, 329 (2003).

state of war is not recognized by one of them.”¹⁸ The Handbook then cites common Article 2 of the Geneva Conventions as the source of the definition applied by the U.S., and provides the Falklands War, Iran-Iraq War, and Desert Storm as “clearly international armed conflicts to which the Law of War applied.” The Manual cautions, however, that while the 1977 Protocol 1 to the 1949 Geneva Conventions expanded the scope of “international armed conflict” to include certain wars of national liberation, “the U.S. is not a Party to the protocol and does not recognize this extension of the Law of War.”¹⁹ The U.S. Navy Annotated Supplement to the Commander’s Handbook of Naval Operations (1999) is similar, stating, “Combatants include all members of the armed forces of a Party to the conflict.”²⁰ *Air Force Operations & the Law* also adopts this standard.²¹

10. Support for a state-based view of international armed conflict can also be found in the decisions of both U.S. and international courts. In *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*,²² the Second Circuit Court of Appeals held that the United States could not have been at war with the Popular Front for the Liberation of Palestine (PFLP), which had engaged in terrorist acts, because it was a non-state, non-belligerent, non-insurgent actor. Abroad, the Appeals Chamber of the International Tribunal on War Crimes in Former Yugoslavia recently stated, “[A]n armed conflict exists whenever there is a resort to armed force between states or protracted

¹⁸ U.S. Army Operational Law Handbook Chapter 2, Law of War, at 10 (2003 ed.), available at <https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/1af4860452f962c085256a490049856f?OpenDocument>.

¹⁹ *Id.*

²⁰ Jordan J. Paust, *War and Enemy Status After 9/11: Attacks On The Laws Of War*, 28 YALE J. INT’L L. 325, 329 (2003).

²¹ *Air Force Operations & the Law* 28-29 (1st ed, 2002).

²² 505 F.2d 989, 1013-15 (2d Cir. 1974)

armed violence between governmental authorities and organized armed groups or between such groups within a state.”²³

Applying the Standard to Al Qaeda

11. Given the definition of international armed conflict elucidated above, it follows that al Qaeda cannot be a party to an international armed conflict unless international law has changed substantially since September 11, 2001. As Professor Jordan Paust asserts, “Since al Qaeda is not a state, nation, belligerent, or insurgent, the United States cannot be at war with al Qaeda as such.”²⁴ Professor Paust supports this view by arguing that al Qaeda does not qualify as an insurgent or belligerent group under international law:

The lowest level of warfare or armed conflict to which certain laws of war apply is an insurgency. For an insurgency to occur, the insurgent group would have to have the semblance of a government, an organized military force, control of significant portions of territory as its own, and its own relatively stable population or base of support within a broader population. Al Qaeda never met any of the criteria for insurgent status. Belligerent status under the laws of war is based on the same criteria for insurgent status plus outside recognition by one or more states either as a belligerent or a state. Al Qaeda never met the criteria for insurgent status and certainly lacked any outside recognition as a belligerent, nation, or state. Indeed, al Qaeda is not known to have even purported to be or to have the characteristics of a state, nation, belligerent, or insurgent.²⁵

²³ Case No. IT-94-1-AR 72; 105 ILR, pp. 453, 486 ff.

²⁴ Jordan J. Paust, *Judicial Power To Determine The Status And Rights Of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 513 n. 30 (2003).

²⁵ Jordan J. Paust, *War And Enemy Status After 9/11: Attacks On The Laws Of War*, 28 YALE J. INT'L L. 325, 327 (2003).

12. Other authorities concur that “acts of violence committed by private individuals or groups which are regarded as acts of terrorism... are outside the scope of IHL [International Humanitarian Law],”²⁶ and that concepts such as “terror” or “terrorism” cannot be parties to an international armed conflict.²⁷ Gabor Rona also argues that there can be no international armed conflict against al Qaeda. She explains:

U.S. officials and other analysts have asserted that the global War on Terror is an international armed conflict even when it is not a conflict between states, where the territorial boundaries of the conflict are undefined, where the beginnings are amorphous and the end indefinable, and, most importantly, where the non-state parties are unspecified and unidentifiable entities that are not entitled to belligerent status. Since an international armed conflict under humanitarian law must be between two or more states, the better terminology for those aspects of the War on Terror that do amount to armed conflict and that cross state boundaries, but that do not implicate two or more governments as parties to the conflict, would be “transnational” or “interstate.” The error of the United States’ choice of nomenclature is neither insignificant nor innocent. The U.S. view, if accepted as a statement of law, would serve as a global waiver of domestic and international criminal and human rights laws that regulate, if not prohibit, killing. Turning the whole world into a rhetorical battlefield cannot legally justify, though it may in practice set the stage for, a claimed license to kill people or detain them without recourse to judicial review anytime, anywhere. This is a privilege that, in reality, exists under limited conditions and may only be exercised by lawful combatants and parties to armed conflict.²⁸

13. Professor Christopher Greenwood gives three reasons why al Qaeda should not be considered a party to an international armed conflict with the United States. First,

²⁶ Leslie C. Green, *The Contemporary Law of Armed Conflict* 56 (2nd ed., Manchester 2000).

²⁷ Rona, *supra* note 1 at 60.

²⁸ Rona, *supra* note 1 at 64. Rona notes elsewhere that “The essential humanitarian function of humanitarian law is carried out through the parties to the conflict. They have rights and responsibilities. There can be no humanitarian law conflict without identifiable parties. As a result, a war on terror cannot be a humanitarian law event.” *Id.* at 60.

[T]he concept of an international armed conflict is one which presupposes the existence in all the parties to the conflict of the legal capacity to wage war, that is to say the capacity to be party to international agreements on war, to comply with those agreements in the conduct of hostilities and, most importantly, to engage in hostilities on a footing of legal equality.”²⁹

He then quotes the eminent jurist Sir Hersch Lauterpacht that it would be “impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from them without being bound by them.”³⁰ Professor Greenwood asserts that al Qaeda cannot be considered a party to an international armed conflict unless it is willing to conduct its operations in accordance with international law.

14. Second, Professor Greenwood argues that state practice prior to September 11, 2001, provides no basis for treating the conflict with al Qaeda as an international armed conflict. In his words,

There is no support in state practice or in the literature of international law prior to 11 September 2001 for treating the concept of international armed conflict as broad enough to encompass a relationship between a state on the one side and a group which has no legal personality, no territory, no capacity to comply with the laws of armed conflict (even if wished to do so), and no competence to wage war in the terms of traditional international law.”³¹

He also finds no support for armed conflict status in U.S. behavior prior to September 11, citing its opposition to broadening the definition of armed conflict to cover national

²⁹ Christopher Greenwood, *Terrorism: The Proper Law and the Proper Form*, in INTERNATIONAL LAW AND THE WAR ON TERROR 358 (Fred L. Borch & Paul S. Wilson, eds., Naval War College, Newport, Rhode Island, 2003).

³⁰ Hersch Lauterpacht, *The Limits of Operation of the Laws of War*, 30 Brit. Y. Bk. Int'l. L. 206, 212 (1953).

³¹ Greenwood, *supra* note 25 at 358-59.

liberation movements, and Presidential speeches on al Qaeda that did not mention a state of armed conflict with the group.³²

15. Third, Professor Greenwood raises significant policy arguments why the United States should be reluctant to designate al Qaeda as a party to an international armed conflict. First, he warns that doing so will confer a measure of legitimacy upon al Qaeda, and cites the fact that members of the Irish Republican Army starved themselves to death in the 1980s in protest of the United Kingdom's refusal to treat them as combatants rather than common criminals.³³ Moreover, if the U.S. is engaged in an international armed conflict with al Qaeda, then its operations must be conducted by members of the armed forces subject to military discipline and not by the members of agencies such as the Central Intelligence Agency or the Federal Bureau of Investigation. He notes further that there may be serious consequences in the application of the law of neutrality by states which choose to stand aside from the conflict, since the law of armed conflict gives them every right to do so.³⁴ Professor Greenwood concludes that it is "difficult... to see what can be gained in terms of international law by a distortion of the concept of armed conflict to make it fit the operations of Al Qaeda."³⁵

16. Professor Jordan J. Paust also raises a concern with expanding the meaning of international armed conflict, noting that "certain forms of non-state actor violence and targeting that otherwise remain criminal could become legitimate and create an extended,

³² *Id.*, citing Remarks by President William Clinton on Departure for Washington DC From Martha's Vineyard (Aug. 20, 1998), 34 WEEKLY COMP. PRES. DOC. 1642 (Aug. 20, 1998). In his remarks explaining the U.S. response to the embassy attacks, President Clinton did not refer to the laws of armed conflict as the basis for the U.S. response. *Id.* See also *Rumsfeld v. Padilla*, Brief Amici Curiae of the American Civil Liberties Union, New York Civil Liberties Union, 2004 WL 791898 (U.S. Apr 09, 2004) (President Reagan explained his unwillingness to submit Protocol I to the Senate for its advice and consent by noting, *inter alia*, that he did not believe terrorists should be granted combatant status.).

³³ Greenwood, *supra* note 23 at 359.

³⁴ *Id.* at 359.

³⁵ *Id.* at 360.

but unwanted, form of combatant immunity.”³⁶ He cites the attacks on the Pentagon and the *U.S.S. Cole* as examples of criminal acts that might become legitimate military conduct during an armed conflict, and warns that such a designation could also legitimize attacks on the President and various U.S. military personnel and facilities.³⁷

17. The difficulty in demarcating the end of a war on terror or against al Qaeda also recommends against labeling counter-terror operations as an international armed conflict. Gabor Rona explains that the beginning and end of an international armed conflict must be identifiable to know when the law of war is triggered, and when it ceases to apply.³⁸ Although no one disputes the gravity of harm suffered by the United-States on September 11, international law holds that hostile acts must be “protracted” in order for the situation to qualify as one of armed conflict.³⁹ Indeed, the Yugoslavia Tribunal has specifically stated that the reason for this requirement is to exclude the application of humanitarian law to acts of terrorism.⁴⁰ Although there is some contrary authority,⁴¹ it is not entirely clear whether even the events of September 11 meet the standard for initiating an international armed conflict, nor is it clear what events would mark the end of such a conflict.

18. State practice also militates against treating al Qaeda as a party to an international armed conflict. For example, as the United Kingdom stated when it ratified Additional Protocol I, “It is the understanding of the United Kingdom that the term

³⁶ Jordan J. Paust, *War And Enemy Status After 9/11: Attacks On The Laws Of War*, 28 YALE J. INT’L L. 325, 327 (2003).

³⁷ *Id.*

³⁸ Rona, *supra* note 1 at 62.

³⁹ *Id.*, citing *The Prosecutor v Dusko Tadic*, ¶ 70, p. 37 (1995), and *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, para. 619 (1998).

⁴⁰ *Id.*, citing *The Prosecutor v. Zejnir Delalic (Celebici Camp case)*, Judgment, IT- 96-21, para. 184, (1998).

⁴¹ See *Abella Case, Inter-American Commission on Human Rights*, Report No. 55/97, Case No. 11.137, November 18, 1997, paras. 155-156 (intense violence of brief duration sufficient to trigger international armed conflict).

'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation."⁴² The British, Spanish, and Peruvian campaigns against the IRA, ETA, and the Sendero Luminoso guerrillas, respectively, have not been treated as armed conflicts under IHL.⁴³ Moreover, international and regional conventions that address terrorism do not treat it as an act of war, but instead as grounds for criminal, civil, or administrative liability.⁴⁴

RELIEF SOUGHT

19. For the forgoing reasons, the Defense respectfully requests that the Military Commission dismiss the charge against Mr. al Qosi or in the alternative, issue an order restricting the charge of conspiracy to commit war crimes to that time period from 11 September 2001 until his capture at some time in December 2001, and to refuse to admit testimony, statements, or any other evidence relating to any alleged conspiracy to commit war crimes which occurred outside the period of 11 September 2001 until Mr. al Qosi's capture in December 2001. The Defense hereby requests oral argument before the Military Commission on this motion to dismiss.

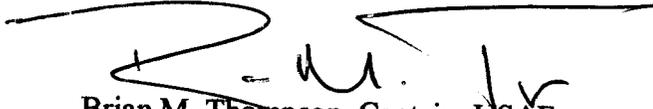
⁴² Reservation by the United Kingdom to Art. 1, para. 4 & Art. 96, para. 3 of Additional Protocol I (Dec. 12, 1977).

⁴³ *Rumsfeld v. Padilla*, Brief of Amici Curiae Practitioners and Specialists in the International Law of War in Support of Respondents, 2004 WL 791895, *23 (Apr. 9, 2004), citing HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 318 (1992).

⁴⁴ *Id.* at 25, citing International Convention for the Suppression of the Financing of Terrorism art. 17; International Convention for the Suppression of Terrorist Bombings art. 14; International Convention Against the Taking of Hostages art. 8; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons art. 9.



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CERTIFICATE OF SERVICE

I hereby certify that on 8 OCT 2004, I e-mailed this Motion to Dismiss to the Presiding Officer and legal assistant to the Presiding Officer. A copy was also e-mailed to the prosecutor.



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