UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	RULING ON DEFENSE MOTION FOR ARTICLE 5 STATUS DETERMINATION 17 December 2007

The Defense has moved this Commission to make a status determination, as required by Article 5 of the Geneva Conventions Relative to the Treatment of Prisoners of War (hereinafter GPW), or that the charges against him be dismissed for lack of personal jurisdiction. The Defense argues that the accused has claimed to be entitled to Prisoner of War Status, that as a result he is not subject to trial by Military Commission absent a determination of his status, and that the burden of proof in any such determination is upon the Government, beyond a reasonable doubt. The Government opposes the motion, arguing alternatively that the Accused is not entitled to an Article 5 status determination because GPW is implemented by the Military Commissions Act and does not apply; that if it does apply, the accused's October 2004 CSRT hearing satisfies it; and finally, that this Commission can hear the evidence and perform the Article 5 determination. The Government disputes the Defense contention that it must prove jurisdiction "beyond a reasonable doubt", and argues that the correct standard is "preponderance of the evidence."

BURDEN OF PROOF

Having read the written briefs of both parties, and carefully reviewed the authorities cited in each, the Commission concludes that the burden upon the Government in an initial showing of jurisdiction is preponderance of the evidence. RMC 905(c)(1); *United States v. Khadr,* (CMCR 07-001, 24, 25). At trial, if the accused raises a affirmative defense, such as the defense of lawful combatancy, the Government will be required to disprove that defense beyond a reasonable doubt. RMC 916(b). *United States v. Khadr*, at 7. Thus, the burden of demonstrating that the accused is subject to the jurisdiction of this Commission is on the Government, by a preponderance of the evidence.

ENTITLEMENT TO AN ARTICLE 5 STATUS DETERMINATION

Article 5 of the Third Geneva Convention, by which the United States is bound, provides:

"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, belongs 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."

Referring to Article 5, Howard S. Levie writes "The present article was an attempt to eliminate, or at least to reduce, the number of instances in which military personnel in the field make an arbitrary decision that a captured individual is an illegal combatant and impose summary justice . . . . [it] assures the accused not only of a determination by a competent tribunal, but of a further *judicial tribunal*—but only if the detaining power proposes to try him for an offense arising out of the hostilities." Howard S. Levie, *The Code of International Armed Conflict, Vol. I*, Oceana Publications, (Rome, London, New York:1986) at 305-6 (emphasis added).

Discussing the same provision, Jean S. Pictet of the International Committee of the Red Cross described the deliberations in these terms "At Geneva in 1949, it was first proposed that for the sake of precision the term "responsible authority" should be replaced by "military tribunal". This amendment was based on the view that decisions which might have the gravest consequences should not be left to a single person, who might often be of subordinate rank. The matter should be taken to a *court*, as persons taking part in the fight without the right to do so are liable to be prosecuted for murder or attempted murder, and might even be sentenced to capital punishment . . ." Jean S. Pictet, *Commentary Relative to the Treatment of Prisoners of War, III.* International Committee of the Red Cross, Geneva 1960 at 77 (emphasis added).

When the drafters sought to clarify *when* such a determination should be made, there was disagreement. "In view of the great differences in national judicial procedures, it was not thought possible to establish a firm rule that this question [an accused's status] must be decided before the trial for the offense, but it should be so decided if at all possible, because on it depends the whole array of procedural protections accorded to Prisoners of War, by the Third Convention, and the issue may go to the jurisdiction of the tribunal." Yves Sandoz et. al, eds. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* International Committee of the Red Cross (Geneva 1987) at 556.

These authorities suggest that the United States is bound not only to perform an initial status determination, such as that provided for under Army Regulation 190-8, but a second, judicial, determination when it proposes to try an detainee for his participation in hostilities. The Government argues that "he has done nothing to trigger" Article 5, but the Commission finds that his claim of entitlement to POW status, made by his counsel before this tribunal, is sufficient to do so. It further finds that because the United States, as Detaining Power, proposes to try the accused for his participation in hostilities, the Geneva Conventions clearly contemplated a judicial determination of his status before any such proceeding.

Congress was clearly aware of these treaty obligations under Article 5 when it debated and enacted the Military Commissions Act. Congress clearly intended that the Combatant Status Review Tribunal (CSRT) would satisfy the requirements of Article 5. Senator Lindsey Graham characterized CSRT's as "Article 5 tribunals on steroids". 151 Cong. Rec. S12,754 (daily ed. Nov 14, 2005), and the Government concedes that there was a "bipartisan consensus" that the CSRT would satisfy the requirements of Article 5. In support of this concession, the Government invites the Commission's attention to this colloquy:

"SEN Graham: 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 Convention, a competent tribunal. Does everyone on the panel believe that the CSRT procedures . . . as constituted, meet [] the test of what the Geneva Convention had in mind as determining status?

GEN Romig: Yes, Sir.

GEN. Black: Yes, Sir.

SEN Graham: . . . Not only does it meet the test, it's gotten better over time. . . Not only did we put in place the CSRT . . . procedure that would comply with Geneva Convention status determination/ competent tribunal standards, we also allowed civilian review of those decisions for the first time. . . ." 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). Elsewhere in the Congressional Record, Senator Kyl opined that the CSRT process would satisfy Article 5's requirement of a status determination before a competent tribunal, and give even more protections than Article 5 requires. Id., at S10,268.

It is clear to the Commission that Congress intended that the accused have an Article 5 status determination in any case in which his status was in doubt, and that it intended the CSRT process to make such a determination.

DID THE ACCUSED'S OCTOBER 2004 CSRT SATISFY ARTICLE 5?

The CSRT held in this case was governed by a Deputy Secretary of Defense Memorandum dated 7 July 2004 and a Secretary of the Navy Order dated 29 July 2004. The Report of the CSRT, dated 8 October 2004, concludes in pertinent part that:

"2. (U) On 3 October 2004, the Tribunal determined, by a preponderance of the evidence, that [the accused] is properly designated as an enemy combatant as defined in [DEPSECDEF Memo of 7 July 2004].

3. (U) In particular, the Tribunal finds that this detainee is a member of, or affiliated with, al-Qaida forces, as more fully discussed in the enclosures."

It is clear from a reading of the balance of the CSRT Report that the panel members found Hamdan to be an "enemy combatant" because of his membership in al-Qaeda, and because he had been employed by Osama bin-Ladin as a bodyguard and driver. The CSRT did not address his entitlement to Prisoner of War Status, cite or discuss the Geneva Conventions or Article 5, or address the lawfulness of the accused's participation in hostilities. Indeed, it was not tasked to do so, the DEPSECDEF and SECNAV Memoranda having ordered the CSRT to make a different determination: whether the accused was an "enemy combatant", as defined in those references, for purposes of continuing his detention. As a consequence, this Commission cannot accept the 2004 CSRT determination that the accused is properly detained as an "enemy combatant" in satisfaction of the required determination regarding his entitlement to Prisoner of

War Status. Even if the Commission were to agree with the Government that the 2004 CSRT process satisfied Article 5, it is clear from the Commentaries on the Geneva Conventions that a second status determination must be made by a judicial officer for detainees the Detaining Power proposes to punish.

Both parties have conceded that this Commission is a competent tribunal within the meaning of Article 5. The hearing the Commission will undertake to determine whether the accused is an alien unlawful enemy combatant, and therefore subject to the Commission's jurisdiction will also determine his status for the purposes of Article 5. This procedure is fully consistent with the intent of Congress, the Law of Armed Conflict, and the decision of the Court of Military Commission Review in *United States v. Khadr*.

The Commission notes the terms of MCA §948b(g), which provide "No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights." Because the accused has not yet been determined to be an alien unlawful enemy combatant by any tribunal, this section does not apply to defeat his right to rely on the Geneva Conventions for the purposes of determining his status.

The Defense Motion for an Article 5 Status Determination is GRANTED.

So Ordered this 17th day of December, 2007.

Keith J. Allred
Captain, JAGC, US Navy
Military Judge