

UNITED STATES OF AMERICA v. Mohammed Jawad	Defense Supplement to D-007 and Request for Judicial Notice Pursuant to M.C.R.E. 201 July 8, 2008
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1. Pursuant to M.C.R.E. 201, the defense requests the Military Judge to take judicial notice of adjudicative facts which are relevant to Defense Motion D-007. Specifically, the defense requests that the Military Judge take notice of the fact that Iraqi insurgents captured by U.S. Armed Forces in Iraq are treated as domestic criminals and tried under the Iraqi Terrorist Law or Iraqi Penal Code in the Central Criminal Court of Iraq (CCCI). This court was established under an order of the Coalition Provisional Authority (Order 13), in April 2004. As of July 2, 2007, (the latest date for which statistics are available) the CCCI had held 2,255 trials for suspected criminals apprehended by Coalition Forces, resulting in 2,003 convictions of individuals. The crimes tried include charges encompassing the crime of attempted murder based on insurgent attacks on U.S. Forces.

2. These facts are not subject to reasonable dispute, are generally known within the military legal community, and are capable of accurate and ready determination by reference to official press releases from the Multi-National Corps-Iraq Public Affairs Office available on the Multi-National Force – Iraq Official Website at <http://www.mnf-iraq.com>. Examples of such press releases are attached. (Attachment 1.)

3. Relevance: In D-007, defense counsel asserted that Mohammad Jawad, an Afghani national, should be treated as a domestic criminal, not a war criminal, and prosecuted, if at all, under domestic Afghan criminal law. The government's position is that Mr. Jawad's alleged grenade attack on U.S. forces is attempted murder in violation of the law of war, simply by virtue of the alleged fact that Mr. Jawad is an unlawful enemy combatant. The fact that the United States treats other similarly situated individuals in Iraq as domestic criminals is thus highly relevant to the issue of whether the appropriate

forum for such conduct is a domestic criminal court or an international war crimes tribunal such as a military commission. Mohammad Jawad is not charged with any crimes of terrorism and is not alleged to have any affiliation with al Qaida or the Taliban. Even in Iraq, the “central front” of the “Global War on Terrorism” according to the President,¹ local nationals who attack U.S. servicemembers in their vehicles with explosive devices are treated as domestic criminals. This strongly supports the view of the defense that such a crime is a domestic crime rather than a violation of the law of war, and that subject matter jurisdiction is lacking.

4. **Additional Documentary Support for D-007:** In 2007, (updated September 27, 2007) the Congressional Research Service prepared a report entitled “The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice” (CRS Report)(available at <http://www.fas.org/sgp/crs/natsec/RL33688.pdf>). The Congressional Research Service provides “authoritative, objective and non-partisan” legal analysis to members of Congress on legislation.² In a section of the report on Subject Matter Jurisdiction, the report states:

Although many of the crimes defined in the MCA seem to be well-established offenses against the law of war, at least in the context of an international armed conflict, a court might conclude that some of the listed crimes are new. For example, a plurality of the Supreme Court in *Hamdan* agreed that conspiracy is not a war crime under the traditional law of war. The crime of “murder in violation of the law of war,” which punishes persons who, as unprivileged belligerents, commit hostile acts that result in the death of any persons, including lawful combatants, may also be new. While it appears to be well-established that a civilian who kills a lawful combatant is triable for murder and cannot invoke the defense of combatant immunity, it is not clear that the same principle applies in armed conflicts of a noninternational nature, where combatant immunity does not apply. The International Criminal Tribunal for the former Yugoslavia (ICTY) has found that war crimes in the context of non-international armed conflict include murder of civilians, but have implied that the killing of a combatant is not a war crime.

¹ “Iraq is now the central front on the war on terror. The war on terror is broader than Iraq, but Iraq is the key battlefield right now.” <http://www.whitehouse.gov/news/releases/2006/04/print/20060406-3.html>;

“The central front on the war on terror is Iraq.”

<http://www.whitehouse.gov/news/releases/2006/03/print/20060320-7.html>. (Attachment 2)

² See the CRS website, <http://www.loc.gov/crsinfo/whatscrs.html>.

CRS Report p. 11-12. The CRS report included a discussion of subject matter jurisdiction in the International Criminal Tribunal for the former Yugoslavia.

Article 3 of the Statute governing the International Criminal Tribunal for the former Yugoslavia (ICTY) includes the following as violations of the laws or customs of war in non-international armed conflict. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

UN Doc. S/Res/827 (1993), art. 3. The ICTY Statute and procedural rules are available at [<http://www.un.org/icty/legaldoc-e/index.htm>]. The Trial Chamber in the case *Prosecutor v. Naletilic and Martinovic*, (IT-98-34) March 31, 2003, interpreted Article 3 of the Statute to cover specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as grave breaches by those Conventions; (iii) violations of [Common Article 3) and other customary rules on internal conflicts, and (iv) violations of agreements binding upon the parties to the conflict” *Id.* at para. 224. *See also* *Prosecutor v. Tadic*, (IT-94-1) (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 86-89.

CRS Report, Note 55. The ICTY statute, a statute written with significant U.S. input in 1993, represents a clear statement of the customary international law of war. As further support for the proposition that murder of lawful combatants would not ordinarily be a war crime triable by military commission, the report cited several recent ICTY cases:

Prosecutor v. Kvočka et al., Case No. IT-98-30/1 (Trial Chamber), November 2, 2001, para. 124: (“An additional requirement for Common Article 3 crimes under Article 3 of the Statute is that the violations must be committed against persons ‘taking no active part in the hostilities.’”); *Prosecutor v. Jelusic*, Case No. IT-95-10 (Trial Chamber), December 14, 1999, para. 34 (“Common Article 3 protects “[p]ersons taking no active part in the hostilities” including persons “placed *hors de combat* by sickness, wounds, detention, or any other cause.”); *Prosecutor v.*

Blaskic, Case No. IT-95-14 (Trial Chamber), March 3, 2000, para. 180 (“Civilians within the meaning of Article 3 are persons who are not, or no longer, members of the armed forces. Civilian property covers any property that could not be legitimately considered a military objective.”).

CRS Report, note 57. All of these cases support the defense view expressed in D-007. The CRS Report section on subject matter jurisdiction concluded with this accurate prediction:

The distinction between a “war crime,” traditionally subject to the jurisdiction of military commissions, and a common crime, traditionally the province of criminal courts, may prove to be a matter of some contention during some of the proceedings.

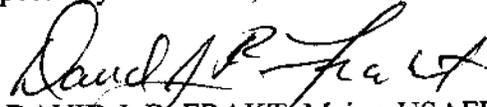
CRS Report, page 15.

CONCLUSION

As the CRS report indicates, and as the practice of the U.S. military in hundreds of cases in Iraq suggests, there is considerable doubt within the U.S. government itself about the propriety of asserting subject matter jurisdiction over murder (and, by extension, attempted murder) by “insurgents” or “unlawful enemy combatants” in circumstances where no traditional law of war violation exists. The government has woefully failed to meet its burden of proving by a preponderance of the evidence that subject matter jurisdiction exists over the alleged crimes of Mohammad Jawad. Accordingly, the charges must be dismissed.

5. Request for Immediate Public Release: The defense requests immediate public release of this filing and any government response thereto.

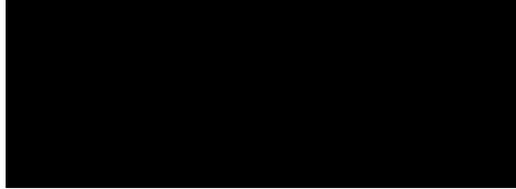
Respectfully Submitted,



By: DAVID J. R. FRAKT, Major, USAFR



And: KATHERINE DOXAKIS, LCDR, USN
Detailed Defense Counsel



6. Attachments:

1. Multi-National Force Iraq Press Releases
2. Excerpts of White House Press Releases

Attachment 1

Court of Iraq convicts, sends criminals to jail (Baghdad)



Thursday, 26 June 2008

**Multi-National Corps – Iraq
Public Affairs Office, Camp Victory
APO AE 09342**

**FOR IMMEDIATE RELEASE
RELEASE No. 20080626-02
June 25, 2008**

**Court of Iraq convicts, sends criminals to jail
Multi-National Division – Baghdad PAO**

BAGHDAD – The Central Criminal Court of Iraq in Baghdad convicted two criminals and sentenced them to time in prison, June 24.

The first criminal was sentenced to two years in prison after being convicted of possession of illegal weapons. He was a former Iraqi security volunteer and was found in possession of body armor, an AK-47 and two magazines when he was detained.

The second criminal was sentenced to 20 years after being convicted of possession of a small weapons cache. He was found in possession of a sniper rifle, a grenade, several loaded magazines, a pressure switch with crush tubing; a 57 mm rocket, blasting caps and construction detonation cord.

“The conviction and sentencing of these criminals further demonstrates the progress of the Iraqi government toward the applications and enforcement of the rule of law,” said Col. Todd McCaffrey, the commander, 2nd Stryker Brigade Combat Team, Multi-National Division – Baghdad.

Both criminals were detained in March by MND-B Soldiers in Taji Qada, northwest of Baghdad.

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AT: MNDB_PAO_CIC@MND-B.ARMY.MIL OR BY PHONE AT: COMMERCIAL (914) 822-
8174 OR IRAQNA 011-964-890-192-4674.

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CCCI Convicts 46: Sentences 4 to death, 3 to life imprisonment



Sunday, 01 July 2007

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BAGHDAD, Iraq

<http://www.mnf-iraq.com>

703.343.8790

July 2, 2007

Release A070702b

CCCI Convicts 46: Sentences 4 to death, 3 to life imprisonment

BAGHDAD, Iraq – The Central Criminal Court of Iraq (CCCI) convicted 46 individuals from June 10 to June 21 for violations of the Iraqi Terrorist Law, Penal Code and Coalition Provisional Authority (CPA) Orders enforced by the Iraqi judiciary.

Ziyad Khalaf Husayn, 26, an Iraqi and Nabil Ahmad Awudah, 28, a Yemeni national, were convicted and sentenced to death June 17 for planning and participating in terrorist operations in Iraq, a violation of Article 4/1 of the Iraqi Terrorist Law. The two had been apprehended by Iraqi Security Forces Dec. 15, 2006.

Faysal Abdallah Al-Faraj, 22, a Saudi Arabian national, was convicted and sentenced to death June 19 for participating in terrorist operations, a violation of Article 4/1 of the Iraqi Terrorist Law. Faysal was apprehended near Baghdad by Soldiers from the 1st Battalion, 8th Infantry Regiment Sept. 9, 2006. Faysal confessed he was recruited by al Qaeda to attack Multi-National Forces in Iraq and that he had participated in an attack on a convoy Sept. 5, 2006.

Jassim Mohammed Madloom, 28, an Iraqi, was convicted and sentenced to death June 21 for participating in multiple terrorist attacks, belonging to the Jaysh Al Mujahedin terrorist organization and kidnapping and killing Iraqi policemen. Jassim confessed that his organization targeted Iraqi Police, Iraqi Army, Multi-national Forces and an Iraqi elementary school in the Al Shihabi area after he returned from Al Qaeda terrorist training in Syria.

Sayf Al Din Hamzah Jasim, 22, an Iraqi, and Hamzah Ahmad Ibrahim, 44, also an Iraqi, were convicted and sentenced to life imprisonment without parole June 12 for violating Article 4/1 of the Iraqi Terrorist Law. Khalil Thabit Fahad Ali, 36, an Iraqi, was convicted and sentenced to life imprisonment with parole for violating Article 41/1 of the Iraqi Terrorist Law.

Fourteen Iraqis were convicted and sentenced to 30 years imprisonment by the CCCI June 11 – 17 for illegal weapons possession, a violation of CPA Order 3/2003. Three Iraqis were convicted and sentenced to 20 years imprisonment, five Iraqis to 15 years imprisonment and two to 10 years imprisonment for violating CPA Order 3/2003.

Five Iraqis were sentenced to 15 years imprisonment. Three were convicted of illegal weapons possession, a violation of Article 2/B of the Iraqi Penal Code, one for violating Article 4/1 of the Iraqi Terrorist Law and the other for violating Article 10/1 of the Iraqi Residency Law.

CCCI Convicts 99: Sentences 16 to death, 7 to life imprisonment



Wednesday, 20 June 2007

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**June 21, 2007
Release A070621b**

CCCI Convicts 99: Sentences 16 to death, 7 to life imprisonment

BAGHDAD, Iraq – The Central Criminal Court of Iraq (CCCI) convicted 99 individuals from May 20 to June 2 for violations of the Iraqi Terrorist Law, Penal Code and Coalition Provisional Authority (CPA) Orders enforced by the Iraqi judiciary.

Six Iraqis were convicted of torture and kidnapping and sentenced to death May 20. Convicted were: Moaazea Khazaal Abdul, 47; Hussein Jihad Hassan, 51; Abd Al Qadar Qasim Jameel, 35; Mustafa Mahmoud Ismael, 31; Qais Habib Aslem, 50; and Islam Mustafa Abd Al Sattar, 20; all from Iraq. The six kidnapped and tortured an Iraqi man, his son and nephew and held them for \$100,000 ransom near the Adhamiyah district in Baghdad. Before being captured by Soldiers from the 1st Battalion 26th Infantry Regiment Sept. 26, 2006, the group killed the man's nephew. The six were convicted of violating Article 424 of the Iraqi Penal Code.

The Central Criminal Court sentenced Marwan Jassim Hamadi, 21; Ali Akil Abass, 19; and Talab Abulla Abbas, 26, to death May 21 for kidnapping and torturing an Iraqi man in Al Anbar province. Marines from the 3rd Recon Battalion, 1st Marine Expeditionary Force, captured the terrorists Nov. 28, 2006 – less than five hours before the terrorists were planning to execute the Iraqi man they had kidnapped. The three were convicted of violating Article 4/1 of the Iraqi Terrorist Law.

Faris Abdallah Alwan, 27, was sentenced to death May 20 by the Central Criminal Court of Iraq for serving as the media and propaganda emir for a terrorist organization. He was captured by Soldiers from the 1st Squadron, 40th Cavalry Division (Airborne) Dec. 13, 2006 in Baghdad. Faris was convicted for distributing and posting terrorist propaganda on websites in violation of Article 4/1 of the Iraqi Terrorist Law.

Ali Ahmad Abd Al Wahid, 23, and Fawwaz Mukhlif Al Qaydi, 28, were sentenced to death by the CCCI May 28 for violating Article 4/1 of the Iraqi Terrorist Law. Ali, a Libyan citizen, and Fawwaz, a Saudi Arabian citizen, both came to Iraq to conduct terrorist operations. They were captured by Iraqi Army units in Al Anbar and were turned over to Multi-National Forces Feb. 20, 2007.

Ahmed Nory Mohammed, 29, and Hosham Bidawe, 27, were sentenced to death May 30 for engaging in terrorist acts, including kidnapping. The two Iraqis were captured Jan. 9, 2007 by Marines from the 3rd Recon Battalion, 1st Marine Expeditionary Force prior to carrying out a planned execution of an Iraqi doctor. The two were convicted of violating Article 4/1 of the

Iraqi Terrorist Law.

Dawud Salaman Al Ubydi, 39, an admitted member of Al Qaeda, was sentenced to death May 30 for participating in suicide bombing and vehicle-borne improvised explosive device attacks on the Sheraton and Al Hamah hotels and arranging transportation for Al Qaeda numerous times for various operations. Dawud was captured Sept. 28, 2006 and was convicted of violating Article 4/1 of the Iraqi Terrorist Law.

Mohammed Ali Khorshed, 29, was sentenced to death May 30 by the CCCI. Mohammed was the Ansar Al Sunna Military Emir of Baqubah and was responsible for supervising up to 50 insurgents. He admitted to conducting numerous IED attacks against Multi-National Forces and was convicted of violating Article 4/1 of the Iraqi Terrorist Law.

In addition to the death penalty sentences, the Central Criminal Court of Iraq sentenced seven Iraqis to life imprisonment May 21 and 22 for violating Article 4/1 of the Iraqi Terrorist Law and Article 421 of the Iraq Penal Code for kidnapping.

The Central Criminal Court of Iraq also sentenced seven Iraqis to 30 years imprisonment and 11 Iraqis to 20 years imprisonment for violating CPA Order 3/2003, illegal weapons possession. Twelve Iraqis were sentenced to 15 years imprisonment for organizing, heading, leading or joining an armed group, a violation of Article 194 of the Iraqi Penal Code. Fourteen Iraqis were sentenced to 15 years imprisonment for illegal weapons possession, a violation of CPA Order 3/2003. Two Iraqis were sentenced to 15 years imprisonment for violating Article 4/1 of the Iraqi Terrorist Law and two others were sentenced to 15 years for violating Article 10/1 of the Iraqi Passport Law.

Four Iraqis were sentenced to 10 years imprisonment for violating Article 10/1 of the Iraqi Passport Law; three were sentenced to 10 years imprisonment for violating CPA Order 3/2003, illegal weapons possession; and two were sentenced to 10 years imprisonment for using explosives to harm others, a violation of Article 345 of the Iraqi Penal Code.

Twelve Iraqis were convicted of violating CPA Order 3/2003, possession of illegal weapons, and were sentenced to one to seven years imprisonment; two were convicted of violating Article 27/3 of the Iraqi Penal Code for possession of illegal weapons and were sentenced to one year imprisonment. Five Iraqis were sentenced to two to seven years imprisonment for illegal use of documents, counterfeiting, and using explosives to harm others.

Since its establishment under an amendment to CPA Order 13, in April 2004, the Central Criminal Court has held 2,211 trials for suspected criminals apprehended by Coalition Forces. The Iraqi Court proceedings have resulted in the conviction of 1,957 individuals with sentences ranging from imprisonment to death.

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CCCI Convicts 99: Sentences 16 to death, 7 to life imprisonment



Wednesday, 20 June 2007

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Release A070621b**

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The Central Criminal Court of Iraq also sentenced seven Iraqis to 30 years imprisonment and 11 Iraqis to 20 years imprisonment for violating CPA Order 3/2003, illegal weapons possession. Twelve Iraqis were sentenced to 15 years imprisonment for organizing, heading, leading or joining an armed group, a violation of Article 194 of the Iraqi Penal Code. Fourteen Iraqis were sentenced to 15 years imprisonment for illegal weapons possession, a violation of CPA Order 3/2003. Two Iraqis were sentenced to 15 years imprisonment for violating Article 4/1 of the Iraqi Terrorist Law and two others were sentenced to 15 years for violating Article 10/1 of the Iraqi Passport Law.

Four Iraqis were sentenced to 10 years imprisonment for violating Article 10/1 of the Iraqi Passport Law; three were sentenced to 10 years imprisonment for violating CPA Order 3/2003, illegal weapons possession; and two were sentenced to 10 years imprisonment for using explosives to harm others, a violation of Article 345 of the Iraqi Penal Code.

Twelve Iraqis were convicted of violating CPA Order 3/2003, possession of illegal weapons, and were sentenced to one to seven years imprisonment; two were convicted of violating Article 27/3 of the Iraqi Penal Code for possession of illegal weapons and were sentenced to one year imprisonment. Five Iraqis were sentenced to two to seven years imprisonment for illegal use of documents, counterfeiting, and using explosives to harm others.

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Three Iraqis were convicted and sentenced to six years imprisonment for illegal weapons possession, a violation of CPA Order 3/2003. Seven other Iraqis were sentenced to imprisonment between one and three years for possession and use of false identification documents and illegal weapons possession.

Since its establishment under an amendment to CPA Order 13, in April 2004, the Central Criminal Court has held 2,255 trials for suspected criminals apprehended by Coalition Forces. The Iraqi Court proceedings have resulted in the conviction of 2,003 individuals with sentences ranging from imprisonment to death.

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CCCI convicts 13 insurgents



Tuesday, 13 February 2007

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**February 14, 2007
Release A070214c
FOR IMMEDIATE RELEASE**

**CCCI convicts 13 insurgents
One sentenced to death, one sentenced to 15 years imprisonment**

BAGHDAD, Iraq — The Central Criminal Court of Iraq convicted 13 terrorists from Feb. 2 - 10, for various crimes including possession of illegal weapons, possessing fake identification, violating terrorism laws and illegal border crossing.

The trial court found an Iraqi man guilty of violating the Anti-Terrorist Law. On Nov. 24 2004, Coalition forces and Iraqi Army were searching vehicles at a gas station near Khalidiyah. Coalition Forces approached the defendant's vehicle and asked him to open the trunk. Forces discovered a 130mm artillery round along with wires, detonation strips and an IED behind the driver's seat. On Feb. 7 the trial panel found the defendant guilty and sentenced him to death.

The trial court found a Syrian man guilty of entering the country illegally in violation of the Passport Law. On Feb. 2, 2005, MNF-I detained the defendant in an insurgent safe house. On multiple occasions the defendant provided accurate details of his illegal entry into Iraq along with another Syrian national. More specifically the defendant admitted to being a lieutenant in the Syrian Intelligence sent to Iraq to oversee a small group of foreign fighters that use mortars around Mosul and recruit Iraqis for suicide missions against MNF-I. On Feb. 4 the trial panel found the defendant guilty and sentenced him to 15 years imprisonment.

In total, the insurgents were convicted of passport violations, possessing and using false ID's, possessing explosives, violating the anit-terrorist laws and illegal possession of special category weapons. They were sentenced to between six and 15 years imprisonment and death. Amongst those convicted were 10 Iraqis and three Syrians.

Since its reorganization, under an amendment to CPA order 13, in April 2004, the Central Criminal Court has held 1,867 trials for Coalition-apprehended insurgents. The proceedings have resulted in the conviction of 1,607 individuals with sentences ranging up to death.

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The Iraqi Central Criminal Court convicts 16



Sunday, 06 August 2006

TASK FORCE 134

MULTI-NATIONAL FORCE-IRAQ

BAGHDAD, Iraq

August 07, 2006

Release A060807a

The Iraqi Central Criminal Court convicts 16

BAGHDAD, Iraq — The Central Criminal Court of Iraq convicted 16 security detainees July 27 to August 3 for various crimes including possession of illegal weapons, attempting to or using explosives and illegal border crossing.

The trial court found Ammar Abbas Farhan Kathem guilty of joining armed groups to unsettle the stability and security of Iraq, in violation of Article 194 of the Iraqi Penal Code, and sentenced him to life imprisonment. Coalition Forces apprehended the defendant during a raid to disrupt anti-Iraqi and anti-Coalition elements when he confessed to be a member of the Islamic Front for the liberation of Iraq.

The trial court found Himin Hussein Abdul Rahman Al Kobadi guilty of joining armed groups to unsettle the stability and security of Iraq, in violation of Article 4 of the Terrorist Law, and sentenced him to life imprisonment. Coalition Forces apprehended the defendant for being a known Iranian insurgent.

The trial court found Abdullah Ali Ibrahim Abdullah guilty of joining armed groups to unsettle the stability and security of Iraq, in violation of Article 194 of the Iraqi Penal Code, and sentenced him to life imprisonment. Coalition Forces apprehended the defendant after they found him in possession of terrorist propaganda, false Iraqi identification documents and more than \$130,000 in cash.

The trial court found Muhammad Hamid Hassan Khalaf guilty of joining armed groups to unsettle the stability and security of Iraq, in violation of Article 194 of the Iraqi Penal Code, and sentenced him to life imprisonment. Coalition Forces apprehended the defendant after a search of his house revealed six RPGs, two RPG launchers, one RPK, three AK-47s, and two grenades.

The trial court found Khalid Mohammed Abdul Qhader guilty of illegal border crossing, in violation of Article 10 of the Iraqi Passport Laws, and sentenced him to 15 years imprisonment. Coalition Forces apprehended the defendant at

he illegally entered Iraq.

The trial court found Falah Khamees Saleh guilty of possession of illegal weapons, in violation of Coalition Provisional Authority Order 3, and sentenced him to 15 years imprisonment. Coalition Forces apprehended the defendant after a search of his house revealed four AK-47s, 375 AK-47 rounds, 17 AK-47 magazines, two hand grenades, 50 shotg shells, one 9mm magazine and 100 9mm rounds.

The trial court found Ahmed Khaboor Abed guilty of possession of illegal weapons, in violation of Coalition Provisional Authority Order 3, and sentenced him to 15 years imprisonment. Coalition Forces apprehended Abed and two other defendants after a search of his vehicle revealed one mortar tube, one mortar round, one mortar base plate, one mortar aiming sight, one compass, one mortar tri-pod and a chemical solution. The charges against the other two defendants were dismissed.

The trial court found Mowloud Manfi Dayeh Hamadi guilty of possession of illegal weapons, in violation of Coalition Provisional Authority Order 3, and sentenced him to 15 years imprisonment. Coalition Forces apprehended Hama and three other defendants after a search of his house revealed three AK-47 rifles, one bolt-action sniper rifle, two bags full of rifle ammunition, 20 AK-47 magazines, two time fuses for mortar rounds, two cans of liquid weld, one copper wire, an empty wooden box of Syrian explosives and \$5,300 in cash. The charges against the other three defendants were dismissed.

The trial court found Hussein Mahmoud Hussein guilty of illegal border crossing, in violation of Article 10 of the Iraqi Passport Laws, and sentenced him to 15 years imprisonment. Coalition Forces apprehended the defendant after they found him in possession of a forged passport, marriage certificate and identification documents.

The trial court found Hussein Saleem Abed Humadi guilty of possession of illegal weapons, in violation of Coalition Provisional Authority Order 3, and sentenced him to 10 years imprisonment. Coalition Forces apprehended the defendant after a search of his house revealed multiple forged identification cards, three hand grenades and anti-coalition materials.

The trial court found Hisham Shehab Ahmed Saleh and E'sam Shehab Ahmed Saleh guilty of possession of illegal weapons, in violation of Coalition Provisional Authority Order 3, and sentenced them each to 10 years imprisonment. Coalition Forces apprehended the defendants after a search of their house revealed one RPG launcher, four RPG rounds, six RPG propellants, 18 RPG arming tips, 12 rockets, two AK-47 rifles, four AK-47 magazines, a 9mm submachine gun, 9mm magazine and a 155mm artillery round.

The trial court found Mohammed Naji As'ad, Mohammed Mukhlif Bayeez Taha and Ammar Humoud Zaidan Khalaq guilty of attempting or using explosives, in violation of Article 345 of the Iraqi Penal Code, and sentenced them each to 10 years imprisonment. Coalition Forces apprehended the defendants after a search of As'ad's vehicle revealed a Senao long-range cordless telephone whose serial number matched the serial number from the base of the telephone found on an IED, a Sony video camcorder, 6 rolls of electrical tape, a flat head screwdriver, wire and a current tester.

The trial court found Mohammed Ibrahim Ali guilty of possession of illegal weapons, in violation of Coalition Provisional Authority Order 3, and sentenced him to six years imprisonment. Coalition Forces apprehended the defendant after a search of his vehicle revealed a remote detonator and three 130mm anti-tank mortar rounds in the trunk.

Upon conviction, defendants will be turned over to the Iraqi Corrections Service to serve their sentences.

To date, the CCCI has held 1,340 trials of insurgents suspected of anti-Iraqi and anti-Coalition activities threatening the security of Iraq and targeting MNF-I. These proceedings have resulted in 1,144 individual convictions with sentences ranging up to death.

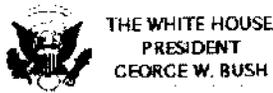
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For more information, contact LTC KEIR-KEVIN CURRY AT KEIRKEVIN.CURRY@IRAQ.CENTCOM.MIL or CAFE TRACY TRACY.GILES@IRAQ.CENTCOM.MIL GILES AT

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Attachment 2



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For Immediate Release
Office of the Press Secretary
March 20, 2006

President Discusses War on Terror and Operation Iraqi Freedom

Renaissance Cleveland Hotel
Cleveland, Ohio

- [Fact Sheet: Strategy for Victory: Clear, Hold, and Build](#)
- [In Focus: Renewal in Iraq](#)
- [On the Record](#)



VIDEO Multimedia

President's Remarks

[view](#)

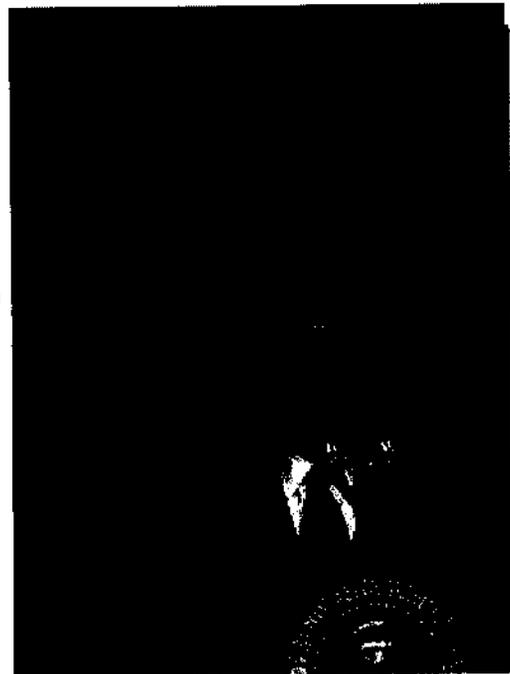
12:25 P.M. EST

THE PRESIDENT: Thank you all. (Applause.) Thank you all. Please be seated. Sanjiv, thanks for the introduction. He called me on the phone and said, listen, we believe in free speech, so you're going to come and give us a speech for free. (Laughter.) Thanks for the invitation, thanks for the warm welcome. It's good to be here at the City Club of Cleveland.

For almost a century, you have provided an important forum for debate and discussion on the issues of the day. And I have come to discuss a vital issue of the day, which is the safety and security of every American -- and our need to achieve victory in the war on terror.

I want to thank the Mayor for joining us. Mr. Mayor, appreciate you being here. (Applause.) It must make you feel pretty good to get the "Most Liveable City" award. (Laughter.) I want to thank all the members of the City Club for graciously inviting me to come. I want to thank the students who are here. Thanks for your interest in your government. I look forward to giving you a speech and then answering questions, if you have any.

[The central front on the war on terror is Iraq.] And in the past few weeks, we've seen horrific images coming out of that country. We've seen a great house of worship -- the Golden Mosque of Samarra -- in ruins after a brutal terrorist attack. We have seen reprisal attacks by armed militia on Sunni mosques. We have seen car bombs take the lives of shoppers in a crowded market in Sadr City. We've seen the bodies of scores of Iraqi men brutally executed or beaten to death.



The enemies of a free Iraq attacked the Golden Mosque for a reason: They know they lack the military strength to challenge Iraqi and coalition forces in a direct battle, so they're trying to provoke a civil war. By attacking one of Shia Islam's holiest sites, they hoped to incite violence that would drive Iraqis apart and stop their progress on the path to a free society.

The timing of the attack in Samarra is no accident. It comes at a moment when Iraq's elected leaders are working to form a unity government. Last December, four short months ago, more than 11 million people expressed their opinion. They said loud and clear at the ballot box that they desire a future of freedom and unity. And now it is time for the leaders to put aside their differences, reach out across political, religious, and sectarian lines, and form a unity government that will earn the trust and the confidence of all Iraqis. My administration, led by Ambassador Zal Khalilzad, is helping, and will continue to help the Iraqis achieve this goal.

The situation on the ground remains tense. And in the face of continued reports about killings and reprisals, I



THE WHITE HOUSE
PRESIDENT
GEORGE W. BUSH

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For Immediate Release
Office of the Press Secretary
April 6, 2006

President Bush Discusses Global War on Terror

Central Piedmont Community College
Charlotte, North Carolina

- [In Focus: National Security](#)
- [In Focus: Renewal in Iraq](#)

10:45 A.M. EDT



VIDEO Multimedia

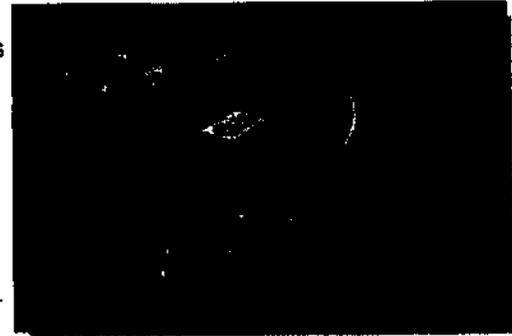
President's Remarks

[view](#)

THE PRESIDENT: Thank you. Firoz, thanks a lot. So I said, that's an interesting name. He said, I've lived in seven countries. But he also said he's proud to be an American. And we're proud you're an American. Thank you very much for inviting me. (Applause.)

You know, I was just standing here, listening to Firoz; one of the great things about our country is that you can come and you can enjoy the great blessings of liberty and you can be equally American if you've been here for one generation or 10 generations. I thought it was neat that somebody who has been -- you've been here 27 years though, right? Yes. Well, seven countries, 27 years here, introducing the President though. I think it says a lot about the United States of America. Thanks for having me.

I'm looking forward to sharing with you what's on my mind. I look forward to hearing what's on yours, as well. First thing is, Laura sends her best to the folks of Charlotte. She sends her best, Tony, to you and your bride. Thank you for having us here, to the Central Piedmont. I appreciate your involvement in education. I married well; she's a really patient person, too. (Laughter.)



I traveled down here with Congressman Robin Hayes, the Congressman from this district. Congressman, thank you for being here, appreciate it. (Applause.) I've known your Mayor for a long time. He's a man of accomplishment. I know he was particularly proud to land the NASCAR Hall of Fame. (Applause.) Pretty big deal, you know? It's a pretty big deal. Thank you all for coming. I want to thank the others who serve on the City Council who are here. The Mayor was telling me a lot of the council members are here. I appreciate your service to your city.

I think one of the things I'd like to tell you about is why and how I made some decisions I made. My friends from Texas who, once they get over the shock that I'm actually the President -- (laughter) -- like to ask me what it's like to be President. And I guess the simple job description would be, it is a decision-making experience. And I make a lot of decisions. Some of them you see, some of them you don't see. Decision making requires knowing who you are and what you believe. I've learned enough about Washington to know you can't make decisions unless you make them on principle. And once you make a decision based upon principle, you stand by what you decide.

In order to make good decisions, you've got to rely upon good people. People have got to feel comfortable about coming in the Oval Office and tell you what's on their mind. There's nothing worse than people walking in, say, well, I'm a little nervous around the guy, I think I'd better tell him what he thinks he needs to hear.

You can't do the country justice, you can't make good decisions unless you've got a lot of good, competent people around you, and I do -- Condoleezza Rice, Secretary of State; Don Rumsfeld -- (applause) -- the Vice President. These are people who have seen good times, and they've seen tough times. But in all times, they're capable of walking in and telling me what's on their mind. That's what you need as the President. And then once you make

was hoping that when the world spoke with that one voice at the United Nations Security Council, Saddam Hussein would see the reason of the free world. But he didn't.

I felt all along the decision was his to make. He said – the world said, disclose, disarm. In the meantime, I want you to remember, he was deceiving inspectors. It's a logical question to ask: Why would somebody want to deceive inspectors? I also told you earlier that when America speaks, we got to mean what we said. I meant what we said when we embraced that resolution that said disclose, disarm, or face serious consequences. Words mean something in this world if you're trying to protect the American people.

I fully understand that the intelligence was wrong, and I'm just as disappointed as everybody else is. But what wasn't wrong was Saddam Hussein had invaded a country. He had used weapons of mass destruction. He had the capability of making weapons of mass destruction. He was firing at our pilots. He was a state sponsor of terror. Removing Saddam Hussein was the right thing for world peace and the security of our country. (Applause.)

[Iraq is now the central front on the war on terror.] The war on terror is broader than Iraq, but Iraq is the key battlefield right now. And the enemy has made it so.

The advance of democracy frightens the totalitarians that oppose us. Mr. Zarqawi, who is there in Iraq, is al Qaeda. He's not Iraqi, by the way. He is there representing the al Qaeda network, trying to stop the advance of democracy. It's an interesting question, isn't it, why would somebody want to stop democracy – like, what's wrong with democracy; Mister, why are you afraid of it? Are you threatened by the fact that people get to speak and you don't get to dictate? Are you threatened by the fact that people should be able to worship the Almighty freely? What about democracy that bothers – I think it's a legitimate question we all ought to be asking.

But nevertheless, he's tough, and he's mean, and he'll kill innocent people in order to shake our will. They have stated, clearly stated – they being al Qaeda – that it's just a matter of time for the United States to lose its nerve. They recognize they cannot beat us on the battlefield, they cannot militarily defeat the United States of America, but they can affect our conscience. And I can understand why. Nobody likes to see violence on the TV screens. Nobody wants to see little children blown up when a U.S. soldier is trying to give them candy. Nobody likes to see innocent women die at the hands of suicide bombers. It breaks our heart.

The United States of America is an incredibly compassionate nation. We value human life, whether it be here at home, or whether it be abroad. It's one of the really noble features of our country, I think. Nobody likes to see that, and the enemy understands that, however. They know that if we lose our nerve and retreat from Iraq, they win.

We've got a strategy for victory in Iraq. It's important for you to know that victory will be achieved with a democracy that can sustain itself, a country that will be able to defend itself from those who will try to defeat democracy at home, a country that will be an ally in the war on terror, and a country that will deny al Qaeda and the enemies that face America the safe haven they want. Those are the four categories for victory. And they're clear, and our command structure and our diplomats in Iraq understand the definition of victory.

And we're moving that way, we're moving that way. We've got a plan to help rebuild Iraq. You know, when we first went in there – by the way, every war plan or every plan is fine, until it meets the enemy. But you've got to adjust. You've got to be able to say on the ground, well, this is working, this isn't working. The enemy is not a – they think differently, they make different decisions, they come up with different tactics to try to defeat us. And it's very important for us – for me to say to our commanders and our diplomats, devise that strategy on the ground; keep adjusting, so that we achieve the victory that we want.

So when we first got into Iraq, we went with big rebuilding projects. You know, we're going to help them do this, and help them do that, big electricity projects. And the enemy blew them up. And so what we've done now is we've gone to a more rational strategy to provide money for local folks, including our military, to help smaller projects, but projects that are able to connect with the people on the ground. You know, jobs helps a lot, if you're trying to say, democracy is worth it.

Second aspect of our plan was to promote democracy. And I know four months in the way these news cycles work seems like a decade – at least it does to me at times, you know? (Laughter.) Four months ago, 12 million people went to the polls. It was an amazing event, wasn't it, I mean, really think about it. You can project back to the amazement, surprise, exhilaration that happened when, given a chance to vote for the third time in one year,

UNITED STATES OF AMERICA v. Mohammed Jawad	Defense Supplement 2 to D-007 Motion to Dismiss for Lack of Subject Matter Jurisdiction (Law of War) July 17, 2008
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1. **Timeliness:** This Supplemental filing is timely in light of new persuasive authority.
2. **Overview:** On 14 July, in the military commission case of *U.S. v. Hamdan*, the commission issued a ruling on a defense motion to dismiss for lack of subject matter jurisdiction (Attachment 1) based on the theory that the crimes with which Mr. Hamdan is charged were not violations of the law of war prior to the enactment of the MCA. Accordingly, the defense argued that the MCA was illegal *ex post facto* legislation. While denying the defense motion to dismiss, Judge Allred's decision offers important and highly persuasive authority which should be considered and followed in ruling on D-007. If the logic and legal analysis of Judge Allred is followed, the charges against Mohammad Jawad must be dismissed for lack of subject matter jurisdiction.
3. **Law and Argument:** Several key points in the ruling deserve special attention.
 - a. First, "the Commission assigns the burden to demonstrate that the offense with which the accused is charged were violations of the law of war at the time Mr. Hamdan engaged in the actions with which he is charged." Unlike trial counsel in this case, the prosecutor in Hamdan argued that the burden on a motion of this nature was on the defense.¹ Judge Allred's decision is undoubtedly the correct approach to the assignment of the burden of persuasion on a jurisdictional issue. In Mr. Jawad's case, this approach would require the government to prove that on 17 December 2002, throwing a hand grenade at lawful military targets in an armed conflict was a violation of the law of war simply by virtue of the fact that the grenade thrower did not have combatant immunity.
 - b. The government provided many of the same civil war era authorities and citations in the Hamdan case that were provided by in the Government response to D-

¹ The prosecution did argue that the burden was on the defense to prove Mr. Jawad was entitled to combatant immunity, a claim that the defense has not made.

007. However, these identical citations were offered in support of very different propositions. In the Government Response to D-007, Mr. Jawad's conduct was likened to that of a "bushwhacker" a "bandit" or a "jawhawker" and it was argued that these terms from the Civil War era established that any unlawful enemy combatant who committed a crime of violence was in violation of the laws of war regardless of the nature of the attempted murder. In Hamdan, the government used the same language to argue that conspiracy was a traditional law of war violation. Judge Allred noted that "bushwhackers", "jawhawkers", "banditti" and "guerrillas" were organized bands who "engaged in the killing, disabling and robbing of peaceable citizens or soldiers, in plunder and pillage, and even in the ransacking of towns, from motives mostly of personal profit or revenge." Judge Allred concluded that organized groups of people engaged in violations of the law of war (killing civilians, plundering towns, stealing or destroying civilian property) were engaged in a form of conspiracy to commit war crimes or terroristic activity. The government's appropriate use of these authorities in Hamdan (including Winthrop, Lieber and the 1865 Attorney General Opinion) only serves to underscore the complete lack of support these authorities provide for the government's position in this case.

c. Judge Allred noted that Material Support for Terrorism was not listed in any international treaty or list of enumerated offenses, but determined that "Congress merely *defined* as "Material Support for Terrorism" conduct that was already proscribed." Judge Allred accepted Congress' assertion that the MCA "codif[ied] offenses that have traditionally been triable by military commission" and did not "establish new crimes that did not exist before its enactment." In other words, with respect to conspiracy and material support to terrorism, Congress simply gave a new name to conduct which was already proscribed by the international law of war. In this case, the government is trying to do something different; namely, the prosecution is attempting to apply an old name for a traditional war crime (murder in violation of the law of war) to conduct that has never before been triable by military commissions. In Hamdan, the question was not whether the conduct fit the definition of the crime.

d. Judge Allred indicated that "where Congress has acted under its Constitutional authority to define and punish offenses against the law of nations, a greater level of

deference to that determination is appropriate.” The defense does not dispute this point; Congress’ power to define and punish is not implicated by D-007. Deference to Congress is not in issue in this case. Indeed, the defense has never alleged an *ex post facto* violation in this case. The only way that the concept of *ex post facto*, or the principle of legality, would be implicated in this case is if the military commission agreed to endorse the government’s position and retroactively expand the definition of a traditional war crime to cover criminal conduct not identified or contemplated by Congress.

CONCLUSION

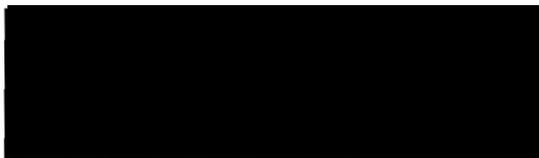
To prevail on this motion, the government must show that the conduct of which Mr. Jawad is accused constituted a traditional violation of the law of armed conflict at the time it is alleged to have occurred. The government has offered virtually no evidence in support of this novel theory and has utterly failed to meet its burden of persuasion by a preponderance of the evidence. The charges must be dismissed.

5. Request for Immediate Public Release: The defense requests immediate public release of this filing and any government response thereto.

Respectfully Submitted,


By: DAVID R. FRAKT, Major, USAFR


And: KATHARINE DOXAKIS, ECDR, USN
Detailed Defense Counsel



Attachment: D012 Ruling on Motion to Dismiss U.S. v. Hamdan

Attachment 1

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

D012
RULING ON MOTION
TO DISMISS (EX POST FACTO)

And

D050
DEFENSE REQUEST TO ADDRESS
SUPPLEMENTAL AUTHORITY ON D012

14 July 2008

The Defense has moved this Commission to dismiss referred charges for lack of subject matter jurisdiction. Specifically they claim the charges of Conspiracy and Providing Material Support for Terrorism violate the prohibition against Ex Post Facto application of the law, found both in the Constitution, in Common Article 3 of the Geneva Conventions, and in the law of nations. The Government opposes the motion, arguing variously that the Constitution does not protect aliens held outside the United States, and that even if it does, there is ample precedent in the Law of Armed Conflict for the trial of these offenses by military commission as violations of the Law of Armed Conflict.

BURDEN OF PERSUASION

The Defense characterizes its motion as one challenging the Commission's jurisdiction, and argues that the burden should be on the Government to prove jurisdiction, in accordance with R.M.C. 905(c)(2)(B). The Government denies that this is a jurisdictional issue, and argues that the burden remains on the Defense, as moving party, in accordance with RMC 905(c)(2)(A). Because a military commission has narrowly constrained jurisdiction as to offenses, the Commission assigns the burden to the Government to demonstrate that the offenses with which the accused is charged were violations of the law at the time Mr. Hamdan engaged in the actions with which he is charged.

DOES THE CONSTITUTION OF THE UNITED STATES PROTECT MR. HAMDAN?

The Commission has previously determined that an alien unlawful enemy combatant held outside the sovereign borders of the United States, who has no voluntary connection to the United States other than his confinement, cannot claim the protections of the Constitution *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007); *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995) cert. den. 516 U.S. 913 (1995); *DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 284 (D.C. Cir. 1989). In light of the Supreme Court's recent ruling, the Defense requests reconsideration and argues that the Constitution does

protect detainees held in Guantanamo, and specifically Mr. Hamdan. *Boumediene v. Bush*, 533 U.S. _____ (2008), [hereinafter *Boumediene*].

In addition, the Defense points out that the Ex Post Facto clause of the Constitution is not a substantive protection to be claimed by individual claimants, but a substantive limitation on the power of Congress. “There is a clear distinction between . . . prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only ‘throughout the United States’ or among the several states. Thus, when the Constitution declares that ‘no bill of attainder or *ex post facto* law shall be passed,’ . . . it goes to the competency of Congress to pass a bill *of that description*.” *Downes v. Bidwell*, 182 U.S. 244, 276-77 (1901). Thus, the Defense argues, whether the *ex post facto* protections of the Constitution protect aliens in Guantanamo Bay, the Constitution prohibits Congress from enacting *ex post facto* legislation. This Commission concludes that Congress is not authorized to pass *ex post facto* legislation, and thus will review the MCA prohibitions against conspiracy and material support for terrorism to determine whether they are such offenses.

To prevail on this motion, the Government must show that conspiracy and material support for terrorism were traditional violations of the law of armed conflict when he engaged in the conduct with which he is charged.

CONSPIRACY

The parties have argued this issue with commendable skill and passion. The Defense points to the plurality’s holding that conspiracy is not a “clear and unequivocal” violation of the common law of war (citing *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2780 & n. 34); that there has been no “universal agreement and practice” establishing conspiracy as a violation of the law of war (citing *Ex Parte Quirin*, 317 U.S. 1, 30); the rejection of conspiracy as a war crime by the Nuremberg Tribunal on the ground that “[t]he Anglo-American concept of conspiracy was not a part of European legal systems and arguably not an element of the internationally recognized laws of war” (citing T. Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* 36 (1992); an *Amicus Curiae Brief of Specialists in Conspiracy and International Law* before the Supreme Court; and the conclusion of a UN Special Rapporteur who concluded that conspiracy is not an offense under the laws of war (citing U.N. Doc. A/HRC/6/17/Add.3 (Nov. 22, 2007)).

The Government responds that the Supreme Court’s opinion in *Hamdan* should be read in light of the absence (at that time) of Congressional action to define violations of the law of war under its Constitutional authority to “define and punish” offenses against the laws of nations, and cite Justice Kennedy’s observation that “Congress, not the Court, is the branch in the better position to undertake the sensitive task” of determining whether conspiracy is a war crime. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2809 (Kennedy, J. concurring). The Government notes that conspiracy convictions of Nazi saboteurs were upheld in *Ex Parte Quirin*, 317 U.S. 1 (1942) and *Colepaugh v. Looney*, 235 F. 2d 429, 431, 433 (10th Cir 1956), cert denied 352 U.S. 1014 (1957). In the Pacific theater, “orders establishing the jurisdiction of military commissions in various theaters of operation provided that conspiracy to violate the laws of war was a cognizable offense” *Hamdan* at 2834 (Thomas, J. dissenting). The World War II military tribunals of several European nations recognized conspiracy to violate the laws of war as an

offense triable before military commissions, and military commissions in the Netherlands and France tried conspiracy to violate the laws of war, as did the International Military Tribunal at Nuremburg with respect to four specific types of conspiracies. *Hamdan* at 2836, n. 14. (Thomas, J. dissenting). The conspirators who assassinated Abraham Lincoln were tried and punished by a military commission for conspiracy, and an 1865 Opinion of the Attorney General declares that “to unite with banditti, jayhawkers, guerillas or any other unauthorized marauders is a high offense against the laws of war; the offence is complete when the band is organized or joined.” 11 Op. Atty. Gen. at 312.

MATERIAL SUPPORT FOR TERRORISM

Once again, the question here is whether “Material Support for Terrorism,” criminalized by 18 U.S.C. §950v(25), is sufficiently well established as a violation of the law of war that exposing Mr. Hamdan to punishment for that offense is not an ex post facto application of the law.

For this offense, the Defense points again to the UN Special Rapporteur, who concluded in 2007 that terrorism, providing material support for terrorism, wrongfully aiding the enemy, spying and conspiracy “go beyond offences under the law of war.” *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, 12, U.N. Doc.A/HRC/6/17/Add.3 (Nov 22, 2007). American military tribunals have never tried this offense, and it is not listed as a war crime in the U.S. War Crimes Act, 18 U.S.C. § 2441, or the U.S. Army’s *Law of War Handbook* (2005). A Congressional Research Service report prepared for Members of Congress recently concluded that “defining as a war crime ‘material support for terrorism’ does not appear to be supported by historical precedent.”¹ Nor is the offense mentioned in any of the treaties or statutes that define law of war offenses: the Hague Conventions, the Rome Statute of the International Criminal Court, nor the International Criminal Tribunals for the Former Yugoslavia, Rwanda or Sierra Leone.

In reply, the Government argues that violations of Common Article 3 (such as “violence to life and person” of those “taking no active part in hostilities”) are widely considered to be war crimes and have been criminalized by the U.S. War Crimes Act, 18 U.S.C. §2441; Providing Material Support for Terrorism and Providing Material Support for an International Terrorism Organization have been violations of federal law, with provisions made for the prosecution of extraterritorial offenses, since 1993. (18 USC §2339A and 2339B) U.N. Security Council Resolutions 1189 and 1373 condemn terrorism and require member states to criminalize it; and the United States is a party to twelve international treaties that prohibit kidnappings, hijackings, bombings, the killing of innocent civilians and other acts of “terrorism.” In essence, the Government argues in part that because terrorism is condemned by International law, and material support for terrorism a violation of U.S. federal law, material support for terrorism has traditionally been a crime under the law of armed conflict, or at least that Hamdan must have known his conduct was not “innocent when done.”

¹ Jennifer K. Elsea, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparisons with Previous DOD Rules and the Uniform Code of Military Justice*, 12 (CRS, updated Sep. 27, 2007), available at <http://www.fas.org/sgp/crs/natsec/RL33688.pdf>.

The Government offers evidence of U.S. practice during the American Civil War. An 1894 Congressional document asserted that during the war, there were “numerous rebels . . . that . . . furnish[ed] the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents [we]re banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maraud and to lay waste to the country. All such persons are by the laws of war in every civilized country liable to capital punishment.” H.R. Doc. No. 65, 55th Cong. 3d Sess., 234 (1894). Likewise, Colonel Winthrop wrote that during the Civil War numerous persons were “liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by a military commission” based upon their support for unlawful combatants. Winthrop, *Military Law and Precedents*, 784.

In addition, the language of General Orders establishing the jurisdiction for military commission during the Civil War suggests the existence of an offense similar to “providing material support for terrorism” existed during that conflict: “There are numerous rebels . . . that . . . furnish the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents are banding together in several areas of the interior counties for the purpose of assisting the enemy to rob, to maraud, and to lay waste of the country. *All such persons are by the laws of war in every civilized country liable to capital punishment* (emphasis added). Numerous trials were held under this authority.” *Hamdan v. Rumsfeld*, *supra*, at 817 n. 9 (Thomas, J. dissenting)(quoting from H.R. Doc. No. 65, 55th Cong., 3d Sess. 164 (1894). Thereafter Justice Thomas cites several General Court-Martial Orders in which convictions were upheld for “being a guerrilla.” The meaning of this term is made clear by Colonel Winthrop, who explains, under his description of “Irregular Forces in War,” the meaning of the term “Guerrillas.” The term encompasses “irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders. . . .” *Winthrop*, at 783. After a discussion of these forces, which a modern reader might understand to be a description of “unlawful combatants,” Winthrop continues in this vein:

But a species of armed enemies whose employment in a military capacity was not and could not be justified were the so called “guerillas” of our late civil war. [Note 55 inserts here “Called ‘guerilla-marauders’ in the act of July 2, 1864, c. 215 and the 105th Article of War. They were also styled, in different localities, “bushwhackers,” “jayhawkers,” “regulators,” etc. Prof. Leiber (Inst § 82, 84) refers to them as “highway robbers or pirates” and “armed prowlers.”] These were persons acting independently, and generally in bands, within districts of the enemy’s country or on its borders, who engaged in the killing, disabling and robbing of peaceable citizens or soldiers, in plunder and pillage, and even in the ransacking of towns, from motives mostly of personal profit or revenge.” Winthrop, at 783-784 and note 55.

Only in light of the further clarification provided in this footnote does the difference between the two types of Civil War “guerillas” appear. Traditional guerillas were irregular forces who supported the Confederate armed forces, and for whom the protections of prisoner of war status was sometimes claimed. Winthrop at 783. The “guerillas” of the civil war era, i.e. those described in the numerous General Court Martial Orders Justice Thomas refers to in *Hamdan*, at 817 n. 9, were more akin to (and were actually referred to as) “spies,” “bridge-burners,”

“pirates,” “highway robbers” and “guerilla-marauders.” They were subject to trial by military commission, along with those who “join, belong to, act, or co-operate” with them. *Ibid.* They acted entirely without the law “plundered the property of peaceable citizens,” and usually for motives of personal profit or revenge. In modern parlance, they might be referred to as terrorists, or those who provided material support for terrorism. At least in American Civil War practice, they were subject to trial by military commission for their activities.

The Government concedes that although the offense of “providing material support for terrorism” does not appear in any international treaty or list of enumerated offenses, the *conduct* now criminalized by the MCA provision has long been recognized as a violation of the law of war. 18 USC §950v(b)(24) defines the offense of Terrorism such that any person “who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life....” shall be punished. Intentionally killing or inflicting great bodily harm upon a protected person is clearly a violation of the law of war. Taking all of this history into account, the Government argues that Congress merely *defined* as “Material Support for Terrorism” conduct that was already proscribed and subject to trial by military commission.

The evidence for both Conspiracy and Material Support for Terrorism is mixed. Absent Congressional action under the define and punish clause to identify offenses as violations of the Law of War, the Supreme Court has looked for “clear and unequivocal” evidence that an offense violates the common law of war, *Hamdan*, at 2780 and n, 34, or that there is “universal agreement and practice” for the proposition. *Ex Parte Quirin*, 317 U.S. 1, 30 (1942). But where Congress has acted under its Constitutional authority to define and punish offenses against the law of nations, a greater level of deference to that determination is appropriate. Quoting from an opinion by the U.S. District Court for the Southern District of New York, the Government argues:

[E]ven assuming that the acts described in 18 U.S.C. §§ 2332 & 2332a are not *widely* regarded as violations of international law, it does not necessarily follow that these provisions exceed Congress’s authority under [Article I, Section 8] Clause 10. Clause 10 does not merely give Congress the authority to punish offenses against the law of nations; it also gives Congress the power to “define” such offenses. Hence, provided that the acts in question are recognized by at least some members of the international community as being offenses against the law of nations, Congress arguably has the power to criminalize these acts pursuant to its power to *define* offenses against the law of nations. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820)(Story, J.) (“Offenses . . . against the law of nations cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations. . . . [T]herefore . . . , there is a peculiar fitness in giving the power to define as well as to punish.”) Note, Patrick L. Donnelly, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Ominibus Diplomatic Security and Antiterrorism Act of 1986*, 72 Cornell L. Rev. 599, 611 (1987) (Congress may define and punish offenses in the international law, notwithstanding a lack of consensus as to the nature of the crime in the United States or in the world community.)

United States v. Bin Laden, 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000), criticized on other grounds by *United States v. Gatlin*, 216 F. 3d 207, 212 n.6 (2d Cir 2000); see also Anthony J. Colangelo, *Constitutional Limits on Extra territorial Jurisdiction; Terrorism and the Intersection of National and International Law*, 48 Harv. Int'l L. J. 121, 142 (2007)) ("we might assume , , , that Congress, representing the United States' sovereign lawmaking body within the international system, has at least some leeway to aid in the development of the category of international offenses by pushing the envelope beyond where it already is").

CONCLUSION AND DECISION

In enacting the MCA, Congress asserted that "The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission. . . . Because the provisions of the subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter." MCA § 950p(a),(b). Thus, Congress was clearly aware of the Constitutional limitation of its power, and indicated its sense that it had complied with that limitation. In light of Congress's enumerated power to define and punish offenses against the law of nations, and its express declaration that in doing so, it has not enacted a "new crimes that did not exist before its enactment", the Commission is inclined to defer to Congress's determination that this is not a new offense. There is adequate historical basis for this determination with respect to each of these offenses.

The Government has shown, by a preponderance of the evidence, that Congress had an adequate basis upon which to conclude that conspiracy and material support for terrorism have traditionally been considered violations of the law of war.

The Motion to Dismiss for Lack of Subject Matter Jurisdiction Over Ex Post Facto Charges is DENIED as to both offenses.



Keith J. Allred
Captain, JAGC, USN
Military Judge

UNITED STATES OF AMERICA v. Mohammed Jawad	Government's Response to Defense Supplement 2 to D-007 Motion to Dismiss July 22, 2008
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1. **Timeliness:** Inasmuch as the original motion was filed in a timely manner, the undersigned notes no irregularities in the Military Judge receiving this supplement.
2. **Relief:** The Government respectfully requests that this motion to dismiss be denied.
3. **Overview:** As this is a mere supplement arguing for consideration of "persuasive" authority, the Government will ask the Commission to consider assertions and arguments made in a previous response to D-007.
4. **Law and Argument:**

Initially in his supplement (paragraph 3a), Mr. Jawad outlines a burden of proof argument as it relates to the *Hamdan* ruling. The ruling in *Hamdan* sheds no new light on any burden of proof issues as they may exist in this case. As noted by the Government in the earlier response, it has the jurisdictional burden of proof. *See* previous Government response paragraph 4.

Secondly, the defense notes an ongoing assertion that Mr. Jawad's actions, as an unlawful combatant, do not constitute a traditional violation of the law of armed conflict and therefore this Commission does not have jurisdiction over his offenses. As noted in the supplement, the defense reiterates the argument that throwing a hand grenade by an unlawful combatant¹ is not a violation of the law of war simply by virtue of the fact that the actor does not have combatant immunity.² The *Hamdan* ruling offers no epiphany on the resolution of the ongoing jurisdictional issue raised by the defense in this case.

The previous arguments articulated by the Government support the finding that when an unlawful combatant throws a hand grenade, that results in horrific injuries by

¹ Mr. Jawad, in his supplement, does not contest that on the day of his actions, he was wearing civilian clothes, under no responsible command and carrying his Soviet made weapons in a concealed manner.

² Assuming *arguendo* the defense maintains its past posture on combat immunity, it appears unlikely the defense will argue Mr. Jawad was entitled to said combatant immunity. *See* FN1 D-007 Supplement.

United States military personnel, he is in violation of the law of war and furthermore that jurisdiction properly lies with this Commission. *See* previous Government Response to D-0007. The recent ruling in *Hamdan*, and any insight gleaned from therein, in no way mandates a dismissal of the charges in this case.

4. **Oral Argument:** The Government rests on the record. Should the Commission desire argument, the Government will supplement this filing with argument.
5. **Witness and Evidence:** The record contains all witnesses and evidence necessary for this issue to be decided by the Commissions.
6. **Certificate of Conference.** Not applicable.

Respectfully Submitted,

//signed//

By: John Ellington, CDR, JAGC, USN

//signed//

And: Darrel Vandeveld
Lieutenant Colonel
United States Army

On behalf of the Government

UNITED STATES OF AMERICA v. Mohammed Jawad	Defense Supplement 3 to D-007 Motion to Dismiss for Lack of Subject Matter Jurisdiction (Law of War) August 7, 2008
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1. **Timeliness:** This Supplemental filing is timely in light of new persuasive authority.
2. **Overview:** The finding instructions provided to the members in *U.S. v. Hamdan*, the sole military commission case to proceed to trial, provide persuasive authority in support of the defense position in D-007 on the meaning of attempted Murder in violation of the law of war, the sole remaining charge against Mohammad Jawad. These instructions were in accord with the U.S. War Crimes Act.

3. **Facts:**

- a. Judge Allred provided the following instructions to the members of the military commission prior to their retirement for deliberation on findings:

Definitions:

A killing violates the law of war where a combatant (*whether lawful or unlawful*) intentionally and without justification kills:

- (i) civilians not taking an active part in hostilities;
- (ii) military personnel placed *hors de combat* by sickness, wounds, or detention; or
- (iii) military medical or religious personnel.

United States v. Hamdan, Prefatory Instructions on Findings, dated 4 August 2008, at 4. (emphasis added).

- b. The prosecution did not file a timely objection to the instructions.

4. **Law and Argument:** Judge Allred's instructions correctly state the law of war and correctly define murder in violation of the law of war. This instruction echoes the

language of the federal War Crimes Act, (the law which defines war crimes for American servicemembers and other U.S. nationals)¹, which defines the war crime of murder as:

The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause. 18 U.S.C. § 2441(d)(1)(D)

Applying this law to the facts of this case, assuming *arguendo* that Mr. Jawad did throw a hand grenade with the intent to kill U.S. servicemembers, and assuming that this act was “in the context of and associated with armed conflict,” another required element of the offense, Mr. Jawad’s actions cannot be construed as attempted murder in violation of the law of war.

The government is attempting to apply one definition of attempted murder in violation of the law of war for U.S. soldiers and citizens, and another for aliens. But the law of war is international and does not vary on the whims of any one government at any one time.

CONCLUSION

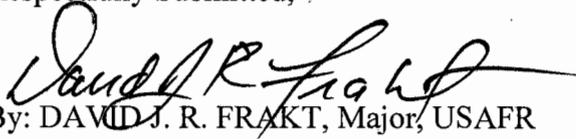
It is time for the commission to turn its attention to trying real terrorists who actually violated the law of war and attacked innocent civilians, rather than teenagers who threw handgrenades at uniformed enemy soldiers in the midst of an armed conflict. Apply the law and dismiss the charge.

5. Request for Immediate Public Release: The defense requests immediate public release of this filing and any government response thereto.

¹ 18 U.S.C § 2241 (a) Offense.— Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b) . . .

(b) Circumstances.— The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States.

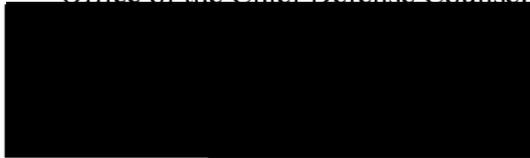
Respectfully Submitted,



By: DAVID J. R. FRAKT, Major, USAFR



And: KATHARINE DOXAKIS, LCDR, USN
Detailed Defense Counsel
Office of the Chief Defense Counsel



UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD

GOVERNMENT'S RESPONSE

to

**Defense Supplement 3 to D-007 Motion to
Dismiss for Lack of Subject Matter
Jurisdiction (Law of War)**

8 August 2008

1. **Timeliness:** This supplement is untimely. The underlying motion has already been fully briefed and argued, and the supposedly “new evidence” is irrelevant.
2. **Relief Requested:** The Government respectfully requests that the Defense’s motion to dismiss the charges of attempted murder in violation of the law of war and intentional infliction of serious bodily injury, be denied.
3. **Overview:** This third supplemental filing by the defense is based solely upon an instruction provided by the military commission judge to the commission panel members in the case of *U.S. v. Hamdan*, in which the Military Judge mistakenly substituted an instruction for murder of protected persons, which defined a killing as violating the law of war where “a combatant (whether lawful or unlawful) intentionally and without justification kills: (i) civilians not taking an active part in hostilities; (ii) military personnel placed *hors de combat* by sickness, wounds, or detention; or (iii) military medical or religious personnel, as opposed to the correct instruction, explained below, for murder in violation of the law of war. The defense believes that the erroneous instruction likewise should be misapplied to the instant case. This position has no basis in law or fact and should be denied.
4. **Facts:**
 - a. Agreed.
 - b. Agreed.

5. Law and Argument:

The judge's instruction in *U.S. v. Hamdan*, failed to correctly state the law of war, and the restrictive interpretation the instruction adopts not only mooted an entire section of the Military Commissions Act of 2006, 10 U.S.C. §948a, et seq., defining murder of protected persons, as opposed to the distinct offense of murder in violation of the law of war, in itself it amounts to erroneous law of the *Hamdan* case, and is not even persuasive authority for this Commission. (*Compare* 10 U.S.C. § 950v(b)(1) [Murder of Protected Persons] *and* 10 U.S.C. § 950v(b)(15) [Murder in Violation of the Law of War].) The *Hamdan* Military Judge obviously instructed the Commission members as to the former offense, when he should have instructed them on the latter. The defense, to its credit, does not even attempt to cite any authority whatsoever for the proposition that a panel instruction carries the weight of the law, particularly the erroneous instruction which, in the government's view, deprived the government of substantial justice in the *Hamdan* case. According to media reports, the military judge himself acknowledged that his instruction may have been erroneous. (Attachment A).

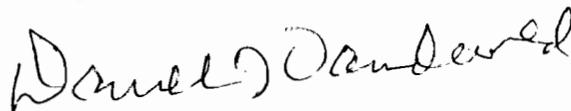
6. Oral Argument: This supplemental is creative – even imaginative – but oral argument is unnecessary to assist the Commission in resolving the underlying motion.

7. Witnesses and Evidence: Not applicable. The question presented is one of law.

8. Certificate of Conference: Not applicable.

9. Additional Information: None.

Respectfully Submitted,



Darrel J. Vandeveld
LTC, USAR
Prosecutor

Attachment A: NY Times article dated 6 August 2008, "Guantanamo Judge Admits Possible Error."

ATTACHMENT A



August 6, 2008

Guantánamo Bay Judge Admits Possible Error

By WILLIAM GLABERSON

GUANTÁNAMO BAY, Cuba — As the military panel at the trial of a former driver for Osama bin Laden deliberated for a full day Tuesday without reaching a verdict, the presiding military judge said he might have given the members incorrect legal instructions about how the international law of war is to be applied here.

“I may well have instructed the members erroneously,” said the judge, Capt. Keith J. Allred of the Navy, during one of several sessions called outside the hearing of the six-member panel of senior military officers who are considering war-crimes charges against the driver, Salim Hamdan.

For a few hours Tuesday morning, defense lawyers suggested that they might use the judge’s admission to press for a mistrial, which could have disrupted the Pentagon’s effort to complete its first war-crimes trial at the United States naval base here. But by day’s end, it appeared that both sides had agreed to permit the panel members to continue deliberating under the original instructions Judge Allred read to them Monday morning.

One reason the government has given for prosecuting Guantánamo detainees as war criminals is that terrorist attacks by Al Qaeda violate the international rules of war. Those rules require, for example, that armed forces wear recognizable uniforms and carry firearms openly.

But prosecutors said Tuesday that the judge had defined “murder in violation of the law of war” incorrectly. He did not tell the panel that it would be a violation of the law of war for an unlawful combatant, like a member of Al Qaeda, to kill a member of an opposing military service during combat.

The defense said that such a killing might be an ordinary crime that could be prosecuted in American courts and that it was not a war crime for an enemy to kill a soldier in combat.

But the prosecutors argued that an unlawful combatant, like a Qaeda fighter without a military uniform, violates the law of war by killing in combat. While Judge Allred’s ruling is not binding on other military commission judges, it could influence them, and both sides cited legal

precedents about the issue that could be critical to this case and others here. Judge Allred said he was not certain of the answer.

A prosecutor, Clayton Trivett, said the judge's interpretation could limit the prosecution's options in other cases here. He noted that prosecutors had said they might charge as many as 80 detainees with war crimes in the military commissions at Guantánamo.

"The concern for the prosecution," Mr. Trivet said, "is that the law be right."

Mr. Hamdan is charged with two war crimes, conspiracy and providing material support to a terrorist organization. Within those two charges are 10 specifications, and only one could be undermined if Judge Allred's instructions proved incorrect.

That specification asserts that Mr. Hamdan, who was captured with two shoulder-fired missiles in his car, conspired with unknown people to kill Americans during the war in Afghanistan in 2001. The defense argued that might be a crime, but not necessarily a war crime.

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