

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

**DEFENSE MOTION TO
DISMISS CHARGE 2 FOR
FAILURE TO STATE AN
OFFENSE TRIABLE BY
MILITARY COMMISSION**

4 October 2004

The defense in the case of the *United States v. David M. Hicks* moves this military commission to dismiss Charge 2 against Mr. Hicks because it fails to state an offense under the law of war, and is not an offense triable by military commission. The defense states in support of this motion:

1. **Synopsis:** In Charge 2, the Government alleges that Mr. Hicks attempted to murder divers members of coalition forces (the identities of these persons are not stated) while he did not enjoy combatant immunity. This conduct is not a violation of the law of war, and, therefore, fails to state an offense that can be tried before this military commission. Further, this military commission is without jurisdiction to try Mr. Hicks for this supposed offense because it is not "triable by military commission." Accordingly, the commission must dismiss Charge 2.

2. **Facts:** See Charge Sheet.

3. **Discussion:** It is not a violation of the law of war for an unprivileged combatant to engage in combat against enemy combatants.¹ Combatants are granted "immunity" from prosecution for acts like deliberately killing (murder) or injuring (battery) another human being that, if committed outside the context of combat, would ordinarily be criminal. Unprivileged combatants, on the other hand, do not enjoy "combatant immunity," and, can be prosecuted for killing or injuring a combatant. However, such prosecution may not be before a military commission. The proper forum in which to try an unprivileged combatant for killing or injuring a combatant is the same as that for other crimes against persons which are not violations of the laws of war--the domestic civilian criminal court of the State where the offense occurred.

An unprivileged combatant who engages in war-like acts (*i.e.*, engaging in combat operations) can be targeted by combatants. However, nothing in the law of war or any statute allows unprivileged combatants to be tried by military commission for the war-like acts they commit unless those acts violate the law of war. The law of war simply does not prohibit war-like acts committed against combatants.

Alleged crimes occurring in the armed conflict that do not violate the law of war are subject to prosecution only in the domestic civilian criminal courts of the sovereign in whose

¹ It would be a crime under the law of war for an unprivileged combatant to cause death or injury to a combatant if the (i) the person attacked was a combatant who had surrendered or was wounded, or (ii) the attacker used prohibited methods or means of warfare when he or she attacked the combatant. However such actions would be triable by a military commission not because of the status of the attacker as an unprivileged combatant, but because the acts themselves are violations of the law of war. Because Charge 2 does not contain allegations that Mr. Hicks engaged in such conduct, it will not be discussed further in this motion.

territory the offense conduct was performed, regardless of the person's status under the law of war as a privileged combatant, unprivileged combatant, or civilian.

Thus, the crime of "Murder by an Unprivileged Belligerent" does not exist under the law of war, notwithstanding its inclusion in Military Commission Instruction No. 2 (MCI No. 2). The offense lacks any basis in the law of war or any enabling statute. The offense of "Murder by an Unprivileged Belligerent" is, as styled in MCI No. 2, a solely domestic offense that must be tried in a domestic civilian criminal court that possesses geographic jurisdiction. Consequently, it must be rejected in this instance.

Article 21 of the Uniform Code of Military Justice (UCMJ) establishes a military commission's jurisdiction over "...offense[s] **that by statute or by the law of war may be tried by military commission...**"² (emphasis added). It is from this congressionally enacted Article that the President, in part, draws his authority to establish military commissions.³

However, there are only two non-law of war offenses Congress has approved for trial by military commission—Aiding the Enemy, Article 104, UCMJ and Spies, Article 106, UCMJ. Congress has never authorized a military commission to try civilians for "Murder by an Unprivileged Belligerent." Indeed, to do so would be completely contrary to logic, sense, and tradition, because the forum to try individuals who lack combatant immunity for deliberately killing or injuring combatants already exists in the form of the domestic civilian courts of the sovereign possessing jurisdiction. Accordingly, "Murder by an Unprivileged Belligerent," as set forth in MCI No. 2, is not triable by military commission, and this military commission lacks jurisdiction to try Mr. Hicks for such an offense. Therefore, Charge 2 must be dismissed.

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

5. **Evidence:** 1. The testimony of expert witnesses.

6. **Relief Requested:** The defense requests Charge 2 be dismissed.

² 10 U.S.C. §821.

³ See President's Military Order of 13 November 2001, first paragraph. Note: "sections 821 and 836 of title 10, United States Code" are Article 21 and Article 36 of the Uniformed Code of Military Justice, respectively.

7. The defense requests oral argument on this motion.

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

JOSHUA L. DRATEL
Joshua L. Dratel, P.C.
14 Wall Street
28th Floor
New York, New York 10005
(212) 732-0707
Civilian Defense Counsel for David M. Hicks

JEFFERY D. LIPPERT
Major, U.S. Army
Detailed Defense Counsel