

<p>UNITED STATES OF AMERICA</p> <p style="text-align: center;">v.</p> <p>DAVID M. HICKS</p>	<p>)</p>	<p>DEFENSE REPLY ON MOTION TO DISMISS CHARGE 3 FOR FAILURE TO STATE AN OFFENSE</p> <p>26 October 2004</p>
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The defense in the case of the *United States v. David M. Hicks* requests that the military commission dismiss Charge 3 against Mr. Hicks, and states in support of this reply:

1. **Synopsis:** Charge 3 alleges that Mr. Hicks aided the enemy. However, the charge fails to state an offense by Mr. Hicks because Mr. Hicks owed no duty of allegiance to the United States or any other nation that would make him criminally liable for his actions while in Afghanistan.
2. **Facts:**
 - A. Mr. Hicks is an Australian citizen.
 - B. Mr. Hicks has never been a member of the United States Armed Forces, and the site of the alleged misconduct by Mr. Hicks is not within the territory under the control of the United States or United States Armed Forces.
 - C. Mr. Hicks’ conduct in Afghanistan did not violate Australian law.

3. **Discussion:**

In defending Charge 3, the prosecution relies exclusively on MCI No. 2 and its attendant commentary. Yet MCI No. 2 and that commentary were issued *after* the alleged commission of the alleged conduct that forms the basis for Charge 3. At the time of the conduct, neither Australian, U.S., or international law prohibited Mr. Hicks from the “aiding the enemy” as alleged in Charge 3.

The prosecution’s reliance on the explanation section to the Manual for Courts-martial that addresses the offense of aiding the enemy is entirely misplaced. Indeed, that section of the Manual directly supports the defense’s position, since it states plainly that “[c]itizens of neutral powers resident in or visiting invaded or occupied territory can claim no immunity from the customary laws of war relating to communication with the enemy.”¹ Once an individual is located within a territory where U.S. forces military forces are in control, Article 104 controls. The decision in *Gillars v. U.S.*, states the same rationale: a “citizen in enemy country owes temporary allegiance to the alien government, must obey its laws and may not plot or act against it”).²

¹ MCM, para. 28(c)(6)(c).

² *Gillars v. U.S.*, 87 U.S. App. D.C. 16, 41-42 (1950).

The prosecution's reliance on *Ex Parte Quirin*³ is also misplaced. The prosecution asserts that the Nazi saboteurs owed no duty to the United States. This is an incorrect statement on the law as described above in *Gillars*. When the saboteurs "enter[ed] the territorial limits of the United States, . . ." ⁴ Article 104 governed their conduct. Thus, in order to violate Article 104, an individual must be present in territory controlled by the U.S. military forces (or U.S. territory itself), a circumstance glaringly absent in this case with respect to Charge 3 against Mr. Hicks. In fact, Mr. Hicks was never within any territory controlled by U.S. forces,⁵ the jurisdictional predicate for the operation of Article 104.

The prosecution fails to cite a single case in which a non-U.S. citizen who had never set foot in the U.S., or in an area under the control of the U.S. armed forces, has been tried for aiding the enemy. The reason for that void is obvious: because it is not authorized under law, and, as a result, has been attempted (under any of the legitimately constituted legal military or international law systems). Moreover, the prosecution's attempt to do so in this case flies in the face of common sense. An individual without allegiance to the U.S. (and alleged to be the enemy) cannot be prosecuted for aiding the enemy for conduct occurring outside territory controlled by the United States or its armed forces.

4. **Evidence:**

A: The testimony of expert witnesses to be requested.

5. **Relief Requested:** The defense requests that Charge 3 be dismissed.

6. The defense requests oral argument on this motion.

By:

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³ 317 U.S. 1 (1942).

⁴ Prosecution Response, page.11, citing *Quirin* transcript.

⁵ It is noteworthy that the prosecution does not take objection to the facts in the defense motion.