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Document Number: 2003STATE225919

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SOURCE: CBLEXCLS.001241

DRAFTED BY: GBRANCATO:GBRANCATO -- 08/05/2003 202-647-2773

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-----8EA318 051614Z /38

P R 051603Z AUG 03

FM SECSTATE WASHDC

TO USMISSION GENEVA PRIORITY

INFO USMISSION USUN NEW YORK

UNCLAS STATE 225919

E.O. 12958: N/A

TAGS: PHUM

SUBJECT: USG RESPONSE TO OPINION NO. 5/2003 OF THE WORKING
GROUP ON ARBITRARY DETENTION

1. RESPONSE OF THE GOVERNMENT OF THE UNITED STATES OF
AMERICA TO THE OPINION NO. 5/2003 DATED MAY 8, 2003, AND THE
COMMUNICATION DATED JANUARY 8, 2003 OF THE WORKING GROUP ON
ARBITRARY DETENTION

THE GOVERNMENT OF THE UNITED STATES WELCOMES THE OPPORTUNITY

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UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 04 NOV 2004 200303827

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ACLU-RDI 4403 p.1

TO RESPOND TO THE ABOVE-MENTIONED OPINION NO. 5/2003 DATED MAY 8, 2003, AND THE COMMUNICATION DATED JANUARY 8, 2003, RELATING TO DETENTION AT GUANTANAMO NAVAL BASE (GUANTANAMO). THE OPINION TOOK EXCEPTION TO THE PERCEIVED LACK OF RESPONSE OF THE UNITED STATES GOVERNMENT TO ITS JANUARY 8 COMMUNICATION AND ALSO CONCLUDED THAT, IN THE VIEW OF THE WORKING GROUP ON ARBITRARY DETENTION, THE DETENTION OF FOUR NAMED INDIVIDUALS AT GUANTANAMO IS "ARBITRARY, BEING IN CONTRAVENTION OF ARTICLE 9 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND ARTICLE 9 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS."

THE UNITED STATES GOVERNMENT RESPECTFULLY DISAGREES WITH THE OPINION OF THE WORKING GROUP AND REFERS TO ITS LETTERS TO THE WORKING GROUP OF DECEMBER 17, 2002, AND APRIL 3, 2003, RESPECTING DETENTION AT GUANTANAMO. THESE TWO EARLIER COMMUNICATIONS TO THIS WORKING GROUP DISCUSSED AT LENGTH THE FACTUAL AND LEGAL ISSUES SURROUNDING DETENTION AT GUANTANAMO.

IN VIEW OF THESE COMMUNICATIONS, THE UNITED STATES BELIEVES THAT, CONTRARY TO THE POSITION EXPRESSED IN THE MAY 8 OPINION, WE HAVE CONSTRUCTIVELY AND RESPECTFULLY ENGAGED IN A DIALOGUE WITH THE WORKING GROUP ON THIS IMPORTANT ISSUE, BEARING IN MIND THE MANDATE OF THE WORKING GROUP.

FURTHER, AS WE OBSERVED IN THE FOREGOING CORRESPONDENCE, THE MANDATE OF THE WORKING GROUP DOES NOT INCLUDE COMPETENCE TO ADDRESS THE GENEVA CONVENTIONS OF 1949 OR MATTERS ARISING UNDER THE LAW OF ARMED CONFLICT. WITHOUT IN ANY WAY WAIVING OR WITHDRAWING ITS CONTINUING OBJECTION THAT THESE MATTERS ARE BEYOND THE COMPETENCE OF THE WORKING GROUP, THE UNITED STATES GOVERNMENT, CONTINUING THE SPIRIT OF DIALOGUE AND READINESS TO COOPERATE EXHIBITED IN ITS TWO EARLIER COMMUNICATIONS, OFFERS THIS DETAILED RESPONSE TO THE WORKING GROUP'S COMMUNICATION AND OPINION.

FOR REASONS OF NATIONAL SECURITY, THE UNITED STATES GOVERNMENT IS NOT IN A POSITION TO ANSWER SPECIFIC QUESTIONS REGARDING FOUR NAMED INDIVIDUALS, KHALED BEN MUSTAFA, NIZAR SASSI, MOURAD BENCHELLALI, AND HAMED ABDERRAHAMAN AHMED. NEVERTHELESS WE ARE PLEASED TO OFFER THE FOLLOWED DETAILED INFORMATION ABOUT THE DETENTION AND TREATMENT OF INDIVIDUALS HELD AT GUANTANAMO.

AS THE UNCHR IS AWARE, ON SEPTEMBER 11, 2001, TERRORISTS USED UNLAWFUL AND PERFIDIOUS MEANS TO ATTACK INNOCENT CIVILIANS IN THE UNITED STATES. IMMEDIATELY FOLLOWING THE ATTACKS OF SEPTEMBER 11, MOST OF THE WORLD, INCLUDING THE UNITED NATIONS SECURITY COUNCIL IN RESOLUTION 1368 AND NATO, CONDEMNED THESE ATTACKS AS A "THREAT TO INTERNATIONAL PEACE AND SECURITY,"

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RECOGNIZED THE INHERENT RIGHT OF INDIVIDUAL AND COLLECTIVE SELF-DEFENSE, AND EXPRESSED DETERMINATION TO COMBAT BY ALL MEANS THREATS TO INTERNATIONAL PEACE AND SECURITY CAUSED BY TERRORIST ACTS.

NATO'S NORTH ATLANTIC COUNCIL DETERMINED ON OCTOBER 2, 2001, THAT THE SEPTEMBER 11TH ATTACK WAS DIRECTED FROM ABROAD BY THE WORLD-WIDE TERRORIST NETWORK OF AL QAIDA AND "SHALL THEREFORE BE REGARDED AS AN ACTION COVERED BY ARTICLE 5 OF THE WASHINGTON TREATY, WHICH STATES THAT AN ARMED ATTACK ON ONE OR MORE OF THE ALLIES OF EUROPE OR NORTH AMERICA SHALL BE CONSIDERED AN ATTACK AGAINST THEM ALL." FOREIGN MINISTERS OF THE STATES PARTIES TO THE 1947 INTER-AMERICAN TREATY OF RECIPROCAL ASSISTANCE (THE RIO TREATY) LIKEWISE RESOLVED ON SEPTEMBER 21, 2001, THAT "THESE ATTACKS AGAINST THE UNITED STATES ARE ATTACKS AGAINST ALL AMERICAN STATES AND THAT IN ACCORDANCE WITH ALL THE RELEVANT PROVISIONS OF THE . . . (RIO TREATY) . . . AND THE PRINCIPLE OF CONTINENTAL SOLIDARITY, ALL STATES PARTIES TO THE RIO TREATY SHALL PROVIDE EFFECTIVE RECIPROCAL ASSISTANCE TO ADDRESS SUCH ATTACKS AND THE THREAT OF ANY SIMILAR ATTACKS AGAINST ANY AMERICAN STATE, AND TO MAINTAIN THE PEACE AND SECURITY OF THE CONTINENT."

CONSISTENT WITH THIS WIDELY HELD INTERNATIONAL VIEW, PRESIDENT BUSH STATED IN THE MILITARY ORDER OF NOVEMBER 13, 2001, THAT "INTERNATIONAL TERRORISTS, INCLUDING MEMBERS OF AL QAIDA, HAVE CARRIED OUT ATTACKS ON UNITED STATES DIPLOMATIC AND MILITARY PERSONNEL AND FACILITIES ABROAD AND ON CITIZENS AND PROPERTY WITHIN THE UNITED STATES ON A SCALE THAT HAS CREATED A STATE OF ARMED CONFLICT THAT REQUIRES THE USE OF THE UNITED STATES ARMED FORCES." SINCE SEPTEMBER 11, THE UNITED STATES HAS EXERCISED ITS INHERENT RIGHT OF SELF-DEFENSE AS RECOGNIZED IN ARTICLE 51 OF THE CHARTER OF THE UNITED NATIONS AND UN SECURITY RESOLUTIONS 1368 (12 SEPTEMBER 2001) AND 1373 (28 SEPTEMBER 2001) AND HAS USED OTHER LAWFUL AND REASONABLE MEANS TO THWART FURTHER ATTACKS BY ENEMY COMBATANTS ON AMERICAN PERSONS AND PROPERTY.

AS THE FOREGOING MAKES CLEAR, THE UNITED STATES GOVERNMENT, AND INDEED THE INTERNATIONAL COMMUNITY, HAVE CONCLUDED THAT AL QAIDA AND RELATED TERRORIST NETWORKS ARE IN A STATE OF ARMED CONFLICT WITH THE UNITED STATES. THEY HAVE TRAINED, EQUIPPED, AND SUPPORTED ARMED FORCES AND HAVE PLANNED AND EXECUTED ATTACKS AROUND THE WORLD AGAINST THE UNITED STATES ON A SCALE THAT FAR EXCEEDS CRIMINAL ACTIVITY. AL QAIDA ATTACKS HAVE DELIBERATELY TARGETED CIVILIANS AND PROTECTED SITES AND OBJECTS. FOR EXAMPLE, IN 2002, AL QAIDA OPERATIVES IN NORTHERN IRAQ CONCOCTED SUSPECT CHEMICALS UNDER THE DIRECTION OF SENIOR AL QAIDA ASSOCIATE ABU MU'SAB AL-ZARQAWI

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AND TRIED TO SMUGGLE THEM INTO RUSSIA, WESTERN EUROPE, AND THE UNITED STATES FOR TERRORIST OPERATIONS. U.S. DEPARTMENT OF STATE PATTERNS OF GLOBAL TERRORISM 2002 (PUBLICATION 11038 APRIL 2003) AT P. 79. OTHER ATTACKS PERPETRATED BY AL QAIDA AND AL QAIDA-LINKED GROUPS INCLUDE THE ATTEMPTED BOMBING ON DECEMBER 22, 2001, OF A COMMERCIAL TRANSATLANTIC FLIGHT FROM PARIS TO MIAMI BY CONVICTED SHOE BOMBER RICHARD REID; ON OCTOBER 12, 2002, A CAR BOMB OUTSIDE A NIGHTCLUB IN BALI, INDONESIA, KILLING ABOUT 180 INTERNATIONAL TOURISTS AND INJURING ABOUT 300; A SUICIDE CAR BOMBING AT A HOTEL IN MOMBASSA, KENYA, KILLING 15 AND INJURING 40; THE SIMULTANEOUS NEAR-MISS SA-7 MISSILE ATTACK ON A CIVILIAN JET DEPARTING MOMBASSA FOR ISRAEL; AN ATTACK ON US MILITARY PERSONNEL IN KUWAIT ON OCTOBER 8 THAT KILLED ONE US SOLDIER AND INJURED ANOTHER; DIRECTING A SUICIDE ATTACK ON THE MV LIMBURG OFF THE COAST OF YEMEN ON OCTOBER 6, 2002, THAT KILLED ONE AND INJURED FOUR; AND A FIREBOMBING OF A SYNAGOGUE IN TUNISIA ON APRIL 11, 2002 THAT KILLED 19 AND INJURED 22. ID. AT 118-19.

MOREOVER, AL QAIDA DIRECTED THE OCTOBER 12, 2000 ATTACK ON THE USS COLE IN THE PORT OF ADEN, YEMEN, KILLING 17 US NAVY MEMBERS AND INJURING AN ADDITIONAL 39. AL QAIDA ALSO CONDUCTED THE BOMBINGS IN AUGUST 1998 OF THE US EMBASSIES IN KENYA AND TANZANIA THAT KILLED AT LEAST 300 INDIVIDUALS AND INJURED MORE THAN 5,000. ID. AT 119. AL QAIDA ADDITIONALLY CLAIMS TO HAVE SHOT DOWN UN HELICOPTERS AND KILLED US SERVICEMEN IN SOMALIA IN 1993 AND TO HAVE CONDUCTED THREE BOMBINGS THAT TARGETED US TROOPS IN ADEN, YEMEN IN DECEMBER 1992. ID.

AL QAIDA IS ALSO LINKED TO THE FOLLOWING PLANS THAT WERE DISRUPTED OR NOT CARRIED OUT: TO ASSASSINATE POPE JOHN PAUL II DURING HIS VISIT TO MANILA IN LATE 1994; TO KILL PRESIDENT CLINTON DURING A VISIT TO THE PHILIPPINES IN EARLY 1995; TO BOMB IN MIDAIR A DOZEN US TRANS-PACIFIC FLIGHTS IN 1995; TO SET OFF A BOMB AT LOS ANGELES INTERNATIONAL AIRPORT IN 1999; AND TO CARRY OUT TERRORIST OPERATIONS AGAINST US AND ISRAELI TOURISTS VISITING JORDAN FOR MILLENNIAL CELEBRATIONS IN LATE 1999. ID. (JORDANIAN AUTHORITIES THWARTED THE PLANNED ATTACKS AND PUT 28 SUSPECTS ON TRIAL. ID.)

DESPITE COALITION SUCCESSES IN AFGHANISTAN AND AROUND THE WORLD, THE WAR IS FAR FROM OVER. THE AL QAIDA NETWORK TODAY IS A MULTINATIONAL ENTERPRISE THAT HAS A GLOBAL REACH THAT EXCEEDS THAT OF ANY PREVIOUS TRANSNATIONAL GROUP. SOME AL QAIDA OPERATIVES HAVE ESCAPED TO PLAN AND MOUNT FURTHER TERRORIST ATTACKS AGAINST THE UNITED STATES AND COALITION PARTNERS. THE CONTINUING MILITARY OPERATIONS UNDERTAKEN AGAINST THE UNITED STATES AND ITS NATIONALS BY THE AL QAIDA

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ORGANIZATION BOTH BEFORE AND AFTER SEPTEMBER 11 NECESSITATE A MILITARY RESPONSE BY THE ARMED FORCES OF THE UNITED STATES. TO CONCLUDE OTHERWISE IS TO PERMIT AN ARMED GROUP TO WAGE WAR UNLAWFULLY AGAINST A SOVEREIGN STATE WHILE PRECLUDING THAT STATE FROM DEFENDING ITSELF.

DURING THE COURSE OF HOSTILITIES IN AFGHANISTAN, THE UNITED STATES MILITARY AND ITS ALLIES HAVE CAPTURED OR SECURED THE SURRENDER OF THOUSANDS OF INDIVIDUALS FIGHTING AS PART OF THE AL QAIDA TERRORIST NETWORK OR WHO SUPPORTED, PROTECTED OR DEFENDED THE AL QAIDA TERRORISTS. THESE WERE INDIVIDUALS CAPTURED IN CONNECTION WITH THE ONGOING ARMED CONFLICT. THEIR CAPTURE AND DETENTION WAS LAWFUL AND NECESSARY TO PREVENT THEM FROM RETURNING TO THE BATTLEFIELD OR REENGAGING IN ARMED CONFLICT.

IN AFGHANISTAN, THE UNITED STATES HAS SCREENED OVER 6,000 ENEMY COMBATANTS TO DETERMINE WHETHER CONTINUED DETENTION BY THE UNITED STATES WAS WARRANTED. MANY INDIVIDUALS RELEASED BY THE UNITED STATES AND COALITION FORCES WERE RELEASED FOR MANY APPROPRIATE REASONS. THOSE ENEMY COMBATANTS WHO WERE ASSESSED AS BEING OF SPECIAL CONCERN TO THE UNITED STATES, INCLUDING BECAUSE OF THEIR POTENTIAL TO REMAIN A THREAT TO COALITION FORCES, THEIR INVOLVEMENT IN WAR CRIMES, AND THEIR INTELLIGENCE VALUE, WERE TAKEN TO GUANTANAMO BAY FOR FURTHER DETENTION. THE FIRST DETAINEES ARRIVED AT GUANTANAMO ON JANUARY 11, 2002, AND OTHERS HAVE ARRIVED (AND SOME HAVE BEEN TRANSFERRED OUT) SINCE THEN.

INTERNATIONAL HUMANITARIAN LAW. AS NOTED EARLIER, THE WORKING GROUP LACKS JURISDICTION TO ENTERTAIN COMMUNICATIONS RAISING ISSUES UNDER THE LAWS AND CUSTOMS OF WAR. THE LAWS AND CUSTOMS OF WAR ARE THE APPLICABLE LAW IN ARMED CONFLICT. THE OPINION AND COMMUNICATION IGNORE THIS CRUCIAL JURIDICAL CONTEXT, SUGGESTING THAT THE DETAINEES ARE ENTITLED TO JUDICIAL REVIEW OR ENJOY THE RIGHT TO RESORT TO THE COURTS. THE OPINION, HOWEVER, PRESENTS NO LEGAL SUPPORT FOR THE NOVEL PROPOSITION THAT DETAINED ENEMY COMBATANTS HAVE ANY RIGHTS UNDER THE LAW OF ARMED CONFLICT TO HAVE THEIR DETENTION REVIEWED IN A HUMAN RIGHTS FORUM OR TO HAVE ACCESS TO THE COURTS OF THE DETAINING POWER TO CHALLENGE THEIR DETENTION DURING THE COURSE OF ONGOING CONFLICT.

THE LAW OF ARMED CONFLICT IS THE LEX SPECIALIS GOVERNING THE STATUS AND TREATMENT OF PERSONS DETAINED DURING ARMED CONFLICT. TO BE SURE, MANY OF THE PRINCIPLES OF HUMANE TREATMENT FOUND IN THE LAW OF ARMED CONFLICT FIND SIMILAR EXPRESSION IN HUMAN RIGHTS LAW. FURTHER, SOME OF THE PRINCIPLES OF THE LAW OF ARMED CONFLICT MAY BE EXPLICATED BY

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ANALOGY OR BY REFERENCE TO HUMAN RIGHTS PRINCIPLES. HOWEVER, SIMILARITY OF PRINCIPLES IN CERTAIN RESPECTS DOES NOT MEAN AN IDENTITY OF PRINCIPLES, DOCTRINE, OR JURISPRUDENCE.

PROFESSOR THEODOR MERON, CURRENTLY THE PRESIDENT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA IN THE HAGUE, HAS WRITTEN:

NOT SURPRISINGLY, IT HAS BECOME COMMON IN SOME QUARTERS TO CONFLATE HUMAN RIGHTS AND THE LAW OF WAR/INTERNATIONAL HUMANITARIAN LAW. NEVERTHELESS, DESPITE THE GROWING CONVERGENCE OF VARIOUS PROTECTIVE TRENDS, SIGNIFICANT DIFFERENCES REMAIN. UNLIKE HUMAN RIGHTS LAW, THE LAW OF WAR ALLOWS, OR AT LEAST TOLERATES, THE KILLING AND WOUNDING OF INNOCENT HUMAN BEINGS NOT DIRECTLY PARTICIPATING IN AN ARMED CONFLICT, SUCH AS CIVILIAN VICTIMS OF LAWFUL COLLATERAL DAMAGE. IT ALSO PERMITS CERTAIN DEPRIVATIONS OF PERSONAL FREEDOM WITHOUT CONVICTIONS IN A COURT OF LAW. THEODOR MERON, THE HUMANIZATION OF HUMANITARIAN LAW, 94 A.J.I.L. 239, 240 (2000) (EMPHASIS ADDED).

THE CONSEQUENCES OF CONFLATING THE TWO BODIES OF LAW WOULD BE DRAMATIC AND UNPRECEDENTED. FOR INSTANCE, APPLICATION OF PRINCIPLES DEVELOPED IN THE CONTEXT OF HUMAN RIGHTS LAW WOULD ALLOW ALL ENEMY COMBATANTS DETAINED IN ARMED CONFLICT TO HAVE ACCESS TO COURTS TO CHALLENGE THEIR DETENTION, A RESULT DIRECTLY AT ODDS WITH WELL-SETTLED LAW OF WAR THAT WOULD THROW THE CENTURIES-OLD, UNCHALLENGED PRACTICE OF DETAINING ENEMY COMBATANTS INTO COMPLETE DISARRAY. AS PROFESSOR MERON CONCLUDES HIS INTRODUCTION TO THE TRENDS AT THE HEART OF INTERNATIONAL HUMANITARIAN LAW, "(T)HE TWO SYSTEMS, HUMAN RIGHTS AND HUMANITARIAN NORMS, ARE THUS DISTINCT...." ID.

THE ENEMY COMBATANTS ARE NOT ENTITLED TO POW STATUS. SHORTLY AFTER THE DETAINEES' ARRIVAL AT GUANTANAMO, THE PRESIDENT OF THE UNITED STATES DETERMINED THAT THE CONFLICT WITH AL QAIDA IS NOT COVERED BY THE GENEVA CONVENTION. AL QAIDA IS A TERRORIST ORGANIZATION, NOT A STATE, AND IT IS NOT AND CANNOT BE A PARTY TO THE GENEVA CONVENTIONS. THE PRESIDENT FURTHER DETERMINED THAT, ALTHOUGH THE CONFLICT WITH THE TALIBAN IS COVERED BY THE GENEVA CONVENTION, THE TALIBAN DETAINEES DO NOT QUALIFY FOR POW STATUS. SEE WHITE HOUSE FACT SHEET, STATUS OF DETAINEES AT GUANTANAMO, OFFICE OF THE PRESS SECRETARY, FEB. 7, 2002, P. 1, AT [HTTP://WWW.WHITELHOUSE.GOV/NEWS/RELEASES/2002/02/20020207-13.HTML](http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html) (VISITED APRIL 5, 2002). THE PRESIDENT REACHED THIS DECISION AFTER CAREFUL REVIEW AND IN CONSULTATION WITH HIS MOST SENIOR ADVISERS.

THE UNITED STATES STATED PUBLICLY THAT:

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UNDER ARTICLE 4 OF THE GENEVA CONVENTION, . . . TALIBAN DETAINEES ARE NOT ENTITLED TO POW STATUS. . . . THE TALIBAN HAVE NOT EFFECTIVELY DISTINGUISHED THEMSELVES FROM THE CIVILIAN POPULATION OF AFGHANISTAN. MOREOVER, THEY HAVE NOT CONDUCTED THEIR OPERATIONS IN ACCORDANCE WITH THE LAWS AND CUSTOMS OF WAR. . . . AL QAEDA IS AN INTERNATIONAL TERRORIST GROUP AND CANNOT BE CONSIDERED A STATE PARTY TO THE GENEVA CONVENTION. ITS MEMBERS, THEREFORE, ARE NOT COVERED BY THE GENEVA CONVENTION, AND ARE NOT ENTITLED TO POW STATUS UNDER THE TREATY.

STATEMENT BY THE U.S. PRESS SECRETARY, THE JAMES S. BRADY BRIEFING ROOM, IN WASHINGTON, D.C. (FEB. 7, 2002).

THUS, THE DETAINEES DO NOT ENJOY POW STATUS BECAUSE THEY DO NOT MEET THE CRITERIA APPLICABLE TO LAWFUL COMBATANTS. THE UNITED STATES HAS MADE IT CLEAR THAT THE DETAINEES ARE UNLAWFUL COMBATANTS -- A LEGAL STATUS THAT HAS LONG BEEN RECOGNIZED UNDER INTERNATIONAL LAW -- WHO MAY BE DETAINED AT LEAST FOR THE DURATION OF HOSTILITIES. THE U.S. SUPREME COURT, CITING NUMEROUS AUTHORITATIVE INTERNATIONAL SOURCES, HAS HELD THAT UNLAWFUL COMBATANTS "ARE SUBJECT TO CAPTURE AND DETENTION, (AS WELL AS) TRIAL AND PUNISHMENT BY MILITARY TRIBUNALS FOR ACTS WHICH RENDER THEIR BELLIGERENCY UNLAWFUL."

SEE EX PARTE QUIRIN, 317 U.S. 1, 31 (1942) (CITING GREAT BRITAIN, WAR OFFICE, MANUAL OF MILITARY, CH. XIV, SS 445-451; REGOLAMENTO DI SERVIZIO IN GUERRA, S 133, 3 LEGGI E DECRETI DEL REGNO D'ITALIA (1896) 3184; 7 MOORE, DIGEST OF INTERNATIONAL LAW, S 1109; 2 HYDE, INTERNATIONAL LAW, SS 654, 652; 2 HALLECK, INTERNATIONAL LAW (4TH ED. 1908) S 4; 2 OPPENHEIM, INTERNATIONAL LAW, S 254; HALL, INTERNATIONAL LAW, SS 127, 135; BATY & MORGAN, WAR, ITS CONDUCT AND LEGAL RESULTS (1915) 172; BLUNTSCHI, DROIT INTERNATIONAL, SS 570 BIS.). SEE, E.G., INGRID DETTER, THE LAW OF WAR 148 (2000) ("UNLAWFUL COMBATANTS . . . THOUGH THEY ARE A LEGITIMATE TARGET FOR ANY BELLIGERENT ACTION, ARE NOT, IF CAPTURED, ENTITLED TO ANY PRISONER OF WAR STATUS.").

FURTHER, AL QAIDA MEMBERS UNLAWFULLY ENGAGE IN AN ARMED CONFLICT TARGETING CIVILIANS AND MILITARY PERSONNEL AND OBJECTS AROUND THE WORLD. AL QAIDA'S CONDUCT FLAGRANTLY VIOLATES EVEN THE MOST FUNDAMENTAL LAWS AND CUSTOMS AND WAR. IN ADDITION TO UNLAWFULLY TARGETING CIVILIANS, AL QAIDA'S METHODS AND MEANS OF WAGING WAR ARE AT ODDS WITH EVERY REQUIREMENT APPLICABLE TO LAWFUL ARMED FORCES. IT IS

IMPORTANT TO THE RULE OF LAW THAT WE NOT RECOGNIZE AL QAIDA AND THE TALIBAN AS HAVING POW STATUS. DOING SO WOULD DISSERVE THE WORLD'S INTERESTS BY DIMINISHING THE PRINCIPLES EMBODIED IN THE GENEVA CONVENTIONS.

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IT IS THE VIEW OF THE UNITED STATES GOVERNMENT THAT WE CANNOT HAVE AN INTERNATIONAL LEGAL SYSTEM IN WHICH HONORABLE SOLDIERS WHO ABIDE BY THE LAW OF ARMED CONFLICT AND ARE CAPTURED ON THE BATTLEFIELD MAY BE DETAINED AND HELD UNTIL THE END OF A WAR WITHOUT ACCESS TO COURTS OR OTHER BENEFITS CLAIMED IN THE OPINION, BUT TERRORIST COMBATANTS WHO VIOLATE THE LAW OF ARMED CONFLICT MUST BE GIVEN SPECIAL PRIVILEGES OR RELEASED AND ALLOWED TO CONTINUE THEIR BELLIGERENT, UNLAWFUL OR TERRORIST ACTIVITIES. SUCH A LEGAL REGIME WOULD SIGNAL TO THE INTERNATIONAL COMMUNITY THAT IT IS ACCEPTABLE FOR ARMIES TO BEHAVE LIKE TERRORISTS.

ARTICLE FIVE TRIBUNALS. MEMBERS OF THE TALIBAN AND AL QAIDA DETAINED AT GUANTANAMO ARE NOT ENTITLED TO PRISONER OF WAR STATUS UNDER THE THIRD GENEVA CONVENTION, AND THERE IS NO NEED TO CONVENE AN ARTICLE 5 TRIBUNAL TO MAKE INDIVIDUALIZED STATUS DETERMINATIONS FOR EACH DETAINEE. ARTICLE 5 STATES THAT "(S)HOULD ANY DOUBT ARISE," DETAINEES "SHALL ENJOY THE PROTECTION OF THE (GENEVA CONVENTION) UNTIL SUCH TIME AS THEIR STATUS HAS BEEN DETERMINED BY A COMPETENT TRIBUNAL." ARTICLE 5 DOES NOT REQUIRE A PARTY TO THE GENEVA CONVENTION TO CONVENE TRIBUNALS TO CONSIDER STATUS DETERMINATIONS UNLESS THERE IS DOUBT. FOR MEMBERS OF AL QAIDA AND THE TALIBAN, CAPTURED IN THE COURSE OF ONGOING HOSTILITIES OR DIRECTLY ACTING IN SUPPORT OF A HOSTILE ARMED FORCE ENGAGED IN AN ONGOING ARMED CONFLICT, THERE IS NO DOUBT ABOUT THEIR STATUS. THE PRESIDENT HAS DETERMINED FOR THE UNITED STATES AS A CATEGORICAL MATTER THAT AL QAIDA FIGHTERS CANNOT ENJOY POW STATUS BECAUSE AL QAIDA IS NOT A STATE PARTY TO THE CONVENTION, AND TALIBAN FIGHTERS CANNOT ENJOY POW STATUS BECAUSE THE TALIBAN MILITIA AS A GROUP FAILED TO COMPLY WITH THE REQUIREMENTS OF ARTICLE 4.

ENEMY COMBATANTS ARE NOT ENTITLED TO BE RELEASED PRIOR TO THE END OF HOSTILITIES OR TO HAVE ACCESS TO COURT OR COUNSEL. SOME HAVE ERRONEOUSLY CLAIMED THAT THE UNITED STATES IS VIOLATING DOMESTIC AND INTERNATIONAL LAWS THAT PROHIBIT THE INDEFINITE DETENTION OF INDIVIDUALS WITHOUT TRIAL. THIS CLAIM IS CONTRARY TO THE WELL-ESTABLISHED AND BROAD AUTHORITY OF A COUNTRY TO DETAIN ENEMY COMBATANTS UNDER THE LAWS AND CUSTOMS OF WAR FOR THE DURATION OF HOSTILITIES.

INDIVIDUALS DETAINED AT GUANTANAMO ARE ENEMY COMBATANTS CAPTURED IN THE COURSE OF ONGOING HOSTILITIES OR DIRECTLY ACTING IN SUPPORT OF A HOSTILE ARMED FORCE ENGAGED IN AN ONGOING ARMED CONFLICT. AS SUCH, THEY ARE BEING HELD IN ACCORDANCE WITH THE LAWS AND CUSTOMS OF WAR, WHICH PERMIT THE UNITED STATES TO CAPTURE AND DETAIN ENEMY COMBATANTS TO PREVENT THEIR RE-ENGAGING IN THE ONGOING ARMED CONFLICT.

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THE UNITED STATES HAS MADE IT CLEAR THAT THE DETAINEES ARE UNLAWFUL COMBATANTS SEE, E.G., SECRETARY RUMSFELD'S STATEMENT THAT THE DETAINEES "ARE NOT POWS" AND INSTEAD ARE "UNLAWFUL COMBATANTS". GERRY J. GILMORE, RUMSFELD VISITS, THANKS U.S. TROOPS AT CAMP X-RAY IN CUBA, AMERICAN FORCES PRESS SERVICE, JAN. 27, 2002, AT WWW.DEFENSELINK.MIL /

NEWS/JAN2002/N01272002-200201271 (VISITED APRIL 11, 2002).

-- A LEGAL STATUS THAT HAS LONG BEEN RECOGNIZED UNDER INTERNATIONAL LAW -- WHO MAY BE DETAINED AT LEAST FOR THE DURATION OF HOSTILITIES. SEE, E.G., INGRID DETTER, THE LAW OF WAR 148 (2000) ("UNLAWFUL COMBATANTS . . . THOUGH THEY ARE A LEGITIMATE TARGET FOR ANY BELLIGERENT ACTION, ARE NOT, IF CAPTURED, ENTITLED TO ANY PRISONER OF WAR STATUS."). INDIVIDUALS DETAINED AT GUANTANAMO INCLUDE A NUMBER OF SENIOR AL QAIDA OPERATIVES OR OTHERS COMMITTED TO KILLING AMERICANS AND OTHERS. THE UNITED STATES CONTINUES TO FIGHT AGAINST ENEMY COMBATANTS WHO ARE PLANNING AND CONDUCTING ATTACKS AGAINST IT.

THE DETENTION OF AN ENEMY COMBATANT IS NOT AN ACT OF PUNISHMENT BUT ONE OF SECURITY AND MILITARY NECESSITY. IT SERVES THE IMPORTANT PURPOSE OF PREVENTING AN ENEMY COMBATANT FROM CONTINUING TO FIGHT AGAINST US. THERE IS NO LAW REQUIRING A DETAINING POWER TO PROSECUTE ENEMY COMBATANTS ON SOME FORM OF CHARGE OR RELEASE THEM PRIOR TO THE END OF HOSTILITIES. LIKEWISE, UNDER THE LAWS AND CUSTOMS OF WAR, DETAINED ENEMY COMBATANTS HAVE NO RIGHT OF ACCESS TO COUNSEL OR THE COURTS TO CHALLENGE THEIR DETENTION. SHOULD A DETAINEE BE CHARGED WITH A CRIMINAL OFFENSE, HE WOULD HAVE THE RIGHT TO COUNSEL AND APPLICABLE FUNDAMENTAL PROCEDURAL SAFEGUARDS.

IT IS ALSO IMPORTANT TO NOTE THAT THE UNITED STATES HAS NO INTEREST IN DETAINING ENEMY COMBATANTS LONGER THAN NECESSARY.

ON AN ONGOING BASIS, WE ARE CONSTANTLY REVIEWING THE CONTINUED DETENTION OF EACH ENEMY COMBATANT, BASED ON SECURITY, WAR CRIME INVOLVEMENT, AND INTELLIGENCE CONCERNS.

THIS PROCESS HAS RESULTED IN THE RELEASE OF, TO DATE, 64 INDIVIDUALS. THESE INDIVIDUALS ARE REQUIRED TO SIGN AN AGREEMENT THAT THEY WILL NOT TAKE UP ARMS AGAINST THE UNITED STATES OR ITS ALLIES. ADDITIONALLY, SOME ENEMY COMBATANTS HAVE BEEN TRANSFERRED TO THEIR COUNTRIES OF NATIONALITY FOR CONTINUED DETENTION.

INTELLIGENCE GLEANED FROM THESE ENEMY COMBATANTS HAS BEEN INVALUABLE IN OUR ONGOING WAR ON TERRORISM. THIS INFORMATION HAS DIRECTLY ASSISTED THE UNITED STATES IN ITS EFFORTS TO WIN THE WAR ON TERRORISM AND IN FORESTALLING FUTURE TERRORIST ATTACKS ON THE CITIZENS OF THE UNITED STATES AND OTHER

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COUNTRIES.

TREATMENT OF DETAINEES. NOTWITHSTANDING THE FACT THAT THE DETAINEES AT GUANTANAMO ARE UNLAWFUL ENEMY COMBATANTS, THE ARMED FORCES OF THE UNITED STATES ARE "TREATING AND WILL CONTINUE TO TREAT (THE DETAINEES) HUMANELY AND, TO THE EXTENT APPROPRIATE AND CONSISTENT WITH MILITARY NECESSITY, IN A MANNER CONSISTENT WITH THE PRINCIPLES OF THE (GENEVA CONVENTION). . . . THE DETAINEES WILL NOT BE SUBJECTED TO PHYSICAL OR MENTAL ABUSE OR CRUEL TREATMENT." SEE WHITE HOUSE FACT SHEET, FEB. 7, 2002, AT 1-2.

THE DETAINEES ARE BEING PROVIDED SHELTER, NEW CLOTHING AND SHOES, SLEEPING PADS AND BLANKETS AND THREE CULTURALLY-SENSITIVE MEALS A DAY. ID. INDEED, THE DETAINEES HAVE GAINED AN AVERAGE OF THIRTEEN POUNDS (OVER FIVE KILOS) EACH SINCE THEIR ARRIVAL IN GUANTANAMO BAY. SEE "INTEL OF 'ENORMOUS VALUE' GLEANED FROM GUANTANAMO DETAINEES," AMERICAN FORCES INFORMATION SERVICE, JAN. 10, 2003, AT WWW.DOD.MIL/NEWS/JAN2003/NO1102003 - 200301107 (VISITED JULY 7, 2003).

THE UNITED STATES IS ALSO PROVIDING THE DETAINEES EXCELLENT MEDICAL CARE. SEE, E.G., PORTABLE HOSPITAL PROVIDES MEDICAL CARE FOR DETAINEES, U.S. JOINT TASK FORCE NEWS SERVICE, JAN. 31, 2002, AT WWW.NSGTMO.NAVY.MIL/JTF-160/NEWS/31JAN02G (VISITED APRIL 11, 2002). THE MEDICAL TREATMENT PROVIDED TO DETAINEES AT GUANTANAMO IS ON A PAR WITH TREATMENT AFFORDED TO MEMBERS OF THE U.S. ARMED FORCES. FOR EXAMPLE, DETAINEES HAVE RECEIVED ROUTINE MEDICAL CARE, PRESCRIPTION MEDICATION, EYE EXAMINATIONS AND CORRECTIVE EYEWEAR, AND WHEN SERIOUS MEDICAL CONCERNS REQUIRE, EVEN HOSPITALIZATION AND SURGERY. ID.

IN MARCH 2003, A SPECIAL MENTAL HEALTH UNIT WAS OPENED WHERE DETAINEES SUFFERING FROM DEPRESSION OR OTHER PSYCHOLOGICAL DIFFICULTIES OR DISEASES RECEIVE INDIVIDUALIZED CARE AND SUPERVISION. ALTHOUGH THERE HAVE BEEN SOME SUICIDE ATTEMPTS BY DETAINEES, DISCOVERY AND RAPID INTERVENTION BY MILITARY GUARDS HAVE PREVENTED DETAINEE DEATHS. THESE INDIVIDUALS WERE ALSO SEEN BY MEDICAL PERSONNEL. THESE ATTEMPTS ARE TAKEN SERIOUSLY AND THE UNITED STATES MAKES EVERY EFFORT TO PREVENT THEM.

THE DETAINEES HAVE BEEN GIVEN PERSONAL TOILETRIES, NEW TOWELS AND WASHCLOTHS, AND AN OPPORTUNITY TO TAKE SHOWERS. SEE WHITE HOUSE FACT SHEET, FEB. 7, 2002, AT 1-2. THEY HAVE BEEN GIVEN THE OPPORTUNITY TO WORSHIP FREELY AND MANY HAVE BEEN GIVEN COPIES OF THE KORAN IN THEIR NATIVE LANGUAGE. NEWLY-CONSTRUCTED DETENTION FACILITIES INCLUDE INDOOR

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PLUMBING, MORE SECURE EXERCISE AREAS, AND IMPROVED SHELTER FROM THE SUN, WHICH IMPROVES UPON THE ORIGINAL, TEMPORARY DETENTION FACILITIES WHICH ARE NO LONGER IN USE. SEE "GITMO GENERAL RATES FORCE PROTECTION HIGH WITH DETAINEE CARE," AMERICAN FORCES INFORMATION SERVICE, JUNE 21, 2002, WWW.DOD.MIL/NEWS/JUN2002/N06212002 - 200206212.HTML (VISITED JULY 7, 2003).

THE DETAINEES ARE NOT BEING HELD INCOMMUNICADO. REPRESENTATIVES OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ("ICRC") HAVE VISITED DETAINEES INDIVIDUALLY AND PRIVATELY. SEE WHITE HOUSE FACT SHEET, FEB. 7, 2002, AT 2; SEE ALSO STATEMENT BY SECRETARY RUMSFELD IN JIM GARAMONE, "RUMSFELD EXPLAINS DETAINEE STATUS, AMERICAN FORCES PRESS SERVICE," FEB. 8, 2002, AT WWW.DEFENSELINK.MIL/NEWS/JAN2002/N01272002-200201271 (VISITED APRIL 11, 2002); INTERNATIONAL COMMITTEE OF THE RED CROSS, "GUANTANAMO BAY: THE WORK CONTINUES," 5.29.03 WWW.ICRC.ORG/WEB/ENG/SITEENGONSF/IWPLIST199/ 5C867C1D85AA2BE 541256C94006000EE. (VISITED JULY 7, 2003).

DETAINEES ARE ALSO PERMITTED TO COMMUNICATE WITH FAMILY AND FRIENDS AT HOME VIA LETTERS AND POSTCARDS. THEY USE EITHER THE U.S. MILITARY POSTAL SERVICE, OR THE ICRC, WHICH DELIVERS MAIL VIA ITS OFFICES IN EACH COUNTRY. THE VOLUME OF COMMUNICATIONS IS NOT INSUBSTANTIAL; FROM JANUARY 2002 (WHEN DETAINEES FIRST BEGAN TO ARRIVE) TO JULY 2002, THE UNITED STATES MILITARY DELIVERED OVER 1,600 PIECES OF MAIL SENT OUT BY DETAINEES AND DELIVERED OVER 300 PIECES OF MAIL SENT TO DETAINEES, SEE "DETAINEES SEND, RECEIVE MAIL VIA JOINT TASK FORCE, RED CROSS," AMERICAN FORCES INFORMATION SERVICE, JUNE 21, 2002, AT WWW.DOD.MIL/NEWS/JUN2002/ N07232002-200207231 (VISITED JULY 7, 2003), WHILE THE ICRC, BY APRIL 2003, HAD DELIVERED NEARLY 4,200 SUCH PIECES OF MAIL. SEE ICRC, "GUANTANAMO BAY: THE WORK CONTINUES," SUPRA.

SUBJECT TO CERTAIN RESTRICTIONS, THE DETAINEES CAN ENGAGE IN EXERCISE AND RECREATION PERIODS AND CAN COMMUNICATE WITH ONE ANOTHER. SOME HAVE MET AND CONSULTED PRIVATELY WITH A U.S. NAVY CHAPLAIN OF MUSLIM FAITH. SEE, E.G., STATEMENT BY U.S. NAVY LT. SAIFUL ISLAM (MUSLIM CHAPLAIN) (SAYING THAT HE CALLS THE DETAINEES TO AFTERNOON PRAYER AND HAS SPOKEN WITH SOME OF THE DETAINEES). SOME HAVE MET WITH GOVERNMENT OFFICIALS FROM THEIR COUNTRY OF NATIONALITY. SEE, E.G., "RUMSFELD INVITES KUWAITIS TO VISIT THEIR CITIZENS AT GUANTANAMO," AMERICAN FORCES INFORMATION SERVICE, JUNE 10, 2002, AT WWW.DOD.MIL/NEWS/JUN2002/ N06102002-200206104. (VISITED JULY 7, 2003); "WOLFOWITZ INTERVIEW WITH JIM LEHRER, NEWS HOUR," DOD NEWS TRANSCRIPT, MAR. 21, 2002, AT

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WWW.DOD.MIL/NEWS/MAR2002/ T03222002-T0321WOL. (VISITED JULY 7, 2003) (EXPLAINING THAT NUMEROUS COUNTRIES HAD ALREADY SENT REPRESENTATIVES TO VISIT THEIR NATIONALS HELD AT GUANTANAMO).

FOR THE REASONS DISCUSSED ABOVE, THE UNITED STATES GOVERNMENT RESPECTFULLY DISAGREES WITH THE OPINION NO. 5/2003 DATED MAY 8, 2003, AND THE COMMUNICATION DATED JANUARY 8, 2003, OF THE WORKING GROUP ON ARBITRARY DETENTION RELATING TO DETENTION AT GUANTANAMO. ADDITIONALLY, THE UNITED STATES GOVERNMENT UNDERSCORES THAT THE COMPETENCE OF THE WORKING GROUP DOES NOT EXTEND TO THE LAWS AND CUSTOMS OF WAR AND THUS THE COMMUNICATION OF JANUARY 8, 2003, AND THE OPINION OF MAY 8, 2003, ARE OUTSIDE THE COMPETENCE OF THE WORKING GROUP.

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