

## **Prefatory Instructions on Findings**

### **Mental Responsibility NOT in Issue**

Members of the court, when you close to deliberate and vote on the findings, each of you must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here in court and upon the instructions which I will give you. My duty is to instruct you on the law. Your duty is to determine the facts, apply the law to the facts, and determine the guilt or innocence of the accused. The law presumes the accused to be innocent of the charges against him.

You will hear an exposition of the facts by counsel for both sides as they view them. Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel in order to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you.

During the trial some of you took notes. You may take your notes with you into the deliberation room. However, your notes are not a substitute for the record of trial.

I will advise you of the elements of each offense alleged.

In specification 1 of Charge I, the accused is charged with the offense of Conspiracy. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence of each of the following elements, beyond a reasonable doubt:

(1) Between about February of 1996 and about 24 November 2001, Mr. Hamdan entered into an agreement with Usama bin Laden, Ayman al Zawahiri, Sheik Sayeed al Masri, Muhammad Atef (aka Abu Hafs al Masri), Saif al Adel or various other members of the al Qaeda organization, known or unknown, to commit one or more of the following substantive offenses triable by military commission: attacking civilians, attacking civilian objects, murder in violation of the law of war, destruction of property in violation of the law of war, or terrorism;

(2) Mr. Hamdan knew the unlawful purpose of the agreement and joined willingly, with the intent to further the unlawful purpose; and

(3) While this agreement continued to exist, and while Mr. Hamdan remained a party to the agreement, Mr. Hamdan knowingly committed at least one of the following overt acts for the purpose of bringing about one of the objects of the agreement: served as a bodyguard for Usama bin Laden; served as a driver for Usama bin Laden; transported and delivered weapons, ammunition or other supplies to al Qaeda members and associates; drove or accompanied Usama bin Laden to various al-Qaeda training camps, press conferences or lectures; or received weapons training in Afghanistan.

(4) that this conduct occurred in the context of and was associated with an armed conflict.

Proof that the offense of attacking civilians, attacking civilian objects, murder in violation of the law of war, destruction of property in violation of the law of war, or terrorism actually occurred is not required. However, it must be proved beyond a reasonable doubt that the agreement included every element of at least one of the offenses the Government has alleged as objects of the conspiracy. At least four of the six members must agree on the same object of the conspiracy to find that the conspiracy existed.

The agreement in a conspiracy does not have to be in any particular form or expressed in formal words. It is sufficient if the minds of the parties reach a common understanding to accomplish the object of the conspiracy, and this may be proved by the conduct of the parties. The agreement does not have to express the manner in which the conspiracy is to be carried out or what part each conspirator is to play.

The overt act required for this offense does not have to be a criminal act, but it must be a clear indication that the conspiracy is being carried out.

The overt act may be done either at the time of or following the agreement.

The overt act must clearly be independent of the agreement itself; that is, it must be more than merely the act of entering into the agreement or an act necessary to reach the agreement.

You are advised that there is no requirement that all co-conspirators be named in the specification or that all co-conspirators be subject to trial by military commission.

You will note that more than one overt act has been listed in Specification 1. You may find Mr. Hamdan guilty of Conspiracy only if you are convinced beyond a reasonable doubt that he personally committed at least one of the overt acts described in the Specification and that such act was indeed an act in furtherance of the alleged agreement. Accordingly, if you find beyond a reasonable doubt that Mr. Hamdan committed one or more such overt act, but not all of them, your findings should reflect this by appropriate exceptions. At least four of the members present when the vote is taken must concur that the accused committed the same overt act.

Thus, you may find Mr. Hamdan guilty of Specification 1 under Charge I if you find beyond a reasonable doubt that he conspired to do any of the following:

Conspiracy to Attack Civilians:

In order to find Mr. Hamdan guilty of Conspiracy to Attack Civilians, you must find beyond a reasonable doubt that Mr. Hamdan:

- (1) entered into an agreement;
- (2) to intentionally direct attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(3) that Mr. Hamdan knew or should have known the factual circumstances that established the civilian status;

(4) that Mr. Hamdan knew the unlawful purpose of the agreement and joined willingly, with the intent to further the unlawful purpose;

(5) that Mr. Hamdan committed an overt act in furtherance of the agreement; and

(6) that the agreement and the intended attack on civilians took place in the context of and was associated with an ~~international~~ armed conflict.

Definitions / Other Instructions:

The intent required for this offense precludes its applicability with regard to collateral damage or death, damage, or injury incident to a lawful attack.

Conspiracy to Attack Civilian Objects

In order to find Mr. Hamdan guilty of Conspiracy to Attack Civilian Objects, you must find beyond a reasonable doubt that Mr. Hamdan:

(1) entered into an agreement;

(2) to intentionally direct attacks against civilian property, that is, property that was not a military objective;

(3) that Mr. Hamdan knew or should have known that such property was not a military objective;

(4) that Mr. Hamdan knew the unlawful purpose of the agreement and joined willingly, with the intent to further the unlawful purpose;

(5) that Mr. Hamdan committed an overt act in furtherance of the agreement; and

(6) that the agreement and the intended attack on civilian objects took place in the context of and was associated with an ~~international~~ armed conflict.

Definitions / Other Instructions:

The intent required for this offense precludes its applicability with regard to collateral damage or death, damage, or injury incident to a lawful attack.

Military objectives are those objects during an armed conflict:

(i) which by their nature, location, purpose, or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability, and

(ii) the total or partial destruction, capture or neutralization of which would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.

Civilian objects are those objects that do not qualify as military objectives.

#### Murder in Violation of the Law of War

In order to find Mr. Hamdan guilty of Conspiracy to Commit Murder in Violation of the Law of War, you must find beyond a reasonable doubt that Mr. Hamdan:

- (1) entered into an agreement;
- (2) to intentionally kill one or more persons;
- (3) in violation of the law of war;
- (4) that Mr. Hamdan knew the unlawful purpose of the agreement and joined willingly, with the intent to further the unlawful purpose;
- (5) that Mr. Hamdan committed an overt act in furtherance of the agreement; and
- (6) that the agreement and the intended ~~destruction of property~~ <sup>Killing</sup> took place in the context of and was associated with an armed conflict.

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.

#### Conspiracy to Destroy Property in Violation of the Law of War

In order to find Mr. Hamdan guilty of Conspiracy to Destroy Property in Violation of the Law of War, you must find beyond a reasonable doubt that Mr. Hamdan:

- (1) entered into an agreement;

(2) to intentionally and without consent destroy property of another which is not a military objective;

(3) that Mr. Hamdan knew the unlawful purpose of the agreement and joined willingly, with the intent to further the unlawful purpose;

(4) that Mr. Hamdan committed an overt act in furtherance of the agreement; and

(5) that the agreement and the intended destruction of property took place in the context of and was associated with an armed conflict.

Definitions:

Military objectives are combatants, and those objects during an armed conflict:

(i) which by their nature, location, purpose, or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability, and

(ii) the total or partial destruction, capture or neutralization of which would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.

Civilian objects are all objects that do not qualify as military objectives.

#### Conspiracy to Commit Terrorism

In order to find Mr. Hamdan guilty of Conspiracy to commit Terrorism, you must find beyond a reasonable doubt that Mr. Hamdan:

(1) entered into an agreement;

(2) to intentionally kill or inflict great bodily harm on one or more protected persons, or engage in an act that evinces a wanton disregard for human life;

(3) in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct;

(4) that Mr. Hamdan knew the unlawful purpose of the agreement and joined willingly, with the intent to further the unlawful purpose;

(5) that Mr. Hamdan committed an overt act in furtherance of the agreement; and

(6) that the agreement and the intended act of terrorism took place in the context of and was associated with an ~~international~~ armed conflict.

Definitions / Other Instructions:

In order to be an act of terrorism, the act must be wrongful. An attack on a military objective, undertaken by military forces of a state in the exercise of their official duties, would not constitute an act of terrorism.

"Protected persons" are:

- (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.

If you have doubt that any overt act alleged in Specification 1 was committed, or that any overt act was committed in furtherance of the alleged agreement, you may still reach a finding of guilty so long as you conclude that Mr. Hamdan committed one of the alleged overt acts in furtherance of the agreement, and all the other elements of the offense are proved beyond a reasonable doubt, but you must modify the Specification to correctly reflect your findings in this regard.

**3-5-1. CONSPIRACY**

In specification 2 of Charge I, the accused is charged with the offense of Conspiracy to Commit Murder in Violation of the Law of War. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence of each of the following elements, beyond reasonable doubt:

- (1). On or about 24 November, 2001, the accused entered into an agreement to commit Murder in violation of the law of war;
- (2). That Mr. Hamdan knew the unlawful purpose of the agreement and joined willingly, with the intent to further the unlawful purpose;
- (3). That in order to effect the object of the Conspiracy, Mr. Hamdan committed an overt act in furtherance of the agreement by transporting one or more SA-7 surface to air missiles to be ultimately used to unlawfully and intentionally kill United States or Coalition service members.
- (4). That the agreement and the intended killing took place in the context of and were associated with an armed conflict.

Proof that the offense of Murder in Violation of the Law of War actually occurred is not required. However, it must be proved beyond a reasonable doubt that the agreement included every element of this offense.

The agreement in a conspiracy does not have to be in any particular form or expressed in formal words. It is sufficient if the minds of the parties reach a common understanding to accomplish the object of the conspiracy, and this may be proved by the conduct of the parties. The agreement does not have to express the manner in which the conspiracy is to be carried out or what part each conspirator is to play.

The overt act required for this offense does not have to be a criminal act, but it must be a clear indication that the conspiracy is being carried out.

The overt act may be done either at the time of or following the agreement.

The overt act must clearly be independent of the agreement itself; that is, it must be more than merely the act of entering into the agreement or an act necessary to reach the agreement.

You are advised that there is no requirement that all co-conspirators be named in the specification or that all co-conspirators be subject to military law.

The Definitions associated with this offense have been discussed on page 4 of these instructions. Those definitions also apply here.

## **MATERIAL SUPPORT FOR TERRORISM**

In Specification 1 of Charge II the accused is charged with Providing Material Support for an Act of Terrorism. In order to find the accused guilty of this offense, you must be convinced beyond a reasonable doubt of each of the following elements:

- (1). Between about February 1996 and November 24, 2001, the accused provided material support or resources, to wit, his person for training, his services as a driver and bodyguard for Usama bin Laden, and his services transporting weapons or weapons systems, to be used in preparation for, or in carrying out, an act of terrorism;
- (2). That he knew or intended that the material support or resources were to be used for carrying out an act of terrorism; and
- (3). That the conduct took place in the context of and was associated with an armed conflict.

In Specification 2 of Charge II the accused is charged with Providing Material Support for an International Terrorist Organization. In order to find the accused guilty of this offense, you must be convinced beyond a reasonable doubt of each of the following elements:

- (1). Between about February 1996 and November 24, 2001, the accused provided material support or resources, to wit his person for training, his services as a driver and bodyguard for Usama bin Laden, and his services transporting weapons or weapons

systems, to be used in support of al-Qaeda, an international terrorist organization engaged in hostilities against the United States;

(2). That he intended to provide such material support or resources to al Qaeda, an international terrorist organization engaged in hostilities against the United States; and

(3). That he knew that such organization has engaged in or engages in terrorism; and

(4). That the conduct took place in the context of and was associated with an armed conflict.

In Specification 3 of Charge II the accused is charged with an Attempt to Provide Material Support for an Act of Terrorism in violation of §950t of the Military Commissions Act. This is a lesser included offense of the charged offense of Providing Material Support for Terrorism. In order to find the accused guilty of this offense, you must be convinced beyond a reasonable doubt of each of the following elements:

(1). On or about November 24, 2001, the accused did a certain overt act, i.e. he transported two SA-7 missiles;

(2). That the act was done with the specific intent to commit the offense of Providing Material Support for an Act of Terrorism;

(3). That the act amounted to more than mere preparation, that is they were a substantial step and a direct movement toward the provision of material support for an act of terrorism;

(4). That the act apparently tended to effectuate the commission of the intended offense of providing material support for terrorism, that is, the act apparently would have resulted in the actual commission of the offense of providing material support for terrorism except for an unexpected intervening circumstances, the accused's capture, which prevented the completion of that offense;

(5). That the conduct took place in the context of and was associated with an armed conflict.

Preparation consists of devising or arranging the means or measures necessary for the commission of the attempted offense. To find the accused guilty of this offense, you must find beyond a reasonable doubt that the accused went beyond preparatory steps, and his act amounted to a substantial step and a direct movement toward the commission of the intended offense. A substantial step is one that is strongly corroborative of the accused's criminal intent and is indicative of his resolve to commit the offense.

Proof that the offense of Material Support for Terrorism actually occurred or was completed by the accused is not required. However, it must be proved beyond a



reasonable doubt that, at the time of the acts, the accused intended every element of the offense of providing material support for a terrorist act.

The elements of the attempted offense have been described on page 7 of these instructions, under Specification 1 of Charge II.

In Specification 4 of Charge II the accused is charged with Attempt to Provide Material Support for an International Terrorist Organization. In order to find the accused guilty of this offense, you must be convinced beyond a reasonable doubt of each of the following elements:

(1). On or about November 24, 2001, the accused did a certain overt act, i.e. he transported two SA-7 missiles;

(2). That the act was done with the specific intent to commit the offense of Providing Material Support for al Qaeda, an International Terrorist Organization engaged in hostilities against the United States;

(3). That the act amounted to more than mere preparation that is they were a substantial step and a direct movement toward the provision of material support for an ~~act of~~ *international terrorist organization.*

(4). That the act apparently tended to effectuate the commission of the intended offense of providing material support for terrorism, that is, the act apparently would have resulted in the actual commission of the offense of providing material support for terrorism except for an unexpected intervening circumstances, the accused's capture, which prevented the completion of that offense

(5). That the conduct took place in the context of and was associated with an armed conflict.

Preparation consists of devising or arranging the means or measures necessary for the commission of the attempted offense. To find the accused guilty of this offense, you must find beyond a reasonable doubt that the accused went beyond preparatory steps, and his act amounted to a substantial step and a direct movement toward the commission of the intended offense. A substantial step is one that is strongly corroborative of the accused's criminal intent and is indicative of his resolve to commit the offense.

Proof that the offense of Material Support for an International Terrorist Organization actually occurred or was completed by the accused is not required. However, it must be proved beyond a reasonable doubt that, at the time of the acts, the accused intended every element of the offense of providing material support for a terrorist act. The elements of providing Material Support for an International Terrorist Organization have been outlined elsewhere in these instructions.

In Specification 5 of Charge II the accused is charged with Providing Material Support for an Act of Terrorism. In order to find the accused guilty of this offense, you must be convinced beyond a reasonable doubt, of each of the following elements:

1. Between about February 1996 and November 24, 2001, the accused provided material support or resources, to wit his services as a driver for Usama bin Laden, to be used in preparation for, or in carrying out, an act of terrorism;
2. That he knew or intended that the material support or resources were to be used for carrying out an act of terrorism; and
3. That the conduct took place in the context of and was associated with an armed conflict.

In Specification 6 of Charge II the accused is charged with Providing Material Support for an International Terrorist Organization. In order to find the accused guilty of this offense, you must be convinced beyond a reasonable doubt of each of the following elements:

1. Between about February 1996 and November 24, 2001, the accused provided material support or resources, to wit, his services as a driver for Usama bin Laden, to be used in support of al-Qaeda, an international terrorist organization engaged in hostilities against the United States;
2. That he intended to provide such material support or resources to an international terrorist organization; and
3. That he knew that such organization has engaged in or engages in terrorism; and
4. That the conduct took place in the context of and was associated with an armed conflict.

In Specification 7 of Charge II the accused is charged with Providing Material Support for an Act of Terrorism. In order to find the accused guilty of this offense, you must be convinced beyond a reasonable doubt, of each of the following elements:

1. Between about February 1996 and November 24, 2001, the accused provided material support or resources, i.e. his services as a bodyguard for Usama bin Laden, to be used in preparation for, or in carrying out, an act of terrorism;
2. That he knew or intended that the material support or resources were to be used for carrying out an act of terrorism; and

3. That the conduct took place in the context of and was associated with an armed conflict.

In Specification 8 of Charge II the accused is charged with Providing Material Support for an International Terrorist Organization. In order to find the accused guilty of this offense, you must be convinced beyond a reasonable doubt of each of the following elements:

1. Between about February 1996 and November 24, 2001, the accused provided material support or resources, to wit, his services as a bodyguard for Usama bin Laden, to be used in support of al-Qaeda, an international terrorist organization engaged in hostilities against the United States;
2. That he intended to provide such material support or resources to an international terrorist organization; and
3. That he knew that such organization has engaged in or engages in terrorism; and
4. That the conduct took place in the context of and was associated with an armed conflict.

With respect to Specifications 1, 3, 5, and 7 of Charge II, "Terrorism" is defined as the intentional killing or the intentional infliction of great bodily harm on one or more protected persons; or intentionally engaging in acts that evince a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or a civilian population by intimidation or coercion, or to retaliate against government conduct.

With respect to each of the eight specifications under Charge II, "Material Support or Resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself) and transportation, except medicine or religious materials.

In order to be an act of terrorism, the act must be wrongful, which means that it was undertaken without legal justification or excuse. An attack on a military objective, undertaken by military forces of a state in the exercise of their official duties, would not constitute an act of terrorism.

To convict the accused of providing material support for an act of terrorism, the government must prove beyond a reasonable doubt that the accused knew or intended to provide support for either the preparation for, or the execution of, a specific act of

terrorism. The offense is inherently forward looking, and an accused cannot be convicted for providing material support for past acts of terrorism.

To convict the accused of providing material support for an international terrorist organization, the government must prove beyond a reasonable doubt that in providing material support or resources, the accused did so knowing that the material support or resources could or would be utilized to further the activities of the international terrorist organization, not merely the personal interests of al Qaeda's individual members.

With respect to each of the ten specifications before you, the Government must prove beyond a reasonable doubt that the actions of the accused took place in the context of, and that they were associated with, armed conflict. In determining whether an armed conflict existed between the United States and al Qaeda, and when it began, you should consider the length, duration and intensity of hostilities between the parties; whether there was protracted armed violence between governmental authorities and organized armed groups; whether and when the United States decided to employ the combat capabilities of its armed forces to meet the al Qaeda threat; the number of persons killed or wounded on each side; the amount of property damage on each side; statements of the leaders of both sides indicating their perceptions regarding the existence of an armed conflict, including the presence or absence of a declaration to that effect; and any other facts and circumstances you consider relevant to the existence of armed conflict. The parties may argue the existence of other facts and circumstances from which you might reach your determination regarding this issue.

In determining whether the acts of the accused "took place in the context of, and were associated with," an armed conflict, you should consider whether the acts of the accused occurred during the period of an armed conflict, as defined above; were performed while the accused acted on behalf of or under the authority of a party to the armed conflict; and whether they constituted, or were closely and substantially related to, hostilities occurring during the armed conflict, and other facts and circumstances you consider relevant to the issue. Counsel may address this matter during their closing arguments, and may suggest other factors for your consideration. Conduct of the accused that occurs at a distance from the area of conflict can still be "in the context of and associated with armed conflict" as long as it was closely and substantially related to the hostilities that comprised the conflict.

A number of pretrial statements by the accused have been admitted into evidence through the testimony of various federal investigative agents. The defense has introduced evidence that the accused's statements were obtained without any warning or advisement of a right to remain silent, and that this was the result of a formal policy decision not to give any such warnings. I have determined that these statements were admissible in a trial by military commission without such warnings. You must decide the weight or significance, if any, such statements deserve under all the circumstances. In deciding what weight or significance, if any, to give to the accused's statements, you should consider the specific evidence offered on the matter, your own common sense and

knowledge of human nature, and the nature of any corroborating evidence as well as the other evidence in this trial.

### **7-3. CIRCUMSTANTIAL EVIDENCE**

Evidence may be direct or circumstantial. Direct evidence is evidence which tends directly to prove or disprove a fact in issue. If a fact in issue was whether it rained during the evening, testimony by a witness that he or she saw it rain would be direct evidence that it rained.

On the other hand, circumstantial evidence is evidence which tends to prove some other fact from which, either alone or together with some other facts or circumstances, you may reasonably infer the existence or nonexistence of a fact in issue. If there was evidence the street was wet in the morning, that would be circumstantial evidence from which you might reasonably infer it rained during the night.

There is no general rule for determining or comparing the weight to be given to direct or circumstantial evidence. You should give all the evidence the weight and value you believe it deserves.

I have instructed you that with respect to specifications 2, 4, 6, and 8 under Charge II, the government must prove beyond a reasonable doubt that the accused actually intended that his support be used for an international terrorism organization. Direct evidence of intent is often unavailable. The accused's intent, however, may be proved by circumstantial evidence, that is, by facts or circumstances from which you may reasonably infer the existence of such an intent. In deciding this issue, you must consider all the relevant facts and circumstances, including but not limited to evidence that he did or did not know a particular matter at a particular time, that he was or was not told of plans then being prepared, his awareness, or lack of it, regarding what bin Laden and al Qaeda were doing, and the degree of his involvement in or agreement with those plans.

I have instructed you that with respect to specifications 1, 3, 5, and 7 under Charge II, you must be satisfied beyond a reasonable doubt that the accused knew that the support he was providing would be used for an act of terrorism. As with intent, direct evidence of a person's knowledge is often unavailable. This knowledge, like any other fact, may be proved by circumstantial evidence. In deciding this issue you must consider all relevant facts and circumstances, such as those you may consider with respect to the issue of the accused's intent.

### **7-6. JUDICIAL NOTICE**

I have taken judicial notice that at all times relevant to this case, the Taliban were the *de facto* government of Afghanistan and Taliban military personnel were serving as the regular armed forces of the State of Afghanistan.

I have also taken judicial notice that, at all relevant times, Afghanistan was a signatory to all four of the Geneva Conventions of 1949.

This means that you are now permitted to recognize and consider those facts without further proof. It should be considered by you as evidence with all other evidence in the case. You may, but are not required to, accept as conclusive any matter I have judicially noticed.

### **7-7-1. CREDIBILITY OF WITNESSES**

You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness' intelligence, ability to observe and accurately remember, sincerity and conduct in court, and prejudices and character for truthfulness. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict.

In weighing discrepancies by a witness or between witnesses, you should consider whether they resulted from an innocent mistake or a deliberate lie.

Taking all these matters into account, you should then consider the probability of each witness' testimony and the inclination of the witness to tell the truth.

The believability of each witness' testimony should be your guide in evaluating testimony and not the number of witnesses called.

### **7-17. "SPILL-OVER"—FACTS OF ONE CHARGED OFFENSE TO PROVE ANOTHER**

An accused may be convicted based only on evidence before the court not on evidence of a general criminal disposition. Each offense must stand on its own and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming, or proving that he committed any other offense.

If evidence has been presented which is relevant to more than one offense, you may consider that evidence with respect to each offense to which it is relevant. For example, evidence has been presented with respect to Mr. Hamdan's possession of missiles. You may consider that evidence with respect to each of the offenses that relate to possession of missiles.

The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.

## 7-15. VARIANCE--FINDINGS BY EXCEPTIONS AND SUBSTITUTIONS

If you have doubt about the time, place or manner in which any of the offenses described in the specification were committed, but you are satisfied beyond a reasonable doubt that the offense was committed at a slightly different time or place, or in a particular manner which differs slightly from the exact time, place or manner in the specification, you may make minor modifications in reaching your findings by changing the time, place or manner in which the alleged ~~injuries~~<sup>acts</sup> described in the specification were inflicted ~~committed~~<sup>committed</sup>, provided that you do not change the nature or identity of the offense.

As to any Specification, if you have doubt that the Government has proven all of the times, places and manners charged in the specification, you may still reach a finding of guilty so long as all the elements of the offense are proved beyond a reasonable doubt, but you must modify the specification to correctly reflect your findings.

### 7-23. "CLOSED TRIAL SESSION," IMPERMISSIBLE INFERENCE OF GUILT

I remind you that you may not infer that the accused is guilty of any offense from the fact that some evidence was presented in closed trial sessions. You also may not reach any other inference adverse to the accused from the fact that a session of the trial was closed to the public. You must evaluate open and closed session evidence and witnesses using the same standards.

Closed trial sessions to consider classified evidence are the most satisfactory method for resolving the competing needs of the Government for protection of the purportedly classified information and the rights of the accused to a public trial. You may not hold the fact there have been closed trial sessions in any way against the accused. Closed trial sessions do not erode the presumption of innocence which the law guarantees the accused.

### 7-9-1. EXPERT TESTIMONY

You have heard the testimony of Evan Kohlmann, Geoffrey Corn, and Brian Williams. They are known as "expert witnesses" because their knowledge, skill, experience, training, or education may assist you in understanding the evidence or in determining a fact in issue. You are not required to accept the testimony of an expert witness or give it more weight than the testimony of an ordinary witness. You should, however, consider their qualifications as experts.

Only you, the members of the court, determine the credibility of the witnesses and what the facts of this case are. No expert witness or other witness can testify that the period of armed conflict between the United States and al Qaeda began on a particular date. To the extent that you believed that Professor Corn or Evan Kohlmann testified or implied that

they believe the armed conflict began on a particular date, you may not consider this as evidence that the armed conflict did in fact begin on that date.

## **7-18. HAVE YOU HEARD QUESTIONS TO IMPEACH OPINION**

During the testimony of various witnesses who appeared before you, they were asked whether they were aware of certain matters counsel believe they should or might be aware of. These were permissible questions. If the witnesses denied that they had knowledge of the matters inquired into, there is no evidence before you that those matters actually occurred. These questions were permitted to test the basis of the witness' opinion and to enable you to assess the weight you accord their testimony. You may not consider the question for any other purpose.

### **7-11-1. PRIOR INCONSISTENT STATEMENT**

You have heard evidence that before this trial various witnesses made statements that may be inconsistent with their testimony here in court.

If you believe that an inconsistent statement was made, you may consider the inconsistency in deciding whether to believe that witness's in-court testimony.

You may not consider the earlier statements as evidence of the truth of the matters contained in the prior statement. In other words, you may only use them as one way of evaluating the witness's testimony here in court. You cannot use them as proof of anything else.

For example, if a witness testifies in court that the traffic light was green, and you heard evidence that the witness made a prior statement that the traffic light was red, you may consider that prior statement in evaluating the truth of the in-court testimony. You may not, however, use the prior statement as proof that the light was actually red.

## **CLOSING SUBSTANTIVE INSTRUCTIONS ON FINDINGS and PROCEDURAL INSTRUCTIONS ON FINDINGS**

### ***Mental Responsibility NOT in Issue***

#### **2-5-12. CLOSING SUBSTANTIVE INSTRUCTIONS ON FINDINGS**

You are further advised:

First, that the accused is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt;



Second, if there is reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused, and he must be acquitted;

Third, if there is a reasonable doubt as to the degree of guilt, that doubt must be resolved in favor of the lower degree of guilt as to which there is no reasonable doubt; and

Lastly, the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of each offense.

The term "reasonable doubt" does not mean a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution, which does not amount to an element, need not be established beyond a reasonable doubt. However, if, on the whole evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty.

Bear in mind that only matters properly before the court as a whole should be considered. In weighing and evaluating the evidence you are expected to use your own common sense, and your knowledge of human nature and the ways of the world. In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence. Bear in mind you may properly believe one witness and disbelieve several other witnesses whose testimony conflicts with the one. The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you.

You must disregard any comment or statement or expression made by me during the course of the trial that might seem to indicate any opinion on my part as to whether the accused is guilty or not guilty since you alone have the responsibility to make that determination. Each of you must impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in court, and your own conscience.

At this time you will hear argument by counsel. As the government has the burden of proof, trial counsel may open and close. Trial counsel, you may proceed.

(ARGUMENT BY COUNSEL)

Counsel have referred to instructions that I gave you. If there is any inconsistency between what counsel have said about the instructions and the instructions which I gave you, you must accept my statement as being correct.

## **PROCEDURAL INSTRUCTIONS**

The following procedural rules will apply to your deliberations and must be observed: The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. Your deliberation should include a full and free discussion of all the evidence that has been presented. After you have completed your discussion, then voting on your findings must be accomplished by secret, written ballot, and all members of the court are required to vote.

The order in which the several charges and specifications are to be voted on should be determined by the president subject to objection by a majority of the members. You vote on the specifications under the charge before you vote on the charge.

If you find the accused guilty of any specification under a charge, the finding as to that charge must also be guilty. The junior member will collect and count the votes. The count will then be checked by the president, who will immediately announce the result of the ballot to the members.

The concurrence of at least two-thirds of the members present when the vote is taken is required for any finding of guilty. Since we have six members, that means four members must concur in any finding of guilty.

If you have at least four votes of guilty of any offense then that will result in a finding of guilty for that offense. If fewer than four members vote for a finding of guilty, then your ballot resulted in a finding of not guilty.

You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, open the court and the president should announce only that reconsideration of a finding has been proposed. Do not state:

- (1) whether the finding proposed to be reconsidered is a finding of guilty or not guilty, or
- (2) which specification (and charge) is involved. I will then give you specific further instructions on the procedure for reconsideration.

As soon as the court has reached its findings, and I have examined the Findings Worksheet, the findings will be announced by the president in the presence of all parties. As an aid in putting your findings in proper form and making a proper announcement of the findings, you may use Appellate Exhibit 370 the Findings Worksheet.

Captain, as indicated on Appellate Exhibit \_\_\_\_, the first portion will be used if the accused is completely acquitted of all charges and specifications. The second part will be used if the accused is convicted, as charged, of all charges and specifications; and the third portion will be used if the accused is convicted of some but not all of the offenses. Once you have finished filling in what is applicable, please line out or cross out everything that is not applicable so that when I check your findings I can ensure that they are in proper form.

The worksheet in no way indicates an opinion by me or counsel concerning the findings you should reach or as to any degree of guilt of this accused. This is merely included to aid you in understanding what findings might be made in the case, and for no other purpose whatsoever. Are there any questions about the findings worksheet?

If, during your deliberations, you have any questions, please write the question on one of the question forms that have been provided to you, and send it to me via the bailiff. I will then open the court and try to answer your question. The Manual for Military Commissions prohibits me and everyone else from entering your closed session deliberations. You may not consult the Manual for Military Commissions or any other legal publication unless it has been admitted into evidence.