

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL-AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

AE617 (AAA)

Mr. al Baluchi's Motion to Compel
Communications from the International
Committee for the Red Cross Concerning the
Existence of an Armed Conflict 1996-2002

17 January 2019

1. **Timeliness:** This motion is timely filed.

2. **Relief Sought:** Mr. al Baluchi respectfully requests that the military commission compel the government to provide all communications from the International Committee of the Red Cross to the U.S. government concerning the existence and character of any armed conflict between the United States and al Qaeda from 23 August 1996 until 31 December 2002.¹

3. **Overview:** In order to prevail, the government must prove during the course of this trial that the United States and al Qaeda were engaged in hostilities—that is, an armed conflict—prior to the 11 September 2001 attacks. The government argues that the United States' armed conflict with al Qaeda began no later than 23 August 1996, with Osama bin Laden's declaration of *jihad*. The government further argues that the appropriate standard for determining the existence of a non-international armed conflict is that reiterated in the Court of Military Commission Review's

¹ Attachment B. Mr. al Baluchi notes that the discovery of ICRC-U.S. communications he seeks through this motion to compel and through DR-392-AAA is wholly distinct from the discovery he sought through AE108C (MAH, AAA, RBS, WBA) Defense Motion to Compel Discovery in Support of Defense Motion for Appropriate Relief to Compel Defense Examination of Accused's Conditions of Confinement. There, Mr. al Baluchi *et al* requested "all correspondence between the [ICRC] and the Department of Defense regarding the conditions of the [defendants'] confinement at Guantanamo." AE108C at 1. Here, Mr. al Baluchi seeks communications concerning the existence or not of an armed conflict between the United States and al Qaeda over a period predating Mr. al Baluchi's confinement at Guantanamo. Attachment B.

reversed opinion in *United States v. Hamdan*. According to the *Hamdan* standard, a determination of the existence of an armed conflict should be based on “any . . . facts or circumstances you consider relevant to determining the existence of armed conflict.”²

Due to its special role under the laws of war, the International Committee of the Red Cross (ICRC) routinely and exhaustively identifies, catalogues, and characterizes situations of armed conflict. When it identifies a situation of armed conflict, the ICRC routinely communicates its determination of the existence and character of an armed conflict to the participants therein. The ICRC generally communicates its conclusions concerning the existence and type of an armed conflict to the parties to the armed conflict, *inter alia*, to ensure compliance with the laws of war. Because it is necessary for the ICRC’s mandate that the organization collect data and accurately determine whether, when, and what type of armed conflict exists, it is likely that, if an armed conflict existed between the United States and al Qaeda prior to 11 September 2001, the ICRC would have noted it, collected information relevant to a determination of the existence of hostilities, and produced an analysis of that information to determine the existence and type of an armed conflict. Because the ICRC generally communicates its determinations concerning the existence of an armed conflict to the parties, it is likely that the ICRC communicated its findings to the United States upon determining the existence of an armed conflict.

The military commission should compel the government to provide Mr. al Baluchi with all communications from the ICRC to the U.S. government concerning the existence of an armed

² *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1278 n.54 (U.S.C.M.C.R. 2011), *reversed by Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012). The *Hamdan* instruction includes the *Tadic* standard for determining armed conflict under the law of war, among other factors. *See, e.g.*, AE502Y (AAA) Mr. al Baluchi’s Combined Response to AE502V Trial Conduct Order and Reply to AE502O Government’s Consolidated Response at 131-34.

conflict, and the character of that conflict, between the United States and al Qaeda from 23 August 1996 until 31 December 2002. Notwithstanding the government's efforts to rewrite history for purposes of this litigation, there was simply no armed conflict between the United States and al Qaeda prior to the terrorist acts of 11 September 2001. The record of communications from the ICRC to the United States between 23 August 1996 and 31 December 2002 will bear out the absence of an armed conflict before 9/11 and the existence of an armed conflict following 7 October 2001.

The absence of any communications from the ICRC to the U.S. government concerning an armed conflict with al Qaeda prior to 9/11, combined with existence of such communications following 7 October 2001, are “a[] . . . fact or circumstance” that future members of the military commission panel are likely to consider “relevant to determining the existence of an armed conflict.”³ Panel members are likely to recognize the unique and relevant contribution to the factual record represented by the ICRC's communications to the United States concerning the existence of an armed conflict between the United States and al Qaeda. Panel members are also likely to take into consideration the significance of communications—or the absence of communications—from the ICRC to the United States concerning an armed conflict with al Qaeda prior to 9/11. After all, the ICRC must accurately identify situations of armed violence and determine whether such a situation qualifies as an armed conflict in order to fulfill its mission and satisfy its mandate. Panel members are likely, therefore, to correctly infer that the failure of the ICRC to identify an armed conflict between the United States and al Qaeda before 11 September 2001 suggests the absence of such an armed conflict. Further, panel members are likely to contrast

³ *Hamdan*, 801 F. Supp. 2d at 1278 n.54.

that absence of communications with the presence of ICRC-U.S. communications reporting on the existence of an armed conflict after 7 October 2001—that contrast, in turn, will corroborate the panel members’ initial inference that there was no armed conflict between the United States and al Qaeda prior to 9/11. These inferences are exculpatory and therefore the facts giving rise to them are helpful to Mr. al Baluchi’s defense. Consequently, all communications from the ICRC to the U.S. government concerning the existence of an armed conflict, and the character of that conflict, between the United States and al Qaeda from 23 August 1996 until 31 December 2002 are material and must be provided to Mr. al Baluchi in discovery.

4. **Burden of Proof:** Mr. al Baluchi must demonstrate by a preponderance of the evidence that the requested relief is warranted.⁴

5. **Facts:**

a. The International Committee of the Red Cross (ICRC) is an uniquely credible and authoritative voice on international humanitarian law or the laws of war,⁵ with a role predicated on determining the existence and character of armed conflicts, and enshrined in the laws of war.⁶

⁴ R.M.C. 905(c)(1)-(2).

⁵ Michael N. Schmitt & Sean Watts, *State Opinio Juris and International Humanitarian Law Pluralism*, 91 INT’L L. STUD. 171, 175 (2015) (“The ICRC is undoubtedly the most influential single body in the field; indeed, few organizations or States field the IHL expertise or experience of its impressive Legal Division); INTERNATIONAL COMMITTEE OF THE RED CROSS, *THE ICRC: ITS MISSION AND WORK* 7 (2009) (“As the guardian of [the laws of war], the ICRC takes measures to ensure respect for, to promote, to reaffirm and even to clarify and develop this body of law.”); Yves Sandoz, *The International Committee of the Red Cross as Guardians of International Law*, ICRC RESOURCE CENTRE (Dec. 31, 1998); PIERRE BOISSIER, *HISTORY OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS: FROM SOLFERINO TO TSUSHIMA* 19-25 (1985); *see also* Schmitt & Watts, *supra*, at 183 (“While the ICRC may lack the de jure competency to express *opinio juris* [concerning the law of war], in the absence of State action in that regard, the organization has de facto filled the void.”).

⁶ Geneva Convention Relative to the Treatment of Prisoners of War, art. 73, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *id.* art. 123; *id.* art. 126; Geneva Convention Relative to the

b. In order to accomplish its mission of ensuring compliance with laws of war in situations of armed conflict,⁷ the ICRC identifies and categorizes armed conflicts throughout the world based on their character.⁸ It also generally communicates its determinations to the parties involved in situations of armed conflict.⁹

c. The United States has repeatedly met with the ICRC and the ICRC has repeatedly communicated its views concerning the existence of an armed conflict and the United States compliance or not with its law-of-war obligations since the 11 September 2001 attacks.¹⁰

Protection of Civilian Persons in Time of War, art. 76, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *id.* art 109; *id.* art. 137; *id.* art. 140; *id.* art. 143. *See also* INTERNATIONAL COMMITTEE OF THE RED CROSS, THE ICRC: ITS MISSION AND WORK 7 n.9 (2009).

⁷ *E.g.*, INTERNATIONAL COMMITTEE OF THE RED CROSS, THE ICRC: ITS MISSION AND WORK 6 (2009) (“The ICRC’s work developed along two lines. The first of these is operational, i.e., helping victims of armed conflict and other situations of violence. The second involves developing and promoting international humanitarian law and humanitarian principles. These two lines are inextricably linked because the first operates within the framework provided by the second, and the second draws on the experience of the first and facilitates the ICRC’s response to the needs identified.”).

⁸ *Cf.* INTERNATIONAL COMMITTEE OF THE RED CROSS, THE ICRC: ITS MISSION AND WORK 12 (2009) (“The ICRC sets priorities on the basis of the following criteria . . . the legal basis for its work: the ICRC endeavors to take action in situations where international humanitarian law is applicable and carefully considers the advisability of taking action in the context of the direct results of these situations and in other situations of violence not covered by international humanitarian law (internal disturbances and tensions). In all cases, it tailors its action according to the criteria set out above.”); *id.* n.20 (“Based on the facts on the ground, the ICRC will determine the legal nature of the situation, which will define its legal frame of reference.”).

⁹ *E.g.*, *The International Committee of the Red Cross’s (ICRC’s) Confidential Approach*, 94 INT’L REV. RED CROSS 1135, 1135-36 (2012) (“To conduct its mission, the ICRC’s preferred mode of action is persuasion, whereby it engages in confidential dialogue with the State and non-State authorities . . . directly responsible for matters relating to respect for international humanitarian law and other fundamental rules protecting persons in situations of violence.”); INTERNATIONAL COMMITTEE OF THE RED CROSS, THE ICRC: ITS MISSION AND WORK 28 (2009).

¹⁰ *E.g.*, AE310K/335K Order; AE108BB Order; Attachment D (“Representatives of the [State] Department, [Joint Chiefs of Staff], and DOD met with representatives of the ICRC on three occasions from May 21-23 in Geneva as part of an ongoing dialogue in the aftermath of September 11. The first two meetings focused on military commissions, the status of detainees, and the

d. The government argues that the United States and al Qaeda are engaged in a non-international armed conflict that began on 23 August 1996 with Osama bin Laden's declaration of *jihād*.

e. Beginning in May 1996, al Qaeda was based in Afghanistan.

f. At that time, the ICRC was actively engaged in Afghanistan due to the ongoing non-international armed conflict between the Taliban and the Northern Alliance.¹¹ As evidenced by its annual report for 1996, presumably through its presence on the ground,¹² the ICRC collected and recorded substantial data relevant to the existence of an armed conflict and the parties' implementation of and compliance with the laws of war.¹³

applicability of international humanitarian law to the Global War on Terrorism."); INTERNATIONAL COMMITTEE OF THE RED CROSS, THE ICRC: ITS MISSION AND WORK 7 (2009) ("The [ICRC] is particularly concerned about possible erosion of international humanitarian law and takes bilateral . . . steps to promote respect for and development of the law.").

¹¹ INTERNATIONAL COMMITTEE OF THE RED CROSS, ANNUAL REPORT 130-137 (1997).

¹² *Id.* at 130 (map depicting locations of ICRC delegations and affiliates throughout Afghanistan in 1996).

¹³ *E.g., id.* at 135 ("Several places, such as Kabul and Jalalabad, changed hands during the year. The detainees whom ICRC delegates had been visiting up to that point were thereupon released as prisons were emptied by the new authorities. Within a short time the delegates were back visiting the same places, this time holding those newly detained by the new authorities."); *id.* ("The ICRC was granted access by the Taliban, and the other parties, to a growing number of detainees being held by them, as a result in particular of the fall of Kabul and the fighting that ensued. These included newly captured combatants."); *id.* at 133 ("In late 1996, relief work was intensive in the north-west as many thousands of people, displaced by the clashes in Badghis province between the Taliban and General Dostom's forces, streamed into Herat."); *id.* at 131 ("In the months before the capital changed hands, while the Rabbani/Masoud forces were confronting the Taliban to the south, there were daily rocket attacks and cases of indiscriminate shelling and sniper fire, with many civilians being killed and many more wounded. The delegation protested on a number of occasions to the parties responsible for these violations of humanitarian law and, as the Taliban advanced on the city, stepped up its representations in an attempt to persuade the warring parties to spare the civilian population and ensure that routes into Kabul remained open for food and medical supplies."); *id.* at 130 ("In August, the Taliban launched an offensive directed first at

g. Between 23 August 1996 and 7 October 2001, the United States used force against targets associated with al Qaeda or Osama bin Laden only once, on 20 August 1998, under the aegis of Operation INFINITE REACH.¹⁴

h. Between 23 August 1996 and 7 October 2001—and depending on how one counts—three to ten terrorist attacks attributed to al Qaeda were perpetrated against U.S. interests on three separate days.

i. On 19 December 2018, the government based on the ICRC’s practice of communicating its views of the existence of armed conflicts to parties to such conflicts, Mr. al Baluchi requested the government provide all documents or information reflecting ICRC communications to the U.S. government concerning the existence of an armed conflict between the United States and al Qaeda or the United States and the Islamic Republic of Afghanistan between 1 January 1996 and 31 December 2002.¹⁵

j. On 21 December 2018, refused to provide Mr. al Baluchi with the discovery he requested on 19 December 2018.¹⁶

6. Argument:

The military commission should compel the government to provide Mr. al Baluchi with the discovery he requested on 19 December 2018. Documents and information reflecting

Jalalabad and neighboring provinces, then at Kabul itself, which was finally taken on 27 September, placing two-thirds of the country in Taliban hands.”)

¹⁴ See, e.g., AE502O (GOV) Government Consolidated Response to AE502L (MAH, Mr. Hawsawi’s Witness List for the August 2017 Hearings, and AE 502J (AAA), Mr. Ali’s List of Potential Witnesses for Personal Jurisdiction at 4-10.

¹⁵ Attachment B.

¹⁶ Attachment C.

communications from the International Committee of the Red Cross (ICRC) to the United States concerning the existence of an armed conflict between the United States and al Qaeda, or the United States and the Islamic Emirate of Afghanistan, are material. Communications from the ICRC concerning the existence of an armed conflict between the United States and al Qaeda are likely to demonstrate that the ICRC—a neutral, impartial organization whose mandate entails exhaustively identifying situations of armed conflict—identified no such armed conflict between the United States and al Qaeda prior to the terrorist attacks of 11 September 2001. The apolitical credibility and the expertise of the ICRC on situations of armed conflict makes its historical views concerning the contemporaneous existence or not of armed conflict highly relevant to the question of when the armed conflict between the United States and al Qaeda began.

Rule for Military Commission (R.M.C.) 701 instructs that the government must provide the defense “[a]ny books, papers, documents . . . or copies of portions thereof, which are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and which are material to the preparation of the defense.”¹⁷ R.M.C. 701’s discussion explains that materiality for purposes of R.M.C. 701(c)(1) carries the same meaning as that found in *United States v. Yunis*. According to *Yunis*—and, therefore, R.M.C. 701—evidence is material if it is “helpful to the defense of the accused.”¹⁸ Evidence that is helpful to the defense is not limited to evidence that may be presented

¹⁷ R.M.C. 701(c)(1).

¹⁸ *United States v. Yunis*, 867 F.2d 617, 625 (D.C. Cir. 1989) (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)); see also *Giles v. Maryland*, 386 U.S. 66, 101-102 (1967) (White, J. concurring) (“[T]he State’s constitutional duty . . . [is to] voluntarily . . . disclose material in its exclusive possession which is . . . helpful to the defense – which the State will not affirmatively use to prove guilt – which it should not conceal.”); *United States v. Cano*, 2004 CCA LEXIS 331,

at trial. Instead, it should include evidence that is useful to “actually preparing to defend a client.”¹⁹ “Evidence that the government does not intend to use in its case-in-chief is material or helpful if it could be used to counter the government’s case or to bolster a defense.”²⁰ “Thus although information that is in anyway exculpatory is obviously both material and helpful to the defense, so too is information that, even though not exculpatory, could still serve either to counter the government's case, for example by . . . bolster[ing] a defendant’s arguments”²¹

In this litigation, Mr. al Baluchi must *de facto* prove a negative: that no armed conflict between the United States and al Qaeda existed prior to the 9/11 attacks. Although the non-existence of this armed conflict was self-evident on 10 September 2001, the difficulty of Mr. al Baluchi’s present position is made plain each time the government insists that there was then an armed conflict while simultaneously accusing *him* of rewriting history.²² In order to defeat the government’s argument concerning the existence of U.S.-al Qaeda hostilities prior to 9/11, Mr. al Baluchi must marshal all the facts history has bequeathed him to negate the government’s effort to convert quintessentially sporadic acts of terrorist violence²³ into protracted armed violence characteristic of armed conflict.

*9 (A. Ct. Crim. App. 2004) (cautioning trial judges that more than mere evidence that will be presented at trial should be disclosed to a defendant pretrial in order to *prepare* a defense).

¹⁹ *Cano*, 2004 CCA LEXIS at *9.

²⁰ *United States v. El-Hanafi*, 2012 U.S. Dist. LEXIS 23403, *11 (N.Y.S.D. 2012) (citing *United States v. Stevens*, 985 F.2d 1175, 1180 (2d Cir. 1993)).

²¹ *Id.* at *11-*12.

²² *E.g.*, Unofficial/Unauthenticated Transcript of 18 October 2017 at 16836.

²³ Unofficial/Unauthenticated Transcript of 7 December 2017 at 18023 (Prof. Watts describing the violence between the United States and al Qaeda prior to 11 September 2001 as “almost quintessentially sporadic. They extend over a period of time, from my understanding, 1998 through 2001 They are—there are occasions of violence; however, there are long periods

One such repository of evidence indicating the absence of an armed conflict between the United States and al Qaeda prior to 9/11 exists in communications from the ICRC to the United States concerning its participation in armed conflicts. This repository of information will negate the government's assertion that hostilities between the United States and al Qaeda existed prior to 9/11, tending to deny the military commission both personal jurisdiction over Mr. al Baluchi and undermining the government's ability to prove a necessary element of each offense with which Mr. al Baluchi is charged.²⁴ Such information is therefore not only material in that it bolsters his defense, it is also exculpatory.

In order to accomplish its dual mission of ensuring protection for victims of armed conflict and promoting compliance with the laws of war, the ICRC is invested in gathering facts pertaining to, and in analyzing, situations of violence to determine whether they rise to the level of an armed conflict, triggering the laws of war. The ICRC is therefore peculiarly well positioned to provide contemporaneous, neutral, and impartial assessments as to whether any given situation of violence amounts to hostilities as they are defined under the 2009 Military Commission Act.²⁵ Likewise, in order to accomplish its mission and fulfill its mandate, the ICRC's practice is not to hide its assessments but instead, generally, to communicate them to parties engaged in armed conflicts. Thus, if any entity other than the United States or al Qaeda were to have noticed and recorded that

that don't involve violence between each of these episodes. Secondly, there are not the clashes that we were speaking of a moment ago. I'm not familiar with exchanges of fire. I'm not familiar with operations that are typically called combat in any of this period that you asked me to consider.”).

²⁴ Cf. *United States v. Boulos*, 2015 U.S. Dist. LEXIS 14002, at *6-*7 (E.D.N.Y. 2015) (denying the defendant discovery where “[i]t [was] quite clear that neither [defendant] could ‘use the withheld material ‘to bolster his defense or to counter the government’s case’”).

²⁵ 10 U.S.C. § 948a(9) (“The term ‘hostilities’ means any conflict subject to the laws of war.”).

the United States and al Qaeda were engaged in hostilities prior to 11 September 2001, the ICRC would have—and it would have informed at least the United States of its belief that such hostilities had arisen.

The documents and information Mr. al Baluchi requested from the government are material under either the consensus definition of hostilities under the law of war or the more inclusive standard advocated by the government. Under international law, hostilities between a state and a non-state actor exists whenever there is protracted armed violence between a state and a non-state actor, so long as the non-state actor exhibits sufficient organization to constitute a party to an armed conflict. Typically, under international law, the existence of a non-international armed conflict is determined by assessing the organization of the parties and the intensity of the armed violence between them.²⁶ International tribunals have developed non-exhaustive lists of factual indicia that tend to demonstrate either organization or intensity. A non-international armed conflict exists when those indicia suggest that the non-state actor is sufficiently organized to constitute a party to an armed conflict and when those indicia demonstrate that the armed violence between the parties is sufficiently intense to constitute an armed conflict.

The documents and information that Mr. al Baluchi sought through DR-392-AAA bolster his defense because they negate the existence of U.S.-al Qaeda hostilities prior to 9/11. The ICRC communications to the United States concerning the existence of an armed conflict between the

²⁶ *E.g.*, U.S. DEPARTMENT OF DEFENSE, OFFICE OF THE GENERAL COUNSEL, LAW OF WAR MANUAL § 3.4.2.2 (2015) (“There has been a range of views on what constitutes an ‘armed conflict not of an international character’. . . . The intensity of the conflict and the organization of the parties are criteria that have been assessed to distinguish between non-international armed conflict and ‘internal disturbances and tensions’”); INT’L LAW ASS’N, THE HAGUE CONFERENCE: FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 3 (2010).

United States and al Qaeda demonstrate the absence of a non-international armed conflict prior to 9/11 under the accepted international law definition of hostilities. The fact that the ICRC, an organization that must identify and classify situations of armed conflict in order to accomplish its mission, did not identify an armed conflict between the United States and al Qaeda prior to 9/11 strongly suggests that no such armed conflict existed, negating the military commission's personal and offense jurisdiction.²⁷ The absence of ICRC communications to the United States prior to 9/11 concerning the existence of an armed conflict between the United States and al Qaeda invites an inference on the part of the military commission panel members that at least the indicia of intensity necessary for an armed conflict did not obtain before the 11 September 2001 attacks.²⁸ That inference will be reinforced by the appearance of ICRC communications to the United States following the United States' invasion of Afghanistan in October 2001 that label the violence between the United States and al Qaeda an armed conflict and that remind the United States of its law-of-war obligations. Taken together, the documents and information that Mr. al Baluchi seeks will serve as the rare historical pronouncement of a thing that does not exist, corroborating nearly twenty year old memories that the United States was not at war on 10 September 2001.

The documents and information that Mr. al Baluchi sought through DR-392-AAA are likewise material under the government's preferred definition of hostilities.²⁹ Although the government's definition of hostilities is not that found at international law, it is inclusive of the

²⁷ Cf. 10 U.S.C. §§ 948a(7), 948a(9); § 948d; § 950p(c).

²⁸ Cf. *United States v. George*, 786 F. Supp. 56, 61 (D.D.C. 1992) (recognizing the materiality of contrasting documentary evidence while denying the defense's discovery request where the defendant already possessed most of what he sought and the remainder included some of the United States' "most sensitive secrets" and were only "marginally relevant").

²⁹ See AE502BBBB Order at 7.

law of war standard. Both definitions require an examination of facts that indicate organization and intensity but the government's preferred definition invites the military commission panel members to also consider "any . . . facts or circumstances you consider relevant to determining the existence of armed conflict."³⁰ This expansive clause in the government's preferred definition invites the panel to consider any other facts it may find relevant to a determination of the existence of an armed conflict and, in turn, invites Mr. al Baluchi to put on evidence of any other facts he believes the panel may find relevant.

In this case, Mr. al Baluchi believes that the panel may well find it relevant that the ICRC, an organization deeply experienced in identifying and classifying situations of armed conflict, saw no armed conflict between the United States and al Qaeda prior to 9/11. Throughout the relevant period, the ICRC had access to all the same information the government claims is necessary today to support a finding of the existence of a U.S.-al Qaeda armed conflict prior to 9/11³¹—and the ICRC, a neutral, impartial body, did not believe that information supported a conclusion that the United States and al Qaeda were engaged in an armed conflict. The government may not advocate for one legal standard while simultaneously denying Mr. al Baluchi the ability to present evidence that squarely addresses that legal standard and falls within its broad ambit.

Moreover, the ICRC reached its conclusions contemporaneously with the events in question. In contrast to the government's interpretation of history, the ICRC's perspective on the existence of an armed conflict between the United States and al Qaeda is not retrospective; neither

³⁰ *Hamdan*, 801 F. Supp. 2d at 1278 n.54.

³¹ *E.g.*, AE502O (GOV) Government Consolidated Response to AE502L (MAH, Mr. Hawsawi's Witness List for the August 2017 Hearings, and AE 502J (AAA), Mr. Ali's List of Potential Witnesses for Personal Jurisdiction at 4-10.

has it been polluted by intervening years of actual armed conflict nor by an interest in arriving at a particular conclusion irrespective of historical facts. In that way, the documents and information reflecting ICRC communications to the United States concerning any armed conflict with al Qaeda between 1 January 1996 and 31 December 2002 corroborate both history and Mr. al Baluchi's interpretation thereof.

Notably, the government does not claim that the documents and information that Mr. al Baluchi sought through DR-392-AAA do not exist or are otherwise not within its possession. Nor has the government asserted any privilege over the ICRC communications to the United States concerning the existence of an armed conflict with al Qaeda or the Islamic Emirate of Afghanistan between 1 January 1996 and 31 December 2002.³² Instead, the government asserts that the documents and information requested are neither material nor relevant.³³ But those records are clearly material because they bolster Mr. al Baluchi's defense. The contrast between pre- and post-9/11 ICRC communications to the U.S. government concerning the existence of an armed conflict between the United States and al Qaeda will demonstrate that hostilities between the United States and al Qaeda did not obtain until the United States began bombing Afghanistan on

³² In the AE108 series, the government asserted the governmental information privilege under M.C.R.E. 506 over confidential reports concerning Mr. al Baluchi's, and others, conditions of confinement generated by the ICRC and delivered to the Defense Department. AE108EE (GOV) Government Response to Defense Motion to Provide AE108BB to the Accused, Att. B (memorandum from the Deputy Secretary of Defense asserting the M.C.R.E. 506 privilege over "confidential, restricted-use" communications from the ICRC). Notwithstanding the government's assertion of privilege over the corpus of ICRC communications to the Department of Defense, after an *in camera* review, the military judge determined that, with the exception of its recommendations, the ICRC's communications "pertaining to the ICRC's inspections of, and work at, the detention facilities" at Guantanamo Bay "meet the criteria of R.M.C. 703 as to discovery to be provided to the Defense." AE108AA Order. The military commission further ordered that the specified reports be produced to the parties under seal. *Id.*

³³ Attachment C.

7 October 2001, denying the military commission both personal and offense jurisdiction over Mr. al Baluchi. A record reflecting that the ICRC identified no U.S.-al Qaeda armed conflict before 9/11 but did after 7 October 2001 is helpful to Mr. al Baluchi's defense, especially under the government's preferred standard for hostilities that invites the panel to consider any facts it may find relevant, and therefore such a record is both material and discoverable.

The military commission should not allow the government to deny Mr. al Baluchi persuasive evidence that the eventual military commission panel members may weigh at trial in determining whether hostilities between the United States and al Qaeda obtained prior to the 11 September 2001 acts of terrorism, a necessary element of the charges he faces. Doing so would prevent Mr. al Baluchi from mounting his chosen defense.

Because documents and information reflecting ICRC communications to the United States concerning the existence of an armed conflict between the United States and al Qaeda between 1 January 1996 and 31 December 2002 are helpful to Mr. al Baluchi's defense—because they bolster it—under either the government's definition of hostilities or that found in the law of war, the military commission should order the government to produce such documents and information to Mr. al Baluchi.

7. **Oral Argument:** Mr. al Baluchi respectfully requests oral argument.

8. **Certificate of Conference:** In its response to Mr. al Baluchi's discovery request, the government stated: "As the Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear

to be material to the preparation of the defense, pursuant to R.M.C. 701, the Prosecution respectfully declines to produce the requested information.”³⁴

9. Attachments:

- A. Certificate of Service;
- B. DR-392-AAA;
- C. Prosecution Response to DR-392-AAA;
- D. Department of State Cable 2002 Geneva 02277 – ICRC: Meetings with the ICRC Regarding the Global War on Terrorism, Status of Detainees, Military Commissions.

Very respectfully,

//s//
JAMES G. CONNELL, III
Learned Counsel

//s//
STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

//s//
ALKA PRADHAN
Defense Counsel

//s//
BENJAMIN R. FARLEY
Defense Counsel

//s//
MARK E. ANDREU
Capt, USAF
Defense Counsel

Counsel for Mr. al Baluchi

³⁴ Att. C.

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 17th day of January, 2019, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//
JAMES G. CONNELL, III
Learned Counsel

Attachment B



DEPARTMENT OF DEFENSE
MILITARY COMMISSIONS DEFENSE ORGANIZATION
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

19 December 2018

MEMORANDUM FOR Trial Counsel

FROM: Sterling R. Thomas, Lt Col, USAF, Defense Counsel for Mr. al Baluchi

SUBJECT: DEFENSE REQUEST FOR DISCOVERY
**International Committee of the Red Cross Communications to the U.S.
Government Concerning Existence of an Armed Conflict with al Qaeda**

Discovery Request

Defendant, by and through undersigned counsel pursuant to RMC 701, 10 U.S.C. § 949p-4, Common Article III to Geneva Convention (III) Relative to the Treatment of Prisoners of War, the Due Process Clause of the Fifth Amendment, the Confrontation Clause to the Sixth Amendment, and the Compulsory Process Clause of the Sixth Amendment to the United States Constitution, hereby requests that the government produce the discovery described below.

Definitions

In this request, the following definitions shall govern:

“Document” means any recorded information, regardless of the nature of the medium or the method or circumstances of recording.

“Information” means any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, and to include handwritten, recorded, or electronic documents.

“Produce” means to convey to the defense without redaction (except as authorized by the military commission pursuant to MCRE 505) or alteration of any electronically stored information associated with the document. If the military commission authorizes substitutions or redactions pursuant to MCRE 505, the word “produce” includes a notation of the Appellate Exhibit number of the order authorizing the substitutions or redactions. To the extent that responsive documents are subject to the attorney-client or other applicable privilege, the word “produce” means to provide a privilege log of any withheld information or documents, along with the facts disclosed in the responsive documents that are not communications protected by attorney-client privilege, and documents attached and/or incorporated into the responsive documents that are not otherwise exempt.

Background

In this litigation, the United States asserts that it was engaged in a non-international armed conflict with al Qaeda from 23 August 1996 through at least the capture of the defendants in *United*

DR-392-AAA
2018-12-19

States v. Mohammad et al. Both at trial and before, the government must demonstrate the existence of a non-international armed conflict.

The International Committee for the Red Cross (ICRC) is a neutral, non-governmental international organization that plays a unique role with respect to international humanitarian law or the laws of war. Because the ICRC's overarching mission is to bring the protections of the laws of war to be affected by armed conflict, the ICRC exhaustively identifies, catalogs, and classifies situations of armed conflict. In order to ensure that participants in armed conflicts comply with and implement the laws of war, the ICRC generally informs parties of its determination of the existence and type of an armed conflict. Such communications may occur in writing or through face-to-face dialogue with ICRC representatives.

Request

Please produce any and all documents or information reflecting communications from the ICRC to the U.S. government concerning the existence of an armed conflict between the United States and al Qaeda, or the United States and the Islamic Emirate of Afghanistan, between 1 January 1996 and 31 December 2002. Such documents or information may take the form of, but are not limited to:

- (a) letters, diplomatic notes, notes verbales, or other written communications from the International Committee of the Red Cross or its delegations to the Secretary of State, the Secretary of Defense, or any other officer of the U.S. government;
- (b) telegrams, cables, record e-mails, e-mails, TDs, TDXs, IIRs, CIRs, or any other recording or reporting method used by the U.S. government to memorialize or convey information received through formal or informal diplomatic or other communications between the U.S. government and the International Committee of the Red Cross or its delegations.

Thank you for your prompt attention to this matter. Please do not hesitate to contact me if you require any clarifications or additional information.

Respectfully submitted,

//s//
STERLING R. THOMAS
Lieutenant Colonel, USAF
Counsel for Mr. al Baluchi

Attachment C



OFFICE OF THE
CHIEF PROSECUTOR

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

21 December 2018

MEMORANDUM FOR Defense Counsel for Ali Abdul Aziz Ali

SUBJECT: Prosecution Response to 19 December 2018 Request for
Discovery (DR-392-AAA)

1. The Prosecution received the Defense classified request for discovery on 19 December 2018. The Prosecution hereby responds to the Defense request, below in bold.

2. In this litigation, the United States asserts that it was engaged in a non-international armed conflict with al Qaeda from 23 August 1996 through at least the capture of the defendants in United States v. Mohammad et al. Both at trial and before, the government must demonstrate the existence of a non-international armed conflict.

The International Committee for the Red Cross (ICRC) is a neutral, non-governmental international organization that plays a unique role with respect to international humanitarian law or the laws of war. Because the ICRC's overarching mission is to bring the protections of the laws of war to be affected by armed conflict, the ICRC exhaustively identifies, catalogs, and classifies situations of armed conflict. In order to ensure that participants in armed conflicts comply with and implement the laws of war, the ICRC generally informs parties of its determination of the existence and type of an armed conflict. Such communications may occur in writing or through face-to-face dialogue with ICRC representatives.

Please produce any and all documents or information reflecting communications from the ICRC to the U.S. government concerning the existence of an armed conflict between the United States and al Qaeda, or the United States and the Islamic Emirate of Afghanistan, between 1 January 1996 and 31 December 2002. Such documents or information may take the form of, but are not limited to:

(a) letters, diplomatic notes, notes verbales, or other written communications from the International Committee of the Red Cross or its delegations to the Secretary of State,

the Secretary of Defense, or any other officer of the U.S. government;
(b) telegrams, cables, record e-mails, e-mails, TDs, TDxs, IIRs, CIRs, or any other recording or reporting method used by the U.S. government to memorialize or convey information received through formal or informal diplomatic or other communications between the U.S. government and the International Committee of the Red Cross or its delegations.

The legal definition of hostilities, as adopted by the Court of Military Commissions Review in the case of *United States v. Hamdan*, lists the elements required to prove hostilities. The substance of communications between the United States and the International Committee of the Red Cross from 1996 to 2003 have no bearing on any of these elements, and as such are neither relevant nor discoverable.

As the Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701, the Prosecution respectfully declines to produce the requested information.

Respectfully submitted,

//s//

Clay Trivett
Managing Trial Counsel

Attachment D

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Document Number: 2002GENEVA02277

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PAGE 01 GENEVA 02277 01 OF 05 191958Z
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USMISSION USUN NEW YORK IMMEDIATE

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C O N F I D E N T I A L SECTION 01 OF 05 GENEVA 002277

L FOR CUMMINGS/KAYE/BOWKER; OSD/GC FOR BURGER/LIETZAU; JCS FOR BROOKS

E.O. 12958: DECL: 06/19/2007
TAGS: IFRC ICRC MOPS
SUBJECT: ICRC: MEETINGS WITH THE ICRC REGARDING THE GLOBAL WAR ON TERRORISM, STATUS OF DETAINEES, MILITARY COMMISSIONS

B1

REF: A. GENEVA 1830

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PAGE 02 GENEVA 02277 01 OF 05 191958Z
B. 01 GENEVA 4432
C. 01 GENEVA 4471

CLASSIFIED BY: STEVE SOLOMON, MISSION DEPUTY LEGAL ADVISER, FOR REASONS 1.5 (B) AND (D)

1. (C) SUMMARY. REPRESENTATIVES OF THE DEPARTMENT, JCS, AND DOD MET WITH REPRESENTATIVES OF THE ICRC ON THREE OCCASIONS FROM MAY 21-23 IN GENEVA AS PART OF AN ONGOING DIALOGUE IN THE AFTERMATH OF SEPTEMBER 11. THE FIRST TWO MEETINGS FOCUSED ON MILITARY COMMISSIONS, THE STATUS OF DETAINEES, AND THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW TO THE

Current Class: CONFIDENTIAL

Page: 1

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: SHARON E AHMAD
DATE/CASE ID: 06 DEC 2004 200303827

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DOS-002061

Current Class: CONFIDENTIAL
Current Handling: n/a
Document Number: 2002GENEVA02277

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Page: 2

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GLOBAL WAR ON TERRORISM,



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Page: 2

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DOS-002063

Current Class: CONFIDENTIAL ~~UNCLASSIFIED~~
Current Handling: n/a
Document Number: 2002GENEVA02277

Page: 3

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END SUMMARY.

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2. (U) AN ICRC DELEGATION VISITED THE U.S. MISSION IN GENEVA ON MAY 21 TO TAKE PART IN AN INFORMAL MEETING ON ISSUES RELATING TO INTERNATIONAL HUMANITARIAN LAW, THE STATUS OF DETAINEES, AND MILITARY COMMISSIONS. THE ICRC ATTENDEES WERE MR. JEAN-PHILIPPE LAVOYER, HEAD OF THE LEGAL DIVISION; MS ANNE RYNIKER, DEPUTY HEAD OF THE LEGAL DIVISION; MS CATHERINE DEMAN, LEGAL ADVISER TO THE OPERATIONS, LEGAL DIVISION; MS JELENA PEJIC, LEGAL ADVISER, LEGAL DIVISION; AND MR. GABOR RONA, LEGAL ADVISER, LEGAL DIVISION. THE U.S. GOVERNMENT ATTENDEES WERE MR. EDWARD CUMMINGS, DEPARTMENT OF STATE, ASSISTANT LEGAL ADVISER; MR. STEVE SOLOMON, U.S. MISSION GENEVA, DEPUTY LEGAL ADVISER; MR. DAVID BOWKER, DEPARTMENT OF STATE, ATTORNEY-ADVISER FOR POLITICAL-MILITARY AFFAIRS; MR. JAMES BURGER, DEPARTMENT OF DEFENSE, OFFICE OF GENERAL COUNSEL; COLONEL WALDO BROOKS, JOINT STAFF, OFFICE OF THE CHAIRMAN'S LEGAL COUNSEL; AND LT. COLONEL WILLIAM LIETZAU, DEPARTMENT OF DEFENSE, OFFICE OF GENERAL COUNSEL. MR. CUMMINGS AND MR. LAVOYER HEADED THEIR RESPECTIVE DELEGATIONS.



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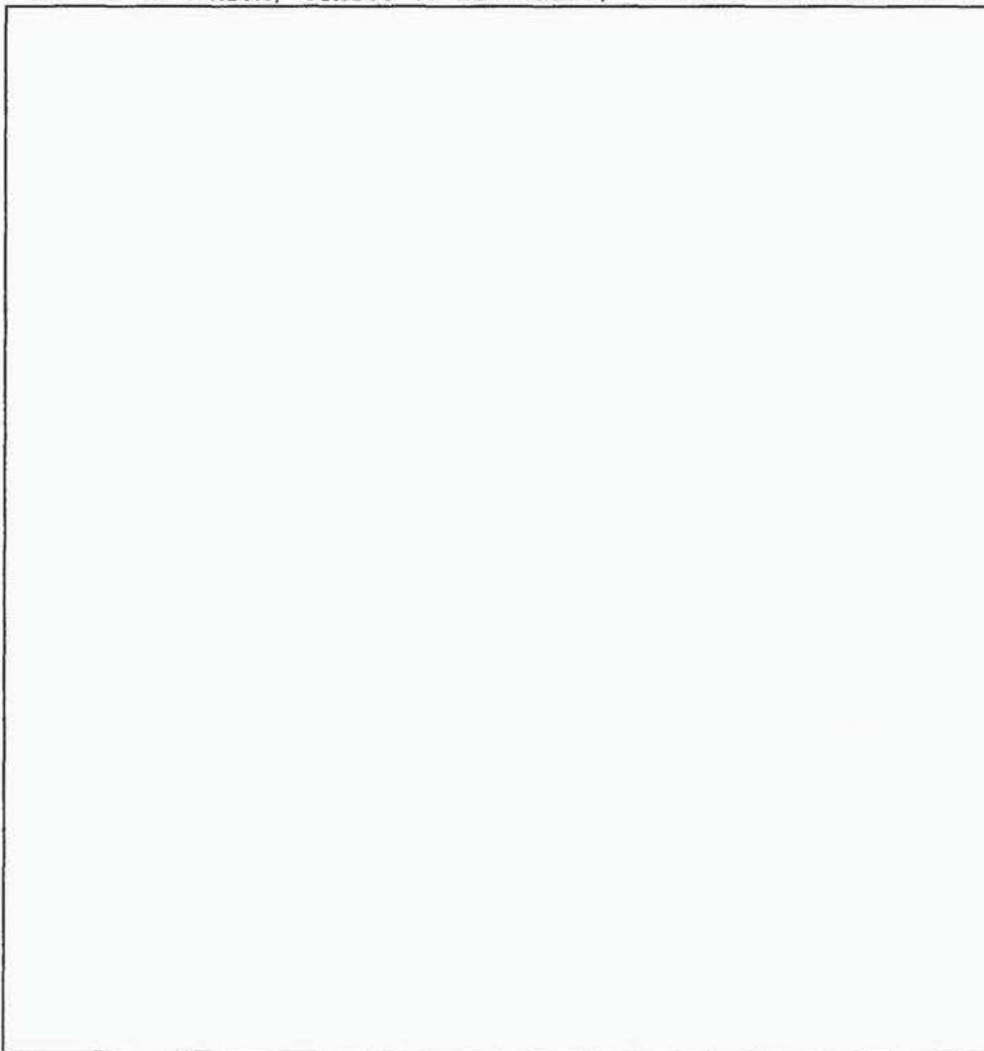
C O N F I D E N T I A L SECTION 02 OF 05 GENEVA 002277

L FOR CUMMINGS/KAYE/BOWKER; OSD/GC FOR BURGER/LIETZAU; JCS
FOR BROOKS

E.O. 12958: DECL: 06/19/2007

TAGS: IFRC ICRC MOPS

SUBJECT: ICRC: MEETINGS WITH THE ICRC REGARDING THE GLOBAL
WAR ON TERRORISM, STATUS OF DETAINEES, MILITARY COMMISSIONS



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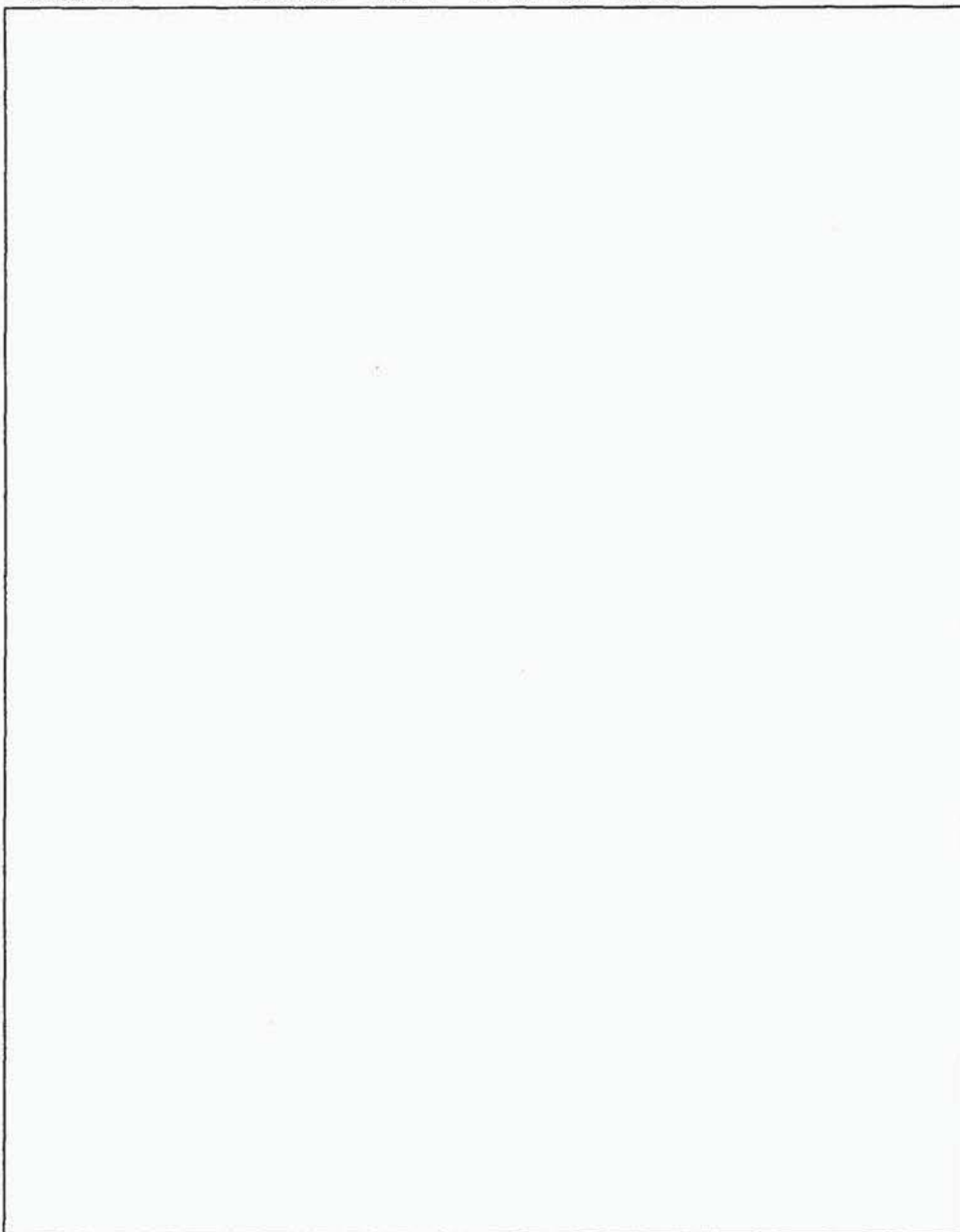
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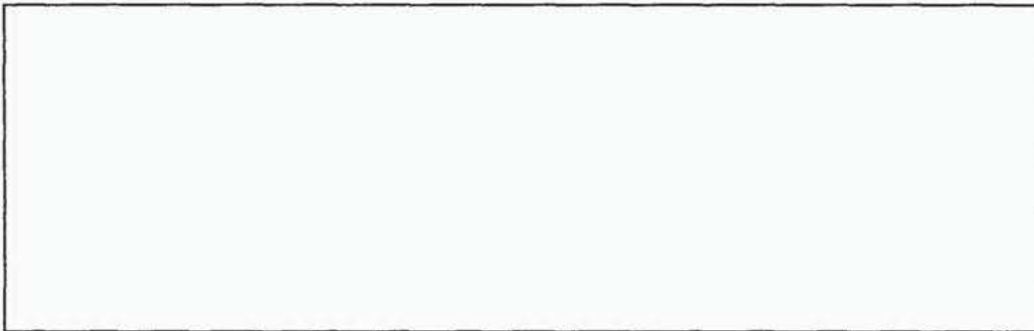
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C O N F I D E N T I A L SECTION 03 OF 05 GENEVA 002277

L FOR CUMMINGS/KAYE/BOWKER; OSD/GC FOR BURGER/LIETZAU; JCS
FOR BROOKS

E.O. 12958: DECL: 06/19/2007
TAGS: IFRC ICRC MOPS
SUBJECT: ICRC: MEETINGS WITH THE ICRC REGARDING THE GLOBAL
WAR ON TERRORISM, STATUS OF DETAINEES, MILITARY COMMISSIONS



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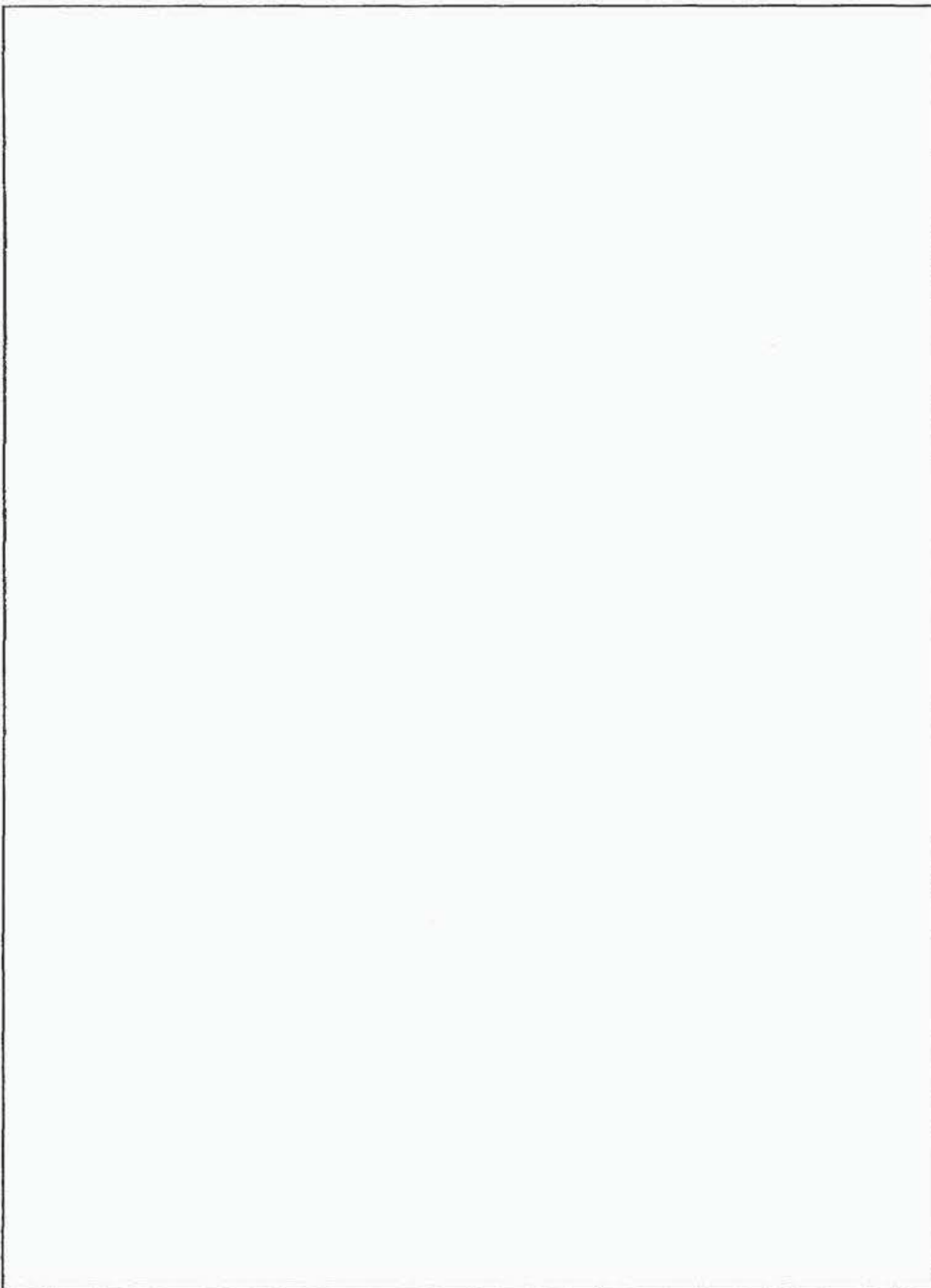
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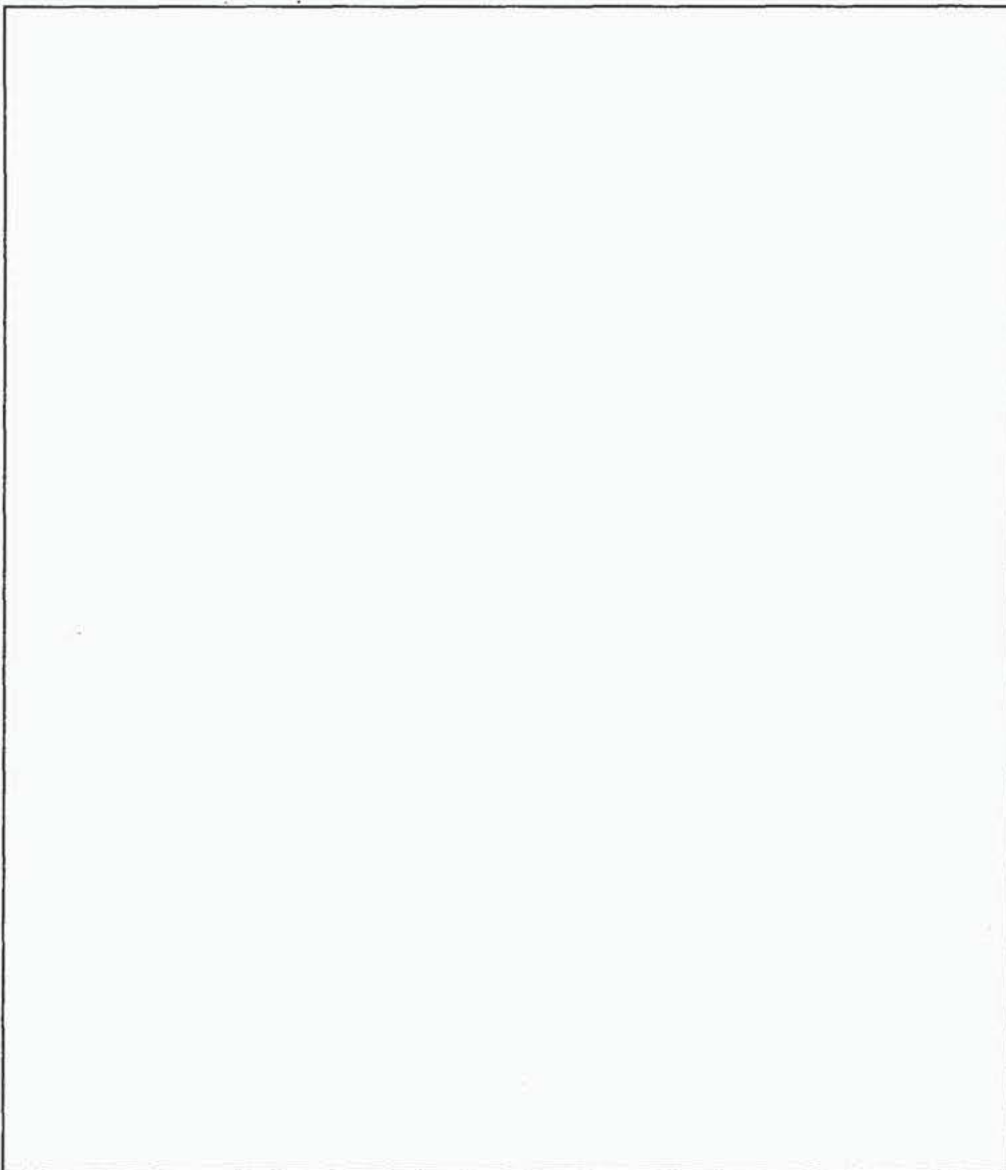
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PAGE 01 GENEVA 02277 04 OF 05 191959Z
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C O N F I D E N T I A L SECTION 04 OF 05 GENEVA 002277

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FOR BROOKS

E.O. 12958: DECL: 06/19/2007
TAGS: IFRC ICRC MOPS
SUBJECT: ICRC: MEETINGS WITH THE ICRC REGARDING THE GLOBAL
WAR ON TERRORISM, STATUS OF DETAINEES, MILITARY COMMISSIONS



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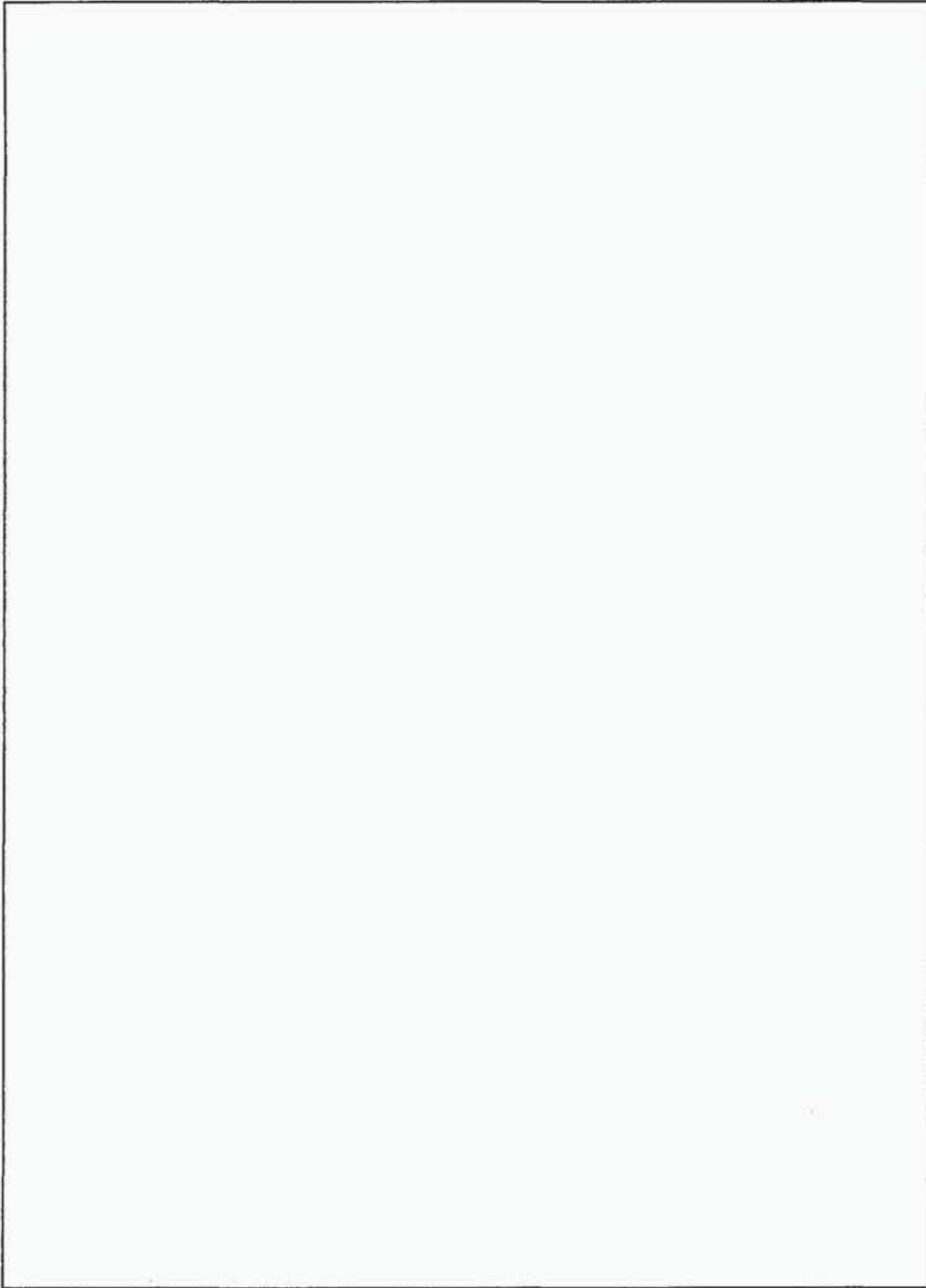
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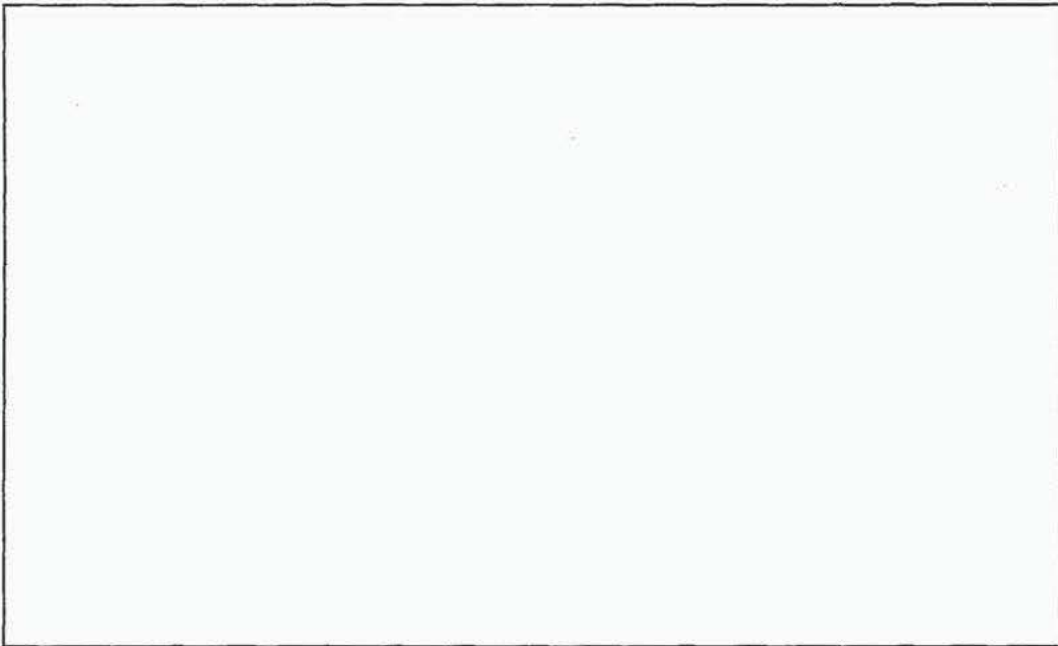
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C O N F I D E N T I A L SECTION 05 OF 05 GENEVA 002277

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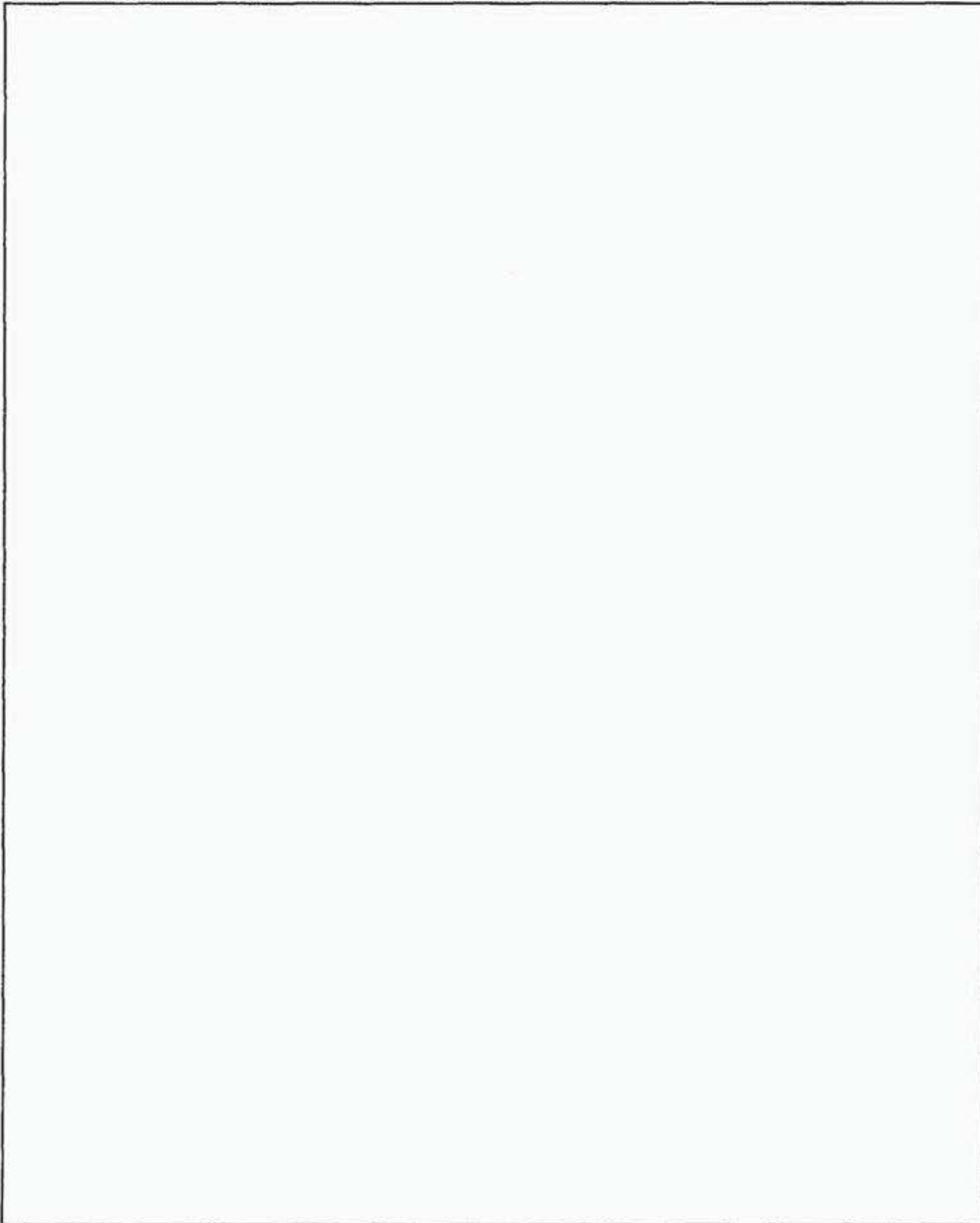
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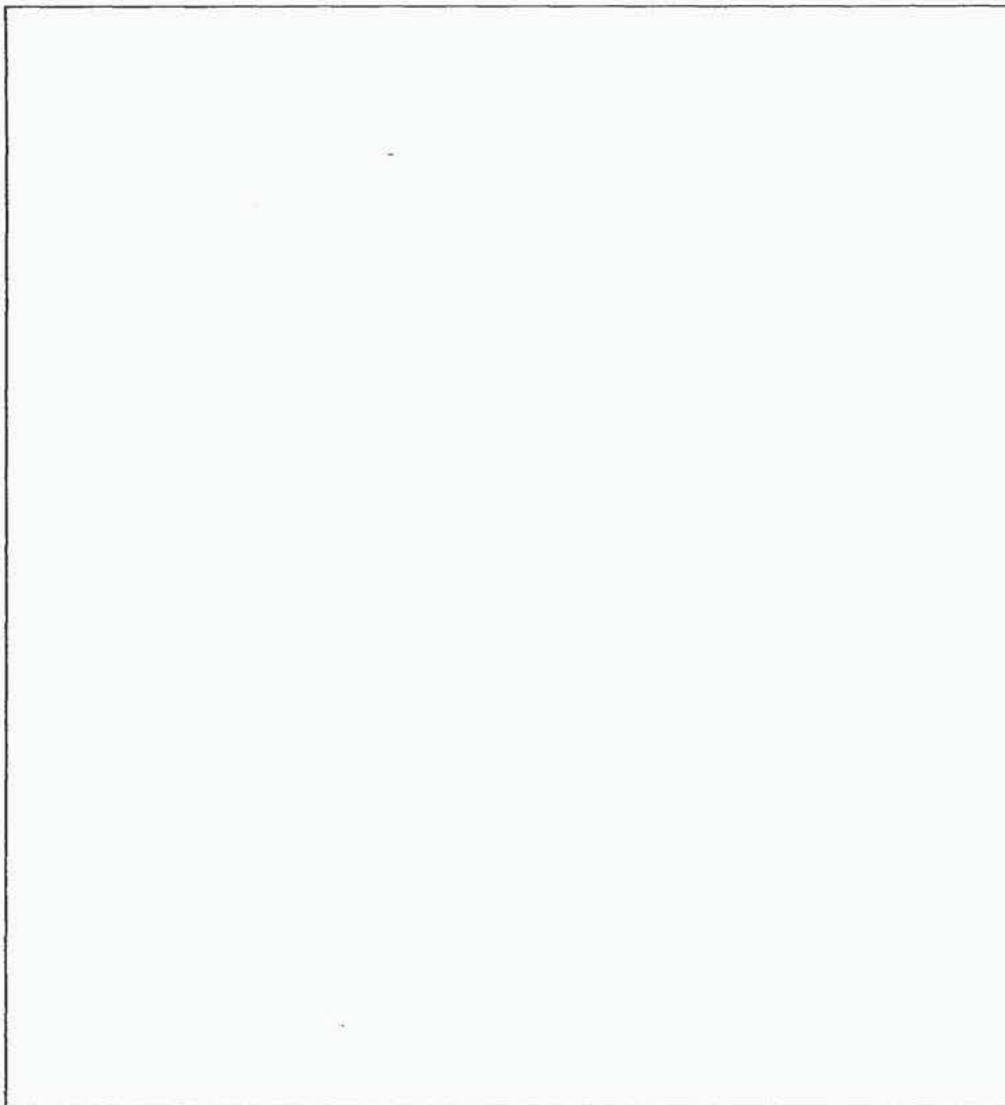
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