

## PO 103 RESPONSE

Question 1: Is the Military Commission a competent tribunal to decide the accused's status under the provisions of Article 5, GPW?

In *Hamdan v. Rumsfeld*, 415 F.3d 33, 43 (D.C. Cir. 2005), the Court said "Hamdan claims that AR 190-8 entitles him to have a 'competent tribunal' determine his status. But we believe the military commission is such a tribunal.... We therefore see no reason why Hamdan could not assert his claim to prisoner of war status before the military commission at the time of his trial and thereby receive the judgment of a 'competent tribunal' within the meaning of Army Regulation 190-8."

Nothing under the President's Military Order of 13 November 2001, the Military Commission Orders, or subsequent Military Commission Instructions prohibits the accused from asserting his claim of prisoner of war status. While the Military Commission would in effect be considering the same questions as an Article 5 tribunal in order to resolve an accused's asserted claim of prisoner of war status, it is not necessary for the Commission to convene as a competent tribunal within the meaning of Army Regulation 190-8.

Question 2: Assuming the answer to question 1 is in the affirmative, who has the burden of proof to prove that the accused is entitled, or not entitled, to prisoner of war status?

The burden is on the accused to assert his claim of prisoner of war status by showing whether there is "any doubt" as to his status. If any doubt arises, the burden is on the accused to prove, by a preponderance of the evidence, his asserted claim of prisoner of war status, and the burden is on the Government to prove, by a preponderance of the evidence, the accused is not entitled to his asserted claim of prisoner of war status. Section 1-6(a) and (e)(9), AR 190-8.

Question 3: Assuming the answer to question 1 is in the affirmative, who makes that decision – the Presiding Officer alone, or members other than the Presiding Officer, or all members of the Commission?

Pursuant to section 4(A)(5)(a), Military Commission Order Number 1 (MCO No. 1) of 31 Aug 05, "[t]he Presiding Officer shall rule upon all questions of law." The other members "shall determine the findings and sentence without the Presiding Officer, and may vote on the admission of evidence, with the Presiding Officer, in accordance with Section 6(D)(1)." The Prosecution contends that whether members of the Taliban or Al-Qaida are unlawful combatants and do not qualify as prisoners of war under Art. 4, GPW, is a question of law within the exclusive purview of the Presiding Officer. This Prosecution position is supported by the President's memorandum "Humane Treatment of al Qaeda and Taliban Detainees" of 7 Feb 02, and *Hamdan v. Rumsfeld*, 415 F.3d 33, 41-42 (D.C. Cir. 2005). Whereas, whether the accused is a member of the Taliban, Al-Qaida, or any of the other categories enumerated in Art. 4, GPW, is a question of fact for

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the military commission members. This factual determination, if necessary, is most appropriately conducted in conjunction with the true mandate and limited jurisdiction of a military commission -- the full and fair trial of: (1) any individual subject to the President's Military Order (66 F.R. 57,833; Nov. 16, 2001) and (2) alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority. Section 3, MCO No. 1.