IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAKHDAR BOUMEDIENE, *et al.*,	)	
Petitioners,	)	**Civil Action No. 04-CV-1166 (RJL)**
v.	)	
GEORGE W. BUSH President of the United States, *et al.*,	)	
Respondents/Defendants.	)	

PETITIONERS' OPPOSITION TO RESPONDENTS' MOTION TO STRIKE THE DECLARATION OF GARY D. SOLIS, J.D., Ph.D.

Petitioners hereby oppose Respondents' Motion to Strike the Declaration of Gary D. Solis, J.D., Ph.D. ("Mot.") on the grounds that (1) expert testimony on international law, including the laws of war and State practice thereunder, is admissible in federal courts; and (2) the Solis Declaration will assist the Court by providing information about a complex, specialized area of international law that has been deeply influenced by historical practice.

INTRODUCTION

Respondents ask the Court to strike Professor Solis' declaration even though, as they appear to recognize, Professor Solis is a recognized expert in the law of war and is eminently qualified to render the opinions expressed in his Declaration. He is an adjunct professor who teaches the law of war at Georgetown University Law Center and is the former head of the law of war program at the US Military Academy at West Point. *See* Trav. Ex. ¶¶ 5.a-i (Solis Decl.).

He has spent the last four decades studying, researching, teaching, and (as a Marine Corps officer in the field in Vietnam) applying the precepts of the laws of war that are the subject of his opinion.

Respondents do not argue that Professor Solis' opinion is poorly reasoned, insufficiently supported, or unreliable. Respondents instead argue only that "experts are prohibited from interpreting the law for the court or advising the court about how the law should apply to the facts of a particular case." Mot. at 3. That is often (though not always) true when it comes to garden-variety questions of *domestic* law. Obviously, this case is very different. This case involves complex questions relating to the law of armed conflict—which is a field of *international*, not domestic, law. Courts routinely receive testimony from *foreign* and *international* law experts—because, as is the case here, such testimony can assist the court in understanding and applying a highly specialized area of law that is heavily informed by custom, State practice, and history. Expert testimony on international law has been found especially appropriate when the matter in question relates to the executive's authority to detain, in cases arising out of such diverse situations as detention in Iraq, the war in Vietnam, the Cuban "Marielitos," and torture in Paraguayan prisons.

The Solis Declaration will assist the Court in rendering a definition of enemy combatant and in applying that definition to the facts of this case. The area of Professor Solis' expertise is based heavily on the norms and accumulated practices of States, including the United States and its allies; it is not a subject easily researched or analyzed by lay civilian lawyers and judges. The Declaration explicates and distills four decades of Professor Solis' experience in the law of armed conflict and provides his expert opinion "regarding State practice – particularly United

States practice – under the law of armed conflict with respect to the treatment of combatants and civilians." Trav. Ex. 18 ¶ 6.a (Solis Decl.).

The Solis Declaration also assists the Court by offering a factual, historical perspective on how the United States has viewed and accepted the law of war. *See, e.g.*, *id.* ¶ 6.c (discussing United States' acceptance of certain provisions of Additional Protocol I to the Geneva Conventions as binding notwithstanding that the Senate has not ratified them); *id.* (discussing 1863 Lieber Code); *id.* ¶ 6.f (discussing U.S. Army's 1956 Field Manual). To the extent the Solis Declaration provides legal conclusions, these are conclusions about what the laws of war actually *are*, not arguments about what they should be. *See, e.g.*, *id.* ¶¶ 6.c-f (discussing definitions of "combatant" and "civilian" under Additional Protocol I of the Geneva Conventions).

The Solis Declaration is not intended to replace the law-finding and law-applying functions of this Court. Rather, it is offered to assist the Court in evaluating the competing definitions of "enemy combatant" proffered by Petitioners and Respondents, and in applying whatever definition is ultimately fashioned by the Court to the facts of the case. What apparently aggrieves Respondents is not Professor Solis' qualifications (which are undisputed), nor the legitimacy of receiving his testimony on this specialized area of international law, but instead the fact that his testimony demonstrates that Respondents' proposed definition of "enemy combatant" is squarely at odds with long-standing principles of combatancy as recognized under the laws of war. Respondents cannot claim that they are unfairly prejudiced by the Court's consideration of Professor Solis' opinion merely because they do not like it. Notably, no expert in the laws of war (much less an expert of similar stature to Professor Solis) has appeared to testify in support of Respondents' definition. The Court is more than capable to decide what

weight to give Professor Solis' opinion in rendering its decision—a point Respondents have not hesitated to urge with respect to their own evidence.

ARGUMENT

I. Respondents' Argument Does Not Apply To Expert Testimony Concerning The Content of International Law, Such As The Laws Of War

Expert testimony concerning the content of foreign and international law, including the laws of war, is admissible in United States courts. The entire argument in Respondents' Motion to strike Professor Solis' expert testimony is irrelevant because it fails to address the admissibility of expert testimony on *international* law. Respondents argue that the Solis Declaration should be stricken because it offers legal conclusions, which fall within "the distinct and exclusive province of the trial judge." Mot. at 3. Respondents dedicate nearly the entirety of their motion to the citation of cases and articles in support of this proposition. *See* Mot. at 3-5. However, almost none of the authorities cited by Respondents addresses a situation where, as here, the expert testimony concerns the content of *international* or *foreign* law. Moreover, the sole case pertaining to international law that the government cites does not stand for the proposition for which it is offered. On the contrary, it supports the admissibility of Professor Solis' Declaration. Even if the ordinary rules of evidence applied in this case—and the Government has repeatedly urged, and the Court has ruled, that they do not—they would pose no barrier to the Court's consideration of Professor Solis' expert testimony.

Federal Rule of Civil Procedure 44.1 expressly states that "[i]n determining foreign law, the court may consider any relevant material or source, ***including testimony***, whether or not

submitted by a party or admissible under the Federal Rules of Evidence." (emphasis added).[1] The same applies to expert testimony regarding international law. *See, e.g.*, *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 902 (N.D. Ga. 1985) (citing to section 113 for the proposition that "expert testimony is an acceptable method of determining international law"); Restatement (Third) of the Foreign Relations Law of the United States, § 113 ("Courts may in their discretion consider any relevant material or source, including expert testimony, in resolving questions of international law."); Part II *infra* (citing cases). As Justice O'Connor recently stated, "[i]nternational law is one of the few legal issues that can be resolved, in part, by expert testimony. Those expert witnesses are frequently scholars in international law." Sandra Day O'Connor, *Keynote Address: Dedication of the Eric E. Hotung International Law Center Building, Georgetown University Law Center, October 27, 2004*, 36 Geo. J. Int'l L. 651, 654 (2005).

International law experts, like foreign law experts, are in many ways more analogous to experts who address matters of fact than to those who might address matters of domestic law, since they opine not on what the Court ought to do, but rather on what international law *is* so that

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[1] Federal courts have consistently ruled in favor of admitting testimony concerning the content of foreign law by qualified experts. *See, e.g.*, *Ganem v. Heckler*, 241 U.S. App. D.C. 11 (D.C. Cir. 1984) ("Generally, written or oral expert testimony accompanied by extracts from foreign legal material is the basic method by which foreign law is proved."); *Nalls v. Rolls-Royce, Ltd.*, 226 U.S. App. D.C. 276 (D.C. Cir. 1983) ("[T]he trial court will have to resolve difficult questions of foreign law on the basis of expert testimony."); *Bamberger v. Clark*, 129 U.S. App. D.C. 70 (D.C. Cir. 1968) ("in ascertaining the foreign law we pay careful attention to the expert testimony adduced at the agency hearing"); *MBI Group, Inc. v. Credit Foncier du Cameroun*, 558 F. Supp. 2d. 21, 35 (D.D.C. 2008) ("A proceeding before this Court applying Cameroonian law would require the testimony of several legal experts familiar with that body of law."); *In re Vitamin Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25070, at *55 (D.D.C. Sept. 10, 2001) ("In reaching my conclusion, I place primary reliance on the Declaration of Mr. Blumrosen and on the absence of any contrary foreign law expert opinions supporting the defendants' assertions.").

the Court can apply international law to the case at hand. *See United States v. Yousef*, 327 F.3d 56 (2d. Cir. 1995) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)) (international law experts testify not on "what the law *ought to be*, but for trustworthy evidence of *what the law really is*." (emphasis in original)). The international law expert is therefore not opining on the ultimate issue of the case, since it is up to the Court to decide how to employ international law to the facts of the case at hand.

Expert testimony on international and foreign law is also admissible because the subject matter is more difficult for a U.S. judge to research and discern than is U.S. domestic law. Thus, as the Fourth Circuit has recognized, unlike cases concerning domestic law, "the court may receive and consider the opinions of experts in . . . foreign law, usually practitioners in that law, as to the meaning and applicability of that law to a controversy pending in one of our courts." *Adalman v. Baker, Watts & Co*., 807 F.2d 359, 366 (4th Cir. 1986) (noting that such expert witness evidence is presented to the judge in part to assist with "understanding the requirements of a different legal system"); s*ee also* Hans W. Baade, *Proving Foreign and International Law in Domestic Tribunals*, 18 Va. J. Int'l L. 619, 624- 625 (1978) (because judges cannot be expected to know foreign law as thoroughly as they know the laws of their jurisdiction, "[q]uestions of foreign law tend to be tried by a combination of expert testimony and argument from counsel.").

In contrast to domestic law, which is found primarily in cases and statutes, international law derives also from State practice and custom, which is not readily ascertainable by ordinary legal research methods. *See* Harold G. Maier, *The Role of Experts in Proving International Human Rights Law in Domestic Courts: A Commentary*, 25 Ga. J. Int'l & Comp. L. 205 (1996) ("Although customary international law is used by United States courts in the same manner as any other law, its content and applicability are often proved by expert testimony rather than by

means of citation and argumentation by counsel. This is so because of a perceived 'special nature' of international law."). Professor Solis can assist the Court by shedding light on what State practice and custom are so that the Court may apply them to the facts at hand.

The Government's selective, elliptical quotation from its only case touching on international law is misleading. In *United States v. Yousef*, 327 F.3d 56 (2d. Cir. 2003), the Second Circuit actually determined that, while scholarly opinions could not trump a state's formal lawmaking actions or official actions, the opinions of professors of international law would still be considered and relied on by the court "as evidence of the established practice of States." *Id.* at 103. This is precisely what Professor Solis provides: evidence of established State practice under the laws of war.

II. Expert Testimony On International Law, Including The Laws Of War, Is Routinely Admitted In Federal Courts

There is a long history of admitting expert testimony on international law in general, and the laws of war in particular, in federal courts. In *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179, 213 (D.D.C. 2003), *vacated on other grounds*, 370 F.3d 41 (D.C. Cir. 2004), the Court recognized two experts on the law of war who provided testimony directly analogous to that offered by Professor Solis. Both experts rendered legal opinions about liability under the law of

war for detention of the Petitioners in the action. *Id.*[2] Even though these experts testified as to the ultimate outcome (liability) under the specific facts of the case—something Professor Solis does *not* do here—their testimony was admissible because it demonstrated to the Court what the law of war *is* so that the Court itself could apply it to the given situation.

Indeed, the United States Government itself has introduced expert testimony on international law as it relates to war. During the 1995 U.S. peacekeeping mission in Haiti, Captain Lawrence Rockwood led an unauthorized trip to a Haitian prison to bring attention to human rights violations. During Rockwood's subsequent court martial for the unauthorized visit, the Army introduced expert testimony that no element of customary humanitarian law, the Geneva Conventions, or human rights law applied to the U.S. troops in Haiti. *See* Robert O. Weiner & Fionnuala Ni Aolain, *Beyond the Laws of War: Peacekeeping in Search of a Legal Framework*, 27 Colum. Human Rights L. Rev. 293, 302 n.54 (1996).

There are numerous additional cases where federal courts have admitted expert testimony concerning the content of international law. To list just a few additional examples:

- After the Mariel Boatlift in 1980, more than a hundred thousand Cuban nationals came to the United States, many of whom had been released from jails or mental hospitals. In determining how customary international law would treat the continued detention of the 1800

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[2] Col. David Graham, Special Assistant to the Judge Advocate General, testified that "States cannot absolve themselves of liability by claiming that torture occurred under the control of units such as their armed forces or intelligence services. . .. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them. Under international law not even a change of government absolves a state of responsibility for its 'grave breaches.'" *Acree*, 271 F. Supp. 2d at 213. Similarly, Patrick Lang, former Defense Intelligence Officer for the Middle East, South Asia, and Counterterrorism, testified that "the POWs who are the plaintiffs in this suit were held and systematically abused in violation of the law of war by the official Iraqi government agencies." *Id.* at 214.

"Marielitos" that had not been paroled and had been sent to the federal penitentiary in Atlanta for an indeterminate period of time, a federal court accepted the expert testimony of international law professors Louis Henkin and Harold G. Maier. *See Fernandez-Roque v. Smith*, 622 F. Supp. 887, 902 (N.D. Ga. 1985).

- In *Filartiga v. Pena-Irala*, 630 F.2d 876, 879 (2d Cir. 1980), the Court accepted a number of affidavits from distinguished international legal scholars describing how torture is treated under the law of nations in a wrongful death case by Paraguayan citizens against another Paraguayan citizen that had tortured and killed a family member because of his political beliefs.

- In *Mudd v. Caldera*, 26 F.Supp.2d 113, 121 (D.D.C. 1998), Dr. Jan Horbaly, an expert on court martial jurisdiction, testified before an Army Board for Correction of Military Records and opined on the jurisdiction of a military commission over aliens under the law of war. Based on Dr. Horbaly's expert testimony regarding law of war jurisdiction over citizens, the Court found that the Assistant Secretary's decision, which rejected the ABCMR's conclusion that the military commission had lacked jurisdiction under the law of war, was arbitrary and capricious. *Id.* at 120-23.

- In *United States v. Royal Caribbean Cruises*, 11 F. Supp. 2d 1358, 1361 (S.D. Fla. 1998), the Court permitted multiple international law experts to testify that the charging theory of a case involving illegal oil dumping (and falsifying documents) was inconsistent with international law. On this question of international law, the U.S. government introduced the expert testimony of the Assistant Legal Advisor for Oceans, International Environment and Scientific Affairs at the Department of State. *See id.* at 1368. The Court found that the

"expert testimony presented by both sides regarding this issue was most informative and helpful." *Id.* at 1366.

- In *Grupo Protexa v. All Am. Marine Slip*, 856 F. Supp. 868, 878 (D.N.J. 1993), the Court permitted two experts to testify regarding whether the Port Captain's order to remove a wrecked ship was a violation of international law—one of the central issues in the case—and based its decision almost entirely upon an analysis of the expert testimony.

- In *In re Alien Children Education Litigation*, 501 F. Supp. 544 (S.D.Tex. 1980), the court permitted two international law experts to testify regarding the self-executing nature of Article 47(a) of the Protocol Relating to the Status of Refugees. *See* Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. Cin. L. Rev. 367, 415 n.116 (1985).

- During the Vietnam War, Professor Richard Falk testified as "an expert witness on international law in numerous cases brought before domestic courts" regarding the Nuremberg Defense. *See* Richard Falk, *Telford Taylor and the Legacy of Nuremberg*, 37 Colum. J. Transnat'l L. 693, 698 (1999).

Moreover, Professor Solis himself has testified in two court-martial proceedings, once on behalf of the Government. *See* Trav. Ex. 18, Attach. A at 2 (Solis Decl.). These cases make abundantly clear that in the realm of international law and the law of war, courts do not exclude

expert testimony; they rely on such experts and use the information provided to reach their legal conclusions.[3]

III. Respondents Will Suffer No Harm If The Solis Declaration Is Admitted

Nowhere in their brief do the Respondents claim that they will suffer any harm if the Court admits the Solis Declaration. Instead, Respondents resort to assertions about "usurping the Court's role as trier of law," Mot. at 6, and misplaced citations to notions that it is the Judge's "province alone to instruct the jury on the relevant legal standards." *Id.* (quoting *Burkhart v. Washington Metro. Area Transit Authority*, 112 F.3d 1207, 1213 (D.C. Cir. 1997)). First, there is no jury in this case, so the latter citation is puzzling at best. Second, there is no usurpation of the Court's role because the Court can choose how much weight to give the Solis Declaration. The Government's implicit suggestion that the Court is not capable of assessing the weight of Professor Solis' declaration is a curious double standard, given the Government's insistence that

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[3] Respondents' contention that an expert witness cannot testify to the content of the law is not always correct even with regard to domestic law. For areas of law that are highly specialized, federal courts have at times permitted legal experts to testify on the content of the law. Thus, federal courts have permitted expert testimony concerning the content of military law. *See, e.g.*, *United States v. Baird*, 271 U.S. App. D.C. 121 (D.C. Cir. 1988) (recognizing Commander Thomas W. Snook, U.S.C.G. as an "expert witness on military law" that could inform the court about chain of custody issues in a suppression hearing and rendering a decision "in light of" the expert's testimony); *State v. Dobert*, 2003 Minn. App. LEXIS 1467, at *9, 15 (Minn. App. Ct. Dec. 16, 2003) (recognizing Major Steven Brodsky as "an expert witness on military law" in a bribery trial and relying on his testimony to explain the reasonableness of the jury's actions). Federal courts have admitted expert testimony concerning the content of the law in other specialized fields as well, such as tax law. *See, e.g.*, *United States v. Garber*, 607 F.2d 92, 94-95 (5th Cir. 1979) (recognizing expert testimony on complex tax laws); *Whittaker Corp. v. Edgar*, 535 F. Supp. 933, 943 (N.D. Ill. 1982) (same); *Sharp v. Coopers & Lybrand*, 457 F. Supp. 879 (E.D. Pa. 1978) (same). Like military law and tax law, the law of war is a highly specialized area of law for which it is appropriate to admit the testimony of qualified experts like Professor Solis.

its numerous exhibits, including unsworn statements (*see* AFR Exs 1, 2), should be evaluated as a matter of weight, not admissibility.

The Solis Declaration, made under oath by a witness of unimpeachable qualifications, merely seeks to provide this Court with the opinions of a well-regarded expert in a specialized area of international law. The Court may and should consider it and, like any other piece of evidence, accord it whatever weight it deems appropriate.

CONCLUSION

For the foregoing reasons, this Court should deny Respondents' Motion to Strike the Declaration of Gary D. Solis, J.D., Ph.D.

Respectfully submitted,
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October 24, 2008

CERTIFICATE OF SERVICE

I, Allyson J Portney, hereby certify that on October 24, 2008, I electronically filed and served the foregoing PETITIONERS' OPPOSITION TO RESPONDENTS' MOTION TO STRIKE THE DECLARATION OF GARY D. SOLIS, J.D., Ph.D.

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