

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Defense Motion
To Compel Production of Documents
(ICRC Documents Relating to
BTIF Conditions)**

21 May 2008

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commission Trial Judiciary Rules of Court and the Military Judge's email order of 15 March 2008.
2. **Relief Sought:** The defense respectfully requests that this Commission order the government to produce the requested discovery, namely copies of all correspondence, reports, or other writings between the U.S. government and the International Committee of the Red Cross relating to conditions at the Bagram Theater Internment Facility (BTIF) or any predecessor facilities, such as the Bagram Collection Point (BCP) and communications and notes of communications with the ICRC referenced in the document labeled with Bates number 766-004485.
3. **Burden of Proof:** The defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. R.M.C. 905(c)(2)(A).
4. **Facts:**
 - a. The defense requested the government to produce "copies of all correspondence, reports, or other writings between the U.S. government and the International Committee of the Red Cross relating to conditions at the Bagram Theater Internment Facility (BTIF) or any predecessor facilities, such as the Bagram Collection Point (BCP) as well as communications with ICRC referenced in the document labeled with Bates number 766-004485. (Def. Supp. Req. for Discovery, 3 Mar 08, paras. 1(a), (n) (attachment A to Def. Mot. to Compel Production of Documents (Detention Facility SOPs) filed 21 May 08).)
 - b. The government refused to produce these documents on the basis that "The information requested is not relevant to the prosecution of the accused and not required to be provided under R.M.C. 701." (Govt. Resp. to Def. Supp. Req. for Discovery, 16 May 08, paras. 1(b), (n) (attachment B to Def. Mot. to Compel Production of Documents (Detention Facility SOPs) filed 21 May 08).)
 - c. In a memorandum to Commander, Bagram Air Base, dated 19 August 2003, Commander, 327th Military Police Battalion, Bagram Air Base, set out a three-phase "five-year construction vision" for the Bagram Personnel Control Facility, also known as the Bagram Theater Internment Facility or BTIF. (LTC H.B.W. Memo, dtd 19 Aug 03 (BPCF 5-Year Construction Vision) (attachment A).) The memo explains that "The purpose of Phase One is . . . to meet minimal International Committee of the Red Cross (ICRC) requests."

d. Under a mandate from the international community pursuant to the Geneva Conventions the ICRC visits detainees who are held in connection with international conflicts as well as internal violence “to verify whether they are being treated according to relevant international standards.” <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/detention?OpenDocument>. “ICRC detention visits aim to ensure respect for the life and dignity of prisoners of war and other detainees and to prevent torture, ill-treatment or abuse which violate essential rights and the basic principles of humanity . . .” *Id.* The ICRC makes “recommendations to the authorities concerned about any improvements to conditions that may be necessary.” *Id.*

e. In the course of an investigation into the December 2002 death of a detainee named Habibullah who was detained in Bagram, Major B., the CJTF180 Staff Liaison with the ICRC, turned over to Special Agents C. and B. files of correspondence he had with the ICRC while he was stationed in Bagram from November 2002 to June 2003. (Agent’s Investigation Report, dtd 27 May 04, at 2, Bates no. 00766-004485 (attachment B); Sworn Statement of Major B, dtd 26 May 04 at 1, Bates no. 00766-004526 [hereinafter MAJ B. Sworn Stmt].) These files include CJTF180’s letters to the ICRC addressing concerns the ICRC raised as well as Major B.’s notes taken during ICRC visits and after action reports. (MAJ B. Sworn Stmt at 3, Bates no. 00766-004528.) During this time, the ICRC made two-day visits every ten days. (*Id.* at 2, Bates no. 00766-004527.)

f. Major B. explained that some of the ICRC complaints related to handcuffs and hooding, which the CJTF180 eventually “changed” due to those complaints, and living conditions, diet, the used of “safety positions” and the use of “punishment.” (*Id.* at 3, 5, Bates no. 00766-004528, 4530.) On 26 November 2002, Major B. and others reviewed the ICRC six-month report, which covered the previous six months. (*Id.*) The report apparently raised concerns regarding sleep deprivation, chaining and forced standing as the BCP Officer-in-Charge wrote a response to the ICRC report to justify such treatment. (*Id.* at 5, Bates no. 00766-004530.) Major B. also mentioned a complaint by the ICRC that that “a detainee was kept chained to the ceiling for over a day.” (*Id.* at 4, Bates no. 00766-004529.) And during a visit, the ICRC observed a detainee being punished for falling asleep on the toilet by cuffing his hands and chaining him in the airlock. (*Id.*)

5. Discussion:

a. The M.C.A., R.M.C. and Regulation for Trial by Military Commission Require Production of the Requested ICRC Documents Relating to Detention Facility Conditions

(i) The Military Commission Act (“M.C.A.”) states that “Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.” *See* 10 U.S.C. § 949j. The Regulation echoes the statute. *See* Regulation for Trial by Military Commissions 17-2(a) (“Pursuant to 10 U.S.C. § 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided by R.M.C. 701-703, and Mil. Comm. R. Evid. 505.”).

(ii) Moreover, Rule for Military Commission 701 requires the government to permit the defense to examine documents and things “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* or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.” R.M.C. 701(c)(1) (emphasis added).¹

(iii) The Requested ICRC Documents Relating to Detention Facility Conditions Documents Are Material To the Preparation of the Defense

(1) In response to a defense request to inspect the BTIF, the government emphasized how much the BTIF had changed since Mr. Khadr’s confinement there in 2002. Without debating the merits of that contention, evidence of the conditions and practices at the facility in 2002 is relevant to the key factual issues in this case, i.e., the reliability of statements Mr. Khadr is alleged to have made while detained at Bagram and repeated later at Guantanamo Bay.

(2) Materials provided in discovery show that the ICRC made numerous visits to, and expressed serious concerns about, the conditions at the BTIF in 2002 contemporaneous with the period of Mr. Khadr’s detention there. Not only did ICRC personnel have the opportunity to observe the physical conditions of the facility, they were able to confidentially interview detainees about their treatment at the facility. (See Annex A to 377th MP Co. TACSOP, Bates no. 766-005818 (attachment D); Sworn Statement of C.P.C., dtd 7 Feb 04, at 4, Bates no. 766-006712 (attachment E).) These inspections and interviews prompted ICRC to raise concerns with the U.S. government, which have resulted in, *inter alia*, “improvements” to the facility since 2002. ICRC reports and correspondence are therefore likely to provide an additional source of information potentially confirming Mr. Khadr’s allegations about the circumstances of his confinement and interrogation. Therefore, this Commission should order the government to produce the requested documents.

¹ The Discussion accompanying R.M.C. 701(c) instructs the military commission judges to look to *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), which applied Federal Rule of Criminal Procedure 16 addressing discovery, for the proper materiality standard. In *Yunis*, the court ruled that the defendant was entitled to “information [that] is at least ‘helpful to the defense of [the] accused.’” *Id.* at 623 (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)); *see also United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (“materiality standard is not a heavy burden”) (internal quotations omitted); *United States v. Gaddis*, 877 F.2d 605, 611 (7th Cir.1989) (defining material evidence as evidence that would “significantly help [] in ‘uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal’”) (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C.1979)). Thus, the materiality standard set forth in R.M.C. 701(c) requires the prosecution to turn over any information that is “at least helpful to the defense.”

b. Due Process, Notions of Fair Trial & the M.C.A. Require Production of the Requested ICRC Documents Relating to Detention Facility Conditions

(i) The notion of a fair trial encompasses the right of access to evidence. *See* M.C.A., 10 U.S.C. § 949j; R.M.C. 701; Fed. R. Crim. P. 16. Well-settled U.S. Supreme Court precedents interpreting our Constitution – made applicable by MCA § 949j(d)(2) – support production of evidence favorable to the accused where it is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also United States v. Bagley*, 473 U.S. 667, 675 (1985) (impeachment evidence falls within *Brady* rule); *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2003) (same).

c. International Law Requires Production of the Requested ICRC Documents Relating to Detention Facility Conditions

(i) The M.C.A. and the Manual for Military Commissions (M.M.C.) incorporate the judicial safeguards of Common Article 3 of the Geneva Conventions. *See* 10 U.S.C. § 948(b)(f) (“A military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of Common Article 3 of the Geneva Conventions.”)²; R.M.C., Preamble (stating that the Manual for Military Commissions “provides procedural and evidentiary rules that [. . .] extend to the accused all the ‘necessary judicial guarantees’ as required by Common Article 3.”) They must, therefore, be read in light of Common Article 3 and international law surrounding that provision.

(ii) The Geneva Convention Relative to the Treatment of Prisoners of War prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” *See* Geneva Convention, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Common Article 3. The judicial safeguards required by Common Article 3 are delineated in article 75 of Protocol I to the Geneva Conventions of 1949.³ Article

² Whether military commissions, in fact, comply with Common Article 3 is ultimately a judicial question that Congress does not have the power to answer. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the *judicial department* to say what the law is.”) (emphasis added). Any congressional attempt to legislative an answer to such a judicial question violates the bedrock separation of powers principle and has no legal effect. *See id.* at 176-77 (“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”). Because a statute should be construed to avoid constitutional problems unless doing so would be “plainly contrary” to the intent of the legislature, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936), the only reasonable interpretation is that § 948b(f) is that it requires military commissions to comply with Common Article 3.

³ *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978 [hereinafter Additional Protocol]. The Protocol has not been ratified by the United States, but the U.S. government has acknowledged that Article 75 is customary

75(a) provides that the procedures for trial “shall afford the accused before and during his trial all necessary rights and means of defense.”⁴

(iii) Read in light of international law principles, precedents applying the U.S. Constitution, and the rules governing this Commission, the government’s refusal to produce the requested documents ignores fundamental concepts of fairness and places in question the integrity of these proceedings.

d. Conclusion

(i) The integrity of these proceedings will be fatally undermined if the defense is denied access to evidence within the control of the government that relates to ICRC inspections of the BTIF. *See United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (“[I]nvestigation is an essential component of the adversary process.”). The requested documents contain evidence of conditions and practices in place at the BTIF in 2002 and are thus material to the defense’s ability to prepare for trial. The Commission should therefore order the government to produce the requested documents.

6. Oral Argument: The defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), which provides that “Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions.” Oral argument will allow for thorough consideration of the issues raised by this motion.

7. Witnesses & Evidence: The defense does not anticipate the need to call witnesses in connection with this motion. The defense relies on the following documents as evidence in support of this motion:

Attachments A - E

international law. *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2797 (2006) (stating that the government “regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled”). *See also* Memorandum from W. Hays Parks, Chief, International Law Branch, DAJA-IA, et. al., to Mr. John H. McNeill, Assistant General Counsel (International), OSD (8 May 1986) (stating art. 75 of Additional Protocol I is customary international law). The Supreme Court has also relied on the Additional Protocol in construing the meaning of Common Article 3 of the Geneva Conventions as applied to military commissions. *See Hamdan*, 126 S.Ct. at 2796.

⁴ The ICTY and the ICTR similarly provide “minimum guarantees” for the accused to “be entitled to a fair and . . . hearing.” Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 21(2), U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), *adopted by* Security Council 25 May 1993, U.N. Doc. S/RES/827 (1993); Statute of the International Tribunal for Rwanda, art. 20(2), *adopted by* S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).

Defense Supplemental Request for Discovery, 3 March 2008 (attachment A to Defense Motion to Compel Production of Documents (Detention Facility SOPs) filed 21 May 2008).

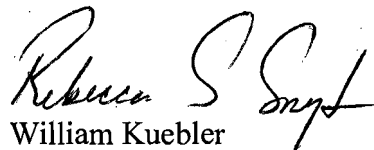
Government Response to Defense Supplemental Request for Discovery, 16 May 2008, (attachment B to Defense Motion to Compel Production of Documents (Detention Facility SOPs) filed 21 May 2008).

8. **Conference:** The defense has conferred with the prosecution regarding the requested relief. The government objects to the requested relief.

9. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

10. **Attachments:**

- A. LTC H.B.W. Memo dated 19 August 2003 (BPCF 5-Year Construction Vision)
- B. Agent's Investigation Report dated 27 May 2004, Bates no. 00766-004484-86
- C. Excerpts from Sworn Statement of Major B dated 26 May 2004, Bates no. 00766-004526-30
- D. Annex A to 377th MP Co. TACSOP, Bates no. 00766-005818
- E. Excerpt from Sworn Statement of C.P.C. dated 7 Feb 04, Bates no. 00766-006712



William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel



**DEPARTMENT OF THE ARMY
HEADQUARTERS, 327th Military Police Battalion
Bagram Air Base, Afghanistan
APO AE 09354**

REPLY TO
ATTENTION OF

AFRC-MRO-CDR

19 August 2003

MEMORANDUM FOR Commander, Bagram Air Base, APO AE 09354

SUBJECT: Bagram Personnel Control Facility (BPCF) Five-Year Construction Vision


1. Purpose: The purpose of this memorandum is to propose the five-year construction vision for the BPCF. This construction plan has three phases described in the following paragraphs.
2. Phase One: The purpose of Phase One is to meet the Secretary of Defense mandate to double the number of Persons Under United States Control (PUCs) in the BPCF and to meet minimal International Committee of the Red Cross (ICRC) requests. In order to double the PUCs capacity, a new level concrete floor must be placed. With this level concrete floor, prefabricated steel cages can be erected. After a significant amount of analysis and discussion, the 327th MP BN believes the concrete floor combined with the prefabricated cages provides the best hygienic and security situation for the PUCs and Military Police personnel. PUCs will be separated from the concrete floor by rubber matting. Also during this phase, two ICRC interview rooms will be completed as well as an outdoor PUC exercise courtyard. The interview rooms are ninety-five percent complete and the courtyard is fifty percent complete.
3. Phase Two: The purpose of Phase Two is to upgrade the infrastructure of the BPCF to accommodate the new PUC caging. Infrastructure improvements include a western-style, stainless steel, running water toilet for each PUC general population cell. The in-ground wastewater plumbing system will preclude our Military Police from having to manually dispose of the PUCs refuse and improve the corresponding unwelcome odor. In addition, the shower facility will be upgraded to improve the hygiene standards of the PUCs. Other infrastructure and construction improvements include new overhead lighting; complete electrical rewiring of the facility; installation of a Heating, Ventilation, and Air Conditioning (HVAC) system for the main open bay; and various exterior security improvements. The execution of phase two may begin before phase one is complete.
4. Phase Three: Phase Three is in the preliminary stages of planning. The concept of this phase is that large, vacant rooms on the south and east sides of the building could be used as a long-term holding area for Low Level Enemy Combatants (LLECs). These rooms have been blocked-off due to hazardous contamination concerns. Army preventive medicine personnel have given an early indication that these rooms can be cleaned and occupied. Further analysis must be completed for a final determination. It is anticipated that LLECs will occupy this segregated portion of the facility that will closely resemble western penal facilities as Phase Three comes to a close.

AFRC-MRO-CDR

SUBJECT: Bagram Personnel Control Facility (BPCF) Five-Year Construction Vision

5. Miscellaneous Repair and Improvements: Throughout all phases of construction, continual improvement to existing conditions will be accomplished.

6. Questions concerning this memorandum may be directed to the 327th MP BN Engineer, CPT Decker, at DSN 318-231-4775.


HOUSTON B. WASHINGTON
LTC, MP
Commanding

AGENT'S INVESTIGATION REPORT

CID Regulation 195-1

ROI NUMBER

0134-02-CID369-23533/0137-02-CID369-23534

PAGE 1 OF 3 PAGES

DETAILS

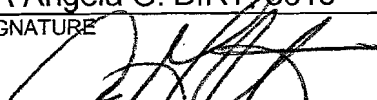
Between 1000 and 1830 hrs, 21 May 04, SA BIRT and SA CARTON interviewed **COL Joseph G. NESBITT, 573-80-3093, G4, XVIII Airborne Corps, Fort Bragg, NC 28310 (FBNC)**, who was appointed by CJTF180 as the AR 15-6 Investigating Officer to examine conditions within the Bagram Collection Point (BCP) after the deaths of HABIBULLAH (PUC 412) and DILAWAR (PUC 421). NESBITT's charter was specific with regard to leaving the investigation of the deaths to CID, but he was to examine tactics, techniques and procedures (TTPs) as well as standard practices, which were dangerous, contrary to legal standard, or ill advised. NESBITT provided a written statement detailing his observations and made comments on the findings of his AR 15-6 report. Due to the nature of the observations and the classification of the referenced material within the statement and as such is was not attached to this report.

AGENT'S COMMENT: COL NESBITT adopted his statement on 23 May 04, after it was reviewed for accuracy and completeness by MAJ John DEHN, Task Force Legal Advisor.

Between 1030 and 1720 hrs, 24 May 04, SA BIRT interviewed **LTC Ronald R. STALLINGS, Headquarters and Headquarters Company (HHC), 1st Corps Support Command (COSCOM), FBNC** who was the CJ2X, Director of Counter-Intelligence and HUMINT in Bagram from 12 May to 21 Nov 02. STALLINGS provided a written statement detailing his observations relative to the operation of the BCP and issues he observed within the facility prior to the deaths. STALLINGS also completed sketches of the facility indicating areas he visited during his almost daily trips there to check the area. *See Sworn Statement and Sketches of STALLINGS, dated 24 May 04, for additional details.*

Between 1300 and 1801 hrs, 24 May 04, SA CARTON interviewed **LTC George E. CONE Jr, 054-46-2063, Deputy Commander, Dragon Brigade, XVIII Airborne (Abn) Corps, FBNC** who was the Deputy Bagram Air Base Commander from May 02 to Feb 03. LTC CONE authored a written statement detailing his actions relevant to construction and maintenance projects at the BCP. CONE also prepared detailed sketches of the BCP and the interior areas of the BCP he visited during his tour in Afghanistan. He also detailed his understanding of command and control relationships between the MI and MP elements at Bagram. *See Sworn Statement and Sketches of CONE, dated 24 May 04, for additional details.*

Between 1000 and 1530 hrs, 25 May 04, SA CARTON and SA BIRT interviewed **LTC Robert J. COTELL, 019-36-2274, Office of the Staff Judge Advocate, HHC, XVIII Abn Corps, FBNC** who was the Deputy SJA for CJTF180 from Nov 02 to May 03. COTELL rendered a written statement detailing his observations and actions relative to his role as the AR 15-6 Legal Advisor. COTELL denied he was the advisor to the CID Investigation and indicated he received only verbal updates on

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|--|-------------------|---|--|
| TYPED AGENT'S NAME AND SEQUENCE NUMBER SA Daniel G. CARTON, 3609 SA Angela G. BIRT, 3615 | | ORGANIZATION HQ, USACIDC Fort Belvoir, VA 22060 | |
| SIGNATURE  | DATE 27 May 04 | EXHIBIT 308 | |

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Attachment B
00766-004484

AGENT'S INVESTIGATION REPORT

CID Regulation 195-1

ROI NUMBER

0134-02-CID369-23533/0137-02-CID369-23534

PAGE 2 OF 3 PAGES

DETAILS

the circumstances of the deaths. See *Sworn Statement and Sketches of COTELL*, dated 25 May 04, for additional details.

Between 1000 – 2239 hrs, 26 May 04, SA CARTON and SA BIRT interviewed **MAJ Jeff A. BOVARNICK, 020-60-2031, Office of the Staff Judge Advocate, HHC, 82nd Abn Division, FBNC** who was the BCP Legal Advisor and International Committee of the Red Cross (ICRC) Liaison from Nov 02 to Jun 03. At 1640 hrs, 26 May 04, BOVARNICK was advised of his rights for Dereliction of Duty. He elected to waive his rights and continued the interview. BOVARNICK provided a written statement detailing his knowledge, actions and legal advice relative to BCP. See *Waiver Certificate and Sworn Statement of BOVARNICK*, dated 26 May 04, for additional details.

At 1035 hrs, 26 May 04, SA CARTON traveled with BOVARNICK to his office, where BOVARNICK provided information retained upon a secure (SIPRNET) computer system to CID by electronically copying the data to another classified system. The material was comprised of correspondence between the Office of the Staff Judge Advocate (OSJA) CJTF180 and the International Committee of the Red Cross (ICRC), discussing visits by the international aid organization to the Bagram Collection Point (BCP). Additionally, BOVARNICK provided computer files he collected under folders entitled "Detainee Operations" and "Historical Files". BOVARNICK stated the records contained "every document related to CJTF180 SJA's involvement in the BCP investigations".

AGENT'S COMMENT: Due to the classified nature of the information within the files, they are maintained in the classified storage facility of HQ, USACIDC and are not attached to this report.

Between 0930 and 1030 hrs, 27 May 04, SA BIRT briefly discussed matters related to this investigation with **COL Theodore C. NICHOLAS, II, 400-84-4035, HHC, XVIII Abn Corps, FBNC (who was in the midst of a Permanent Change of Station to US Army Element, US Forces Korea, APO AP 96205)**. NICHOLAS was unavailable for a lengthy interview, but was apprised of the issues CID wished to discuss with him and agreed to make arrangements for a complete interview while on PCS leave in early Jun – prior to his movement date of 14 Jun 04.

Between 1000 and 1321 hrs, 27 May 04, SA CARTON interviewed **COL Christopher S. PRITCHETT, 226-86-2140, HHC, Dragon Brigade Commander, XVIII Abn Corps, FBNC** who was the Bagram Air Base Commander from Apr 02 to Mar 03. PRITCHETT authored a sworn statement detailing his actions and observations relative to the operation of the BCP and interaction with MP and MI soldiers working within the facility. PRITCHETT's duties included law and order operations, which included the MP element operating at the BCP. However, he explained his responsibilities were limited to administrative support to the soldiers and maintenance of the BCP facility. He was not involved in, briefed on, nor visited the BCP on a daily basis. PRITCHETT admitted touring the BCP

TYPED AGENT'S NAME AND SEQUENCE NUMBER

SA Daniel G. CARTON, 3609

SA Angela G. BIRT, 3615

ORGANIZATION

HQ, USACIDC

Fort Belvoir, VA 22060

SIGNATURE

DATE

EXHIBIT

27 May 04

308

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Attachment B
00766-004485

AGENT'S INVESTIGATION REPORT

CID Regulation 195-1

ROI NUMBER

0134-02-CID369-23533/0137-02-CID369-23534

PAGE 3 OF 3 PAGES

DETAILS

on several occasions, but added he never observed any maltreatment of detainees. PRITCHETT stated he was aware MI personnel were employing sleep deprivation as an interrogation technique, but denied seeing detainees shackled to fixed objects to obtain sleep deprivation. See Sworn Statement of PRITCHETT, dated 26 May 04, for additional details.

////////////////////////////////////LAST ENTRY////////////////////////////////////

TYPED AGENT'S NAME AND SEQUENCE NUMBER

SA Daniel G. CARTON, 3609

SA Angela G. BIRT, 3615

ORGANIZATION

HQ, USACIDC

Fort Belvoir, VA 22060

SIGNATURE

DATE

EXHIBIT

27 May 04

308

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Attachment B
00766-004486

SWORN STATEMENT

File Number : 0134-02-CID369-23533/0137-02-CID369-23534
Location : Fort Bragg, North Carolina
Date : 26 May 2004 *JAB* **Time:** 2239 *JAB*
Statement of: BOVARNICK, Jeff Allan
SSN : 020-60-2031 **Grade/Status:** MAJ/O4
Org/Address : Headquarters and Headquarters Company (HHC), 82nd
Airborne Division, Fort Bragg, North Carolina 28307

JAB I, Jeff A. BOVARNICK, want to make the following statement under oath:

Q: What dates were you deployed to Afghanistan?

A: We left here on the 6th of Nov 02, but we took a few days to travel through Germany and arrived at Bagram. I was on the ground in Afghanistan from approximately 12 Nov 2002 to 5 Jun 2003. I arrived back at Bragg on 6 Jun 2003.

Q: What were your duties while deployed to Afghanistan?

A: I was the Chief of Operational Law on the CJTF180 Staff. I was also the BCP Legal Advisor and I was the Staff Liaison with the International Committee Red Cross (ICRC). I was the legal advisor for the Leadership Targeting Cell.

Q: What is your functional area?

A: I'm a lawyer, Judge Advocate. I think the branch designator just changed from 55A to 27A.

Q: How long have you been a lawyer? What positions have you held?

A: I've been a lawyer since 1992, when I passed the bar in Massachusetts. I've been an Army lawyer since 1993. I went to the JAG Course in 1993 (Jul 93-Sep 93). I was a trial counsel with 101st Airborne Division, Fort Campbell, KY from Jan 94 to Aug 95. I did about 32 prosecutions. I was then the Chief of Operational Law, Fort Campbell, KY from Aug 95 to Jun 96. I then moved to Fort Bragg, NC where I was a Trial Defense Counsel from Jul 96 to Dec 97. I did about 60 court cases, but I had over a hundred clients. I was then assigned to the Joint Readiness Training Center (JRTC) at Fort Polk, LA for most of 1998. Then I was the Chief of Criminal Law at Fort Sam Houston, TX from Jan 99 to Dec 00. My last six months I was at Fort Sam, I was the Chief of Client Services. I was promoted to MAJ, in Dec 00, that was when I moved to client services. From Aug 01 to May 02 I attended the Graduate Course at The Judge Advocate General (JAG) School, Charlottesville, VA. I returned to Bragg and became the Chief of Operational Law for XVIII Airborne Corps and then I deployed in Nov 02 to Afghanistan.

INITIALS *JAB*

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Page 1 of 23

EXHIBIT 312 Attachment C
00766-004526

STATEMENT OF MAJ Jeff A. BOVARNICK, TAKEN AT Fort Bragg, NC,
DATED 26 May 2004, CONTINUED:

JAB Q: Had you been deployed prior to the Afghanistan deployment?

A: No.

Q: Have you previously discussed the events related to this investigation with any one since leaving Bagram?

A: Yes, COL MAHER, the FORSCOM SJA called me last week to ask me the name of the ICRC representative and he asked me what we did right after the first guy died and why certain actions were not taken.

Q: Was that the only discussion you had with COL MAHER, relative to this investigation? Did you talk with anyone else about the investigation recently?

A: I don't know what prompted the call, but he used to supervise me at Fort Polk, LA. I knew from someone, I think it was LTC COTELL told me a MAJ DEHN from FORSCOM was visiting. I knew MAJ DEHN was from FORSCOM and COL MAHER was the FORSCOM SJA. I heard yesterday that LTC COTELL was talking with CID. I just informed COL DUNN I was coming to talk with CID.

Q: Where did you normally perform your duties in Afghanistan?

A: My office was a chair and desk in the Joint Operation Center (JOC), which was a tent outside the Headquarters Building. That was my primary daytime duty location.

Q: Where was that in relation to the BCP?

A: It was about a ten-minute walk, maybe 1/4 of a mile.

Q: How much of your time did you spend at the BCP?

A: In a week on average, not more than ten hours. My visits were for a particular purpose, not to hang out. Before the deaths, I had a tour by the MP Company Commander (CPT BEIRING), two ICRC visits and I think I observed one in-processing session. Primarily I went to the BCP for just for ICRC visit. The ICRC visited every ten days, but the visits lasted two days. I took them (ICRC) down there and stayed for about an hour to talk about previously raised issues, made sure they had everything they needed and then I left them to do their interviews. Then I would come down at the end of their visit and discuss issues, which came up during that visit. Prior to the deaths I think there were two ICRC visits, one I attended with the JAG I was replacing (MAJ Frank VILA) and one I handled on my own. I also took other judge advocates on OPD sessions.

Q: Were you the primary point of contact for legal matters for the facility known as the Bagram Collection Point (BCP), AKA Bagram Control Point and Bagram Detention Facility?

A: Yes.

Q: Who was the ICRC representative you dealt with?

INITIALS JAB

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Page 2 of 23

EXHIBIT 312 Attachment C
00766-004527

STATEMENT OF MAJ Jeff A. BOVARNICK, TAKEN AT Fort Bragg, NC,
 DATED 26 May 2004, CONTINUED:

JAB

A: Giovanna SCHMIDT worked for the ICRC out of the ICRC office in Kabul, Afghanistan. She departed Afghanistan about July 2003.

Q: What documentation would you receive from the ICRC?

A: They prepared reports on ICRC letterhead, which are maintained at the CJTF180 Headquarters, but I regurgitated the entire content of any issues raised in my response letters, and notes, which I gave a copy of to CID this morning.

Q: Did anything come up with ICRC during the two visits prior to the deaths that you specifically recall were serious complaints?

A: I can't recall specifics, but I kept copies of all the notes from my meetings with ICRC and a copy of the notes and correspondence is maintained at XVIII Abn Corps. Some of the complaints were living conditions or diet issues. But the ICRC consistently complained about the handcuffs, and the hooding and we changed that.

Q: How did you document what occurred during the ICRC visits?

A: We knew about their next visit from the previous visit. The ICRC representative informed us when she would be returning. In preparation for the visit, I reviewed the last visit's documentation and see what issues remained for follow up and the progress of ongoing projects. It could require me to make a visit to the BCP to check on the status of the projects. I also checked the status of the ICRC note cards from family members and outgoing note cards from detainees, which had to be screened by the MI interrogators. I prepared an ICRC information sheet, which listed the detainees. I checked the sheet to identify those detainees, who arrived at the facility within the last 10 days. Those names were not released to the ICRC based upon Army directives which stated we would not release the names of detained personnel for a period of two weeks, during which time the individuals would be screened and interviewed to determine their exact status. This was the period prior to their receipt of their ISN.

Q: How long after you arrived did you have your first meeting with the ICRC representative and what did you discuss?

A: Within the first week with MAJ VILA and 19 Nov 02 on my own.

Q: What specific changes were instituted prior to the deaths?

A: None from me as I was still learning the details of the process. There was a meeting on 26 Nov 02 to identify changes.

Q: What observations did you make relative to changes, which were instituted pursuant to ICRC complaints?

INITIALS *JAB*

Page 3 of 23

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EXHIBIT *3/2* Attachment C
 00766-004528

STATEMENT OF MAJ Jeff A. BOVARNICK, TAKEN AT Fort Bragg, NC,
DATED 26 May 2004, CONTINUED:

JAB A: I remember a lot of friction between CPT WOOD, MI Commander and myself and CPT BEIRING, MP Commander, when I directed changes. CPT BEIRING was a very weak commander, but he did not want responsibility for warming their food, getting them clean clothes, simple stuff that made sense. He was very resistant to changing anything. I worked with a couple of the MP Lieutenants, whose attitude was much better. 1LT BUELTERMAN was very receptive to making changes, which related to the humane treatment of detainees. CPT BEIRING's attitude was they were "just detainees". I tried to explain that keeping the detainees in the same clothes all the time was unclean and could create problems with disease (because they have a high tuberculosis rate in Afghanistan). He did not see the hygiene issue as important and in some cases, with both of them I had to remind them I was speaking on behalf the CJTF180 Commander. Something they just had to be directed to do (or not do), but it was often a struggle.

Q: During your liaison trips with ICRC representatives, what areas of the BCP were accessible to them? Were they restricted from any areas? If so, explain what they couldn't see and why they couldn't see it.

A: Everything except for the MI portion of the BCP, where they did DOCEX, the JIF. The first two or three rooms on the second floor. They were permitted in the Isolation Rooms, but not the billets of the Iraqis neither of which were detainees. The Iraqis were later released to UNHCR. They also did not talk with the High Value Target (HVT), they were not even supposed to know they were there. The HVT's were not even listed on the ICRC info sheet, based on directives from CENTCOM.

Q: Referring to your notes, what complaints did ICRC lodge relative to the treatment of detainees at the BCP?

A: Not about treatment, during my first visit, according to my notes. On my second visit (which occurred 1 Dec/2 Dec 2002), SCHMIDT and myself observed a PUC being punished by having him chained in the airlock, with his hands cuffed to the bars at eyelevel. The guard (as referenced in my notes) gave two explanations. The first was that the detainee was kicked by another detainee. Then the MP corrected himself and said the detainee fell asleep on the toilet. In my seven page ICRC AAR, dated 1 Dec - 2 Dec 02, there is a complaint raised by SCHMIDT, wherein she reported a detainee was kept chained to the ceiling for over a day. I confronted CPT BEIRING with the accusation and he told me categorically that did not happen.

INITIALS JAB

Page 4 of 23

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EXHIBIT 3/2 Attachment C
00766-004529

STATEMENT OF MAJ Jeff A. BOVARNICK, TAKEN AT Fort Bragg, NC,
DATED 26 May 2004, CONTINUED:

JAB

On 26 Nov 2002, I convened a council of personnel (including PMO, BCP Ops, J2, JIC, OGA, 377th MP Company rep and others) to discuss the findings in the ICRC Six Month report, which covered the period prior to my arrival. Within the six-month report, there is discussion of concern over the use of "safety positions" and "punishment". There is a response to this ICRC report, dated 5 Dec 02, which documents comments by 1LT COLLINS, the BCP OIC who reported chaining was used to enforce the punishment of standing. He further explains and I understood that since standing was a method used to achieve sleep deprivation, they also chained people to keep them awake.

Q: Was prior notification to the BCP required for all ICRC visits?

A: Their visits were cyclical and programmed. They told us when they were coming again, at the end of each visit. It was typically about ten days between visits. Some times she (SCHMIDT) would email me and adjust the date, this often disturbed the MPs and MI. They complained about it. My perception was that CPT WOOD had to adjust her interrogation schedule. When I took over, MAJ VILA checked the programmed interviews on the status board and worked around MI's schedule. When I took over, I told MI they would have make any one with an ISN available for ICRC interviews when they came. It created friction between us at first but after awhile they adjusted.

Q: Was any information withheld from ICRC or were practices modified during their visits? If so, explain what the information was and why it needed to be withheld.

A: The identities of certain HVTs was withheld on directions from CENTCOM, sometimes based on their cooperation with Coalition Forces, but it varied and it was just isolated cases. I think of the 500 detainees who processed through the BCP, about 10 of them were HVTs. I can really only comment about after the death, because before that no one knew there was a problem with it. To my knowledge, no practices were modified. I never gave any direction to them to change anything. But after the 15-6 findings and recommendations were instituted I did training with the MPs and I made certain they knew if they (meaning the MPs) stepped over the line and violated an order I would make certain they were held accountable. Of course, this was after both men died.

Q: Who selected the detainees the ICRC would be allowed to interview?

INITIALS

JAB

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Page 5 of 23

EXHIBIT 312 Attachment C
—00766-004530

0137-02-CID369-23534

11. Calisthenics

- a. Three times a day, the detainees are lead through a series of calisthenics by a guard to ensure they maintain a proper level of fitness and health. The guards stands outside the cell and leads the detainees through the workout while they stay in the cell in their designated places.
- b. This is voluntary for the detainees. If a detainee is not able to perform the calisthenics they will sit in their designated place during the exercise period.

12. ICRC:

The HQ SJA and/or Company Commander will lead all ICRC visits. The ICRC is allowed to interview each detainee in an interrogation room without an armed guard. The crash team escorts the detainee to the room or the crash team provides security for the ICRC member inside the cell.

13. Access to the facility

- a. An armed guard controls the access roster at a station inside the doorway to the facility. Only personnel on the roster are allowed inside the facility. Those personnel in **bold type** on the roster are the only personnel allowed to escort people not on the access roster.
- b. If someone who is not on the roster attempts to access the facility, they are to be instructed that they are not permitted in the facility and if necessary detained and the OIC or NCOIC must be contacted to assume control of the detained person.
- c. Non MP or MI personell as well as visitors must clear and check their weapon at the access desk.

14. Police Call

- a. At shift change, the outgoing squad is responsible for policing up the facility and removing the trash to the trash point within the company area.
- b. The latrine bucket must be pulled to the curb to be sucked once a day. The bucket is removed from the cell. An empty bucket is placed back in the cell and the filled bucket is taken out to the curb to be sucked. The mid shift is responsible for pulling the

FOLIO

STATEMENT OF Christopher P. COLLINS, TAKEN AT Embassy Suites Hotel, DATED 7 Feb 04, CONTINUED:

CPC

would not see us "lock and load" our weapons. I can still remember the man from the incident. He was an older gentleman.

Q: Did you point your weapon at the forehead of this man?

A: No. I wouldn't do that.

Q: What was the typical frequency of repat missions?

A: Three to four a week, sometimes multiple missions in different directions a day, or multiple aircraft in a single day. There had to be MPs on both aircraft. I got soldiers from other platoons in addition to mine for help. We usually used two MP's per detainee.

At the end of Nov 02/early Dec 02, we began transitioning to the gates (outside the facility). We shifted about a team or a squad at a time and the transition took roughly a week to complete. I was not working in the BCP when either death happened. They happened on nightshift and I don't remember the second one as much as the first. The first one, I remember 1LT BUELTERMAN coming into our tent and waking up CPT BEIRING. The following morning we were told a PUC died. I believe the second one happened about a week later.

Q: What was your job, when you were in the facility and where did you work?

A: My job was the Dayshift Officer in Charge (OIC). For roughly the first 45 days, I worked in the In-processing Room, working out all the problems with the accountability of detainee property. Later I worked in a room on the first floor, in the back of the facility, near the weight lifting room.

Q: What did you typically do on a shift?

A: In the beginning it was mostly repat missions, then it was mostly property. I was also the designated Fire Marshal and Force Protection Officer. I wrote, with the help of SFC Miller, the Fire Evacuation Plan (for getting all the PUCs out of the facility safely in the event of a fire). As Force Protection Officer, I was charged with duty of finding ways to upgrade the facility for detainee holding (e.g., building the wall at the front of the facility, building a new holding area, putting cages around the "shit" buckets). I was also the chief liaison for the International Committee of the Red Cross. I worked with them to make detainees available for private interviews. They usually came in once a week for about 4-6 hours. After the ICRC had finished their interviews, they would speak with me and the JAG officer (he was a Major, but I can't remember his name) to work out any issues that arose.

INITIALS *CPC*

Page 4 of 8

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EXHIBIT 251 Attachment E
00766-006712