TESTIMONY OF GABOR RONA
INTERNATIONAL LEGAL DIRECTOR
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HEARING ON

GUANTANAMO DETAINEES AFTER *BOUMEDIENE*

BEFORE

THE UNITED STATES COMMISSION
ON SECURITY AND COOPERATION IN EUROPE
(HELSINKI COMMISSION)

JULY 15, 2008

Chairman Hastings, Co-Chairman Cardin and Members of the Commission, thank you for inviting me to share the views of Human Rights First on these important issues. We appreciate the work of the Helsinki Commission and in particular its leadership among OSCE member states in the areas of human rights and humanitarian affairs – "the human dimension." Human Rights First is honored to have the opportunity to express its views to you today about how best to ensure that U.S. policy on the detention, interrogation and trial of terrorist suspects is effective, humane and consistent with our laws and values.

My name is Gabor Rona and I am the International Legal Director of Human Rights First. For thirty years, Human Rights First has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and work to ensure that human rights laws and principles are enforced in the United States and abroad.

I last came before you a year ago to lay out the international law applicable to the detainees held at Guantanamo and others detained in the so-called "War on Terror" and to make recommendations designed to bring U.S. policies and practices back into the fold of the international legal order that the United States shares with its OSCE partner-States. You have asked me back to express views on the future of Guantanamo detainees following the Supreme Court's *Boumediene* decision.

I want to start by noting, with some satisfaction, that each successive decision of the Supreme Court on the subject of post-9/11 detention has brought the United States further back toward, if not into, the fold of respect for international human rights and humanitarian law and the purposes they serve. *Boumediene* recognizes the right of detainees to habeas corpus, and in so doing, not only vindicates a bedrock provision of the U.S. Constitution, but also comports with majority views among the international

legal and political community that human rights law and domestic law operate in concert with the laws of war in times of armed conflict.

Still, popular notions persists that a) existing laws of war and criminal law are inadequate because they did not anticipate today's conflicts, b) that there is conflict and a requirement to choose between "war" and "crime" paradigms, and c) that therefore, a new "legal architecture" needs to be developed. I will address each of these three notions.

First, just because Henry Ford was not foreseen by the inventor of the wheel, does not mean that wheels are inappropriate to facilitate the locomotion of automobiles. The proper question is not whether traditional criminal law and the law of war ***were built to deal with*** modern forms of transnational terrorism, but rather, whether they are legally and practicably applicable to it.

Second, the "either/or" and "neither/nor" approach that pits two distinct camps against each other ("it's a war, no it's a crime") is misguided. In fact, criminal law applies in wartime. And the laws of war that apply to detention and trial of terrorism suspects in today's conflicts are not materially different from domestic criminal law, as tempered by international human rights law. Nonetheless, this false "tastes great/less filling" argument has staying power. One reason is that the administration has falsely insisted that domestic criminal law and human rights law do not apply in this "war" and only the laws of war apply. Critics naturally gravitated to the converse view, equally incorrect, that only criminal law and human rights law should apply, not the laws of war. The administration was able to build up steam for its inaccurate vision because there is relatively little familiarity with how the laws of war, domestic law and international human rights law interact, both complementing and indeed, reinforcing one another. The way out of this endless and fruitless exercise in contradiction lies in two steps: first, recognizing the difference between how these three complementary legal regimes (domestic law, human rights law, laws of war) operate in three situations: in war between states, in war not between states, and in peacetime; and second, in exercising good faith judgment in deciding in which of those three contexts an individual is being held or tried. This does not mean that detention under the laws of war can have no place beyond the battlefield. Far from it. It does mean, however, that lines must be drawn between detentions that are truly in the context of war, and those that are not.

Third, this third way - the one that does not require a choice between competing visions of war and peace, but rather, recognizes the complementarity of domestic criminal law and international laws of war and human rights - does not need to be "invented" with new laws, as some have advocated. It ***is*** the law. That fact has been obscured by the administration's pick-and-choose approach to the laws of war and its wrong-headed assertions about what it means for the law of war to be the *lex specialis,* or specialized law, in times of war. *"Lex specialis*" does not mean that one body of laws applies to the exclusion of others. In armed conflict, for example, it merely means that individual law-of-war rules trump conflicting, and otherwise applicable, law-of-peacetime rules.

Critics who scoff at this vision of complementary relations among applicable legal regimes think it naïve. I believe they overstate the benefits and underestimate the costs of ignoring domestic criminal and international human rights law in both liberty and security terms.

What I envision is not a mere slavish implementation of pre-existing rules. The changing meaning of sovereignty in an increasingly interconnected world, the shifting focus of international law from state-to-state to state-to-individual relationships, the post-Second World War flowering of the age of rights, the maturation of the laws of war (sponsored in large part by the United States) into ever-more finely tuned rules designed to protect those who are not, or are no longer, taking part in hostilities – these are the moving parts in a delicate architecture upon which counterterrorism practices and policies are built. It's a finely tuned balance derived of experience and negotiation among generations of lawyers, politicians, diplomats and other experts. This is the china shop into which the U.S. has now injected itself like a bull. The cries that the old rules are quaint, or that they were not designed for this new model of conflict, or that their imprecision makes it impossible for us to behave humanely, are shallow arguments in light of the grand interests that those rules are designed to vindicate. In other words a new "legal architecture" for terrorism is not merely unnecessary. It would risk doing more violence to the relationship among existing applicable criminal law, human rights law and the laws of war than the U.S. has already done, and of most importance, to the humanitarian purposes those laws serve.

And within the existing legal architecture, there is more than sufficient flexibility to adopt new rules for current exigencies. In fact, Congress has been a player, providing new tools in relation to surveillance, terrorism financing, and criminal responsibility for support of terrorism at home and abroad.

Some argue that the criminal courts are ill-equipped to prosecute terrorism cases. Calls for an administrative detention law and/or the establishment of a new national security court are built on this premise. Human Rights First recently released a report authored by former federal prosecutors detailing the experience of the criminal justice system in dealing with over 120 terrorism cases some before, and most after 9/11. The study, "In Pursuit of Justice: Prosecuting Terrorism in the Federal Courts," is grounded in real experience with real cases, not on speculation. It found that the federal courts, while not perfect, have proven themselves to be capable of bearing the load and capable of flexing to meet the exigencies of cases brought before them. It found, most significantly, that tools such as the Classified Information Procedures Act (CIPA) operate properly to assure the protection of sensitive information and that there is sufficient substantive law to cover preparatory acts and conduct occurring abroad. It also found that criticism about soldiers being required to issue "Miranda" warnings and to conduct criminal investigations while under fire is simply misplaced.

U.S. District Judge Leonie Brinkema, has presided over multiple terror trials including that of the so-called "20th hijacker" - possibly the most notorious and complicated post-9/11 terrorism prosecution - the *Moussaoui* case. The trial featured a variety of

challenges, including a defendant serving as his own lawyer and a block of classified evidence. Judge Brinkema noted that individually those circumstances are not unusual, but they were uniquely concentrated in *Moussaoui*. She said "I've reached the conclusion that the system does work," and that the notion of a national security court should "send shivers down the spine of everyone."[1]

In other settings, federal judges have confided that where federal terrorism prosecutions falter or run aground, it is because the Justice Department had hyped and politicized the cases and brought charges not sustained by the evidence.

Because this system works, it enjoys public confidence and is capable of delivering true justice and accountability. This is not to say that federal prosecution is the silver bullet answer to terrorism. Other strategies such as intelligence gathering, interruption of terrorism financing, diplomacy and even the use of armed force have their place. But when the question is "According to what legal architecture should we detain and try terrorist suspects?" the answer is in plain sight, not in some hidden, secret place on the distant tip of a Caribbean island.

In the *Hamdan* case, the Supreme Court recognized that Common Article 3 of the Geneva Conventions applies to wars that ***are not*** between two states, in this case, between the United States and al Qaeda. *Boumediene* takes the next logical step, consistent with the notion of complementarity among domestic law, human rights law and laws of war. It decides that, at least with reference to Guantanamo, where Common Article 3 applies, so can provisions of domestic law relevant to detention and trial, in this case, habeas corpus. While the Court focused its attentions on the constitutional right to habeas, it is equally important to note that Article 9 of the International Covenant on Civil and Political Rights, to which the U.S. is a party, also recognizes a prohibition against arbitrary detention, enforced by a right to judicial challenge of detention. This is a classic example of the co-operation of domestic law, human rights law and the law of war.

In a somewhat anachronistic but pregnant phrase, Common Article 3 requires trials conducted in the context of wars that **are not** between two or more states to afford "all the judicial guarantees which are recognized as indispensible by civilized peoples." This reference to law beyond the pages of the Geneva Conventions, themselves, is in contrast to the Conventions' other sections dealing with wars that ***are*** between states. In state-to-state wars detainees have no right to habeas. Domestic and international human rights law have a minimal role. But these absences are compensated for by the fact that in wars between states, elements of fair trial are spelled out in detail that trumps inconsistent rules of domestic law and international human rights law.

This distinction that the Conventions make between rules that govern state-to-state armed conflicts and rules that govern other armed conflict makes sense. In state-to-state conflict, a captured enemy combatant or civilian fighter does not get a habeas review, but instead, benefits from administrative review of detention. In lieu of judicial review to challenge

[1] See AP article, attached.

detention, the Conventions provide detailed protections for treatment and trial of both prisoners of war and civilians. Such details are conspicuously absent from Common Article 3. Their absence is no accident. Combatants in state-to-state armed conflict are privileged belligerents who break no law by their mere participation in hostilities. But in other forms of conflict, fighters are unprivileged belligerents. And while unprivileged belligerency, contrary to the belief of some, is not a violation of the laws of war, it is definitely a violation of domestic criminal laws. In other words, where fighters are mere criminals the law of war anticipates that they would be treated under domestic law as tempered by international human rights law obligations.

H.L. Mencken is reputed to have said that to every complicated problem there is a solution that is clear, simple, and wrong. The choice between crime and war is a debate inviting just such a solution. The complex real world in which we live has fortunately, and over considerable time, given us a suitably complex architecture of overlapping legal frameworks. If understood and respected, this architecture will provide the tools necessary to meet the challenge of international terrorism without the harm to both security and civil liberties that would certainly result should we abandon it.

The Associated Press
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WASHINGTON: The judge who presided over Zacarias Moussaoui's trial questioned the government's decision to seek a death sentence against the Sept. 11 conspirator, and offered a strong defense of federal courts' ability to handle terror trials.

U.S. District Judge Leonie Brinkema said in a speech Friday at the American University law school that the government's decision to seek a death sentence against Moussaoui appeared to be politically motivated, and that the zealous pursuit of a death sentence opened up numerous issues of exposing classified information that otherwise could have been avoided.

"The war on terror is an important piece of political leverage," Brinkema said. "Don't lose sight of the political realities."

Because the trial was a capital case, Moussaoui was allowed access to a wide array of evidence that would have been irrelevant in a non-capital case, including statements from captured al-Qaida leaders that Moussaoui was at best a bit player in their plans.

The court struggled for nearly two years in trying to balance Moussaoui's right to have access to those witnesses with the government's right to continue its ongoing interrogations of those witnesses, including Sept. 11 mastermind Khalid Sheikh Mohammed, without interruption. Eventually the 4th U.S. Circuit Court of Appeals ordered that summaries of the men's statements be prepared for trial without allowing defense depositions.

At one point Brinkema barred the government from pursuing the death penalty as a sanction for its refusal to make key witnesses available, although an appellate court later lifted that sanction.

Moussaoui pleaded guilty in 2005 to conspiring with al-Qaida to hijack aircraft, among other crimes. In a 2006 sentencing trial, a jury concluded that Moussaoui's actions furthered the Sept. 11 plot. But the jury ultimately decided to spare his life and sentence him to life in prison.

Rob Spencer, the lead prosecutor in the Moussaoui case, who is now in private practice at Lockheed Martin Corp., agreed that the case would have been much simpler as a non-capital case.

"But it was the greatest mass murder in our history, and it should have been charged as a death-penalty case," Spencer said in a telephone interview.

Both Brinkema and Spencer are in agreement, though, that the federal courts are equipped to handle terror trials, despite suggestions by Attorney General Michael Mukasey and others that some sort of new national security court should be considered to handle such cases.

Brinkema, who has presided over multiple terror trials in Alexandria, Va., in addition to the Moussaoui case, said the notion of a national security court should "send shivers down the spine of everyone."

The judge said she bristles at descriptions of Moussaoui's trial — which included frequent outbursts by the defendant and a retracted confession — as a circus. Instead, she said the trial included a variety of challenges, like a defendant serving as his own lawyer and a block of classified evidence. Individually those circumstances are not unusual, but they were uniquely concentrated in the Moussaoui case, she said.

"I've reached the conclusion that the system does work," Brinkema said.

Spencer said a jury trial "serves a useful public purpose. It lets the public see what a terrorist really looks like. It lets the victims participate in the process."

David Laufman, a former assistant U.S. attorney in Alexandria who prosecuted Ahmed Omar Abu Ali, a U.S. citizen from Falls Church who was convicted of joining al-Qaida and plotting to assassinate President Bush, acknowledged that such trials can be complicated. But he said in a telephone interview that courts have "legitimate constitutionally defensible mechanisms to allow these cases to go forward while protecting the rights of the accused." Laws exist, for example, to develop declassified substitutions at trial for classified evidence under a judge's supervision.

Brinkema also said in her speech that there is no room in the American justice system for evidence obtained through torture, saying that "coerced testimony is inherently unreliable."

She cited Moussaoui as an example of an individual who likely would have cooperated with the right kind of questioning.

"I'm convinced that if someone sat down and had tea with him and could put up with his ramblings, that they could have gotten some information from him because he couldn't keep his mouth shut," Brinkema said.