

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 108-10</p> <p>ORDER</p> <p>Defense Motion for Leave to Use ICRC Documents in Litigation and DOD Advocacy</p> <p>21 July 2014</p>
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1. This Order applies only in the case of *United States v Ali Abdul-Aziz Ali*.
2. In accordance with the Commission Order releasing certain records of the International Committee of the International Red Cross (ICRC) (AE 108BB, 31 January 2014) Mr. Aziz Ali now requests he be permitted to use some of these reports as “a basis for requests for improved conditions on confinement within the Department of Defense, as a predicate for motions regarding past and present conditions of confinement, and to make requests for production of witnesses.”¹
3. The Prosecution response does not object to the use of the ICRC documents for motions before the Commission concerning conditions of confinement or the production of witnesses² subject to the caveat³ counsel adhere to the provisions of Protective Order #2 pertaining to

¹ Defense Motion for Leave To Use ICRC Documents in Litigation and DOD Advocacy, filed 9 June 2014 (AE 108-7 (AAA))

² Government Response to Defense Motion for Leave To Use ICRC Documents in Litigation and DOD Advocacy, filed 23 June 2014 (AE 108-8), para. 3

³ *Id.* at para. 6.I.B

unclassified but sensitive material.⁴ The Prosecution also requests any use of the ICRC reports in this fashion be safeguarded in accordance with the Amended Policy Guidance on International Committee of the Red Cross (ICRC) Communications (Oct 5, 2007) (File No. OSD 15196-07).⁵ The Prosecution objects to the use of the ICRC reports for advocacy within the Department of Defense (DoD) in that permitting such use falls outside the purview of the discovery process⁶ and requests the Commission deny this portion of the motion.

4. The Defense reply, filed as though it were classified in accordance with the Amended Policy Guidance on International Committee of the Red Cross (ICRC) Communications (Oct 5, 2007) (File No. OSD 15196-07) sets out previous advocacy efforts on behalf of Mr. Aziz Ali and request the Commission permit the use of the ICRC records in a continuance of the effort only to those individuals, or successors in interest who have had previous access to the ICRC reports.⁷

5. The Commission, having originally released the records to counsel, is already in possession of the ICRC reports. Mr. Aziz Ali may summarize the salient points from these reports, as opposed to providing the full report, in a sealed attachment as part of any motion it desires to file with the Commission.

6. Exhaustion of available administrative remedies is considered a predicate for judicial action, in part as a means to conserve judicial resources, permit an agency to fix its own problems, afford a more expeditious remedy than a court can craft, and build a record, if necessary, for future judicial consideration.⁸ The Commission assumes from the correspondence relating to the

⁴ PROTECTIVE ORDER #2, To Protect Unclassified Discovery Material Where Disclosure is Detrimental to the Public Interest, 20 December 2012 (AE 014H)

⁵ AE 108-8, paragraph 6.I.B

⁶ AE 108-8, paragraph 6.I.A

⁷ Defense Reply to Government Response to Defense Motion for Leave To Use ICRC Documents in Litigation and DOD Advocacy, filed 26 June 2014 (AE (108-9 (AAA)))

⁸ *Woodford v. Ngo*, 548 U.S. 81, 85-86 (2006)

ICRC reports,⁹ the chain-of-command for the detention facility have seen and are familiar with these reports. Within the parameters of the detention facility chain-of- command Defense Counsel may use the ICRC reports to advocate on behalf of Mr. Aziz Ali. In so doing Counsel will protect the ICRC documents as set forth in Protective Order #2.¹⁰

7. The motion of Mr. Aziz Ali is **GRANTED**, subject to the conditions as set out above.

8. The request of the Prosecution for the ICRC reports to be protected as *pseudo* classified is **DENIED**.

So ORDERED this 21st day of July, 2014.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge

⁹ See AE 108W

¹⁰ See MEMORANDUM FOR CHIEF PROSECUTOR, TRIAL COUNSEL AND PERSONNEL ASSOCIATED WITH THE OFFICE OF THE CHIEF PROSECUTOR, OFFICE OF MILITARY COMMISSIONS; SUBJECT: Assertion of Military Commission Rule of Evidence 506 "Government Information Other Than Classified Information" Privilege Regarding International Committee of the Red Cross Communications, January 10, 2014, Attachment B, Government Response To Defense Motion to Provide AE108BB to the Accused, filed 19 March 2014 (AE 108EE)