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1 [The R.M.C. 803 session was called to order at 1049,
2 12 February 2015.]

3 MJ [COL POHL]: The commission is called to order. All
4 parties again are present that were present when the
5 commission recessed with the exception of?

6 CP [BG MARTINS]: Ms. Tarin, Your Honor, is no longer, but
7 all of the remaining prosecution members are present.

8 LDC [MR. CONNELL]: Your Honor, while we are accounting
9 for people, can we account for the law enforcement in the
10 courtroom?

11 MJ [COL POHL]: Sure. Mr. Ryan.

12 TC [MR. RYAN]: Detective Patrick Lantry of the NYPD,
13 Ms. Brianna Hearn and Mary Needham, both from the Federal
14 Bureau of Investigation.

15 MJ [COL POHL]: Just a little housekeeping and then we
16 will go there.

17 Mr. Connell, yesterday you indicated that you said
18 230 was one of your motions, I believe it's actually 320; is
19 that correct?

20 LDC [MR. CONNELL]: I transposed the number, Your Honor.
21 It is 320, and I am prepared.

22 MJ [COL POHL]: It's my understanding, and this actually
23 impacts also Ms. Bormann's issue with 008, is that since you

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1 are all still part of 292, that that's the reason why we are
2 only doing Mr. Hawsawi's motions?

3 LDC [MR. CONNELL]: That's fine with me, Your Honor. It's
4 very close to the same issue as in 214A.

5 MJ [COL POHL]: I understand, but you are still -- you are
6 not withdrawing 292?

7 LDC [MR. CONNELL]: No, sir.

8 MJ [COL POHL]: So since Mr. Hawsawi's counsel has, that's
9 why we are doing this today. But anybody who has not, we are
10 going to go back to the 292.

11 That being said, Mr. Ruiz.

12 CP [BG MARTINS]: Your Honor, just so I am clear, we are
13 only going to litigate 214, and 320, though it has substantial
14 overlap, we are not going to take up?

15 MJ [COL POHL]: Right. Again, because of the 292 issue,
16 yes, that's correct.

17 LDC [MR. RUIZ]: Judge, I have actually got 303 with me,
18 which is another motion that I am prepared to argue.

19 MJ [COL POHL]: Let's talk about 303 before we get to it.
20 Does 303 apply to all five detainees?

21 LDC [MR. RUIZ]: No. 303 is Mr. Hawsawi's motion and it
22 has been withdrawn by every other counsel. They affirmatively
23 withdrew from it.

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1 MJ [COL POHL]: Okay.

2 LDC [MR. RUIZ]: So the only ----

3 MJ [COL POHL]: Based on that representation, therefore,
4 you are the only one with a dog in this fight.

5 LDC [MR. RUIZ]: I mean, they filed a withdrawal with you,
6 so it's clear on the record.

7 MJ [COL POHL]: Okay. Go ahead.

8 LDC [MS. BORMANN]: Judge, I just want to make the record
9 clear -- a little clearer. We withdrew, not because we don't
10 have the same issue in common, but we withdrew because we
11 don't believe we are prepared at this point with outstanding
12 motions for discovery to be able to even draft it. So that's
13 where we are.

14 MJ [COL POHL]: Okay. I got it. I got it.

15 Mr. Connell?

16 LDC [MR. CONNELL]: I just wanted to make ----

17 MJ [COL POHL]: Understand this, it is now a standalone
18 motion by Mr. Hawsawi, it is not to the prejudice of your
19 ability to file a similar motion on behalf of your own client.

20 LDC [MR. CONNELL]: Thank you so much.

21 MJ [COL POHL]: Okay. That being said.

22 LDC [MR. RUIZ]: Yes, sir. And so I will start with the
23 conundrum that we started with with Mr. al Hawsawi's legal

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1 team, which is we have longstanding and current conditions of
2 confinement that we know violate law of war detention
3 standards and humanitarian -- humanitarian law in terms of the
4 standards necessary for the preservation and the appropriate
5 detention of individuals who have come into a detaining
6 power's care. So we are aware of that.

7 On the other hand, we know that these conditions are
8 affecting the quality of life of Mr. al Hawsawi on a daily
9 basis and that, therefore, also affects the quality of
10 engagement that we have with the person that we represent and
11 that we are asked to represent before this commission. So the
12 analysis for us was do we wait endlessly, Judge, in order to
13 continue to fight the protracted fight that we have waged to
14 obtain discovery, to obtain information that will allow us to
15 continue to inform our observations, or do we file now what we
16 know needs to be remedied.

17 I will tell you that we made the decision to file now
18 because we believe that there were conditions that were
19 absolutely violative of our responsibilities as a nation, as
20 attorneys, and as participants in this proceeding. We filed
21 that motion on May 29, 2014, Judge, and at that time we
22 highlighted for you in the motion a number of different issues
23 that we know were being violated.

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1 As part of that motion, Judge, we submitted to you --
2 actually, we didn't submit to you, after some discussion with
3 court personnel, we proffered for you the records of the
4 International Committee for the Red Cross which, as you are
5 well aware, we had a very long and very difficult battle to
6 obtain access to those records which the ICRC has maintained
7 since they first obtained access to Guantanamo, I believe it
8 was in 2007 through the current period.

9 Those records absolutely informed and opened our eyes
10 to the conditions of confinement in Camp VII. The
11 prosecution's position, as you may recall originally, was that
12 those documents were classified. And, in fact, we later,
13 through subsequent proceedings, learned that, in fact, those
14 documents were not classified, but it was their position
15 should be treated as classified. To this date, those
16 documents have not been classified. However, Your Honor
17 issued an order consistent with your review and when you
18 provided those records for us for our analysis said that those
19 documents had to be handled under seal and with the permission
20 of the commissions.

21 In this motion we have submitted to you,
22 Mr. al Hawsawi's counsel have submitted to you -- I keep
23 saying submitted because that's what we intended to do, but

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1 then the judiciary said we have already got the records since
2 it was us that provided them to you. So what we have done is
3 we submitted to you an outline of the specific portions of the
4 reports from the International Committee for the Red Cross
5 that absolutely affirmatively tell you where these violations
6 are.

7 Unfortunately, I am prevented and prohibited from
8 discussing that today in open court even though those
9 documents are not classified. The reason for that is because
10 after we obtained access to those records, and by we I mean
11 the defense obtained access to those records, the Department
12 of Defense decided to issue a memorandum that indicated the
13 release of those records to the public would be detrimental to
14 the public interest. Now, they did not make a specific
15 argument for that, they did not submit factual matters that
16 would support that; they simply said that the release of those
17 documents to the public would be detrimental to the public
18 interest. My translation of that is we don't want them to see
19 all of the bad stuff. It would be bad. I would analogize
20 that to the battle that the Senate waged in order to finally
21 have some transparency in the release of the Senate
22 Intelligence executive summary.

23 Nevertheless, a key and very significant part of our

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1 argument to this court why these infirmities, violations of
2 the law need to be remedied exist within the International
3 Committee of the Red Cross documents, Your Honor, that you
4 have in your possession and that we have gone through and
5 highlighted for you in our argument.

6 In the open part, in the part that we were permitted
7 to discuss publicly, because the government has drawn those
8 lines and in essence ushered us into that box, and in that
9 limited box that we can discuss here openly and somewhat
10 transparently, the question is why should we care about the
11 conditions of the detention of these men at all.

12 I don't think I need to spend a whole lot of time on
13 that, but we certainly briefed for you in this submission that
14 we are giving you the standards of law that apply to this case
15 in both international or domestic applications. And in the
16 prosecution's response to this motion they go through a litany
17 of different documents and memorandums that have been issued
18 that have aspirational -- aspirational goals of what we ought
19 not to do. And what I said to that submission and what I will
20 say to you, Your Honor, is that the prosecution's response and
21 the litany of documents that they cite, the Walsh report
22 amongst those, which is a 2009 report which was created by
23 Admiral Walsh of the conditions of confinement, all of those

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1 tell us what we already know, what we already should know, and
2 that is, we should not violate established norms for detention
3 conditions for law of war detainees and people that are in our
4 custody, and we need to bring those standards up to -- up to
5 the legal standard that we expect.

6 What we have asked for you to do in this motion with
7 Mr. al Hawsawi is to move Mr. al Hawsawi -- or to ask that
8 Mr. al Hawsawi either be provided with the adequate standards
9 that are necessary or, if not, to be moved to a facility that
10 complies with international law standards.

11 Now, I suspect that the prosecution's position and
12 one of their arguments will also be, Judge, you can't tell the
13 jailer where to jail Mr. al Hawsawi. And you should not
14 inject yourself into determinations of the jailer. That has
15 been a consistent position that the prosecution has taken.
16 You heard some of that argument earlier today.

17 But again, there is that intersection where you are
18 the presiding official in the military commission of
19 Mr. al Hawsawi and -- along with the co-accused of
20 Mr. al Hawsawi, and to the extent that those conditions of his
21 prolonged detention continue to violate international norms
22 and continue to violate our own standards and principles, you
23 have absolute authority to make sure that those come into

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1 conformity because those conditions continue to affect the
2 adequacy of our legal services, the adequacy of our
3 engagement, and also the ability to continue to have the
4 relationship with this man that is required of us as our
5 representative. So I think it is not a question of your
6 authority and I think you have more than enough grounds for
7 acting in this case, Your Honor.

8 Now, I will say that since we filed our motion on
9 May 29, 2014, one of the issues that we have raised before the
10 commission was that, in recognizing international norms of
11 detention -- and let me also say this: This is not unique and
12 it is not tied to and it is not based on what a prisoner is
13 accused of or what a prisoner is accused or suspected of
14 having done or whether we like him or whether we think they
15 are people we want to associate with or whether we agree with
16 their politics. That's not what this motion is about and what
17 these arguments are about. It is about standards that are set
18 forth not only by us, by the international communities, and
19 the standards that we have signed on to in the international
20 community and that's why we are making these arguments.

21 One of these standards that we raised before the
22 court was that prisoners in a pretrial detention setting, such
23 as Mr. al Hawsawi, such as his co-accused, but then we tied it

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1 to Mr. al Hawsawi, Your Honor, must be given the opportunity
2 to have meaningful contacts with family or friends. That is
3 an established norm. Certainly, Judge, there can be security
4 concerns that need to be taken into account. We won't quibble
5 with that, but certainly, Judge, an absolute blackout of
6 family contacts since 2003 when Mr. al Hawsawi was first
7 brought into our custody is unacceptable and is absolutely
8 violative of international law.

9 MJ [COL POHL]: Has there been any change to that?

10 LDC [MR. RUIZ]: There has, and that's what I am getting
11 to. Since May 29 of 2014 when we first filed our motion, I
12 understand that now in October, following the filing of that
13 motion, the men in Camp VII were first allowed to begin a
14 process of recording a message that they could send to their
15 families as -- I don't know the exact methodology for the
16 recording, but they could make a recording and have it go
17 through censorship. I also understand that as recently as
18 January 17, they have begun attempting to implement a process
19 whereby there can be, for lack of a better term, Skype
20 telephone conversations. So I want to acknowledge that, and I
21 want to acknowledge that that had been a change since we filed
22 the motion.

23 When we filed the motion, from May 29, 2014, moving

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1 back all the way to when Mr. Hawsawi was first captured,
2 detained in 2003, there had never been such a process, there
3 had never been such opportunity. So I will say and I will
4 acknowledge that I am glad that our government is
5 acknowledging that obligation and taking it seriously and
6 taking steps to bring our practices in conformity with
7 recognized standards of detention. However, there is still
8 much work to be done, Judge. Much of that I can't discuss
9 because it is under seal with the records from the
10 International Committee of the Red Cross.

11 We have asked the commission for additional records
12 since the production that you first reviewed all the way up to
13 the present time. We just recently received a communication
14 from the prosecution that I believe those documents were
15 provided to you for an in camera review to be provided to us
16 for a review. That is, of course, also an important source of
17 information for us as we inform our analysis and attempt to
18 litigate this issue in the manner that we need to do.

19 Judge, one issue of concern -- and certainly we know
20 that the condition of this facility is -- in this instance, I
21 am actually going to quote a communication from, I think it
22 was Mr. Mark Thornberry, a representative from Texas, who was
23 quoted after his visit in Camp VII where he clearly and openly

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1 indicated that the facilities where Mr. al Hawsawi is
2 currently detained are far exceeding their life expectancy and
3 deteriorating rapidly. Failure to meet those needs will
4 degrade operational life and health and safety standards.

5 And the reason I think it is important to highlight
6 that from the perspective of a government representative is
7 obviously it's not something that Walter Ruiz is articulating,
8 it is something that I am repeating that comes from someone
9 who has had the opportunity to review that and talk about the
10 operational life and health expectancy and the standards of
11 this proceeding. And certainly when you talk about any
12 detention facility where we have that responsibility, part of
13 that responsibility is to make sure that the facilities where
14 the men are detained during the pendency of the process, in
15 this case the trial process, that they are up to standards.
16 That clearly is not the case right now, and we need
17 intervention in that forum.

18 Communications with counsel. And I believe, Judge, I
19 will just touch on this because this is the subject of an
20 independent motion, but contact with attorneys via telephone
21 calls is something that we will litigate independently and
22 separately, but it kind of dovetails into it a little bit, as
23 well as the ability to, consistent with the protections of the

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1 Geneva Conventions, that as far as I understood we had
2 consistently said we were going to follow, we were going to
3 apply, and we were going to remain -- and when I say "we," I
4 mean our government, the United States, were going to remain
5 faithful to those dictates, those applications and obligations
6 that we have signed on to in terms of our obligations.

7 Now, I will point out that I was a bit thrown off
8 because I do know that in the prosecution's response, on
9 page 11 of their response, they actually take a step back from
10 that, or so it appears, and they say that the Geneva
11 Conventions is not applicable and that Article 16 doesn't
12 apply. And the reason that caused me to do a double take is
13 because I have seen General Martins a number of times, the
14 Chief Prosecutor, in multiple public appearances where he
15 continues to say that we remain faithful to the application of
16 the Geneva Conventions. So imagine my surprise when I turn to
17 page 11 of their briefing and he says -- or representatives of
18 his office say the Geneva Conventions are not applicable,
19 Article 16 does not apply. And then they go on to say, well,
20 even if it does apply, you know, even if everything that we
21 said before about it applying, it doesn't apply to -- it only
22 applies to adverse distinctions.

23 So it very clearly says their position is now that

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1 the Geneva Conventions does not apply, at least Article 16 is
2 not applicable, but if it does apply, then, Judge, they submit
3 for you that it ought to be interpreted only with respect to
4 adverse decisions.

5 The other issue that we raised, Judge, is in the
6 context of our obligations with Geneva obligations, with
7 international law standards, in connection with our own
8 domestic promises to fulfill these guarantees, is that
9 Mr. al Hawsawi must be allowed consistently and within reason
10 to practice the tenets of his religion. Now, that's not tied
11 to Islam, it's not tied to Christianity, it is not tied to
12 Judaism, it is something that applies to any person who is in
13 the captivity of a detaining power and who needs to have the
14 ability to exercise basic tenets of their faith. In this case
15 the issue that we raised before you is that there is still no
16 means for Mr. al Hawsawi to practice his ritualistic prayer in
17 a manner that will allow him to do that in a group setting.

18 And this is something, Judge, that I have had the
19 opportunity to visit. What I would suggest to you is that the
20 premier international law of war detention standard in The
21 Hague, in The Netherlands -- as you may know, they detain
22 prisoners who are charged with some of the most heinous
23 crimes, genocide, crimes against humanity, and they face

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1 extremely, extremely serious charges on par with some of the
2 accusations that we see here today, certainly in terms of
3 scope, certainly in terms of number, and certainly in terms of
4 the concern that a reasonable community may have in terms of
5 balancing the security protections, but also the balancing of
6 human interest rights, as well as protections under the Geneva
7 Conventions and international humanitarian law. And I will
8 tell you that they managed to strike that balance. And part
9 of that balance is to have adequate access to their lawyers,
10 telephonic conversations. They do have the ability to engage
11 in communal prayer and to do these kinds of acts consistent
12 with the dictates of international law and consistent with the
13 security concerns that that particular facility may have.

14 I will also highlight that that is in a relatively
15 large and open metropolitan community. It is not in an
16 isolated island, heavily militarized, and with multiple bodies
17 of water and air, land, and sea that must be crossed before
18 they can get to the detention facility.

19 And so I mention that, Judge, because when you start
20 hearing the balancing of the security interests, it is
21 important to look to guidance of a facility that has managed
22 to strike that interest, who has managed to balance it while
23 remaining faithful to the application of international law and

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1 to the detention standards that are required in international
2 law and has done a very good job of it. And the balance of
3 security doesn't weigh in favor always or doesn't mean that
4 you get a pass on the obligations that you have to bring these
5 issues into compliance.

6 In this case, I would submit to you that the
7 prosecution's response states only the obvious, which is, yes,
8 we have a number of pronouncements that have been made by the
9 President, we have a number of pronouncements that have been
10 stated in treaties, we have a number of obligations that we
11 continue to pronounce, and we continue to go overseas before
12 the United Nations that we continue to affirm; but when it
13 comes down to the facts in the matter and the truth of what is
14 going on, we are not there yet and we need to bring those
15 standards up to compliance.

16 And until the government does that, Judge -- and if
17 they continue not to do that, Judge, then, Judge, it is your
18 authority and your responsibility to order that Mr. al Hawsawi
19 be put under the conditions of confinement that are
20 appropriate. Thank you.

21 MJ [COL POHL]: Thank you.

22 Trial Counsel? Mr. Trivett.

23 MDTC [MR. TRIVETT]: Good morning, Your Honor.

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1 MJ [COL POHL]: Good morning.

2 MDTC [MR. TRIVETT]: In response to Mr. Ruiz's reference
3 to the Geneva Conventions and our position on the Geneva
4 Conventions, the United States is bound by Common Article 3 in
5 its war against al Qaeda. That's the official government
6 position. But his reference to Article 16 confuses things a
7 bit. Common Article 3 governs not international armed
8 conflict such as the conflict between the United States and
9 the nonstate actor of al Qaeda, whereas Article 16
10 specifically deals with international armed conflict. So it's
11 a conflation of the two issues. We wanted to make sure we
12 clarified that on the record.

13 But saying that we are bound by Common Article 3 of
14 the Geneva Conventions is different than saying that
15 Mr. Hawsawi himself has a right in this military commission to
16 have Common Article 3 rights vindicated by the court. In
17 fact, he is statutorily barred from asserting the Geneva
18 Conventions by the Military Commission Act of 2009. And
19 that's what he is trying to do here. I think he nuances it a
20 bit in his written filings by saying I'm not asserting Geneva
21 Convention as a right. What I'm saying is that the Geneva
22 Conventions is evidence of the international humanitarian law
23 at issue and that there is some other amorphous standard of

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1 international humanitarian law that he is asking you to apply
2 in this military commission.

3 But really that's just an end run around Congress'
4 intent. The United States complies with Common Article 3 in
5 all respects with Mr. Hawsawi's confinement. But if we did
6 not, Mr. Hawsawi could not raise that as an enforceable
7 standard that the military judge here in this military
8 commission could assert and could enforce. The Geneva
9 Conventions are a very large part of the international
10 humanitarian law, but to simply spin this argument into simply
11 saying that it's just evidence as opposed to the actual
12 international humanitarian law at issue the government
13 believes is a legal fallacy.

14 It's important to note Mr. Ruiz's comparison to The
15 Hague facility being a facility that handles what I believe he
16 said were crimes of genocide. We would note that the facility
17 at Camp VII handles individuals who were alleged to have
18 committed pretty bad offenses themselves. But the standard
19 that he is asking you to apply with The Hague facility is an
20 impossible legal standard. Taking it to its logical
21 conclusion, every military detention facility around the
22 world, not just this one, would have to have an exact
23 facsimile of The Hague facility, or lest have to defend itself

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1 against every way in which it is different from The Hague
2 facility.

3 And while The Hague facility no doubt complies with
4 Common Article 3, that clearly does not mean that what it has
5 is the minimum standard of compliance with Article 3, nor does
6 it mean that every facility that does not have every creature
7 comfort that The Hague may have falls below that standard.

8 The U.S. is committed to complying with Common
9 Article 3, it does comply with Common Article 3, but it should
10 not be the military's job to examine all aspects of his
11 detention at Camp VII and how they may be different than what
12 a detainee has at The Hague facility.

13 And I heard Mr. Ruiz comment a couple of times about
14 the standards that should govern pretrial detainees. And when
15 someone is being detained at The Hague, I'll assume for
16 purposes of this motion that they are considered and held as
17 pretrial detainees there for their violations of international
18 war. That's not how Mr. Hawsawi is being detained.

19 Mr. Hawsawi is being detained as an alien unlawful enemy
20 belligerent, which is a standard set forth both in the 2006
21 Military Commission Act, although in slightly different
22 terminology, and under that specific terminology in the 2009
23 Military Commission Act.

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1 He is not a pretrial detainee. He is not a prisoner
2 of war as the Geneva Conventions would define a prisoner of
3 war. And while Mr. Ruiz in his filings seems to believe that
4 that is a legal, logical, and moral failing of the United
5 States Government, I would point out that it's the will of the
6 people and it's the will of Congress in two different
7 Congresses and the will of two different presidents in two
8 entirely different executive branches from two different
9 political parties.

10 The United States Government has decided that they
11 are not entitled to all of the privileges that a prisoner of
12 war under the Geneva Conventions would be. Part of that is
13 based on the fact that they have -- this war with al Qaeda,
14 they have almost no regard for the Geneva Conventions. So the
15 moral failings of the United States can be put on the people's
16 representatives, but shouldn't be a legal standard by which
17 this military commission decides this issue.

18 What he is entitled to before this court is he can
19 challenge his status as an alien unlawful enemy belligerent if
20 he so chooses. And we believe that AE 119, when filed by the
21 defense counsel, was such a challenge. And we are ready to
22 meet that challenge. And as a sidenote to that, all of the
23 evidence that we intended to present to establish his alien

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1 unlawful enemy belligerency was immediately moved by the
2 defense to never go on to the public website. So right now
3 the public doesn't understand the government's position on how
4 its going to challenge -- the challenge to Mr. Hawsawi's or
5 all five of these accused's alien unlawful enemy belligerency.

6 But what he is entitled to, I think, is an important
7 understanding for the commission in how limited your role
8 should be in this request. And, of course, the request is to
9 move Mr. Hawsawi to a different facility or to somehow have
10 the facility change the creature comforts that the accused
11 believe that they are entitled to. But ultimately if he
12 challenges that and he wins, then there is no jurisdiction for
13 this military commission and the case goes away.

14 That does not mean, however, that if he wins and he
15 is not an alien unlawful enemy belligerent, that the military
16 judge would have the authority to then direct, then direct
17 Camp VII to either comply with what it feels was required
18 under international law or to move him away to a different
19 facility. So I think that's an important understanding of the
20 strictures of what your power is here, sir, and you have all
21 of the power to vindicate all of the rights that an accused
22 may have before this military commission.

23 But at some point there has to be a better limitation

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1 on what the military judge engages on when there is questions
2 about conditions of confinement, when there is questions about
3 medical intervention, when there is questions about how the
4 guards move individuals to and from. It can't be as easy for
5 the defense to simply assert that it somehow impacts their
6 relationship. That can't be the standard. That can't be
7 enough for the defense to be able to get it before the
8 military commission to consider it.

9 And by analogy, here is the far extreme of the
10 analogy. My client likes ice cream. The facility doesn't
11 want him to have ice cream. If I provide him ice cream, he is
12 going to like me more, he is going to come to my meetings, and
13 we are going to have a better defense. Now, that seems
14 logically absurd that the military judge would get involved
15 under a standard like that, but at some point that's what they
16 are trying to do: Quality of life equals quality of
17 representation. Does it really, or are we just talking about
18 a choice? Are we talking about five accused who are trying to
19 manipulate this military commission in order to improve
20 their ----

21 LDC [MR. RUIZ]: Objection, relevance.

22 MJ [COL POHL]: Objection sustained. Move on to something
23 else.

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1 MDTC [MR. TRIVETT]: We believe it's at least relevant to
2 the determination that this is something that you should defer
3 to the administration on as far as the administration of the
4 prison facility by the JTF-GTMO. We don't believe you have --
5 we believe that the deference in this instance is equally
6 important to the deference in the other instances in which we
7 have asked you to defer to the experts in the prison
8 administration.

9 If I could just have one moment, sir.

10 MJ [COL POHL]: Sure.

11 MDTC [MR. TRIVETT]: Absent further questions, sir.

12 MJ [COL POHL]: I have none.

13 MDTC [MR. TRIVETT]: Thank you, sir.

14 LDC [MR. RUIZ]: May I?

15 MJ [COL POHL]: Sure.

16 LDC [MR. RUIZ]: Judge, I know I can't get into the very
17 troubling issues that are referenced in the ICRC reports, but
18 what I can represent to this commission and to you, and I
19 think if you've reviewed those, is that there are no issues of
20 ice cream involved in those --

21 CP [BG MARTINS]: Your Honor, at this point I would like
22 to invoke the government information privilege. We have a
23 relationship between the International Committee of the Red

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1 Cross, international partners that should be protected, and he
2 is now delving into matters that relate to communication that
3 appropriately have protection with a privilege.

4 LDC [MR. RUIZ]: The matter of ice cream is a matter of
5 protection with -- I am actually saying there is no mention of
6 ice cream in the ----

7 MJ [COL POHL]: General Martins, just so I understand
8 this, all I heard him say was that he wasn't talking about the
9 ice cream analogy that Mr. Trivett raised and he has
10 referenced without saying substantively the ICRC documents.

11 CP [BG MARTINS]: He is referring to what may or may not
12 be in the contents of the document, Your Honor, and this is
13 why you sealed it. This is why you have taken great
14 protections with regard to these communications.

15 MJ [COL POHL]: So you are saying he is referring to the
16 fact that ice cream wasn't in the documents?

17 CP [BG MARTINS]: Your Honor, this is your protective
18 order.

19 MJ [COL POHL]: I got it. I got it.

20 LDC [MR. RUIZ]: Judge, I will cease and desist from
21 mentioning ice cream in the ICRC's protective order, but I
22 will continue to draw your attention to the substance of those
23 reports.

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1 MJ [COL POHL]: Got it.

2 LDC [MR. RUIZ]: Thank you. Judge, mind your own
3 business. Mind your own business, this is our box, you need
4 to stay out of it. That's my translation. That's my
5 translation of what the argument is, is you don't get to play
6 in the detention aspect, you don't have a role in it. The
7 word used is "deference," but really what they are saying is,
8 Judge, mind your own business, and your business is not that.
9 Your business is here judging and ruling on these motions
10 based on the information that is provided to you.

11 Our argument is, Judge, it is your business and
12 responsibility and you have the authority to act, and you
13 should act, Judge, in this matter. Actually, Judge, I need to
14 retrieve another notepad.

15 MJ [COL POHL]: Sure.

16 LDC [MR. RUIZ]: I'm not going to get into more of the
17 Geneva Conventions, but I think it's safe to say that we have
18 established now that the government does not believe that
19 Mr. Hawsawi is entitled to all the protections of the Geneva
20 Conventions. I think we have argued this and briefed it
21 extensively.

22 I would submit to you that you have an independent
23 obligation to make sure that we comply with those protections

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1 and that to say that Mr. al Hawsawi and the other men who are
2 in our detention and in our care are treated in accordance
3 with Geneva, but if we violate that, there is nothing he can
4 do about it, there is nothing you can do about it, so we
5 will -- you know, we will just -- you know, we will just be
6 satisfied with saying that it applies or it doesn't apply in
7 some instances.

8 With respect to the analogy of The Hague, no, Judge,
9 we are not saying that you should have an exact facsimile of
10 the detention facility at The Hague, but we are providing you
11 with the best example of a real-world example of a
12 high-security facility that manages to balance the interests
13 of appropriate law of war detention and their security
14 concerns, whatever they may have. And by analogy we are
15 saying, Judge, if you are being told that we can't and it is
16 something that cannot happen, then I think you should at least
17 use that example in your analysis.

18 Mr. Trivett referred to our motion in regards to 119
19 where we asked the commission not to allow the prosecution to
20 publish the statements that they utilized in their motion.
21 What he failed to say was the reason behind that was because
22 we did not believe -- actually, we believed General Martins
23 when he said that they would not use statements derived from

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1 torture or utilized or obtained through the use of torture in
2 the course of these military proceedings. Yet in AE 119 they
3 proceed to set forth a litany of statements that we believe
4 are derived directly from methodology employing torture.

5 And since we, for the most part, at times tried to
6 take the Chief Prosecutor at his word when he says he is not
7 going to use evidence derived from torture, we take that to
8 mean not only at trial, but in their pleadings and pleadings
9 that would be made public. And we certainly -- if we litigate
10 that issue before this commission and Your Honor says, well,
11 that information will be admissible or that information will
12 be excluded, it would be meaningless at that point if the
13 prosecution has already plastered it upon some pleading and
14 taken advantage of evidence that has been obtained and derived
15 from torture.

16 So there was a legitimate need to say to this
17 commission, which is what we said, Judge, let's wait until we
18 litigate the admissibility of those documents, determine if
19 they were derived from torture, from techniques that the
20 general himself has tried to distance himself from. So it's
21 very disingenuous to get up here saying we need to keep it
22 from the public when the entire mantra of the prosecution has
23 been these military commissions will not utilize statements

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1 derived from torture.

2 What we said in our pleading, Judge, is we will
3 litigate that. We will litigate the admissibility, but we are
4 not going to rule that out at this point and just allow them
5 to take advantage of this evidence that we know and believe
6 has been derived from techniques that our law says are not to
7 be utilized in the admissibility of evidence because it goes
8 against reliability and voluntariness. That's well
9 established.

10 That's all I have, Judge.

11 MJ [COL POHL]: Thank you.

12 Mr. Trivett, anything further?

13 MDTC [MR. TRIVETT]: We certainly disagree with the
14 defense counsel's characterization of how the statements were
15 derived. That's all.

16 MJ [COL POHL]: That brings us to 214 and 214A. It's --
17 on 214A the government response is basically -- let me ask the
18 government first of all. Your response of 23 September --
19 because this is one of our older ones, 25 September 2013 was
20 delay action until you completed your review of any potential
21 discovery material responsive to the requested relief?

22 CP [BG MARTINS]: Yes, Your Honor. Subsequent to that we
23 went out and did prudentially search records and fulfill our

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1 due diligence and made a review, and then we did provide
2 responsive discovery.

3 MJ [COL POHL]: Okay.

4 CP [BG MARTINS]: And I suspect counsel will get to that
5 chronology as he talks ----

6 MJ [COL POHL]: Okay. Just to update the pleadings where
7 we are at. Okay.

8 Commander.

9 LDC [MR. RUIZ]: Judge, the discovery request we submitted
10 was tied to the government of Saudi Arabia, obviously since
11 Mr. al Hawsawi is a Saudi Arabia citizen. The information we
12 received contained diplomatic notes from the government of
13 Pakistan. So if that's responsive, I would say yes, we
14 received the response. It was concerning the government of
15 Pakistan and had nothing to do with Mr. al Hawsawi.

16 So in regards to the request and the essence of our
17 request, which has all the information, diplomatic notes and
18 cables between our government and the government of
19 Saudi Arabia, we don't have that.

20 MJ [COL POHL]: Okay. Trial Counsel, response?

21 CP [BG MARTINS]: Your Honor, we did do a search for
22 communications reflecting contacts by consular officials in
23 states of whom the five accused are nationals with the

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1 U.S. Government and then got that product and provided it to
2 all five teams. So he -- and we looked at this and analyzed
3 it for the responsiveness to the requests that the different
4 teams had.

5 We actually reflected that there are three pages of
6 classified material that related to Mr. al Hawsawi. Our
7 records reflect that you got those. Even though you have not
8 signed the MOU, we looked hard at the protective order you
9 signed, which says they must sign an MOU, but there is a
10 clause that states that "if not authorized by the government."
11 So in a case-specific setting, we deemed that that piece of
12 discovery could go to the accused. So ----

13 MJ [COL POHL]: There appears to be a disconnect here of
14 what you think you gave him and what Mr. Ruiz thinks he has.
15 Would that be accurate?

16 LDC [MR. RUIZ]: Yes, Judge. And in the area of
17 discovery, that's not necessarily always unusual. But we may
18 be better served if we can try to discuss this and see if we
19 can work that out.

20 CP [BG MARTINS]: I agree.

21 MJ [COL POHL]: Let's do that on 214A and 214 itself. Is
22 that ----

23 LDC [MR. RUIZ]: I would like to resolve the discovery

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1 issue first, Judge.

2 MJ [COL POHL]: Okay. Why don't we do this: We will
3 break for lunch and reconvene at 1330, and the only two I see
4 left are the 214A and 214 itself, and then I am open to
5 discussion about any other business we can take up this week
6 or next week, if any.

7 The commission is in recess until 1330.

8 [The R.M.C. 803 session recessed at 1133, 12 February 2015.]

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