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1 [The R.M.C. 803 session was called to order at 1108,
2 9 December 2015.]

3 MJ [COL POHL]: The commission is called to order. All
4 parties are again present that were present when commission
5 recessed. Is there any exception to that? Apparently not.

6 Mr. Swann, I just want to make sure that we
7 understand where we're at here so there's no confusion. I
8 understand Mr. Hawsawi's executed a waiver for this
9 afternoon's session; is that correct?

10 TC [MR. SWANN]: He has, Your Honor.

11 MJ [COL POHL]: How about this morning?

12 TC [MR. SWANN]: No, Your Honor. That was not the
13 direction we received. It was just simply this afternoon, but
14 he did not indicate anything about this morning.

15 MJ [COL POHL]: So wouldn't the state of the record be
16 that right now we have an involuntary waiver for this
17 morning's session?

18 TC [MR. SWANN]: Yes, Your Honor. I understand what
19 you're saying.

20 MJ [COL POHL]: We didn't ask him whether he wanted to
21 come this morning?

22 CP [BG MARTINS]: Your Honor, we did understand you to say
23 that this morning was not what was to be asked of him.

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1 MJ [COL POHL]: Perhaps I wasn't as clear as I should have
2 been, but -- and maybe that's my fault, I'll take that hit.
3 But as you -- you stated yourself, his waiver this morning was
4 involuntary. Wouldn't that necessarily imply, an implied task
5 that we had to address his absence this morning?

6 TC [MR. SWANN]: Your Honor, if I might?

7 MJ [COL POHL]: Yes.

8 TC [MR. SWANN]: Army captains are a lot smarter than
9 retired Army colonels; therefore, an Army captain did ask him
10 that and, therefore, she is prepared to testify regarding
11 that.

12 MJ [COL POHL]: Well, good. Good. Then she understands
13 implied tasks perhaps better than others do. Okay. Let's go
14 ahead, then.

15 CAPTAIN, U.S. ARMY, was recalled as a witness for the
16 prosecution, was reminded she was previously sworn, and
17 testified as follows:

18 **DIRECT EXAMINATION**

19 Questions by the Trial Counsel [MR. SWANN]:

20 Q. Captain, I remind you you are still under oath. You
21 were given some guidance by the commission. Did you have
22 occasion to go back and talk to Mr. Hawsawi?

23 A. Yes, I did.

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1 Q. All right. Obviously, you've got a waiver prepared
2 by Mr. Hawsawi for this afternoon's session. Did he waive his
3 rights to attend this afternoon?

4 A. Yes, he did.

5 Q. And did he indicate to you that he understood what
6 those rights were?

7 A. Yes, he did.

8 Q. He said he didn't want to come?

9 A. That's correct.

10 Q. And there was a follow-up to the conversation that
11 you had with Mr. Hawsawi, and did he indicate that he wanted
12 to waive his attendance for the remainder of this morning's
13 session?

14 A. Sir, he stated that he wanted to go to his ICRC
15 meeting at 11:00. I gave him the letter that Mr. Ruiz asked
16 that I deliver to him. I asked that he read that letter first
17 before I spoke to him and ask him about attending. He read
18 the letter. He stated he wanted to go to ICRC at 11:00 and he
19 did not wish to attend this afternoon's p.m. commission
20 session.

21 Q. What about the morning session? Did he waive his
22 rights to attend the remainder of the morning?

23 A. Yes, he did, sir.

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1 TC [MR. SWANN]: Okay. Thank you very much.

2 MJ [COL POHL]: Did he have any caveats when he talked
3 about this morning? Do you remember when you testified
4 earlier, he said, "I want to go to my ICRC meeting and so I'm
5 involuntarily waiving my right to attend the commission
6 proceeding"? Was there any discussion about that?

7 WIT: No, sir. He stated he wanted to go to his ICRC
8 meeting at 11:00.

9 MJ [COL POHL]: Mr. Ruiz?

10 **CROSS-EXAMINATION**

11 **Questions by the Learned Defense Counsel [MR. RUIZ]:**

12 Q. Captain, I assume you did not read my letter before
13 you gave it to him?

14 A. That's correct, sir.

15 LDC [MR. RUIZ]: So, Judge, the substance of my letter
16 makes his response understandable. And while I am normally
17 not wanting to reveal attorney-client privileged information,
18 I will tell you for purposes of ----

19 MJ [COL POHL]: I need to make a finding that we have a
20 knowing and voluntary waiver, okay?

21 LDC [MR. RUIZ]: Judge, I will tell you what I told
22 Mr. Hawsawi.

23 MJ [COL POHL]: Let me ask you this: Can you just give it

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1 to me ----

2 LDC [MR. RUIZ]: No, unless ----

3 MJ [COL POHL]: ---- in written form that you gave to him
4 and I can make a finding whether it's knowing and voluntary?
5 Because right now, I don't.

6 LDC [MR. RUIZ]: We would have to retrieve it from him,
7 Judge. I handwrote it on a piece of white paper and gave it
8 to the captain.

9 MJ [COL POHL]: Do you feel comfortable telling me what
10 you said? Tell me what you told him.

11 LDC [MR. RUIZ]: Yes, I can tell you for this limited
12 purpose.

13 MJ [COL POHL]: Okay.

14 LDC [MR. RUIZ]: I told Mr. Hawsawi that you had indicated
15 that he could go to the ICRC meeting this morning and that he
16 could attend court in the afternoon. But I think that implies
17 that there is -- that he didn't have to choose either/or.
18 Does that make ----

19 MJ [COL POHL]: No, exactly.

20 LDC [MR. RUIZ]: Right. So I don't think -- I don't think
21 Mr. Hawsawi was saying, I will continue to waive the rest of
22 the morning based on -- my understanding is he didn't have to
23 make that choice and that's what I was trying to convey to

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1 him, that he could go to the meeting and come in the afternoon
2 if he chose.

3 MJ [COL POHL]: Yeah.

4 LDC [MR. RUIZ]: Now, for the afternoon, I think he freely
5 and voluntarily waived that.

6 MJ [COL POHL]: Yeah. Do we have a knowing and voluntary
7 waiver for this morning?

8 LDC [MR. RUIZ]: I'm not -- I don't think that's -- I
9 mean, I understand because she didn't read the letter, but
10 given what I communicated to him, I don't think he was being
11 asked to waive the morning session.

12 MJ [COL POHL]: Okay. Okay. Got it.

13 General Martins.

14 CP [BG MARTINS]: Your Honor, I agree with the tenor and
15 the direction of the questioning. We have 50 minutes,
16 five-0 minutes, until the afternoon starts. Probably in light
17 of the record, our recommendation would be the cleanest thing
18 is to rely on that waiver starting at noon.

19 MJ [COL POHL]: Agreed. Okay. Agreed.

20 ACC [MR. BINALSHIBH]: **[Speaking English.]** Your Honor,
21 can I say something for the problem that we have today? I
22 think we need self-confidence, honesty, and a more helpful
23 SJA. Because the SJA that you have here, she is not -- she is

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1 not responding any answer if you have any concern. When we
2 ask him [sic], she just repeats herself again and again and
3 again.

4 MJ [COL POHL]: Okay. I'm about to address that. Thank
5 you, Mr. Binalshibh.

6 Trial Counsel, again, we are going to recess. And,
7 you know, there's a thought -- Captain, you can return to your
8 seat.

9 [The witness was excused and returned to her seat in the
10 courtroom.]

11 MJ [COL POHL]: There's a thought to call the SJA in here
12 and say let's -- tell me what happened and let's resolve this
13 problem with the ICRC de-confliction. But my experience and
14 perhaps others is that this is just -- I know there's two
15 sides to every story, but it appears to come up frequently.
16 And I'm not sure sticking the finger in the dike of this
17 problem will solve the other problem, but we need to have a
18 more realistic attitude.

19 I'm assuming when I set out a calendar -- and, quite
20 frankly, not just me, but the other judges, too -- we send out
21 our calendar way in advance. If we need to de-conflict
22 things, let's do it. But there needs to be more of a spirit
23 of "let's work this out so we don't waste our time." You

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1 understand, I'm not sitting here pointing fingers and taking
2 sides and things like that.

3 If the issue is simply a scheduling one, it strikes
4 to me -- I don't want to call the SJA in, saying, "Why did you
5 mess this up," if he did; I'm not assuming he did. We need to
6 move this thing, understand what I'm saying? Everybody wants
7 this to go smoothly -- rephrase that. I know the government
8 has an interest in moving things as efficiently as possible
9 and not to waste time, and sometimes we get these time-wasting
10 things because of things like this that, at least in my view,
11 are fixable.

12 So whatever swag you have with them, if we need to
13 call the SJA in, we're going to start calling him in, because
14 I don't want to waste time doing that, if we can avoid it. So
15 do what you can using your offices to avoid these kinds of
16 problems in the future.

17 And, Defense Counsel, again, not taking sides, but I
18 mean, if you have got these kind of issues, let me know about
19 them. I commend you for asking them to alter their schedules.
20 The ICRC, I understand, is somewhat flexible on this, but this
21 really is something that should be resolvable at a lower
22 level. If it's not because you're not getting the appropriate
23 response, I understand that. Let me know as soon as possible.

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2 Commission is in recess.

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