MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI**	**AE 617A (GOV)** **Government Response** To Mr. Ali's Motion to Compel Communications from the International Committee for the Red Cross Concerning the Existence of an Armed Conflict 1996-2002 24 January 2019

1. Timeliness

The Prosecution timely files this Response pursuant to Military Commissions Trial Judiciary Rule of Court ("R.C.") 3.7.

2. Relief Sought

The Prosecution respectfully requests that the Commission deny, without oral argument, the requested relief contained within AE 617 (AAA), Mr. Ali's Motion to Compel Communications from the International Committee for the Red Cross (ICRC) Concerning the Existence of an Armed Conflict 1996-2002.

3. Burden of Proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. *See* R.M.C. 905(c)(1)-(2).

4. Facts

The controlling legal standard for determining the existence of hostilities in this Commission is set forth in *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1277–78 (U.S.C.M.C.R. 2011), *rev'd on other grounds, Hamdan v. United States,* 696 F.3d 1238 (D.C. Cir. 2012).

On 19 December 2018, Defense counsel for Mr. Ali submitted a request for discovery to the Prosecution requesting all documents or information reflecting ICRC communications to the United States government concerning the existence of an armed conflict between the United States and al Qaeda or the United States and the Islamic Emirate of Afghanistan between 1 January 1996 and 31 December 2002. *See* AE 617 (AAA), Attach. B.

On 21 December 2018, the Prosecution denied the Defense request and stated that the proper legal standard for defining hostilities was adopted by the United States Court of Military Commissions Review as articulated in *United States v. Hamdan*. The Prosecution further specified that the substance of the requested communications were neither relevant nor material when applying that standard. *See* AE 617 (AAA), Attach. C.

On 17 January 2019, Defense counsel for Mr. Ali filed AE 617 (AAA) requesting this Commission "compel the [Prosecution] to provide the Defense with all communications from the [ICRC] to the U.S. government concerning the existence and character of any armed conflict between the United States and al Qaeda from 23 August 1996 until 31 December 2002." AE 617 (AAA) at 1.[1]

5. Law and Argument

I. The Prosecution's Discovery Obligations Are Defined by the Relevant Rules and Statutes

The Military Commissions Act of 2009 ("M.C.A.") affords the Defense a reasonable opportunity to obtain evidence through a process comparable to other United States criminal courts. *See* 10 U.S.C. § 949j. Pursuant to the M.C.A., the Rules for Military Commissions (R.M.C.) require that the Prosecution produce evidence that is material to the preparation of the

[1] It should be noted that while the relief sought by the Defense in AE 617 (AAA) references ICRC communications relating to al Qaeda, on page eight of their brief, the Defense indicates that they are also still seeking communications relating to the Islamic Emirate of Afghanistan. As this Commission has already ruled in AE 564E, such communications relating to the Islamic Emirate of Afghanistan are not relevant and the Prosecution does not further address the issue in this response.

defense. Specifically, R.M.C. 701(c)(1) requires the Prosecution to permit defense counsel to examine,

> [a]ny books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are 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.

See R.M.C. 701(c)(1). However, notwithstanding this requirement, no authority grants defendants an unqualified right to receive, or compels the Prosecution to produce, discovery merely because the defendant has requested it. Rather, the relevant rules and statutes define the Prosecution's discovery obligations. *See generally United States v. Agurs*, 427 U.S. 97, 106 (1976) (noting that "there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor").

A criminal defendant has a right to discover certain materials, but the scope of this right and the government's attendant discovery obligations are not without limit. For example, upon request, the government must permit the defendant to inspect and copy documents in the government's possession, but only if the documents meet the requirements of R.M.C. 701. Military courts have adopted a standard by which "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *United States v. Graner*, 69 M.J. 104, 107–08 (C.A.A.F. 2010). In instances where the Defense did not present an adequate theory of relevance to justify the compelled production of evidence, C.A.A.F. has applied the relevance standard in upholding denials of compelled production. *See Graner*, 69 M.J. at 107–09. A defense theory that is too speculative, and too insubstantial, does not meet the threshold of relevance and necessity for the admission of evidence. *See United States v. Sanders*, 2008 WL 2852962 (A.F.F.C.A. 2008) (citing *United States v. Briggs*, 46 M.J. 699, 702 (A.F.C.C.A. 1996)). A general description of the material sought or a conclusory argument as to

its materiality is insufficient. *See Briggs*, 46 M.J. at 702 (citing *United States v. Branoff*, 34 M.J. 612, 620 (A.F.F.C.A) (remanded on other grounds) (citing *United States v. Cadet*, 727 F.2d 1453, 1468 (9th Cir. 1984))). The Prosecution takes is discovery obligations seriously and will provide the Defense with that which is material to this case.

II. The Controlling Legal Standard for Determining Hostilities is Set Forth by the United States Court of Military Commissions Review in *United States v. Hamdan*

The Prosecution incorporates herein by reference the facts, law, and argument as articulated in AE 502O (GOV), which details the Prosecution's position on legally establishing hostilities.

At trial, and for any jurisdictional hearing, the Military Judge is bound to apply the following instruction, articulated by the U.S.C.M.C.R., as the correct legal standard for establishing the existence of hostilities:[2]

> In determining whether hostilities existed between the United States and al Qaida, and when it began, you should consider the length, duration and intensity of hostilities between the parties; whether there was protracted armed violence between governmental authorities and organized armed groups; whether and when the United States decided to employ the combat capabilities of its armed forces to meet the al Qaida threat; the number of persons killed or wounded on each side; the amount of property damage on each side; statements of the leaders of both sides indicating their perceptions regarding the existence of an armed conflict, including the presence or absence of a declaration to that effect; and any other facts and circumstances you consider relevant to the existence of armed conflict.

United States v. Hamdan, 801 F. Supp. 2d 1247, 1277–78 (U.S.C.M.C.R. 2011), *rev'd on other grounds, Hamdan v. United States,* 696 F.3d 1238 (D.C. Cir. 2012). The U.S.C.M.C.R. held that this is the proper instruction for the members to determine whether an armed conflict exists between al Qaeda and the United States during the charged time period. *Hamdan*, 801 F. Supp. 2d at 1277–78. The U.S.C.M.C.R.'s holding in this regard is binding on this Commission.

[2] The M.C.A. uses the word "Hostilities." *See* 10 U.S.C. § 948a(9).

III. The Requested ICRC Information is Clearly Irrelevant When Applying the Proper Legal Standard for Establishing the Existence of Hostilities and Thus Not Discoverable

Broken out, the following seven elements are the legally binding elements to consider when determining the existence of hostilities:

1. Length, Duration and Intensity of Hostilities Between the Parties;

2. Whether There Was Protracted Armed Violence between Governmental Authorities and Organized Armed Groups;

3. Whether and When the United States Decided to Employ the Combat Capabilities of its Armed Forces to Meet the al Qaida threat;

4. The Number of Persons Killed or Wounded on Each Side;

5. The Amount of Property Damage on Each Side;

6. Statements of the Leaders of Both Sides Indicating Their Perceptions Regarding the Existence of an Armed Conflict, Including the Presence or Absence of a Declaration to that Effect[3];

7. Any Other Facts and Circumstances This Commission Considers Relevant to the Existence of Armed Conflict.

The Defense is asking this Commission to look only at the last element (element seven above) and find that the requested ICRC information falls within that category. While this portion of the definition does not draw any legal boundaries, like all legal instructions, it must be read in context, and is not limitless. As an initial matter, this will be the legal instruction put forth to the members, who will have sat through all of the evidence the Military Judge has determined is competent and relevant during the course of the trial before making their decision. Military members could conceivably find certain facts and circumstances relevant to the question

[3] As stated in AE 502O (GOV), the Prosecution posits that "leaders of al Qaeda" were Usama bin Laden, Ayman al Zawahiri, and their designated spokesmen who produced propaganda on their behalf. The Prosecution posits that, for purposes of the legal definition of hostilities, the United States' leaders should be limited to United States cabinet-level officials of war-fighting departments: The President of the United States, as the Commander-in-Chief, the Secretary of Defense, as the leader of the Department of Defense, as well as their designated spokesmen. Even if the Military Judge should expand this definition of "leaders" to other branches of the Executive, he should not consider statements of individuals who are subordinates of the cabinet-level appointees unless they were a designated spokesman.

from the legal and competent evidence admitted relating to the hostilities and ask questions of their own in that context. However, this subsection of the definition does not provide Defense counsel *carte blanche* to enter into evidence whatever they themselves deem relevant regarding the existence of the armed conflict, nor would it entitle them to discovery of every document that in their own minds constitutes "other facts and circumstances relevant to the existence of armed conflict." Such a reading would completely eviscerate the actual legal standard and make the discovery phase of this case a never-ending proposition.

The Defense goes to great lengths to legitimize the ICRC as an expert on determining the existence of hostilities, and makes the claim that the ICRC is "apolitical" and its documents therefore "credible." *See* AE 617 (AAA) at 5 n.8; *id.* at 8. The Defense then attempts to justify the ICRC document production by claiming the ICRC documents are relevant to Element 7 of the hostilities standard analysis. In reality, however, the document, while not only irrelevant to the proper legal standard for hostilities, would also be further objectionable on the basis that it is the ICRC's own legal opinion, as determined by the ICRC's own internal legal standards, which is an improper expert opinion on an issue of law that is the Commission's to solely make.[4] Nor is the ICRC opinion customary international law. *See, e.g.,* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (defining customary international law as "result[ing] from . . . [the] consistent practice of states followed by them from a sense of legal obligation").

The Defense's attempt to offer the ICRC's opinion as a fact is tantamount to offering improper expert testimony that consists of legal conclusions. *See Burkhart v. Washington Metro. Area Transit Auth.,* 112 F.3d 1207, 1212 (D.C. Cir. 1997) ("Expert testimony that consists of legal conclusions cannot properly assist the trier of fact in either respect."); *United States v.*

[4] It should not go unnoted that the Defense draws an unsupported conclusion that the ICRC did not believe that there were facts supporting a conclusion of law that the United States and al Qaeda were engaged in an armed conflict. *See* AE 617 (AAA) at 13. To the extent there is open source documentation that supports such a conclusion, it would negate the need for the Defense to compel this Commission to grant what would be cumulative information.

Littlewood, 53 M.J. 349, 353 (C.A.A.F. 2000) ("[O]pinion testimony is not helpful where it does no more than instruct the factfinder as to what result it should reach."); *United States v. Lukens*, 2007 CCA LEXIS 59, *5–6 (N-M.C.C.A. 2007) (upholding admission of expert testimony, in part, because the military judge did not ask the expert to make conclusions of law); *Convertino v. United States DOJ*, 772 F. Supp.2d 10, 12 (D.D.C. 2010) (that a judge is the trier of fact "does not change the calculus of whether an expert witness offering legal conclusions should be stricken."); *Id.* ("Legal conclusions, unlike factual assessments, intrude upon the duties of, and effectively substitute for the judgement of, the trier of fact."); *cf.* AE 200Z, Ruling, at 2 (the international law matters that "Dr. Nowak will testify concern legal conclusions which are properly left to the Military Judge to resolve.").

Whether or not the ICRC is an expert in determining hostilities is irrelevant, as its standard for determining hostilities is not the proper legal standard to be used by this Commission.[5] It is simply the ICRC's opinion, which has no bearing on this case. *Cf. United States v. Adnan Ibrahim Harun a Hausa*, No. 12 CR. 0134 (BMC), 2017 WL 354197, at *1 (E.D.N.Y. Jan. 24, 2017) (denying proffered testimony from a purported law-of-war expert that al Qaeda constituted an "armed force" engaged in an "armed conflict," and holding that "[d]etermining the applicability of the 18 U.S.C. § 2332f(d)(1) prosecutorial exemption requires the legal interpretation or definition of certain key phrases in the subsection itself, and that it is for the Court, not an attorney-expert on the law of war, to determine"). With respect to the ICRC, its opinion is simply not a fact or circumstance that is relevant to the legal determination of hostilities between the United States and al Qaeda as specified under *United States v. Hamdan*, and thus the Defense is not entitled to the information pursuant to R.M.C. 701. Therefore, the Defense request and motion should be denied by the Commission.

[5] The Commission previously examined the facts of this case and for purposes of its own jurisdiction determined after applying the applicable legal standard that, "A state of hostilities existed between the United States and the transnational terrorist organization known as al Qaeda on, and for an indeterminate time before, September 11, 2001 . . . ." *See* AE 502BBBB, Ruling, at 4–7, 19.

6. Conclusion

The applicable legal standard for determining the existence of hostilities in this Commission is set forth in *United States v. Hamdan*. It is the responsibility of the Prosecution to determine what is discoverable and, as set forth above, the Prosecution takes its discovery obligations seriously and will produce any documentation/material requested by the Defense that is material to the preparation of the defense or is otherwise one of the enumerated categories of discoverable information under R.M.C. 701 and other applicable law. However, where the Defense has failed to demonstrate that the requested information is relevant and material to the case at bar, the Prosecution will dutifully object, as it does here, and request that the Commission deny the Defense motion, without oral argument.[6]

7. Oral Argument

The Prosecution does not request oral argument. Further, the Prosecution strongly posits that this Commission should dispense with oral argument as the facts and legal contentions are adequately presented in the material now before the Commission and argument would not add to the decisional process. However, if the Military Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

8. Witnesses and Evidence

The Prosecution will not rely on any witnesses or additional evidence in support of this pleading.

9. Additional Information

The Prosecution has no additional information.

[6] In the event that the Commission finds the ICRC communications relevant, such communications are also now potentially privileged subject to Military Commission Rule of Evidence 506A. The 2012 Edition of the Manual for Military Commissions ("M.M.C.") was revised in accordance with amendments made to Chapter 47A of title 10, United States Code by Sections 1031 and 1037 of the National Defense Authorization Act for FY 2014. The revised edition included an amendment to the M.C.R.E. with the inclusion of M.C.R.E. 506A – Privilege for ICRC Communications in the Possession of the Government. The effective date of the 2016 Edition of the M.M.C. was 31 March 2017.

10. Attachments

A. Certificate of Service, dated 24 January 2019.

Respectfully submitted,

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Clay Trivett
Managing Trial Counsel

Nicole Tate
Assistant Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 24th day of January 2019, I filed AE 617A (GOV), Government Response to Mr. Ali's Motion to Compel Communications from the International Committee for the Red Cross Concerning the Existence of an Armed Conflict 1996-2002, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//
Nicole A. Tate
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