MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	**AE617B (AAA)** **Mr. al Baluchi's Reply to** Government's Response to Mr. al Baluchi's Motion to Compel Communications from the International Committee of the Red Cross Concerning the Existence of an Armed Conflict 1996-2002 31 January 2019

1. Timeliness: This Reply is timely filed.[1]

2. Law and Argument:

The military commission should compel the government to provide Mr. al Baluchi with documents and information reflecting communications from the International Committee of the Red Cross (ICRC) to the United States concerning the existence of an armed conflict between the United States and al Qaeda between 1996 and 2002. These records are evidence in the possession of the government. They are material to Mr. al Baluchi's defense because they will help him disprove the existence of hostilities prior to 11 September 2001 and they fit squarely within the broad ambit of the *Hamdan* standard for determining the existence of hostilities. The government has not denied the existence of the records or raised a claim of privilege over the records Mr. al Baluchi seeks. And, instead, it seeks to prevent their mere production by raising an entirely inapplicable *testimonial* objection that the evidence itself is expert testimony as to a conclusion of law.

[1] R.C. 3.7.e.(2).

Rather than issue an advisory opinion on an objection to testimony which may or may not be presented, the military commission should instead compel the government to provide Mr. al Baluchi with the unusual evidence in its possession that remarks on what was self-evident and generally unremarked on 10 September 2001: that the United States was not then engaged in an armed conflict with al Qaeda. Mr. al Baluchi expects that ICRC communications will exist only after the armed conflict began on 7 October 2001, and that the contrast will assist him in presenting his challenge to personal jurisdiction and the hostilities element at trial.

A. The Hamdan *hostilities standard encompasses the* Tadic *definition of armed conflict.*

As Mr. al Baluchi has repeatedly briefed, the government's preferred standard for determining the existence of hostilities—that quoted by the Court of Military Commission Review's (CMCR's) now vacated opinion in *United States v. Hamdan*—"embraces much of the *Tadic* definition of armed conflict,"[2] the prevailing standard for determining the existence of hostilities under international law. However, the *Hamdan* standard articulates a true totality of the circumstances approach that includes but is not limited to the factors identified by the *Tadic* decision and its subsequent interpretations.[3]

The primary difference between the *Tadic* approach and the *Hamdan* approach to determining the existence of hostilities is the necessity of finding both intensity and organization

[2] AE494D (AAA) Mr. al Baluchi's Reply to Government's Response to Mr. al Baluchi's Notice of Declination of Joinder and Motion to Consider Other Arguments or for Other Relief Regarding AE494 at 8; AE502Y (AAA) Mr. al Baluchi's Combined Response to AE502V Trial Conduct Order and Reply to AE502O Government's Consolidated Response to AE502L (MAH) and AE 502J (AAA) Witness Lists for Personal Jurisdiction Hearing at 131.

[3] The issue with instructing a panel regarding a true totality of the circumstances approach is that it provides no guidance on the significance of any particular factor. *See United States v. Hallford*, 816 F.3d 850, 857 n.9 (D.C. Cir. 2016).

separately under *Tadic* and its progeny. Rather than treating intensity and organization as separate prongs that must be satisfied, the *Hamdan* standard treats them as a multifactor test. Although this distinction may be important at trial, it does not affect the materiality of the ICRC-U.S. government communications Mr. al Baluchi seeks here.

Moreover, and contrary to the government's argument in AE617A, the factors identified in the *Hamdan* standard are explicitly *not exclusive*. Judge Allred, who issued the *Hamdan* standard as a panel instruction, explained, in response to defense counsel's objection, that the instruction was intentionally broad and designed to "give both sides the ability to argue their theories [of hostilities] without suggesting the correct answer to the members and to give you *the ability to suggest other factors*."[4] In fact, the portion of the *Hamdan* standard, as quoted by both the CMCR and the government, is incomplete, omitting its clarifying final sentence: "The parties may argue the existence of other facts and circumstances from which you [the panel members] might reach your determination regarding this issues [the existence of hostilities]."[5] That sentence was included specifically to allow the parties to "make whatever argument [they] wish."[6]

Even if the *Hamdan* standard did not encompass the *Tadic* definition for the existence of hostilities, the standard itself is meant to allow defense and trial counsel latitude to make whatever argument they think may be persuasive. In this case, as he explained in his initial brief, Mr. al Baluchi believes that communications from the ICRC—an organization whose mandate requires it to discriminate between situations of hostilities and situations that do not constitute hostilities—

[4] AE502Y (AAA), Att. K (emphasis added).

[5] *Id.*

[6] *Id.*

that tend to demonstrate an absence of hostilities between the United States and al Qaeda prior to the 11 September 2001 terrorist attacks may be persuasive to the panel members.

Having identified a factor the panel may find persuasive, as authorized by the *Hamdan* standard, and having identified evidence in the government's possession that speaks to that factor, the government cannot now claim that the evidence is undiscoverable simply because it does not like the way the factor and the evidence cut.

B. Communications from the ICRC are evidence not expert opinion.

Communications from the ICRC to the U.S. government between 1996 and 2002 concerning the existence of an armed conflict between the United States and al Qaeda are not expert testimony. They are evidence of the ICRC's contemporaneous view of the world between 1996 and 2002. The issue is not a pre-2001 ICRC analysis of whether the United States and al Qaeda were engaged in armed conflict; such an analysis is unlikely to exist because no one at the time suggested the existence of an armed conflict. The issue is the contrast between the state of affairs before and after 7 October 2001, which was the actual, contemporaneously-recognized beginning of hostilities. The *fact*—likely demonstrated by the evidence Mr. al Baluchi seeks here—that the ICRC did not identify an armed conflict between al Qaeda and the United States prior to 9/11 may be persuasive to members of the panel, who will note that this evidence corroborates the public acts of the President of the United States that the United States was not engaged in hostilities with al Qaeda in the aftermath of the U.S.S. *Cole* bombing, al Qaeda's final pre-9/11 act of violence targeting the United States.

Mr. al Baluchi does not concede that the ICRC's communications to the United States concerning the existence of an armed conflict with al Qaeda between 1996 and 2002 constitute

expert testimony. The military commission has before it a motion to compel discovery, not a motion regarding the testimony of any person. That said, he does note that the government's positions respecting expert testimony are incorrect. It is neither improper for the military commission to hear expert testimony on the content of the laws of war nor improper for the military commission to hear testimony as to legal conclusions.

First, expert testimony is relevant if it "will assist the trier of fact to understand the evidence or to determine a fact in issue."[7] With respect to international law, of which the laws of war are a component, the Supreme Court approved more than a hundred years ago the "resort . . . to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."[8] M.C.R.E. 210A specifically authorizes the military judge to, "in determining such law, . . . consider any relevant material or source, including testimony of lay and expert witnesses."[9] And, of course, this military commission has already heard expert testimony concerning the content of the laws of war.[10]

[7] M.C.R.E. 702.

[8] *The Paquette Habana*, 175 U.S. 677, 700 (1900).

[9] M.C.R.E. 210A(b).

[10] *See, e.g.*, Unofficial/Unauthenticated Transcript of 7 December 2017 at 17984-18034. Notably, Professor Watts, an expert in the law of war, testified to the legal conclusion that, based on intensity, no armed conflict existed between the United States and al Qaeda until October 2001. *Id.* at 18023-24.

Second, otherwise admissible opinion testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[11] As a result the government cannot successfully argue that Mr. al Baluchi's expert witnesses will improperly testify as to an ultimate issue. Rather, citing *Burkhart v. Washington Metro. Area Transit Auth.*, the government asserts that the discovery sought by Mr. al Baluchi cannot properly assist the trier of fact because it expresses legal conclusions.[12] But the *Burkhart* court noted that "the line between an inadmissible legal conclusion and admissible assistance to the trier of fact in understanding the evidence or in determining a fact in issue is not always bright."[13] The distinguishing factor is "whether the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular. If they do, exclusion of testimony is appropriate. For example, in a Title VII discrimination suit, the question, "Did an employer *discriminate* based on national origin?" should be excluded, while the question, "Did national origin motivate the hiring decision?" should be allowed.[14] Policing this distinction is a task left to the examining attorneys and the military judge presiding over the court room when faced with an expert witness, not a task that is appropriately resolved when Mr. al Baluchi is merely seeking discovery in the first instance.

Nevertheless, even if the ICRC's communications to the United States concerning the existence of an armed conflict *were* "tantamount to . . . improper expert testimony that consists of legal conclusions," that is the basis of a testimonial objection to a question not an excuse for

[11] M.C.R.E. 704.

[12] AE617A (GOV) at 6-7 (citing *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1212 (D.C. Cir. 1997).

[13] *Burkhart*, 112 F.3d at 1212.

[14] *Id.*

refusing to provide material discovery wholesale. The government cites no authority that supports its attempt to transform an objection to improper expert *testimony* into an excuse for withholding material discovery.[15] Moreover, even if the government's testimonial objection applied to Mr. al Baluchi's requested discovery, evidence need not be admissible to be produced in discovery.[16]

Because the ICRC's communications to the United States concerning the existence of an armed conflict between the United States and al Qaeda between 1996 and 2002 are material, are in the possession of the government, and are not privileged, the military commission should order the government to produce them to Mr. al Baluchi.

[15] Mr. al Baluchi notes that the government appears to misunderstand the military judge's ruling in AE200Z Ruling. Although the government quotes from that ruling in a manner suggesting that the judge refused expert international law testimony because it was expert testimony on international law, in fact the military judge declined the testimony because the expert's "assistance [was] not required on [that] issue." AE200Z Ruling at 2.

[16] *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008); *see also United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004) (discovery practice is not focused solely upon evidence known to be admissible at trial).

3. <u>Attachments</u>:

A. Certificate of Service

Very respectfully,

//s//
JAMES G. CONNELL, III
Learned Counsel

//s//
STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

//s//
ALKA PRADHAN
Defense Counsel

//s//
BENJAMIN R. FARLEY
Defense Counsel

//s//
MARK E. ANDREU
Capt, USAF
Defense Counsel

Counsel for Mr. al Baluchi

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 31st day of January, 2019, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//
JAMES G. CONNELL, III
Learned Counsel