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**	**AE 617K** **RULING** **Mr. al Baluchi's Motion to Compel** Communications from the International Committee for the Red Cross Concerning the Existence of an Armed Conflict 1996-2002 **31 March 2019**

1. **Procedural History**.

a. On 17 January 2019, Mr. Ali (a.k.a. al Baluchi) moved the Commission "[to] compel the government to provide all communications from the International Committee of the Red Cross [(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."[1] Mr. Ali argued this material was relevant to the question of whether and when hostilities existed between the United States and al Qaeda (AQ).[2]

b. On 24 January 2019 the Government responded, arguing the discovery should be denied because (1) it would constitute improper expert opinion, and (2) it would also be irrelevant under the applicable legal standard.[3] The Government argued that a binding standard for determining existence of hostilities had been established in a panel instruction favorably referenced by the United States Court of Military Commission Review (U.S.C.M.C.R.) in *United*

[1] AE 617 (AAA), Mr. al Baluchi's Motion to Compel Communications from the International Committee for the Red Cross Concerning the Existence of an Armed Conflict 1996-2002, filed 17 January 2019, para. 2.
[2] *Id*. at para. 3.
[3] 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, filed 24 January 2019, pp. 6-7.

States v. Hamdan.[4] (This instruction, also quoted by the U.S.C.M.C.R. in *United States v. Al-Bahlul*,[5] is hereinafter referred to as "the *Hamdan*/*Al-Bahlul* Instruction" or "HBI.")

c. On 31 January 2019, Mr. Ali replied that (1) the Government's response amounted to a testimonial objection that was inapplicable during the discovery stage of litigation, and (2) the discovery at issue was in fact relevant under *Hamdan* (which, in Mr. Ali's view, established a broad "totality of the circumstances" standard).[6]

d. On 25 March 2019, the parties argued the matter before the Commission.[7]

e. On 4 April 2019, recognizing existence of hostilities significantly underlay this and a number of other pending motions, the Commission directed briefing and argument on several questions[8] regarding 10 U.S.C. § 948p's requirement that "[a]n offense . . . [be tried] by military commission . . . only if . . . committed in the context of and associated with hostilities."[9] In accordance with the schedule established by the Commission,[10] on 19 April 2019 briefs were

[4] 801 F. Supp. 2d 1247, 1278 fn 54 (U.S.C.M.C.R. 2011), *rev'd on other grounds, Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012), *overruled on other grounds, Al-Bahlul v. United States*, 767 F.3d 1, 12 (D.C. Cir. 2014).
[5] 820 F.Supp.2d 1141, 1190 (U.S.C.M.C.R. 2011), *vacated in part*, 767 F.3d 1 (D.C. Cir. 2014) (*en banc*), *aff'd en banc per curiam*, 840 F.3d 757, 759 (D.C. Cir. 2016), *cert. denied*, ___ U.S. ___, 138 S.Ct. 313, 199 L.Ed.2d 232 (2017), *sentence aff'd*, ___ F.Supp.3d ___, 2019 WL 1614674 (U.S.C.M.C.R. 2019).
[6] AE 617B (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, filed 31 January 2019.
[7] Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 25 March 2019 from 3:19 P.M. to 4:38 P.M. at pp. 22417-22433, 22443-22457. For brevity's sake, subsequent citation to the Unofficial/Unauthenticated Transcript will be by page number only (*e.g.*, "Transcript at 12345.")
[8] *See* para. 3.a, *infra*.
[9] 10 U.S.C. § 950p(c). The MCA 2009 also requires proof of hostilities for other purposes, *e.g.*, as a component of certain bases for personal jurisdiction. 10 U.S.C. §§ 948a(7)(1)-(2), 948c. However, existence of hostilities has already been established in this case for purposes of personal jurisdiction. *See* AE 502BBBB Ruling, Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities, dated 25 April 2018; AE 502FFFF, Ruling: Mr. al Baluchi's Motion to Schedule Evidentiary Hearing Regarding Personal Jurisdiction, dated 3 April 2019.
[10] *Id*. at para. 5.b.

filed by Messrs. Ali,[11] Hawsawi,[12] bin al Shibh,[13] and by the Government.[14] The parties argued with respect to these specified issues on 29-30 April 2019.[15]

2. **Law**.

a. **Burden of Proof**. As the moving party, Mr. Ali bears the burden of proving by a preponderance of the evidence any facts prerequisite to the relief he seeks.[16]

b. **Discovery**. Information is discoverable if it is material to the preparation of the defense[17] or exculpatory.[18] Information is also discoverable if there is a strong indication it will play an important role in uncovering admissible evidence; assist in impeachment; corroborate testimony; or aid in witness preparation.[19] Finally, information is discoverable if it is material to sentencing.[20]

c. **Standard for Determining Existence of Hostilities**. Given the length of the Commission's discussion of this subject, it will be addressed separately in paragraphs 3 and 4, below.

3. **Hostilities under 10 U.S.C. § 950p(c) as a Matter of Law**.

a. The discoverability of information regarding existence of hostilities is in part driven by the scope of 10 U.S.C. § 950p(c), and the extent to which its requirements may be resolved as a

[11] AE 617F/AE 620E (AAA), Mr. al Baluchi's Response to AE 617D/AE 620C Order (Briefing on Specified Issues), filed 19 April 2019.
[12] AE 617G (MAH)/AE 620F (MAH), Mr. al Hawsawi's Response to AE 617D/AE 620C, Regarding Hostilities as an Element of the Charges, filed 19 April 2019.
[13] AE 617H (RBS)/AE 620G (RBS), Mr. Bin al Shibh's Response to AE 617D and AE 620C Issues of Law Regarding Proof of the Existence of Hostilities between the United States and Al Qaeda, the Existence and Duration of Hostilities as an Instructional Matter, the Existence of a Non-Justiciable Political Question, and Judicial Notice as a Matter of Legislative Fact, filed 19 April 2019.
[14] AE 617E (GOV)/AE 620D (GOV), Government Brief In Response To AE 617D/AE 620C Order, filed 19 April 2019.
[15] Transcript at 22827-853, 22855-874, 22895-987.
[16] Rule for Military Commissions (R.M.C.) 905(c)(1)-(2).
[17] R.M.C. 701(c)(1)-(3).
[18] R.M.C. 701(e). *See also Brady v. Maryland*, 373 U.S. 83, 88 (1963)
[19] *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993).
[20] R.M.C. 701(e)(3)).

matter of law. At the Commission's direction, the parties considered certain questions, specifically:

> (1) Whether (a) proof of existence of hostilities (as opposed to nexus to hostilities) is a component of the common substantive element established by 10 U.S.C. § 950p(c); and (b) if so, whether this Commission is bound to use the [HBI].
>
> (2) Whether the Military Judge may determine the existence and duration of hostilities for purposes of 10 U.S.C. § 950p(c) as an instructional matter, while reserving the question of nexus to hostilities to the panel.
>
> (3) Whether existence of hostilities for purposes of 10 U.S.C § 950p(c) in this case is to any extent a non-justiciable political question.
>
> (4) Whether existence of hostilities for purposes of 10 U.S.C § 950p(c) in this case is to any extent subject to judicial notice as a matter of legislative fact.[21]

The parties answered question (1)(a) in the affirmative;[22] the Commission agrees with that conclusion. The parties' positions on question (1)(b) will be discussed further in paragraph 4, below.

b. Regarding questions (2) through (4), the Defense responses were uniformly in the negative.[23] The Government's view was that the Commission could take judicial notice as a matter of legislative fact that hostilities existed for purposes of 10 U.S.C. § 950p(c), and instruct the panel to that effect.[24] However, as a precaution, the Government recommended instructing the panel it was not bound by the Commission's determination.[25] The Government asked the Commission to undertake this course of action.[26] Even assuming this approach to be viable, however, from the perspective of efficient and just resolution of this case, the Commission sees it

[21] AE 617D/AE 620C, para. 5.a.
[22] AE 617E (GOV), p. 1; AE 617F (AAA)/AE 620E (AAA), p. 1; AE 617G (MAH)/620F (MAH), p. 2; AE 617H (RBS)/AE 620G (RBS), pp. 5-6.
[23] AE 617F (AAA)/AE 620E (AAA), pp. 1-2; AE 617G (MAH)/AE 620F (MAH), pp. 19-30; AE 617H (RBS)/AE 620G (RBS), pp. 10-22.
[24] AE 617E (GOV), para. 5.
[25] *Id*.
[26] Transcript at 22834.

having little or no practical and/or beneficial effect. Accordingly, the Commission declines at this time to further consider resolution of existence of hostilities for purposes of 10 U.S.C. § 950p(c) as a matter of law.[27]

4. **Hostilities Standard**.

a. With regard to the standard for determining existence of hostilities, the parties may be roughly divided into two groups. The first (Messrs. Hawsawi and bin al Shibh—the "*Tadic* Group") relies solely on the standard articulated by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case of *Prosecutor v. Tadic*.[28] The second group (the Government and Messrs. Ali and bin 'Attash—the "Instruction Group") points primarily to the HBI.[29]

b. As a preliminary matter, the MCA 2009 defines "hostilities" as "any conflict subject to the laws of war."[30] Generally speaking, there are two such types of conflict—international armed conflicts (IACs) and non-international armed conflicts (NIACs)—which are respectively defined by Common Articles (CA) 2 and 3 of the Geneva Conventions (GCs) of 1949.[31] The IAC category ("any . . . armed conflict which may arise between two or more of the High Contracting

[27] Should the Government wish to again raise the possibility of the Commission taking such judicial notice regarding the existence of hostilities, it is free to renew its request closer to trial.
[28] AE 617H (RBS), p. 8 (citing *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia 1995)(hereinafter, *Tadic* Appeals Chamber Decision)); AE 617G (MAH), p. 9 (citing same); Transcript at 22858-59.
[29] AE 617A (GOV), para. 4; AE 617E (GOV)/AE 620D (GOV), p. 2; AE 617F/AE 620E (AAA), p. 1; Transcript at 22831, 22911, 22966. Counsel for Mr. Mohammad declined to participate in litigation of the matter, claiming to be under a conflict of interest. Transcript at 22853-54. The Commission previously ruled in no uncertain terms that the claim of conflict was baseless, and ordered Defense Counsel to continue zealously representing his client. Transcript at 22674. Learned Counsel for Mr. Mohammed was offered an opportunity to argue this matter on 1 May 2019 during an open session of the Commission, but declined. Transcript at 22993-4.
[30] 10 U.S.C. § 948a(9).
[31] Articles 2-3, Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956 (hereinafter, GC III). These "common articles" are so called because they appear identically in each of the four 1949 GCs. Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* 84-85 (2010). For convenience and brevity, only citation to GC III is provided herein.

Parties") is irrelevant, as there has been no allegation here that Al Qaeda (AQ) is a state party to the GCs (or the equivalent).[32]

c. The text of CA3 provides no black-letter test for determining the existence of NIACs, simply defining them as "armed conflict not of an international character."[33] It is generally accepted that CA3 establishes a minimum threshold above which violence is recognized as a NIAC, rather than mere "internal disturbances and tensions."[34] The CA3 NIAC threshold's criteria (first described in the Commentaries to the 1950 GCs) were very vague,[35] and remained relatively undeveloped until the ICTY's *Tadic* decisions in the 1990s.[36]

d. The ICTY Appeals Chamber in 1995 first articulated the test, stating that "an armed conflict exists whenever there is . . . protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[37] The Trial Chamber in 1997 elaborated:

> The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of . . . [CA3] focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. . . . [T]hese closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law. Factors relevant to this determination are addressed in the [CA3] Commentary.[38]

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[32] Article 2, GC III.
[33] Article 3, GC III. The GC definition also requires that the conflict "occur[] in the territory of one of the High Contracting Parties." *Id*. Practically speaking, however, this requirement is never at issue—as the GCs have been universally ratified. *See* Sasha Radin, *Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts*, 89 Int'l L. Stud. 696, 716 ("According to a literal reading of the text, every armed conflict today takes place 'in the territory of one of the High Contracting Parties.'" *Id*.)
[34] U.S. Dep't of Defense, Office of General Counsel, *Department of Defense Law of War Manual*, para. 3.4.2.2 (June 2015, Updated May 2016) (hereinafter, DoD LOW Manual).
[35] The commentaries to CA3 listed a number of relevant factors, but emphasized (a) the list was non-exhaustive, (b) none of the listed factors was prerequisite to finding existence of a NIAC, and (c) NIAC categorization was intended to be applied broadly. *See, e.g.*, *Commentary to Geneva Convention Relative to the Treatment of Prisoners of War* 27-44 (Jean Pictet ed., 1960).
[36] Radin, supra note 33 at 705-11.
[37] *Tadic* Appeals Chamber Decision, para. 70.
[38] *Prosecutor v. Tadic*, Case No. IT-94-1-T ICTY, Judgment, para. 562 (Int'l Crim. Trib. for the former Yugoslavia May 7, 1997). The Commission notes the *Tadic* Court's exclusion of low-level "terrorist activities" from the NIAC

Over time the *Tadic* "intensity and organization" standard became the most broadly-accepted test in international law for determining when a NIAC had arisen.[39] Subsequent litigation in various international fora would produce a long list of judicially developed factors that have been considered in determining whether those two requirements are met.[40]

e. The *Hamdan/Al-Bahlul* instruction arose out of efforts to identify and apply relevant law of war standards in the litigation of those two cases. The portion of the instruction pertaining to existence of hostilities[41] reads as follows:

> With respect to each of the offenses listed as objects in the Specification of charges, the government must prove beyond a reasonable doubt that the offense took place in the context of and was associated with armed conflict. In determining whether an armed conflict existed between the United States and al Qaeda and when it began, you should consider the length, duration, and intensity of the hostilities between the parties; whether there was protracted armed violence between the 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 Qaeda threat; the number of persons killed or wounded on each side; the amount of property damage on each side; statements of the leaders of either side 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.[42]

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category does not foreclose events bearing hallmarks of terrorism from qualifying as or comprising part of an armed conflict, so long as they otherwise meet intensity and organization requirements. Solis, *supra* note 31 at 157.

[39] *See* Laurie R. Blank and Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 Vand. J. Transnat'l L. 693 (2013) (describing how "the *Tadic* definition of armed conflict [became] . . . definitive . . . for use not only by the ICTY, but also by a variety of national and international courts and tribunals around the world." *Id*. at 719-20). The Commission notes the possibility that, as of September 11, 2001, *Tadic* remained more of a "totality of the circumstances" standard (as envisioned in the CA3 Commentary), which eventually coalesced into a stricter two-prong elements test. *See, e.g., id*. The Commission finds it unnecessary to consider this possibility at present, however, as the requested discovery would be unwarranted under either formulation.

[40] *See* Radin, *supra* note 33 at 711-712 (providing a non-exhaustive list of examples developed by the ICTY).

[41] The instruction also included language regarding the standard for determining whether charged misconduct occurred "in the context of and associated with" armed conflict—*i.e.*, the *connection between* the misconduct and armed conflict, rather than the *existence of* the armed conflict itself. The discovery sought here, however, is plainly irrelevant to the former.

[42] *Hamdan*, 801 F.Supp.2d at fn 54.

The *Hamdan* decision was ultimately overturned, but not due to any legal or factual insufficiency regarding the standard for existence of hostilities or its application.[43] The *Al-Bahlul* decision was eventually upheld in part.[44] The members of the "Instruction Group" aver that the legal standard articulated by the HBI is binding on this Commission (while acknowledging the Commission's authority and duty to modify the instruction appropriately to reflect the facts of this case).[45]

f. During oral argument, it became apparent there was potentially less distance between the positions of the two groups than there originally seemed. The Government indicated that during trial in *Hamdan*, it had originally requested the military judge base his hostilities instruction on the *Tadic* standard.[46] The Instruction Group argued the HBI simply articulated specific factors that were consistent with the *Tadic* test.[47] The *Tadic* Group, of course, did not contest that *Tadic* was the overall controlling standard; they did, however, aver that the HBI had no precedential authority whatsoever; was overly broad; and was materially inconsistent with *Tadic*, and therefore invalid.[48]

5. **Analysis—Hostilities Standard**.

a. First, the Commission concludes the overarching standard under 10 U.S.C. § 948a(9) for determining whether a NIAC existed is the *Tadic* "organization and intensity" test. The parties agree (and the Commission sees no reason to doubt) that the accepted international law of war standard for NIAC identification as of September 11, 2001 was the *Tadic* Court's

[43] *Hamdan v. U.S.*, 696 F.3d 1238, 1253 (2012) (vacating conviction "because material support for terrorism was not a preexisting war crime under 10 U.S.C. § 821." *Id*.)
[44] *See Al-Bahlul v. U.S.*, ___ F.Supp.3d. ___, 2019 WL 1614674 (U.S.C.M.C.R. 2019)(describing appellate history of *Al-Bahlul* and affirming sentence).
[45] AE 617E (GOV), p. 11; Transcript at 22935.
[46] Transcript at 22837.
[47] Transcript at 22836, 22845-46, 22911-12. Counsel for Mr. Ali further assert that *Hamdan* and *Al-Bahlul* in fact establish a "totality of the circumstances" test that is somewhat broader than *Tadic*. AE 617B (AAA), pp. 2-4; Transcript at 22937-38. It is not necessary for the Commission to resolve that specific issue at present, however. *See* fn 39, *supra*.
[48] Transcript at 22870-73, 22972-77.

application of CA3.[49] Accordingly, the Commission finds that, when a military commission is required to determine whether a "conflict subject to the laws of war" existed, the overarching relevant standard is the "intensity and organization" standard articulated in *Tadic*.

b. The Commission further finds, however, that the HBI—as a matter of persuasive appellate precedent—provides a non-exhaustive list of factors consistent with *Tadic*.[50] The vast majority of the HBI's factors are clearly derivable from *Tadic*'s intensity and organization factors (and in some cases use those precise terms).[51]

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[49] It is notable that, in 10 U.S.C. § 950p(c), the drafters of the MCA 2009 essentially mirrored the "in the context of and associated with armed conflict" element found in International Criminal Court (ICC) war crimes. *See, e.g.*, Rome Statute, Elements of Crimes, art. 8(2)(e)(i) (2011) (elements of "[w]ar crime of attacking civilians.") The Rome Statute underlying the ICC expressly incorporated *Tadic* as its hostilities standard—defining NIACs as "armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups," and excluding "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature." Rome Statute of the International Criminal Court, art. 8, § (2)(d), (f), U.N. Doc. A/CONF. 183/9 (1998). While the United States is not a party to the Rome Statute, to the Commission this indicates Congressional recognition of the broad international acceptance of these standards and the decision to substantially incorporate them in this context.

[50] The U.S.C.M.C.R. noted its statutory obligation to "ensure that findings of guilty are correct in law and fact and the sentence is appropriate." *Hamdan*, 801 F.Supp.2d at 1263. In accomplishing that requirement, the U.S.C.M.C.R. made a specific finding that "the [mis]conduct took place in the context of and was associated with an armed conflict"—which, in that case, was an express element of the specific offense charged. *Id*. at 1278. The U.S.C.M.C.R. went so far as to expressly find that "the military judge properly instructed the members concerning this element," and quoted at length from that instruction. *Id*. at 1278, fn 54. This is sufficient to indicate the U.S.C.M.C.R. meaningfully considered the validity of the legal standard articulated by that instruction.

In *Al-Bahlul*, the U.S.C.M.C.R. again noted its statutory duty to "affirm only such findings of guilty . . . as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." *Al-Bahlul*, 820 F.Supp.2d at 1158. The appellant claimed "none of the charges constitute war crimes triable by military commission." *Id*. at 1164. Taking this as a subject matter jurisdiction challenge, the U.S.C.M.C.R. noted that "whether a military commission may exercise jurisdiction over the charged offenses is a question of law we review *de novo*." *Id*. at 1164. It then undertook a searching, in-depth review of the facts and authorities underlying the commission's jurisdiction, to include existence of hostilities. *Id*. at 1164-1190. In its discussion of the international law standard regarding existence of hostilities, the U.S.C.M.C.R. essentially articulated the *Tadic* factors (noting that the determination of whether hostilities exist is driven by "intensity and duration," and citing, *inter alia*, the Rome Statute's requirement of "protracted armed conflict between governmental authorities and organized armed groups or between such groups.") *Id*. at 1189, fn 66. The U.S.C.M.C.R. again favorably cited, and quoted at length, the HBI—specifically stating that "the requirement that the charged conduct occur 'in the context of and associated with an armed conflict,' as defined . . . by the military commission judge at trial [is] consistent with the law of armed conflict." *Id*. at 1190.

The *Hamdan* decision was overturned, but not due to any legal or factual insufficiency regarding the standard for existence of hostilities or its application. *Hamdan v. U.S.*, 696 F.3d 1238, (2012). The *Al-Bahlul* decision was eventually upheld in part. *Al-Bahlul v. U.S.*, ___ F.Supp.3d. ___, 2019 WL 1614674 (U.S.C.M.C.R. 2019). Ultimately, the Commission determines the HBI to be a persuasive higher appellate determination that the factors recited in the HBI were properly derived from *Tadic*.

[51] The *Tadic* Group argues that the HBI factor regarding "statements of the leaders of either side indicating their perceptions regarding the existence of an armed conflict" is outside the scope of *Tadic*, and therefore improper.

c. The Commission agrees, however, with the concerns voiced by the *Tadic* Group that the final factor set forth in the HBI ("any other facts and circumstances you consider relevant to the existence of armed conflict") is so impracticably open-ended as to establish no real standard at all. Rather than guiding the members on the law to apply, inclusion of the catch-all provision impermissibly allows the members to consider whatever *they* deem relevant—potentially leading the members far afield of the *Tadic* standard. As such, this Commission believes that the better course of action is to allow the parties to propose relevant factors based on the evidence admitted during trial, but with the military judge to serve as the gatekeeper during the final crafting of the members instruction.[52]

d. In short, the Commission finds (1) the *Tadic* "intensity and organization" factors to be the overarching hostilities standard; (2) the HBI to be a persuasive, non-exhaustive recitation of factors consistent with *Tadic*; and (3) that the parties may argue (based on the facts of this case as they develop)[53] that additional articulable factors consistent with *Tadic* are relevant, and should be considered.

Appellate AE 617G (MAH), p. 12. While the connection of this HBI factor to intensity and/or organization is perhaps less obvious, the Commission notes public pronouncements or declarations by organized armed group officials could at least be arguably relevant to some factors considered by international tribunals (*e.g.*, whether an organized armed group has the ability "to speak with one voice.") *Prosecutor v. Boskoski & Tarculovski*, Case No. IT-04-82-T, Trial Chamber Judgment, para. 203 (Int'l Crim. Trib. for the Former Yugoslavia 2008) (hereinafter, *Boskoski* Judgment). The Commission need not further parse this issue, however—the overall propriety of this specific factor has been sufficiently established by the U.S.C.M.C.R., which itself recognized the significance of *Tadic*. *Al-Bahlul*, 820 F.Supp.2d at 1189, fn 66. For purposes of this litigation, that answers the question.

[52] The case law of the international tribunals themselves is a study in the identification, articulation and application of case-specific factors consistent with the overarching *Tadic* standard. *Boskoski* Judgment, paras. 175-292 (lengthy discussion of judicial development of factors relevant to *Tadic* standard over time, and application of those factors to case). The international tribunals, however, are comprised of judges, not laypersons. Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. Rev. 1, 70 (2002)("[T]here are no juries under international criminal process." *Id*.). Consistent with general courts-martial practice, the military judge may appropriately tailor the instructions in this case for the members based on the evidence admitted as the time for deliberations draws closer. *See* R.M.C. 920; Rule for Courts-Martial 920.

[53] The Commission will endeavor to tailor the HBI as the evidence develops in this case, and for other appropriate purposes, *e.g.*, for clarity, to eliminate potentially redundant language, to track more closely with the language of the MCA 2009, *et cetera*. Were the Commission to issue today an HBI-based instruction addressing existence of hostilities, it would likely read as follows:

6. **Analysis—ICRC Discovery**.

a. Under the standards recited above, the Commission concludes Mr. Ali has not demonstrated the relevance and materiality of the ICRC communications sufficiently to require their production. There has been no showing that the ICRC communications would be material to the preparation of the defense, or that such communications would be material to sentencing. Likewise, there is no indication that the ICRC communications, if they exist all, would play an important role in uncovering other admissible evidence, assist in impeachment, corroborate testimony, or aid in witness preparation.

b. While acknowledging the special role given the ICRC within the Geneva Conventions, ultimately the information Mr. Ali seeks is essentially a contemporaneous third-party assessment of relevant facts and circumstances, rather than evidence of the facts and circumstances themselves. Because the ICRC is bound to apply its own legal standards, the ICRC assessment is not necessarily the proper legal standard applicable to this Commission.

c. Mr. Ali's argument in support of the requested ICRC communications rests primarily upon the catch-all factor articulated in the HBI, as no other factor is facially on point. As this Commission has eliminated the catch-all provision from the instruction it intends to provide the

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The term 'hostilities' means any conflict subject to the laws of war. In determining whether a conflict subject to the laws of war existed between the United States and al Qaeda and when it began, you should consider:

a) whether there was protracted armed violence between the governmental authorities and organized armed groups as measured by the nature, duration, and intensity of the violence between the parties;

b) the extent and degree of organization exhibited by the parties;

c) whether and when the United States decided to employ the combat capabilities of its armed forces to meet the al Qaeda threat;

d) the number of persons killed or wounded on each side;

e) the amount of property damage on each side; and

f) statements of the leaders of either side indicating their perceptions regarding the existence of an armed conflict including the presence or absence of a declaration to that effect.

Undoubtedly this and other pertinent instructions will be refined by the Military Judge, with appropriate input from the parties, as the time for panel deliberations draws nearer.

members in this case,[54] any potential relevance of the requested information is even further diminished.[55]

d. Mr. Ali has failed to demonstrate the relevance and necessity of the requested ICRC communications. Accordingly, his motion to compel discovery of those communications must fail.

7. **Ruling**. Mr. Ali's motion to compel discovery is **DENIED**.

So **ORDERED** this 31st day of May, 2019.

//s//
K. A. PARRELLA
Colonel, U.S. Marine Corps
Military Judge

[54] *See* para. 5.c, *supra*.
[55] Based on the foregoing, the Commission need not determine whether compelling disclosure of the ICRC documents at this stage would in some way constitute improper involvement of or reliance on experts.