

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

**AE620 (AAA)**

**Mr. al Baluchi’s Motion to Compel**  
Documents and Information Concerning the  
United States Pre-9/11 Law-of-War Detainees  
Associated with al Qaeda

25 February 2019

1. **Timeliness:** This motion is timely filed.
2. **Relief Sought:** Mr. al Baluchi respectfully requests that the military commission compel the government to provide any and all documents or information relating to U.S. law-of-war detention operations as they pertained to individuals associated with al Qaeda between 23 August 1996 and 11 September 2001.<sup>1</sup> Mr. al Baluchi further requests the military commission compel the government to provide any and all documents or information relating to the U.S. government’s decision to prosecute the East Africa embassy co-conspirators in federal criminal court rather than to subject them to law-of-war detention.<sup>2</sup>
3. **Overview:** In order to prevail, the government must prove during the course of this trial that the United States and al Qaeda were engaged in hostilities—that is, an armed conflict—prior to the 11 September 2001 attacks. The government argues that the United States’ armed conflict with al Qaeda began no later than 23 August 1996, with Osama bin Laden’s declaration of *jihad*. The government further argues that the appropriate standard for determining the existence of a non-international armed conflict is that reiterated in the Court of Military Commission Review’s

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<sup>1</sup> Attachment B.

<sup>2</sup> Attachment D.

reversed opinion in *United States v. Hamdan*. The government describes the *Hamdan* standard as containing “seven elements,”<sup>3</sup> which include “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 [sic] threat,” “statements of the leaders of both sides indicating their perceptions regarding the existence of an armed conflict,” and “any other facts and circumstance this commission considers relevant to the existence of armed conflict.”<sup>4</sup>

Evidence concerning U.S. law-of-war detention of individuals associated with al Qaeda prior to the terrorist acts of 11 September 2001 is material to Mr. al Baluchi’s defense because the existence or not of pre-9/11 detention operations for individuals associated with al Qaeda speaks directly to four of the seven “elements” in the government-endorsed *Hamdan* standard. Law-of-war detention or not of individuals associated with al Qaeda prior to 9/11 is a fact material to whether there was protracted armed violence between the United States and al Qaeda and it is also a fact material to whether and when the United States decided to employ its armed forces’ combat capabilities to the meet al Qaeda’s threat. Law-of-war detention or not of individuals associated with al Qaeda prior to 9/11, as well as any discussions leading to policy decisions to forgo law-of-war detention in favor of criminal prosecution, are facts material to Mr. al Baluchi’s defense because they indicate the perceptions of U.S. leaders regarding the existence of an armed conflict prior to the 11 September 2001 attacks. Finally, because detention operations are a

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<sup>3</sup> AE617A (GOV) Government Response to 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 at 5.

<sup>4</sup> *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1278 n.54 (U.S.C.M.C.R. 2011), *rev’d*, *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012).

fundamental incident of armed conflicts, the existence or absence of detention operations—like the existence or absence of uses of lethal force as a first resort—is another “fact or circumstance” the military commission is likely to consider relevant to the existence of an armed conflict.

The evidence Mr. al Baluchi sought through DR-397-AAA and DR-397A-AAA speaks directly to the indicia of armed conflict identified by the *Hamdan* standard and repeatedly boosted by the government. The evidence is therefore both relevant and material under R.M.C. 701(c). The government should not be allowed to withhold material and relevant evidence. Instead, the military commission should compel the government to provide Mr. al Baluchi with any and all documents or information relating to U.S. law-of-war detention operations as they pertained to individuals associated with al Qaeda between 23 August 1996 and 11 September 2001. The military commission should further compel the government to provide Mr. al Baluchi with any and all documents or information relating to the U.S. government’s decision to prosecute captured East Africa embassy co-conspirators in federal criminal court rather than to subject them to law-of-war detention before 9/11.

**4. Burden of Proof:** Mr. al Baluchi must demonstrate by a preponderance of the evidence that the requested relief is warranted.<sup>5</sup>

**5. Facts:**

a. The government claims that a non-international armed conflict between the United States and al Qaeda began on 23 August 1996 with Osama bin Laden’s declaration of *jihād*.<sup>6</sup>

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<sup>5</sup> R.M.C. 905(c)(1)-(2).

<sup>6</sup> Unofficial/Unauthenticated Transcript of 18 October 2017 at 16837 (“We do believe the ’96 document written by Usama bin Laden, who was head of al Qaeda at the time he wrote it, is a declaration of war.”); *id.* at 16845 (“And clearly our position has always been that we believe [the

b. Between 23 August 1996 and 11 September 2001, the United States used force against targets associated with al Qaeda or Osama bin Laden only once, on 20 August 1998, under the aegis of Operation INFINITE REACH.<sup>7</sup>

c. Between 23 August 1996 and 11 September 2001—and depending on how one counts—either two or three terrorist attacks attributed to al Qaeda were perpetrated against U.S. interests on two separate days.

d. On 12 February 2019, Mr. al Baluchi transmitted DR-397-AAA to the government, requesting the government produce “any and all documents or information relating to U.S. law-of-war detention operations as they pertained to individuals associated with al Qaeda between 23 August 1996 and 11 September 2001.”<sup>8</sup> Among other documents and information, Mr. al Baluchi requested “rosters of all individuals associated with al Qaeda who were detained by the United States under the laws of war between 23 August 1996 and 11 September 2001,”<sup>9</sup> including “the name of the detained individual . . . the identification number assigned to the individual by the United States . . . and the detained individual’s disposition.”<sup>10</sup>

e. On 14 February 2019, the government denied Mr. al Baluchi’s discovery request, claiming that records concerning U.S. law-of-war detention of individual associated with al Qaeda

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armed conflict between the United States and al Qaeda] began in 1996 with Usama bin Laden’s declaration . . .”).

<sup>7</sup> See, e.g., AE502O (GOV) Government Consolidated Response to AE502L (MAH, Mr. Hawsawi’s Witness List for the August 2017 Hearings, and AE 502J (AAA), Mr. Ali’s List of Potential Witnesses for Personal Jurisdiction at 4-10.

<sup>8</sup> Attachment B.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

prior to 9/11—and after the date the government claims the armed conflict began—are not material or relevant to the existence of an armed conflict.<sup>11</sup>

f. Also in its 14 February 2019 response to Mr. al Baluchi’s discovery request, the government represented that:<sup>12</sup>

As an initial matter, several of the co-conspirators in the East Africa Embassy Attack were, in fact, captured by the United States, overseas, following the attacks in August 1998. However, the decision to prosecute those individuals in federal court made it unnecessary to detain them under the laws of war, although the United States certainly would have had the authority to do so. The

g. On 21 February 2019—and in light of the government’s 14 February 2019 representation—Mr. al Baluchi requested the government provide “any and all documents or information relating to the U.S. government’s decision to prosecute the East Africa embassy co-conspirators in federal criminal court rather than to subject them to law-of-war detention.”<sup>13</sup>

h. On 22 February 2019, the government denied Mr. al Baluchi’s 21 February 2019 discovery request, asserting that documents evidencing the U.S. government’s decision to criminally prosecute the captured East Africa embassy attack co-conspirators are “irrelevant to the existence of hostilities.”<sup>14</sup>

**6. Argument:**

The military commission should compel the government to provide Mr. al Baluchi with the documents and information he requested through DR-397-AAA and DR-397A-AAA.

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<sup>11</sup> Attachment C.

<sup>12</sup> *Id.*

<sup>13</sup> Attachment D.

<sup>14</sup> Attachment E.

Documents and information concerning the United States law-of-war detention of individuals associated with al Qaeda prior to 11 September 2001 are material under R.M.C. 701(c) because they are both helpful to Mr. al Baluchi's defense and likely exculpatory. Detention of enemy fighters is fundamental, even inherent, in armed conflict. Implementation of law-of-war detention is evidence of the protracted armed violence between governmental authorities and organized armed groups that characterizes non-international armed conflict. It is an aspect of the United States utilizing its armed forces' combat capabilities. Planning for law-of-war detention operations is evidence of U.S. leaders' perception as to the existence of an armed conflict. Likewise, debates over whether to subject captured individuals to law-of-war detention or criminal prosecution, and a decision to utilize law-enforcement tools instead of armed conflict tools are evidence U.S. leaders' perception as to the existence of an armed conflict. The absence of evidence of the foregoing suggests the absence of an armed conflict, even if it does not on its own demand a legal conclusion that an armed conflict did not exist.

Under R.M.C. 701(c) the government must produce, *inter alia*, records that are material—that is, helpful—to Mr. al Baluchi's defense. Documents and information relating to U.S. law-of-war detention operations pertaining to individuals associated with al Qaeda between 23 August 1996 and 11 September 2001 are material to Mr. al Baluchi's defense because they are either exculpatory or they will assist him in preparing his defense. Likewise, documents and information relating to the U.S. government's decision to prosecute the East Africa embassy co-conspirators in federal criminal court rather than to subject them to law-of-war detention is material to Mr. al Baluchi's defense because they are either exculpatory or they will assist him in preparing his defense. If such documents and information do not exist they tend to demonstrate the absence of

an armed conflict between the United States and al Qaeda prior to 11 September 2001. And, if such documents and information do exist, they are material because they will assist Mr. al Baluchi in preparing his defense by dissuading him from pursuing unsupported or unpersuasive arguments concerning both this military commission's personal jurisdiction over him and the hostilities-nexus the government must prove beyond a reasonable doubt at trial. Consequently, Mr. al Baluchi is entitled to the documents and information he sought through DR-397-AAA and DR-397A-AAA. In light of the government's refusal to produce responsive records—or indicate the non-existence of such records—the military commission should compel their production.

Both at trial and before, the government must prove that the United States and al Qaeda were engaged in an armed conflict prior to 11 September 2001. The government's failure to demonstrate the existence of such an armed conflict by a preponderance of evidence prior to trial would deprive this military commission of personal jurisdiction over Mr. al Baluchi. The government's failure to prove the existence of such an armed conflict beyond a reasonable doubt at trial would deprive this military commission of offense jurisdiction over Mr. al Baluchi and represent a failure on the part of the government to carry its burden necessary for a conviction of Mr. al Baluchi.<sup>15</sup>

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<sup>15</sup> Mr. al Baluchi reminds the military commission that, notwithstanding the government's unsupported representations, the existence of an armed conflict between the United States and al Qaeda for purposes of the military commission's personal jurisdiction over Mr. al Baluchi is not *res judicata*. See AE502EEEE (AAA) Defense Reply to Government Response to Mr. al Baluchi's Motion to Schedule Evidentiary Hearing Regarding Personal Jurisdiction. Although the military commission ruled that it has personal jurisdiction over Mr. Hawsawi in AE502BBBB, it has not held the evidentiary hearing concerning personal jurisdiction over Mr. al Baluchi it ordered in AE502I. The military commission explicitly bifurcated its proceedings concerning its personal jurisdiction over Mr. al Baluchi and Mr. Hawsawi. AE502QQQ Ruling; AE502BBBB Ruling at 19-20. Moreover, the government cannot assert that AE502BBBB is *res judicata* with respect to Mr. al Baluchi. As a matter of law, *res judicata* is not an argument available to the government in

The government has consistently argued that the military commission is bound to apply the definition of the existence of an armed conflict provided by the military commission through its instruction to panel members in *United States v. Hamdan*.<sup>16</sup> The government describes the *Hamdan* standard as consisting of “seven elements,” that include “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 [sic] threat,” “statements of the leaders of both sides indicating their perceptions regarding the existence of an armed conflict,” and “any other facts and circumstance this commission considers relevant to the existence of armed conflict.”<sup>17</sup> Although Mr. al Baluchi parts company with the government as to the appropriate standard for determining the existence of hostilities between the United States and al Qaeda,<sup>18</sup> Mr. al Baluchi agrees with the government that

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this instance. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Ashe v. Swenson*, 397 U.S. 436, 443 (1970).

<sup>16</sup> *E.g.*, AE617A (GOV) Government Response to 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; AE502O (GOV) Government Consolidated Response to AE502L (MAH) Mr. Hawsawi’s Witness List for the August 2017 Hearings and AE502J (AAA) Mr. al Baluchi’s List of Potential Witnesses for Personal Jurisdiction Hearing.

<sup>17</sup> *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1278 n.54 (U.S.C.M.C.R. 2011), *reversed by Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012).

<sup>18</sup> Although the *Hamdan* standard embraces much of the *Tadic* standard—the prevailing standard for determining the existence of hostilities between a state and a non-state actor under international law—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. *See* 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.



hostilities exist where there is protracted armed violence between governmental authorities and organized armed groups.

Irrespective of the appropriate standard by which the military commission ought to determine the existence of hostilities between the United States and al Qaeda, the documents and information sought by Mr. al Baluchi through DR-397-AAA and DR-397A-AAA are material to Mr. al Baluchi's defense. Documents and information relating to U.S. law-of-war detention operations pertaining to individuals associated with al Qaeda between 23 August 1996 and 11 September 2001, and documents and information relating to the U.S. government's decision to prosecute the East Africa embassy co-conspirators in federal criminal court rather than to subject them to law-of-war detention, are material to Mr. al Baluchi's defense because they help him develop his case by directly addressing four of the seven so-called elements identified in the *Hamdan* standard by the government.

The records sought by Mr. al Baluchi address the existence of "protracted armed violence" between the United States and al Qaeda prior to 11 September 2001. "Protracted armed violence" is a term given meaning only by reference to the prevailing definition of non-international armed conflict under international law. A Lexis search for "protracted armed violence" returns only three American cases other than *United States v. Hamdan*, each of which juxtaposes "protracted armed violence" with a citation to the International Criminal Tribunal for the Former Yugoslavia (ICTY) appellate chamber's decision on jurisdiction in *Prosecutor v. Tadic*.<sup>19</sup> Although the ICTY did not define "protracted armed violence" in *Tadic*, subsequent ICTY decisions identified indicia of

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<sup>19</sup> See *New York Times v. United States Dep't of Justice*, 756 F.3d 100, 138 (2d Cir. 2014); *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1181 (C.M.C.R. 2011); *United States v. Proserpi*, 573 F. Supp. 2d 436, 451 (D.M.A. 2008).

protracted armed violence. In one such subsequent decision, *Prosecutor v. Boskoski*—a case cited favorably by the Department of Defense’s Law of War Manual—the ICTY’s trial chamber identified the existence of detention operations, including “facilitation by the ICRC for the release of detainees on both sides,”<sup>20</sup> a Macedonian Ministry of Defense order to treat “‘military captured persons’ in accordance with ‘the Geneva Conventions,’”<sup>21</sup> and the government of the former Yugoslav Republic of Macedonia’s charging of detained individuals with “offences that would normally only apply during an armed conflict”<sup>22</sup> as evidence weighing in favor of a finding that armed violence between the Albanian National Liberation Army and the government of former Yugoslav Republic of Macedonia was sufficiently protracted to constitute an armed conflict. Likewise, the ICTY’s appellate chamber specifically cited the existence of law-of-war detention operations in upholding the trial chamber’s determination that a non-international armed conflict existed between the Albanian National Liberation Army and the government of the former Yugoslav Republic of Macedonia during the period relevant to the indictment.<sup>23</sup>

Thus, evidence of U.S. law-of-war detention operations for individuals associated with al Qaeda between 23 August 1996 and 11 September 2001 would tend to suggest the existence of “protracted armed violence” and, therefore, the existence of a pre-9/11 U.S.-al Qaeda armed conflict. However, evidence that there were no pre-9/11 U.S. law-of-war detention operations for individuals associated with al Qaeda would suggest just the opposite—that there was no

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<sup>20</sup> *Prosecutor v. Boskoski*, Case No. IT-04-82-T, Judgment, ¶ 247 (Int’l Crim. Trib. For the Former Yugoslavia July 10, 2008).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Prosecutor v. Boskoski*, Case No. IT-04-82-A, Appellate Judgment, ¶ 22 (Int’l Crim. Trib. For the Former Yugoslavia May 19, 2010).

“protracted armed violence” between the United States and al Qaeda before 11 September 2001 and, as a consequence, no pre-9/11 U.S.-al Qaeda armed conflict. Either way, the evidence is material under the *Hamdan* standard and must be provided to Mr. al Baluchi.

The records sought by Mr. al Baluchi address “whether and when the United States decided to employ the combat capabilities of its armed forces to meet the al Qaida [sic] threat.” Detention operations are intrinsic to armed conflict. Like using lethal force as a first resort, detaining enemy fighters for the duration of hostilities is a hallmark of armed conflict.<sup>24</sup> Both the United States Supreme Court and the Department of Defense recognize that “detention is fundamental to waging war.”<sup>25</sup> According to the DOD Law of War Manual, “[d]etention operations may be militarily necessary to achieve the object of” military operations. Indeed, the DOD Law of War Manual asserts that “it may be inhumane to conduct military operations without some provision for those who are detained incident to [military operations].”<sup>26</sup> And, at the same time the government now claims the United States was engaged in an armed conflict with al Qaeda, the U.S. government in fact issued detention guidance for the U.S. mission in Kosovo.<sup>27</sup>

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<sup>24</sup> *E.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004); U.S. DEPARTMENT OF DEFENSE, OFFICE OF THE GENERAL COUNSEL, LAW OF WAR MANUAL § 3.4.2.2 (2015) (identifying “detention of enemy military personnel without criminal charge, bombardment of military objectives” as exemplary “activities that the law of war contemplates”).

<sup>25</sup> U.S. DEPARTMENT OF DEFENSE, OFFICE OF THE GENERAL COUNSEL, LAW OF WAR MANUAL § 8.1.3.1 (2015).

<sup>26</sup> *Id.*

<sup>27</sup> *Cf.* Brigadier General Bantz J. Craddock, Task Force Falcon, Policy Letter #TFF-04, Detention Processing ¶1 (Aug. 3, 1999), *reprinted in* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001: LESSONS LEARNED FOR JUDGE ADVOCATES 281 (2001).

Although the absence of law-of-war detention of individuals associated with al Qaeda prior to 11 September 2001 does not necessarily require a conclusion that there was no armed conflict between the United States and al Qaeda before 9/11, evidence of the absence of this fundamental aspect of armed conflict before 11 September 2001 tends to make the existence of such an armed conflict less likely. Indeed, in light of the significance of detention operations to U.S. humanitarian obligations during armed conflict, evidence that the United States failed even to plan for the law-of-war detention of individuals associated with al Qaeda strongly suggests the absence of an armed conflict between the United States and al Qaeda prior to 9/11. The absence of evidence concerning even planning for law-of-war detention operations for individuals associated with al Qaeda takes on added significance when compared to the existence of contemporaneous such planning in the context of U.S. operations in Kosovo.

Because law-of-war detention operations are a combat capability of the U.S. armed forces, evidence that the United States did or did not undertake or plan for law-of-war detention operations vis-à-vis individuals associated with al Qaeda is material under the *Hamdan* standard. The government must provide it to Mr. al Baluchi.

The records sought by Mr. al Baluchi address the “perceptions” of U.S. leaders “regarding the existence of an armed conflict” prior to 11 September 2001. Evidence concerning the use of law-of-war authorities, including evidence concerning actual or contemplated law-of-war detention operations, between 23 August 1996 and 11 September 2001 are probative of U.S. leaders’ perception as to the existence of an armed conflict between the United States and al Qaeda prior to 9/11. The existence of records indicating that the U.S. government viewed law-of-war detention operations as legally available—even if the government chose not to utilize them for

policy reasons—before 9/11 suggests that the United States and al Qaeda were engaged in an armed conflict prior to the 11 September 2001 attacks.<sup>28</sup> Such records—and, in particular, the records the existence of which the government implied in its response to DR-397-AAA—are not only material but highly salient because they would represent one of only a very small handful of pieces of evidence that point to the existence of an armed conflict before 9/11. Should they exist, the government must provide them to Mr. al Baluchi in order for him to prepare his defense, meet the government’s case against him, and avoid pursuing an impotent defense strategy. Conversely, the non-existence of the records Mr. al Baluchi seeks would tend to demonstrate that U.S. leaders did not perceive the existence of an armed conflict between the United States and al Qaeda between 23 August 1996 and 11 September 2001.<sup>29</sup>

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<sup>28</sup> In contrast to the position the government takes in its response to DR-397A-AAA, the government has previously argued before this military commission that planned for but unimplemented military plans are both relevant and material. *Contrast* Attachment E (“[T]he ‘choice’ the United States ultimately made in 1998 to prosecute the East Africa Embassy Bombers in federal court is irrelevant to the existence of hostilities, and as such the Defense is not entitled to any such documents that may exist regarding United States policy decisions to prosecute the East Africa Embassy Bombers in Federal Court. . . .”) *with* Unofficial/Unauthenticated Transcript of 18 October 2017 at 16843-45 (“We will concede that we didn’t actually get to fire a shot when we tried to, but the very fact that there was an entire military mission dedicated to this very issue from 1998 to 2001 inures to our benefit. It establishes the existence of hostilities, certainly a fact relevant to that.”).

<sup>29</sup> In its denial to Mr. al Baluchi’s subsequent discovery request, DR-397A-AAA, the government asserts that “[t]he same legal justification used for the kinetic military strikes on Usama bin Laden’s chemical facilities and military training camps would have certainly permitted the United States to also detain al Qaida [sic] members under the law of war had it captured them.” There is almost no evidence to support this assertion by the government. The only legal justification for Operation INFINITE REACH produced to date is the United States’ inherent right to international self-defense, as preserved by Article 51 of the United Nations Charter. Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (Oct. 7, 2001), S/2001/946. Although a state’s use of force in self-defense against a non-state actor *may* give rise to protracted armed violence amounting to a non-international armed conflict, it very often does not. Indeed, the United States’ position on uses force in international self-defense against non-state actors is that, when such force gives rise to

Finally, even if the records sought by Mr. al Baluchi did not address the three “elements” of the *Hamdan* standard discussed above, the records are evidence that constitute “other facts and circumstance this commission considers relevant to the existence of armed conflict.” The ultimate, “other facts and circumstance” clause of the *Hamdan* standard is intended to be an open invitation for either the defense or the prosecution to “make whatever argument [they] wish.”<sup>30</sup> Records showing that the United States did not detain individuals associated with al Qaeda subject to the laws of war let alone plan for such detention may be extremely persuasive for the members of the U.S. armed forces, experienced with actual hostilities, who will constitute Mr. al Baluchi’s panel. Certainly, these professional soldiers will recognize the incongruity of calling something “war” that is nearly devoid of the bombs, bullets, explosions, firefights, deployments, sorties, raids, checkpoints, forward operating bases, detention operations, ceasefires, and prisoner exchanges that characterize armed conflict.

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protracted armed violence and a non-international armed conflict, the state need not notify the United Nations of its subsequent uses of force. John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at Harvard Law School: Strengthening Our Security by Adhering to Our Values and Law (Sept. 16, 2011) (“Because we are engaged in an armed conflict with al-Qa’ida [sic], the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa’ida [sic] and its associated forces without doing a separate self-defense analysis each time”). Thus, according to the United States, subsequent article 51 notifications attending discrete uses of force imply the absence of a prior existing armed conflict. It is significant, then, that the United States notified the United Nations of its use-of-force consistent with its inherent right to self-defense contemporaneously with Operation INFINITE REACH and then submitted a new article 51 notification on 7 October 2001 concerning its use of force against al Qaeda, after a three year period of quiescence.

<sup>30</sup> *United States v. Hamdan* Official/Authenticated Transcript of 4 August 2008 at 3727 (“MJ [CAPT ALLRED]: Okay. I think since that’s one of many factors, it’s fair enough. Matter of fact, with respect to the draft language on the context and associated with armed conflict, I think I’ll add the phrase ‘and other facts and circumstances that the parties might argue,’ so you can roam around in that territory and make whatever argument you wish.”).

Under R.M.C. 701(c), Mr. al Baluchi is entitled to all records in the government's possession that are material to his case. Documents and information relating to U.S. law-of-war detention operations for individuals associated with al Qaeda between 23 August 1996 and 11 September 2001, as well as documents and information relating to the U.S. government's decision to prosecute the East Africa embassy co-conspirators in federal criminal court rather than to subject them to law-of-war detention, are material to Mr. al Baluchi's defense because they are evidence in the government's possession that are either exculpatory or will assist Mr. al Baluchi in preparing his defense under the *Hamdan* standard. Consequently, the government must provide these records to Mr. al Baluchi and, in light of the government's refusal, the military commission should compel the government to do so.

7. **Oral Argument**: Mr. al Baluchi respectfully requests oral argument.

8. **Certificate of Conference**: In its response to Mr. al Baluchi's discovery requests, the government stated: "As the Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701, the Prosecution respectfully declines to produce the requested information."<sup>31</sup>

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<sup>31</sup> Attachment C; Attachment E.

**9. Attachments:**

- A. Certificate of Service;
- B. DR-397-AAA;
- C. Prosecution Response to DR-397-AAA;
- D. DR-397A-AAA;
- E. Prosecution Response to DR-397A-AAA.

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 25th day of February, 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*

# Attachment B



DEPARTMENT OF DEFENSE  
MILITARY COMMISSIONS DEFENSE ORGANIZATION  
1620 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1620

12 February 2019

MEMORANDUM FOR Trial Counsel

FROM: Sterling R. Thomas, LtCol, USAF, Defense Counsel for Mr. al Baluchi

SUBJECT: DEFENSE REQUEST FOR DISCOVERY  
**Documents or Information Relating to Pre-9/11 U.S. Law-of-War Detainees  
Associated with al Qaeda**

**Discovery Request**

Defendant, by and through undersigned counsel pursuant to RMC 701, 10 U.S.C. § 949p-4, Common Article III to Geneva Convention (III) Relative to the Treatment of Prisoners of War, the Due Process Clause of the Fifth Amendment, the Confrontation Clause to the Sixth Amendment, and the Compulsory Process Clause of the Sixth Amendment to the United States Constitution, hereby requests that the government produce the discovery described below.

**Definitions**

In this request, the following definitions shall govern:

“Document” means any recorded information, regardless of the nature of the medium or the method or circumstances of recording.

“Information” means any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, and to include handwritten, recorded, or electronic documents.

“Produce” means to convey to the defense without redaction (except as authorized by the military commission pursuant to MCRE 505) or alteration of any electronically stored information associated with the document. If the military commission authorizes substitutions or redactions pursuant to MCRE 505, the word “produce” includes a notation of the Appellate Exhibit number of the order authorizing the substitutions or redactions. To the extent that responsive documents are subject to the attorney-client or other applicable privilege, the word “produce” means to provide a privilege log of any withheld information or documents, along with the facts disclosed in the responsive documents that are not communications protected by attorney-client privilege, and documents attached and/or incorporated into the responsive documents that are not otherwise exempt.

**Background**

In this litigation, the United States asserts that it was engaged in a non-international armed conflict with al Qaeda from 23 August 1996 through at least the capture of the defendants in *United*

DR-397-AAA  
2019-02-12

*States v. Mohammad et al.* Both at trial and before, the government must demonstrate the existence of a non-international armed conflict between the United States and al Qaeda prior to the 11 September 2001 attacks.

The Supreme Court has repeatedly recognized that the capture and detention of enemy belligerents is a fundamental incident of war.<sup>1</sup> As a matter of fact, the United States has consistently captured and detained enemy belligerents under the laws of war either directly or with the assistance of partner forces in its post-9/11 conflicts. For example, the United States operated detention facilities in Afghanistan and Iraq, and, of course, the United States continues to operate the detention facility at Guantanamo Bay. Indeed, the ultimate disposition of law-of-war detainees captured in Syria and held by U.S. partner forces like the Syrian Democratic Forces have figured prominently in recent news reporting.

In light of detention's integral role in war or armed conflict, it is likely that if the United States and al Qaeda were engaged in an armed conflict prior to the 11 September 2001 terrorist attacks then the United States would have captured and detained individuals associated with al Qaeda under law-of-war authorities prior to 9/11—just as it did subsequent to 9/11.

Normally, when the United States exercises its law of war authorities to detain an individual, it, *inter alia*, assigns the detained an individual unique identification number and it notifies the International Committee of the Red Cross (ICRC). Typically, in furtherance of its mandate and mission, the ICRC then visits the law-of-war detainee.

Documents and information that tend to demonstrate the existence or absence of an armed conflict between the United States and al Qaeda prior to the 11 September 2001 attacks are material to Mr. al Baluchi's defense. Documents and information relating to U.S. law-of-war detention operations with respect to al Qaeda between 23 August 1996 and 11 September 2001 are material because they tend to demonstrate the existence or absence of an armed conflict between the United States and al Qaeda during that period. As a consequence, under R.M.C. 701(c), the government must provide Mr. al Baluchi with documents and information relating to U.S. law-of-war detention operations, as they concern individuals associated with al Qaeda, from 23 August 1996 until 11 September 2001.

### Request

Please produce any and all documents or information relating to U.S. law-of-war detention operations as they pertained to individuals associated with al Qaeda between 23 August 1996 and 11 September 2001. Such documents and information include but are not limited to:

- (a) rosters of all individuals associated with al Qaeda who were detained by the United States under the laws of war between 23 August 1996 and 11 September 2001. Such rosters should include the name of the detained individual, his or her nationality or citizenship, the identification number assigned to the individual by the United States, the duration of his or her detention, the authority responsibility for his or her detention

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<sup>1</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004); *Ex parte Quirin*, 317 U.S. 1, 28-30 (1942).

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(e.g., the U.S. Army, the U.S. Marine Corps, the U.S. Bureau of Prisons, the U.S. Marshalls Service, etc.), and the detained individual's disposition.

- (b) rosters of all individuals associated with al Qaeda who were captured by the United States under the laws of war between 23 August 1996 and 11 September 2001 but who were not detained by the United States. For example, this category of individuals would include persons who were captured by the United States under law-of-war authorities but who were transferred to a partner country or organized armed group. This category would also include persons who were captured by the United States under law-of-war authorities and who were quickly released without further detention. For this category, please include the location of the individual's capture, their nationality, the authority responsible for their capture, the authority to which the individual was transferred, if any, and the individual's ultimate disposition.
- (c) correspondence or records of correspondence from any agency, entity, or instrumentality of the U.S. government to the ICRC notifying the ICRC that an individual is in U.S. custody under the laws of war.
- (d) correspondence or records of correspondence from any agency, entity, or instrumentality of the U.S. government to the ICRC concerning any individual associated with al Qaeda who is in U.S. custody under the laws of war.
- (e) logs or records of any type concerning any visits by representatives of the ICRC to individuals associated with al Qaeda who are in U.S. custody under the laws of war.

Thank you for your prompt attention to this matter. Please do not hesitate to contact me if you require any clarifications or additional information.

Respectfully submitted,

//s//

Sterling R. Thomas  
Lt Col, USAF  
Counsel for Mr. al Baluchi

# Attachment C

Filed with TJ  
25 February 2019

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OFFICE OF THE  
CHIEF PROSECUTOR

**DEPARTMENT OF DEFENSE**  
OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS  
1610 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1610

14 February 2019

MEMORANDUM FOR Defense Counsel for Ali Abdul Aziz Ali

SUBJECT: Prosecution Response to 12 February 2019 Request for  
Discovery (DR-397-AAA)

1. The Prosecution received the Defense request for discovery on 12 February 2019. The Prosecution hereby responds to the Defense request, below in bold.

2. The Defense asserts and requests:

In this litigation, the United States asserts that it was engaged in a non-international armed conflict with al Qaeda from 23 August 1996 through at least the capture of the defendants in *United States v. Mohammad et al.* Both at trial and before, the government must demonstrate the existence of a non-international armed conflict between the United States and al Qaeda prior to the 11 September 2001 attacks.

The Supreme Court has repeatedly recognized that the capture and detention of enemy belligerents is a fundamental incident of war. As a matter of fact, the United States has consistently captured and detained enemy belligerents under the laws of war either directly or with the assistance of partner forces in its post-9/11 conflicts. For example, the United States operated detention facilities in Afghanistan and Iraq, and, of course, the United States continues to operate the detention facility at Guantanamo Bay. Indeed, the ultimate disposition of law-of-war detainees captured in Syria and held by U.S. partner forces like the Syrian Democratic Forces have figured prominently in recent news reporting.

In light of detention's integral role in war or armed conflict, it is likely that if the United States and al Qaeda were engaged in an armed conflict prior to the 11 September 2001 terrorist attacks then the United States would have captured and detained individuals associated with al Qaeda under law-of-war authorities prior to 9/11—just as it did subsequent to 9/11.

Normally, when the United States exercises its law of war authorities to detain an individual, it, inter alia, assigns



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the detained an individual unique identification number and it notifies the International Committee of the Red Cross (ICRC). Typically, in furtherance of its mandate and mission, the ICRC then visits the law-of-war detainee.

Documents and information that tend to demonstrate the existence or absence of an armed conflict between the United States and al Qaeda prior to the 11 September 2001 attacks are material to Mr. al Baluchi's defense. Documents and information relating to U.S. law-of-war detention operations with respect to al Qaeda between 23 August 1996 and 11 September 2001 are material because they tend to demonstrate the existence or absence of an armed conflict between the United States and al Qaeda during that period. As a consequence, under R.M.C. 701(c), the government must provide Mr. al Baluchi with documents and information relating to U.S. law-of-war detention operations, as they concern individuals associated with al Qaeda, from 23 August 1996 until 11 September 2001.

Please produce any and all documents or information relating to U.S. law-of-war detention operations as they pertained to individuals associated with al Qaeda between 23 August 1996 and 11 September 2001. Such documents and information include but are not limited to:

(a) rosters of all individuals associated with al Qaeda who were detained by the United States under the laws of war between 23 August 1996 and 11 September 2001. Such rosters should include the name of the detained individual, his or her nationality or citizenship, the identification number assigned to the individual by the United States, the duration of his or her detention, the authority responsibility for his or her detention (e.g., the U.S. Army, the U.S. Marine Corps, the U.S. Bureau of Prisons, the U.S. Marshalls Service, etc.), and the detained individual's disposition.

(b) rosters of all individuals associated with al Qaeda who were captured by the United States under the laws of war between 23 August 1996 and 11 September 2001 but who were not detained by the United States. For example, this category of individuals would include persons who were captured by the United States under law-of-war authorities but who were transferred to a partner country or organized armed group. This category would also include persons who were captured by the United States under law-of-war authorities and who were quickly released without further detention. For this category, please include the location of the individual's capture, their nationality, the authority responsible for

their capture, the authority to which the individual was transferred, if any, and the individual's ultimate disposition.

(c) correspondence or records of correspondence from any agency, entity, or instrumentality of the U.S. government to the ICRC notifying the ICRC that an individual is in U.S. custody under the laws of war.

(d) correspondence or records of correspondence from any agency, entity, or instrumentality of the U.S. government to the ICRC concerning any individual associated with al Qaeda who is in U.S. custody under the laws of war.

(e) logs or records of any type concerning any visits by representatives of the ICRC to individuals associated with al Qaeda who are in U.S. custody under the laws of war.

**As an initial matter, several of the co-conspirators in the East Africa Embassy Attack were, in fact, captured by the United States, overseas, following the attacks in August 1998. However, the decision to prosecute those individuals in federal court made it unnecessary to detain them under the laws of war, although the United States certainly would have had the authority to do so. The principals in the attack against the *U.S.S. Cole* were still at-large at the time the attacks of September 11, 2001 occurred. As such, the Prosecution rejects as false the factual underpinnings for this Defense request that "the United States would have captured and detained individuals associated with al Qaeda under law-of-war authorities prior to 9/11."**

While the Defense continues to insist that "Both at trial and before, the government must demonstrate the existence of a non-international armed conflict between the United States and al Qaeda prior to the 11 September 2001 attacks," the Prosecution reminds the Defense that this Commission's legal ruling that hostilities existed between the United States and Al Qaeda on or before the 11 September 2001 attacks is *res judicata* and applies to all of the Accused for the purposes of any jurisdictional challenge. See AE 502BBBB. The characterization of the armed conflict between the United States and al Qaeda is also irrelevant to the jurisdiction of this commission. See 10 U.S.C 948a(9).

The Supreme Court, in *Hamdi v. Rumsfeld*, recognized that "the capture and detention of lawful combatants and the capture, detention and trial of unlawful combatants... are important incidents of war."<sup>1</sup> However, it did so in the context of determining whether or not Hamdi's detention was authorized pursuant to the Authorization for Use of Military Force resolution (AUMF) (115 Stat 224) rather than setting forth a legal principal by reverse implication that somehow detention of legal or illegal combatants is a pre-requisite to the legal establishment of hostilities.

Furthermore, the Defense's claimed need for such documents is both overbroad and potentially legally limitless. In the instant request the Defense claims that "Documents and information that tend to demonstrate the existence or absence of an armed conflict between the United States and al Qaeda prior to the 11 September 2001 attacks are material to Mr. al Baluchi's defense." The Prosecution has provided its intended evidence to establish the existence of hostilities and documents that demonstrate the "absence of an armed conflict" could theoretically include every document in the possession of the United States that does not speak directly to the specific legal question of whether the United States was in a state of legal hostilities with al Qaeda. As such it is overbroad. No system of justice could ever function if a party to the litigation was required to locate and provide all documentation reflecting the "absence" of anything.

The Defense request also fails to state how the requested documents are material to the legal standard to establish hostilities. As has been oft-articulated by the Prosecution in this case, 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:

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

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<sup>1</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

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.

See *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 and the information requested in the instant discovery motion has no relevancy to any of on these legal elements.

As the Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701, the Prosecution respectfully declines to produce the requested information.

Respectfully submitted,

//s//

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Nicole A. Tate  
Assistant Trial Counsel

# Attachment D



DEPARTMENT OF DEFENSE  
MILITARY COMMISSIONS DEFENSE ORGANIZATION  
1620 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1620

21 February 2019

MEMORANDUM FOR Trial Counsel

FROM: Sterling R. Thomas, Lt Col, USAF, Defense Counsel for Mr. al Baluchi

SUBJECT: DEFENSE REQUEST FOR DISCOVERY  
**Documents or Information Relating to the United States decision to prosecute the East Africa embassy co-conspirators rather than detain them under the laws of war.**

Discovery Request

Defendant, by and through undersigned counsel pursuant to RMC 701, 10 U.S.C. § 949p-4, Common Article III to Geneva Convention (III) Relative to the Treatment of Prisoners of War, the Due Process Clause of the Fifth Amendment, the Confrontation Clause to the Sixth Amendment, and the Compulsory Process Clause of the Sixth Amendment to the United States Constitution, hereby requests that the government produce the discovery described below.

Definitions

In this request, the following definitions shall govern:

“Document” means any recorded information, regardless of the nature of the medium or the method or circumstances of recording.

“Information” means any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, and to include handwritten, recorded, or electronic documents.

“Produce” means to convey to the defense without redaction (except as authorized by the military commission pursuant to MCRE 505) or alteration of any electronically stored information associated with the document. If the military commission authorizes substitutions or redactions pursuant to MCRE 505, the word “produce” includes a notation of the Appellate Exhibit number of the order authorizing the substitutions or redactions. To the extent that responsive documents are subject to the attorney-client or other applicable privilege, the word “produce” means to provide a privilege log of any withheld information or documents, along with the facts disclosed in the responsive documents that are not communications protected by attorney-client privilege, and documents attached and/or incorporated into the responsive documents that are not otherwise exempt.

DR-397A-AAA  
2019-02-21

**Background**

On 12 February 2019, Mr. al Baluchi transmitted DR-397-AAA to the government, requesting “all documents or information relating to U.S. law-of-war detention operations as they pertained to individuals associated with al Qaeda between 23 August 1996 and 11 September 2001.” As the Supreme Court has recognized, law-of-war detention is a fundamental incident to armed conflict. As Mr. al Baluchi previously explained, law-of-war detention’s integral relationship to armed conflicts makes it likely that, if the United States were engaged in an armed conflict with al Qaeda prior to 9/11, the United States would have undertaken law-of-war detention operations vis-à-vis individuals associated with al Qaeda.

Traditionally, in the context of non-international armed conflicts, it is well accepted that a state may use either its law-of-war or its criminal-law authorities upon capturing a member of an oppositional organized armed group. Generally, the state has this choice because, in addition to functioning as the belligerent opposition force in an armed conflict, the organized armed group’s members have violated the state’s domestic law.

On 14 February 2019, the government responded to DR-397-AAA, in part, by asserting that “several of the co-conspirators in the East Africa Embassy Attack were . . . captured by the United States . . . . However, the decision to prosecute those individuals in federal court made it unnecessary to detain them under the laws of war, although the United States certainly would have had the authority to do so.”

Documents and information relating to the “decision to prosecute” co-conspirators of the East Africa embassy bombing in contradistinction to subjecting them to law-of-war detention are material to Mr. al Baluchi’s defense. Such documents and information will capture the fact of the U.S. government’s contemporaneous analysis of the law applicable and the facts relevant to the appropriate disposition of the East Africa embassy co-conspirators. If, in deciding to prosecute the East Africa embassy co-conspirators in federal criminal court, the U.S. government determined it could otherwise detain them under the laws of war, then these documents will demonstrate that, at that time, the U.S. government made a *policy* choice to rely on law-enforcement rather than traditional military activities in order to address the threat posed by al Qaeda. In that case, the documents and information are material to Mr. al Baluchi’s defense because they will assist him develop his case by preventing him from pursuing an unfruitful case. However, if, in deciding to prosecute the East Africa embassy co-conspirators in federal criminal court, the U.S. government determined that it lacked the authority to detain them under the laws of war, then the documents and information pertaining to that decision are material to Mr. al Baluchi’s defense because they are “any other facts [or] circumstances” that suggest the absence of an armed conflict between the United States and al Qaeda prior to 9/11, making them both material and exculpatory.

Whether the documents and information relating to the United States decision to prosecute the East Africa embassy co-conspirators in federal criminal court tend to demonstrate the existence or the absence of an armed conflict between the United States and al Qaeda prior to 11 September 2001, they are material to Mr. al Baluchi. Pursuant to R.M.C. 701(c), the government must produce them.

**Request**

Please produce any and all documents or information relating to the U.S. government's decision to prosecute the East Africa embassy co-conspirators in federal criminal court rather than to subject them to law-of-war detention.

Thank you for your prompt attention to this matter. Please do not hesitate to contact me if you require any clarifications or additional information.

Respectfully submitted,

//s//

Sterling R. Thomas

Lt Col, USAF

Counsel for Mr. al Baluchi



# Attachment E



OFFICE OF THE  
CHIEF PROSECUTOR

**DEPARTMENT OF DEFENSE**  
OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS  
1610 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1610

22 February 2019

MEMORANDUM FOR Defense Counsel for Ali Abdul Aziz Ali

SUBJECT: Prosecution Response to 21 February 2019 Request for  
Discovery (DR-397A-AAA)

1. The Prosecution received the Defense request for discovery on 21 February 2019. The Prosecution hereby responds to the Defense request, below, in bold.

2. In DR-397A-AAA, the Defense states that: On 12 February 2019, Mr. al Baluchi transmitted DR-397-AAA to the government, requesting "all documents or information relating to U.S. law-of-war detention operations as they pertained to individuals associated with al Qaeda between 23 August 1996 and 11 September 2001." As the Supreme Court has recognized, law-of-war detention is a fundamental incident to armed conflict. As Mr. al Baluchi previously explained, law-of-war detention's integral relationship to armed conflicts makes it likely that, if the United States were engaged in an armed conflict with al Qaeda prior to 9/11, the United States would have undertaken law-of-war detention operations vis-à-vis individuals associated with al Qaeda.

Traditionally, in the context of non-international armed conflicts, it is well accepted that a state may use either its law-of-war or its criminal-law authorities upon capturing a member of an oppositional organized armed group. Generally, the state has this choice because, in addition to functioning as the belligerent opposition force in an armed conflict, the organized armed group's members have violated the state's domestic law.

On 14 February 2019, the government responded to DR-397-AAA, in part, by asserting that "several of the co-conspirators in the East Africa Embassy Attack were . . . captured by the United States . . . . However, the decision to prosecute those individuals in federal court made it unnecessary to detain them under the laws of war, although the United States certainly would have had the authority to do so."

Documents and information relating to the "decision to prosecute" co-conspirators of the East Africa embassy bombing in contradistinction to subjecting them to law-of-war

detention are material to Mr. al Baluchi's defense. Such documents and information will capture the fact of the U.S. government's contemporaneous analysis of the law applicable and the facts relevant to the appropriate disposition of the East Africa embassy co-conspirators. If, in deciding to prosecute the East Africa embassy co-conspirators in federal criminal court, the U.S. government determined it could otherwise detain them under the laws of war, then these documents will demonstrate that, at that time, the U.S. government made a *policy* choice to rely on law-enforcement rather than traditional military activities in order to address the threat posed by al Qaeda. In that case, the documents and information are material to Mr. al Baluchi's defense because they will assist him (sic) develop his case by preventing him from pursuing an unfruitful case. However, if, in deciding to prosecute the East Africa embassy co-conspirators in federal criminal court, the U.S. government determined that it lacked the authority to detain them under the laws of war, then the documents and information pertaining to that decision are material to Mr. al Baluchi's defense because they are "any other facts [or] circumstances" that suggest the absence of an armed conflict between the United States and al Qaeda prior to 9/11, making them both material and exculpatory. Whether the documents and information relating to the United States decision to prosecute the East Africa embassy co-conspirators in federal criminal court tend to demonstrate the existence or the absence of an armed conflict between the United States and al Qaeda prior to 11 September 2001, they are material to Mr. al Baluchi. Pursuant to R.M.C. 701(c), the government must produce them.

**Evidence previously provided to the Defense, and now in the record of the Commission, has established that on 7 August 1998, Al Qaeda attacked the United States Embassies in Kenya and Tanzania with car bombs, killing 257 people, including 12 Americans. Less than two weeks later, on 20 August 1998, the United States responded to the embassy attacks by striking Usama bin Laden's training camps in Afghanistan and a suspected chemical weapons laboratory he owned in Sudan with more than eighty Tomahawk Missiles. The same legal justification used for the kinetic military strikes on Usama bin Laden's chemical facilities and military training camps would have certainly permitted the United States to also detain al Qaida members under the law of war had it captured them, had the United States chosen to do so. It did not. Although documents provided to the Defense indicated that many al-Qaida-affiliated individuals were killed in those missile strikes, the United States did**

not detain any of the individuals that were present at the factories or the training camps that were bombed in August 1998, nor did it recover any of the bodies of those killed in the strikes.

As has been repeatedly stated by the Prosecution, it is the position of the United States that activities by one branch of the United States Government against Al Qaeda are not legally or logically exclusive from the existence of hostilities. Furthermore, the Prosecution disagrees with the Defense premise that "law-of-war detention's integral relationship to armed conflicts makes it likely that, if the United States were engaged in an armed conflict with al Qaeda prior to 9/11, the United States would have undertaken law-of-war detention operations vis-à-vis individuals associated with al Qaeda." This is especially true in light of the circumstances of al Qaeda's attacks on the United States Embassies in August 1998 and the attack on the *U.S.S. Cole* in October of 2000 (including the state of the United States investigations into both attacks and what conspirators were still at-large at the time of the September 11, 2001 attacks). The policy decision to prosecute these individuals in federal court is irrelevant to the existence of hostilities, and such documents are not discoverable pursuant to R.M.C. 701.

As the Defense request readily admits:

Traditionally, in the context of non-international armed conflicts, it is well accepted that a state may use either its law-of-war or its criminal-law authorities upon capturing a member of an oppositional organized armed group. Generally, the state has this choice because, in addition to functioning as the belligerent opposition force in an armed conflict, the organized armed group's members have violated the state's domestic law.

Clearly, a kinetic attack on two sovereign embassies overseas, a kinetic attack on a sovereign warship, and a kinetic attack on sovereign U.S. soil, all by the same organized armed group, would constitute both hostilities as well as violations of United States domestic law as well (regardless of how the hostilities are ultimately characterized). As such, by the Defense's own admission, the "choice" the United States ultimately made in 1998 to prosecute the East Africa Embassy Bombers in federal court

is irrelevant to the existence of hostilities, and as such the Defense is not entitled to any such documents that may exist regarding United States policy decisions to prosecute the East Africa Embassy Bombers in Federal Court, as it is irrelevant to any legal issue before the Commission.

In its review of tens of thousands of documents relating to the United States response to the al Qaida threat from 1996-2001, the Prosecution does not recall seeing any documents that state or otherwise establish that "the U.S. government determined that it lacked the authority to detain the East Africa Embassy co-conspirators under the laws of war." Had the Prosecution uncovered any such document in its extensive search efforts (or any such document of arguably similar ilk), it would have already been provided it to the Defense.

As the Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701, the Prosecution respectfully declines to produce the requested information.

Respectfully submitted,

//s//

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Clay Trivett  
Managing Trial Counsel