

UNCLASSIFIED//FOR PUBLIC RELEASE
**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH; RAMZI BINALSHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 620A (GOV)</p> <p>Government Response To Mr. Ali’s Motion to Compel Documents and Information Concerning United States Pre-9/11 Law-of-War Detainees Associated with al Qaeda</p> <p>8 March 2019</p>
--	---

1. Timeliness

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

2. Relief Sought

The Prosecution respectfully requests that this Commission deny the requested relief set forth in AE 620 (AAA), Mr. Ali’s Motion to Compel Documents and Information Concerning the United States Pre-9/11 Law-of-War Detainees Associated with al Qaeda, without oral argument.

3. Burden of Proof

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

4. Facts

On 12 February 2019, Defense counsel for Mr. Ali submitted a discovery request to the Prosecution requesting, “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.” AE 620 (AAA), Attach. B at 2. In doing so, the Defense asserted that such information was relevant and material because it “tend[s] to

demonstrate the existence or absence of an armed conflict between the United States and al Qaeda” *Id.*

On 14 February 2019, the Prosecution denied the Defense request and stated, in part, “As the Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, . . . the Prosecution respectfully declines to produce the requested information.” *Id.*, Attach. C at 5.

On 21 February 2019, Defense counsel for Mr. Ali submitted an additional discovery request to the Prosecution and requested, “. . . 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.” *Id.*, Attach. D at 3. Within its request, the Defense argued that “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” *Id.* at 2.

On 22 February 2019, the Prosecution denied the Defense’s 21 February 2019 discovery request and once again stated, in part, “As the Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, . . . the Prosecution respectfully declines to produce the requested information.” *Id.*, Attach. E. at 4.

On 25 February 2019, the Defense filed the instant motion based on the above-referenced discovery requests. *See* AE 620 (AAA).

5. Law and Argument

I. The Government’s Discovery Obligations Are Defined By The Relevant Rules and Statutes

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

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

[a]ny books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

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

A criminal defendant has a right to discover certain materials, but the scope of this right and the government's attendant discovery obligations are not without limit. For example, upon request, the government must permit the defendant to inspect and copy documents in the government's possession, but only if the documents meet the requirements of R.M.C. 701. Similarly, due process requires the government to disclose evidence favorable to the accused, but only when the evidence is "material" to guilt or punishment, *see Brady v. Maryland*, 373 U.S. 83, 87 (1963), or may be used to impeach the credibility of government witnesses, *see Giglio v. United States*, 405 U.S. 150, 154 (1972). Information that is favorable to the Defense includes evidence which "would tend to exculpate [the defendant] or reduce the penalty." *Brady*, 373 U.S. at 88. Although the materiality standard is not a heavy burden for the Defense to meet under R.M.C. 701, trial counsel must disclose information "only if it enables the [Accused] significantly to alter the quantum of proof in his favor." *United States v. Graham*, 83 F.3d 1466, 1474 (D.C. Cir. 1993) (quoting *United States v. Caicedo-Llanos*, 295 U.S. App. D.C. 99, 960

F.2d 158, 164 n.4 (D.C. Cir. 1992) (quoting *United States v. Ross*, 511 F.2d 757, 763 (5th Cir. 1975), *cert denied*, 423 U.S. 836 (1975))).

Military courts have adopted a standard by which “relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *United States v. Graner*, 69 M.J. 104, 107–08 (C.A.A.F. 2010). In instances where the Defense did not present an adequate theory of relevance to justify the compelled production of evidence, C.A.A.F. has applied the relevance standard in upholding denials of compelled production. *See Graner*, 69 M.J. at 107-109. A defense theory that is too speculative, and too insubstantial, does not meet the threshold of relevance and necessity for the admission of evidence. *See United States v. Sanders*, 2008 WL 2852962 (A.F. Ct. Crim. App. 2008) (citing *United States v. Briggs*, 46 M.J. 699, 702 (A.F. Ct. Crim. App. 1996)). A general description of the material sought or a conclusory argument as to its materiality is insufficient. *See Briggs*, 46 M.J. at 702 (citing *United States v. Branoff*, 34 M.J. 612, 620 (A.F.C.M.R. 1992) (remanded on other grounds), citing *United States v. Cadet*, 727 F.2d 1453, 1468 (9th Cir. 1984)).

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

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

At trial, and for any jurisdictional hearing, the Military Judge is bound to apply the following instruction, articulated by the U.S.C.M.C.R., as the correct legal standard for establishing the existence of hostilities:¹

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

¹ The M.C.A. uses the word “Hostilities.” *See* 10 U.S.C. § 948a(9).

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 both sides indicating their perceptions regarding the existence of an armed conflict, including the presence or absence of a declaration to that effect; and any other facts and circumstances you consider relevant to the existence of armed conflict.

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

III. The Commission Has Determined that Hostilities Existed Between the United States and Al Qaeda Prior to September 11, 2001

Within the instant motion, the Defense continues, remarkably, to assert that the “existence of an armed conflict between the United States and al Qaeda for purposes of the military commission’s personal jurisdiction over [Mr. Ali]” remains an open question. AE 620 (AAA) at 7 n.15. However, such an argument is legally and factually incorrect and should be rejected by this Commission. While the Defense may wish to overlook this Commission’s ruling in AE 502BBBB, or at minimum argue its inapplicability to Mr. Ali, the Commission has already conclusively determined that “hostilities—specifically, armed conflict between the United States and al Qaeda—existed as of September 11, 2001, and for an indeterminate period before that date.” AE 502BBBB at 12. While it may be technically correct that the Commission has not applied its legal conclusion regarding hostilities to Mr. Ali’s jurisdictional challenge *at this time*, it nonetheless cannot be disputed that the Commission’s hostilities determination in AE 502BBBB is still the law of the case on the future resolution of any of the Accused’s jurisdictional challenges (at least as it applies to the element regarding hostilities between United States and al Qaeda). *See* AE 502I, Ruling, at 5 (“The parties may file additional motions regarding the issues raised in AE 502 (MAH) upon receipt of discovery. Any such motions must take into consideration any rulings issued by the Commission with regard to AE 502 (MAH).”).

Unless, the Defense can demonstrate a revision of world history, new legal precedent, or that the Commission's conclusion of law as set forth in AE 502BBBB, para. 4.b.(4) is inconsistent with case law not previously briefed, the Commission's determination that hostilities existed between the United States and al Qaeda is *res judicata* in this military commission. *See, e.g.*, AE 108AA at 2 ("Generally, reconsideration should be limited to a change in the facts or law or instances where the ruling is inconsistent with case law not previously briefed."). As such, this Commission should reject the Defense attempt to diminish the holdings of this Commission as it relates to hostilities, and compel the Defense to adhere to AE 502I, requiring that "[a]ny . . . motions must take into consideration . . . rulings issued by the Commission with regard to AE 502 (MAH)." AE 502I at 5.

IV. The Requested Information Is Neither Relevant Nor Material to Establishing the Existence of Hostilities

Notwithstanding the above, Defense counsel for Mr. Ali request within the instant motion that the Commission compel the Prosecution "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. AE 620 (AAA) at 1. Further, the Defense requests that the Commission order the production of "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." *Id.* at 1. In so doing, Defense counsel argue that "[e]vidence concerning U.S. law-of-war detention of individuals associated with al Qaeda prior to the terrorist attacks of 11 September 2001 is material to [Mr. Ali's] defense because the existence or not of pre-9/11 detention operations for individuals associated with al Qaeda" is relevant to certain elements of the *Hamdan* standard. *Id.* at 2. However, such argument is contradicted by the Defense's own request that states, in part,

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.

Id., Attach. D at 2; *see also* AE 620 (AAA) at 12 (“ . . . the absence of law-of-war detention of individuals does not necessarily require a conclusion that there was no armed conflict between the United States and al Qaeda before 9/11 . . . ”). Given this, as well as the fact that the Prosecution has uncovered no documents demonstrating that the White House or the Department of Defense had concluded that it lacked the authority to detain the East Africa embassy co-conspirators under the laws of war, the Commission should deny the Defense motion without oral argument.

A. Information Relating to U.S. Law-of-War Detention Operations of Individuals Associated with Al Qaeda Between 23 August 1996 and September 11, 2001 Is Not Discoverable

In making its request for “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 Defense argues that such information 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.” AE 620 (AAA) at 1, 10. Alternatively, the Defense argues that “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 ‘protracted armed violence’ . . . and, as a consequence, no pre-9/11 U.S.-al Qaeda armed conflict.” *Id.* at 10–11. However, such deductive reasoning is simply misleading and incorrect as a matter of law and thus should be rejected by this Commission.

1. The Requested Information Is Neither Relevant Nor Material to the Establishment of Hostilities

As an initial matter, the characterization of the armed conflict between the United States and al Qaeda is irrelevant to the jurisdiction of this Commission. *See* 10 U.S.C. § 948a(9); *see also United States v. Hamidullin*, 888 F.3d 62, 87 (4th Cir. 2018) (“As the Supreme Court explained in [*Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006)], the AUMF authorized both the

war against al Qaeda (a non-international armed conflict) and the war against the Taliban (at least initially an international armed conflict).”). There is simply no requirement under the Military Commissions Act to characterize the international or non-international nature of the hostilities between the United States and al Qaeda at all. That notwithstanding, the Prosecution agrees with the Defense that “in the context of non-international armed conflicts, it is well-accepted that a state may use its law-of-war *or* its criminal-law authorities upon capturing a member of an oppositional organized armed group.” AE 620 (AAA), Attach. D at 2 (emphasis added). In that vein, the Prosecution affirmatively concedes and will stipulate that the United States did not detain any individual associated with al Qaeda solely under the laws of war between 23 August 1996 and September 11, 2001. Instead, utilizing its “criminal-law authorities,” the United States prosecuted the very few individuals associated with al Qaeda, who were in fact captured (such as several of the co-conspirators in the East Africa embassy attacks), in Article III courts during that same timeframe. While the decision to prosecute such individuals in federal court made it unnecessary to detain them under the laws of war, such decision did not effectively limit or eliminate the United States’ authority to do so, as it was nevertheless still engaged in a non-international armed conflict with al Qaeda at all relevant times.²

As stated by the Supreme Court in *Hamdi v. Rumsfeld*, “[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’” 542 U.S. 507, 518 (2004) (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942)).³ But the capture and detention of unlawful combatants, while “an important incident of war,” does not mean by reverse implication that the

² Notably, the principals associated with the attack against the *U.S.S. Cole* were still at-large at the time of the September 11, 2001 attacks. If captured, prior to September 11, 2001, the United States could have detained such individuals consistent with the laws of war as Mr. al-Nashiri is currently.

³ The Prosecution notes that the Supreme Court in *Hamdi v. Rumsfeld* made this statement in the context of determining whether or not Mr. Hamdi’s detention was authorized pursuant to the Authorization for Use of Military Force resolution (AUMF) (115 Stat. 224).

detention of unlawful combatants is a pre-requisite to the establishment of hostilities as required under the Military Commissions Act of 2009. Certainly while “[d]etention operations *may* be militarily necessary to achieve the object of those operations,”⁴ detention operations equally *may not* be militarily necessary to achieve the same object of those operations.⁵ For example, to argue that the absence of law of war detention operations “make[s] the existence of . . . an armed conflict less likely,” is equally as unpersuasive as arguing that the absence of armored personnel carriers makes an armed conflict less likely; especially where a country can engage in hostilities through a broad range of other capabilities, such as in air, sea, and cyberspace. Simply put, the absence of law-of-war detention operations is not probative of either the presence or absence of hostilities between the United States and al Qaeda. In either case, where law-of-war detention is not a pre-requisite to hostilities, and may or may not even occur during the course of a non-international armed conflict, information regarding its absence is neither relevant nor material to the establishment of hostilities and may only serve to mislead the ultimate fact-finder. As such, the Commission should deny the Defense motion without further analysis.

2. *The Defense Request is Overbroad and Potentially Legally Limitless*

However, in addition to the irrelevant nature of the requested information, the Defense’s claimed need for such documents is both overbroad and potentially legally limitless. In its requested relief, the Defense seeks “*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

⁴ U.S. DEPARTMENT OF DEFENSE, OFFICE OF THE GENERAL COUNSEL, LAW OF WAR MANUAL §8.1.3.1 (2016) (emphasis added).

⁵ The Prosecution notes that the Defense also argues that “[t]he records sought by [Mr. Ali] address the ‘perceptions’ of U.S. leaders ‘regarding the existence of an armed conflict’ prior to 11 September 2001.” AE 620 (AAA) at 12. However, the *Hamdan* instruction specifically provides that the perception of leaders as to whether hostilities exist should be determined through their statements. *See Hamdan*, 801 F. Supp.2d 1247, 1277–78; *see also* AE 502O at 8–9 (stating the Prosecution’s position of who constitutes the “leaders” of al Qaeda and the United States ((Usama bin Laden, Ayman al Zawahiri, and their designated spokesman for al Qaeda, and the President and the Secretary of Defense for the United States)). As such, documents pertaining to the fact that there was no law-of-war detentions during the subject time period, if such documents even exist, are not relevant to determining the perceptions of U.S. leaders regarding the existence of an armed conflict.

23 August 1996 and [September 11, 2001].” AE 620 (AAA) at 1 (emphasis added). To be clear, while the Prosecution has already provided its intended evidence to establish the existence of hostilities, to require the Prosecution to disclose “any and all documents or information” demonstrating the absence of an armed conflict or the absence of law-of-war detention operations could theoretically include every document in the possession of the United States that does not speak directly to the specific legal question at issue. Given this, and where no system of justice could function if a party to litigation is required to locate and provide all documentation reflecting the absence of something, the Commission should determine that the Defense request is overbroad and deny the Defense motion.

B. Information Relating to the Decision to Prosecute Co-Conspirators of the East Africa Embassy Bombing in Federal Court

Evidence previously provided to the Defense, and now in the record before 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. Although it could have exercised the same legal authorities it used for the kinetic military strikes on Usama bin Laden’s facilities to detain suspected al Qaeda members under the laws of war had it captured them, the United States chose not to. Instead, as the documents previously provided to the Defense demonstrate, many al Qaeda-affiliated individuals were in fact killed in those missile strikes, and the United States affirms that it neither detained any of the individuals present, nor did it recover any of the bodies of those killed at the facilities.

As has been stated by the Prosecution, activities by one Executive Branch agency/department of the United States Government against al Qaeda are not mutually exclusive

from legally establishing the existence of hostilities. *See* AE 502O (GOV) at 9.⁶ Consistent with this, the decision to prosecute the captured co-conspirators of the East Africa embassy attacks in an Article III court is irrelevant to the existence of hostilities under the controlling *Hamdan* standard. Clearly, a kinetic attack on two sovereign embassies overseas (the embassies in Kenya and Tanzania), and a kinetic attack on a sovereign warship (the *U.S.S. Cole*), all by the same organized armed group, would constitute both hostilities, as well as violations of United States domestic law (regardless of how the hostilities are ultimately characterized). As such, by the logic of the Defense's own admission, the "choice" the United States ultimately made in 1998 to prosecute the East Africa embassy bombers in federal court (a fact that is not in dispute) is irrelevant to the establishment of hostilities, and the Defense is not entitled to information that may exist regarding policy decisions to prosecute such individuals in federal court.

To be clear, in its review of hundreds of thousands of documents relating to the United States' response to the threat posed by al Qaeda from 1996–2001, the Prosecution did not uncover any documents that state or otherwise establish that the U.S. Government determined that it lacked the authority to detain the East Africa embassy bombers under the laws of war. Had the Prosecution uncovered any such documentation through its extensive search efforts, it would have already and voluntarily provided this information to the Defense. However, as it has failed to discover any such information, and the Defense has failed to establish how such information would be relevant or material to the preparation of the defense should it exist, this Commission should deny the Defense discovery request and motion without oral argument.

6. Conclusion

As set forth above, the Prosecution takes its discovery obligations seriously and will produce any documentation/material requested by the Defense that is material to the preparation

⁶ The Prosecution also maintains its willingness to stipulate to the fact that the United States viewed, and still views, al Qaeda as a military, law enforcement, and diplomatic matter, as the Prosecution does not view the options the United States Government has in containing the terrorist threat as mutually exclusive, as all instruments of national power and authority can be employed together.

of the defense or is otherwise one of the enumerated categories of discoverable information under R.M.C. 701 and other applicable law. However, where the Defense has failed to demonstrate that the requested information is relevant and material to the case at bar, the Prosecution will dutifully object, as it does here, and request that the Commission deny the Defense motion, without oral argument.

7. Oral Argument

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

8. Witnesses and Evidence

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

9. Additional Information

The Prosecution has no additional information.

10. Attachments

A. Certificate of Service, dated 8 March 2019

Respectfully submitted,

//s//

Clay Trivett
Managing Trial Counsel

Christopher Dykstra
Major, USAF
Assistant Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 8th day of March 2019, I filed AE 620A (GOV), Government Response To Mr. Ali's Motion to Compel Documents and Information Concerning United States Pre-9/11 Law-of-War Detainees Associated with al Qaeda, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

Christopher Dykstra
Major, USAF
Assistant Trial Counsel