

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ENCEP NURJAMAN; MOHAMMED NAZIR BIN LEP; MOHAMMED FARIK BIN AMIN</p>	<p>AE 0032.010 (TJ)</p> <p>RULING</p> <p>Defense Motion to Dismiss Due to Prosecution Use of Prohibited Evidence Obtained by Torture</p> <p>6 October 2022</p>
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1. Procedural History.

a. On 14 March 2022, Counsel for Mr. Nurjaman filed a Motion to Dismiss¹ with prejudice all charges and specifications in this case. In the alternative, Mr. Nurjaman requested dismissal without prejudice accompanied by permanent disqualification of the Office of the Chief Prosecutor (OCP) and the Office of the Convening Authority (OCA) from involvement in any future prosecution against him. The Defense argued that the Government committed prosecutorial misconduct due to the use of prohibited torture-derived evidence in their referral package to the OCA.

b. On 21 April 2022, the Government requested the Commission deny Mr. Nurjaman's request for relief.² The Government argues that the CA was presented with sufficient independent evidence to find reasonable grounds to believe the Accused committed triable offenses. The Government argues that Mr. Nurjaman has failed to meet his burden to establish entitlement to the requested relief.

¹ AE 0032.001 (NUR), Defense Motion to Dismiss Due to Prosecution Use of Prohibited Evidence Obtained by Torture, filed 14 March 2022.

² AE 0032.004 (GOV), Government Response to AE 0032.001 (NUR), Defense Motion to Dismiss Due to Prosecution Use of Prohibited Evidence Obtained by Torture, filed 21 April 2022.

c. The Defense filed a reply³ on 5 May 2022. Mr. Nurjaman renewed his requests in AE 0032.001 (NUR) and argued that only dismissal of the charges can adequately address the issue concerning the use of illegal evidence to support the preferral and referral of charges. Upon the Defense's request, counsel for Mr. Nurjaman was granted permission to amend AE 0032.007 (LEP) and to file the amendment out of time. Mr. Nurjaman filed his amended pleading⁴ on 12 May 2022.

2. Findings of Fact.

a. The charges before this Commission were preferred on 5 April 2019. On 8 October 2019, the charges, along with a referral binder containing evidentiary documentation, were transmitted to the CA for his consideration. The referral binder included a "cover sheet" delineating "each element of each specification with pinpoint citations to the corresponding evidence."⁵ The evidentiary documentation included more than 1,300 pages of supporting documents. Charges were referred to Military Commission on 21 January 2021.

b. Tab D of the referral binder is a nine-page excerpt from the National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report (2004) ("The 9/11 Commission Report").⁶ Specifically, the excerpt includes Subchapter 5.1 "Terrorist Entrepreneurs" which profiles Khalid Sheikh Mohammed (KSM), Riduan Isamuddin (Hambali), and Abd Al Rahim Al Nashiri.⁷ A pull-out text box titled "Detainee Interrogation Reports" states that the authors of Chapter 5 relied heavily on information from captured al Qaeda members. The

³ AE 0032.007 (NUR), Defense Reply to AE 0032.004 (GOV), Government Response to AE 0032.001 (NUR), Defense Motion to Dismiss Due to Prosecution Use of Prohibited Evidence Obtained by Torture, filed 5 May 2022.

⁴ AE 0032.007 (AMEND) (NUR), Amendment* to Defense Reply to AE 0032.004 (GOV), Government Response to AE 0032.001 (NUR), Defense Motion to Dismiss Due to Prosecution Use of Prohibited Evidence Obtained by Torture, filed 12 May 2022.

⁵ AE 0032.004 (GOV), Government Response to AE 0032.001 (NUR), Defense Motion to Dismiss Due to Prosecution Use of Prohibited Evidence Obtained by Torture, filed 21 April 2022, page 2.

⁶ AE 0032.004 (GOV).

⁷ AE 0032.001 (NUR), Att. C (filed under seal).

authors accessed this information from intelligence reports that were “based on communications received from the locations where the actual interrogations take place.”⁸ Of the nine-pages, the Government highlighted the section titled “Hambali”, which included the last 11 lines of text on page 150, all of page 151, and 5 lines of text on page 152.⁹ There are seven footnotes in this subchapter – all but one of them cite to intelligence reports.¹⁰ The cited intelligence reports are dated from December 2001 to April 2004¹¹, prior to the transfer of the Accused to Guantanamo Bay in September 2006.¹²

c. In 2004, the Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program (“SSCI Report”)¹³ was published. The SSCI Report provides details concerning the enhanced interrogation techniques (“EITs”) which were used in interrogations conducted during the time period of the cited intelligence reports in the 9/11 Commission Report.¹⁴ According to the U.S. Court of Appeals for the District of Columbia Circuit “[s]ome of these techniques allegedly constituted torture under United States and international law.”¹⁵

d. The excerpt from the 9/11 Commission Report (or Tab D) of the referral binder is cited as proof of 2 elements: (1) the “hostilities” element for each charged offense and (2) an element for the conspiracy charge. In addition to citing to the 9/11 Report, the Government cited to

⁸ *Id.*

⁹ *Id.*

¹⁰ AE 0032.001 (NUR), Attachment D.

¹¹ *Id.*

¹² AE 0032.001 (NUR), page 7.

¹³ Senate Report 113-288 - Report of the Senate Select Committee on Intelligence Study of the Central Intelligence Agency’s Detention and Interrogation Program, dated 9 December 2014.

¹⁴ See AE 0032.001 (NUR), Attachments D.

¹⁵ In Re: Abd Al-Rahim Hussein Muhammed Al-Nashiri, SEPT 2, 2022, page 2.

23 additional sources to support the hostilities element and 5 additional sources to support the conspiracy element.¹⁶

3. Law and Analysis.

a. Applicability of 10 U.S.C. § 948r(a) to Referral Process.

(1) The Defense argues the Government improperly included the excerpt of the 9/11 Commission Report in the “referral binder.” The referral binder was presented to the Convening Authority along with the charges on 8 October 2019. The Convening Authority reviewed and considered the documents contained in the referral binder when making his referral determination.¹⁷ Relying on the SSCI Report, the Defense concludes the 9/11 Commission Report relied on statements obtained by torture. For purposes of resolving this motion, the Commission finds the section of the SSCI Report in the referral binder contained citations to statements which were obtained by the use of torture or by cruel, inhuman or degrading treatment.

(2) 10 U.S.C. § 948r(a) states “No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment ... shall be *admissible* in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.” While the Defense argues that the statute “strictly prohibited”¹⁸ the use of statements obtained by the use of torture, a plain reading of the statute does not support this argument. Rather than provide for a strict prohibition, the statute references the admissibility of statements within a military commission. The Commission finds this term instructive on how, or if, such evidence may be utilized in other ways, to include the referral process. While the defense

¹⁶ AE 0032.004 (GOV), page 5.

¹⁷ AE 0032.004 (GOV) at 2.

¹⁸ AE 0032.001 (NUR) at 2.

correctly highlights that the relevant statute is located in the Military Commissions Act, titled “Pre-Trial Procedures,”¹⁹ its argument proves too much. Even if the Commission were to conclude that the mere placement of the statute in this section is sufficient to overcome the plain reading of the statute, the prohibition the Defense seeks would not apply to the referral process. A military commission forms after the referral of charges²⁰ and as such, the statute does not apply to the referral stage. Simply based on the reading of the statute, there is no violation of § 948r(a).

(3) However, given the government position taken in a recent appellate court case, the inquiry into the impact of the inclusion of the SSCI Report in the referral packet cannot be resolved by interpreting the statute alone.

(4) Subsequent to the referral of charges in this Commission (21 January 2021), attorneys representing the United States before the United States Court of Appeals for the District of Columbia have taken a more expansive position in regards to § 948r(a) when responding to a Writ of Mandamus filed in a different Military Commission. In its Opposition Brief which was filed 31 January 2022, the Government represented by Department of Justice attorneys and the Interim Chief Prosecutor of the Military Commissions stated:

“In the absence of direct authority interpreting Section 948r(a), the government took the position below that Section 948r(a)’s prohibition on admission of statements obtained through torture or cruel, inhuman, or degrading treatment applies only to the trial and sentencing phases of a military commission and not to pretrial proceedings. Since that filing, the government has reconsidered its interpretation of Section 948r(a) and, as a result of that review, has concluded that Section 948r(a) applies to all stages of a military commission case, including pretrial proceedings. In accordance with that conclusion, the

¹⁹ AE 0032.007 (NUR) (Amend), filed 12 May 2022, page 3 (footnote 5).

²⁰ See R.M.C. 504(a) “A military commission is created by a convening order of the convening authority.”; R.M.C. 601 “Referral is the order of a convening authority that charges against an accused will be tried by a specified military commission.”; *U.S. v. Tonev*, No. NMCCA 200200935, 2004 CCA LEXIS 101, at *1 (N-M Ct. Crim. App. Apr. 19, 2004)

government will not seek admission, at any stage of the proceedings, of any of petitioner's statements while he was in CIA custody."²¹

On 2 September 2022, the United States Court of Appeals for the District of Columbia Circuit dismissed the petition for Writ of Mandamus for lack of jurisdiction. Specifically, the appellate court, citing the government position set out above, found it lacked jurisdiction as the issue was moot.²²

(5) The Government's current position is that § 948r(a) applies to *all stages of a military commission case*. It is important to note the Government position at the time of referral was that § 948r(a) applied "only to the trial and sentencing phases of a military commission and not to pretrial proceedings."²³ Therefore, at the time of the referral, the inclusion of the 9/11 Commission Report in the referral binder was not in violation of § 948r(a). A violation of § 948r(a) can only be found if the new Government position was applied retroactively. For purposes of determining whether or not there was a defective referral, the Commission will assume the new Government position retroactively applies to the referral process in this case.

b. Defective Referral.

(1) Even with a finding that the inclusion of the SSCI Report in the referral binder was a violation of § 948r(a), the Accused is not entitled to the relief sought. When faced with challenges to charging decisions that may have been based on impermissible or improper evidence, courts have concluded the charging decision is valid as long as "there was sufficient other [evidence] to support" the decision.²⁴

²¹ In Re: Abd Al-Rahim Hussein Muhammed Al-Nashiri, SEPT 2, 2022, page 4.

²² *Id.* at pages 5-8. This Commission notes the appellate court does not, in fact, make a determination on the legality of section 948r(a) *applying at all stages of a military case*. Rather, the court finds the question in front of it is mooted given the Government position.

²³ AE 0032.001 (NUR), Tab F, page 11 of 37.

²⁴ *Coppedge v. United States*, 311 F.2d 128, 131 (D.C. Cir. 1962)

(2) The referral binder in this commission contained in excess of 1,300 pages of evidence. The excerpt of the SSCI Report, or Tab D, merely contained nine-pages. Of these nine-pages, less than two of those pages were highlighted for the convening authority. In its response, the Government acknowledges that it cited to the 9/11 Commission Report excerpt to support the “hostilities” and “conspiracy” elements. For the hostilities element, the Government references 23 other additional sources other than Tab D which support the hostility element.²⁵ For the conspiracy element, the Government references six other additional sources other than Tab D which support the conspiracy element.²⁶ After reviewing the Government response and the evidence provided by the Government, this Commission finds there was sufficient evidence other than the nine-page excerpt of the SSCI Report to support the referral decision of the CA.

(3) The Commission further finds the inclusion of nine-page excerpt of the SSCI Report in the referral binder (assuming the inclusion was in fact a violation of § 948r(a)) does not support the requested relief by the Defense. In determining the impact of a defective referral for courts-martial, military courts require a showing that the defect “materially prejudiced the substantial rights of an accused.”²⁷ The M.C.A. § 950a(a) expresses the same test as used by the military courts and thus, this Commission will use it in evaluating the alleged deficiency in referral. While the Defense claims “[t]he prejudice resulting from the use of information obtained by torture when referring charges in this case is clear and apparent”²⁸, the Defense does not convincingly provide concrete examples of the “clear and apparent” prejudice. The Defense claims that Government tried to “unlawfully bolster” their case by including the

²⁵ See AE 0032.004 (GOV), page 7 & Tabs F-S.

²⁶ See AE 0032.004 (GOV), page 7-8 & Tabs F, G, T-V.

²⁷ Article 59, UCMJ (10 U.S.C.A. § 859); United States v. Loving, 41 M.J. 213 (C.A.A.F. 1994); United States v. Murray, 22 M.J. 700 (A.C.M.R. 1986).

²⁸ AE 0032.001 (NUR), page 20.

excerpt from the SSCI Report²⁹ and that the inclusion of the Report was “highly prejudicial”. The Commission is not convinced by Defense’s arguments, nor does it find that the inclusion of the excerpt from the SSCI Report “materially prejudiced the substantial rights” of the Accused.

c. Prosecutorial Misconduct.

(1) Defense asserts the Prosecution committed prosecutorial misconduct by including excerpts from the SSCI Report in the referral binder. The Defense states, “Prosecutorial misconduct occurs when trial counsel “overstep[s] the bounds of that propriety and fairness which should characterize that conduct of such an officer in the prosecution of a criminal offense.”³⁰ “Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g. a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.”³¹ Furthermore, the “prosecutorial misconduct inquiry is an objective one, requiring no showing of malicious intent on behalf of the prosecutor.”³² For purposes of this ruling, the Commission will accept the Defense’s standard for prosecutorial misconduct.

(2) The bases of the Defense’s allegation of prosecutorial misconduct is the alleged violation of 10 U.S.C. § 948r(a). As stated above, the plain language of § 948r(a) does not support a finding that the use of statements obtained by torture is strictly prohibited in pretrial proceedings. In order to strengthen its argument, the Defense cites to the Government position first taken in the Government Opposition Brief filed in the United States Court of Appeals for the District of Columbia.³³ This brief was filed on 31 January 2022 – a year after the

²⁹ *Id.* at page 21.

³⁰ AE 0032.001 (NUR), Defense Motion to Dismiss Due to Prosecution Use of Prohibited Evidence Obtained by Torture, filed 14 March 2022.

³¹ *Id.*

³² *Id.*

³³ In Re: Abd Al-Rahim Hussein Muhammed Al-Nashiri, SEPT 2, 2022, pages 5-8.

current case was referred. In the brief, the Government attorney clearly stated the original position of the attorneys was that § 948r(a) did not apply to pretrial proceeding and that the change in position for the Government occurred between September 2021 and the filing of the brief on 31 January 2022. The Commission finds the actions of the Prosecution during the referral process, as well as the legal advice provided by the legal advisor, did not constitute prosecutorial misconduct. Therefore, there is no basis to disqualify the Office of the Chief Prosecutor and/or the Office of the Convening Authority.

4. Ruling. The Defense motion set forth in AE 0032.001 (NUR) is **DENIED**.

So **ORDERED** this 6th day of October, 2022.

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HAYES C. LARSEN
CAPT, JAGC, USN
Military Judge